THE GENERAL STATUTES OF NORTH CAROLINA OF 1943

Containing the General Laws of North Carolina to and Including the Legislative Session of 1943

Prepared under Legislative Authority by the Department of Justice of the State of North Carolina

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UNDER THE DIRECTION OF
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The Constitution of North Carolina of 1868, with amendments to 1943.
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Annotations:

Sources of the annotations to the North Carolina Constitution and General Statutes appearing in this work were:

North Carolina Reports volumes 1-222.
Federal Reporter volumes 1-300.
Federal Reporter 2nd Series volumes 1-134 (p. 416).
Federal Supplement volumes 1-49 (p. 224).
United States Reports volumes 1-317.
Supreme Court Reporter volumes 1-63 (p. 861).
North Carolina Law Review volumes 1-21.

Abbreviations

(The abbreviations below are those found in the General Statutes which refer to prior official codes.)

C. C. P.....Code of Civil Procedure (1868)
C. S.....Consolidated Statutes of North Carolina (1919, 1924)
Code.....The Code of North Carolina (1883)
R. C.....Revised Code of North Carolina (1854)
R. S.....Revised Statutes of North Carolina (1837)
Rev.....Revisal of 1905

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Art. 1. Probate Jurisdiction.

§ 28-1. Clerk of superior court has probate jurisdiction.—The clerk of the superior court of each county has jurisdiction, within his county, to take proof of wills and to grant letters testamentary, letters of administration with the will annexed, and letters of administration, in cases of intestacy, in the following cases:

Character of Duties.—The powers and jurisdiction exercised by the clerk pursuant to this section are not those of a servant or ministerial officer or exercised as and for the superior court, but those of an independent tribunal of original jurisdiction. Edwards v. Cobb, 95 N. C. 4, followed in In re Styers, 202 N. C. 715, 164 S. E. 123.

Summary Proceedings.—The proceedings of the clerk in respect to the exercise of his probate jurisdiction are summary in their nature. Edwards v. Cobb, 95 N. C. 4, 5, 9.

Jurisdiction Exclusive. — Jurisdiction to appoint an administrator of a deceased person, who has died intestate, and to issue letters for the administration of his estate is conferred by this section exclusively upon the clerk of the Superior Court of the county in which decedent was domiciled at or immediately previous to his death. Bank v. Commissioners of Yancey, 195 N. C. 678, 680, 681, 143 S. E. 252.

When Jurisdiction Presumed.—Where it is admitted that the plaintiff was regularly appointed administrator, it will be presumed that the clerk acted within his jurisdiction. Vance v. Southern R. Co., 138 N. C. 460, 50 S. E. 860.

More than One Appointment.—When letters of administration are once issued to a person who qualified, the powers of the clerk in that respect are exhausted and the subsequent appointment of another person, before the first appointment is revoked, is void. In re Bowman's Estate, 121 N. C. 373, 28 S. E. 404.

Clerk May Vacate Order Admitting Will to Probate.—The clerk of the superior court, in his probate jurisdiction, has the power to vacate a previous order admitting a will to probate in common form on motion aptly made when it is clearly made to appear that the order of probate was improvidently granted, or that the court had been imposed upon and misled as to the essential and true conditions of the case. In re Smith's Will, 218 N. C. 161, 10 S. E. (2d) 676.

Collateral Attack.—When the clerk under this section has general jurisdiction of the subject matter of the inquiry, a decree appointing an executor or administrator may not be collaterally attacked. Batchelor v. Overton, 158 N. C. 395, 74 S. E. 20; Fann v. North Carolina R. Co., 155 N. C. 136, 71 S. E. 81; Tyer v. Blades Lumber Co., 188 N. C. 268, 124 S. E. 305. But where jurisdictional facts were lacking, it can be so attacked. Reynolds v. Lloyd Cotton Mills, 177 N. C. 412, 99 S. E. 240, and cases cited. And see Vance v. Southern R. Co., 138 N. C. 460, 462, 50 S. E. 860, where the court, after stating that jurisdiction is presumed, declares: "We do not mean to say that the validity of the letters cannot be questioned collaterally, the existence of such assets and their proper situs being jurisdictional matter."

The facts very generally recognized as jurisdictional are stated in this section and where, on application for letters of administration, these facts appear of record, the question of the qualification of the appointee cannot be collaterally assailed. Holmes v. Wharton, 194 N. C. 470, 472, 140 S. E. 93, citing Wharton v. Ins. Co., 178 N. C. 135, 100 S. E. 266. The only exception to this rule is that it may be shown collaterally that the person for whom an administrator has been appointed is not in fact dead, but is still living. Hines v. Foundation Co., 196 N. C. 322, 325, 145 S. E. 612. In such case, the order making the appointment being void, it may be attacked collaterally. Holmes v. Wharton, 194 N. C. 470, 473, 140 S. E. 93, citing Clark v. Homes, 189 N. C. 703, 128 S. E. 20.

A clerk has jurisdiction to appoint an administrator where the affidavit of the applicant presumes the death of the decedent from his absence of seven years and the lack of communication from him. The order and appointment can only be avoided by showing the person not to be in fact dead. Chamblee v. Security Nat. Bank, 211 N. C. 48, 188 S. E. 632.

Evidence that deceased was not domiciled in the county of the clerk, as required by subsec. 1 of this section, was inadmissible in an action for wrongful death. Holmes v. Wharton, 194 N. C. 470, 140 S. E. 93.

The burden of proof to show jurisdictional facts rests upon the person applying for letters. Reynolds v. Lloyd Cotton Mills, 177 N. C. 412, 99 S. E. 240.

1. Where the decedent at, or immediately previous to, his death was domiciled in the county of such clerk, in whatever place such death may have happened.

In General.—Where the facts stated in this subsection exist, a grant in any county other than that prescribed by the subsection is absolutely void. Johnson v. Corpenning, 39 N. C. 216; Collins v. Turner, 4 N. C. 541.

Domicile.—Reynolds v. Lloyd Cotton Mills, 177 N. C. 412, 99 S. E. 240, contains an excellent discussion of "domicile" as distinguished from "residence," "inhabiting," etc.

Change of County Lines.—The county referred to in this subsection is the county at the time of the death of the decedent, and not the one subsequently formed by a change of county lines. Hannon v. Southern Power Co., 173 N. C. 520, 92 S. E. 353.

2. Where the decedent at his death had places of residence in more than one county, the clerk of any such county has jurisdiction.

3. Where the decedent, not being domiciled in this state, died out of the state, leaving assets in the county of such clerk, or assets of such decedent thereafter come into the county of such clerk.

Assets.—If the assets are bona notabelia (chattels or goods of sufficient value to be accounted for) they are sufficient to convey jurisdiction to the clerk. Hyman v. Gaskins, 27 N. C. 267. The value of chattels sufficient to be accounted for has varied at different times, but was finally established at five pounds in 1603.

The time and manner of bringing the assets into the jurisdiction is immaterial. Shields v. Union Cent. Life Ins. Co., 119 N. C. 380, 25 S. E. 951.

Cited in Price v. Askins, 212 N. C. 583, 194 S. E. 284.

4. Where the decedent, not being domiciled in this state, died in the county of such clerk, leaving assets in the state, or assets of such decedent thereafter come into the state.

Provided, that in all cases where the clerk of the superior court is interested in an estate, the judge of the superior court resident in the district or the judge of the superior court holding the courts of the county by regular or special assignment shall have jurisdiction to take proof of wills and grant letters testamentary, letters of administration with the will annexed and letters of administration in cases of intestacy, to audit and approve the accounts of executors and administrators, to make orders and to do any and all things in connection with the administration of estates which the clerk of the superior court might or could have done, had he not been interested in the estate. (Rev., s. 16; Code, s. 1374; C. C. P., s. 433; R. C., c. 46, s. 1; 1868-9, c. 113, s. 115; 1931, c. 165; 1943, c. 543; C. S. 1.)

Cross References.—As to jurisdiction when clerk is disqualified, see § 31-12 and note, and also §§ 2-17 through 2-21. As to clerk's power to remove executors and administrators, see § 28-32 and note.

As to probate of wills generally, see § 31-12 et seq.

Editor's Note.—The Act of 1931 added the proviso to this section.

The 1943 amendment substituted, in subsection 2, the words "places of residence" for the words "his fixed place of domicile."

In General.—Where decedents were not domiciled in this state, but died intestate in Henderson county, leaving assets in the state, the clerk of the superior court of Henderson county had jurisdiction in said county to grant letters of administration. In re Franks, 220 N. C. 176, 180, 16 S. E. (2d) 831.

Death by Wrongful Act Sufficient Asset.—Where a nonresident is killed in this state the cause of action for death by wrongful act is sufficient under this section as a basis for the grant of letters in the county where the injury and death occured. Vance v. Southern R. Co., 138 N. C. 460. 50 S. E. 860; Fann v. North Carolina Co., 155 N. C. 136, 71 S. E. 81. See notes to sections 28-173, 28-174.

Cited in Edwards v. McLawhorn, 218 N. C. 543, 11 S. E. (2d) 562.

§ 28-2. Exclusive in clerk who first gains.—The clerk who first gains and exercises jurisdiction under this chapter thereby acquires sole and exclusive jurisdiction over the decedent's estate. (Rev., s. 17; Code, s. 1375; C. C. P., s. 434; C. S. 2.)

Domicile in Two Counties.—The provisions of this section apply even though the decedent at the time of his death was domiciled in both counties. And the jurisdiction first acquired cannot be collaterally impeached. Tyer v. Blades Lumber Co., 188 N. C. 274, 124 S. E. 306.

Superior Court to Determine Proper Grant.—Where two clerks of different counties have granted letters to different parties, and the judgments granting them have been respectively affirmed by the superior court, that court will determine which of the letters were properly granted. Tyer v. Blades Lumber Co., 188 N. C. 274, 124 S. E. 306.

Art. 2. Necessity for Letters and Their Form.

§ 28-3. Letters must issue; immediate rights of family.—No person shall enter upon the administration of any decedent's estate until he has obtained letters therefor, under the penalty of one hundred dollars, one-half to the use of the informer and the other half to the state; but nothing herein contained shall prevent the family of the deceased from using so much of the crop, stock and provisions on hand as may be necessary, until the widow's year's support is assigned therefrom, as prescribed by law. (Rev., s. 1; Code, s. 1522; 1868-9, c. 113, s. 93; C. S. 3.)

Penalty Not Incurred by Mere Possession.—To incur the penalty provided by this section, something more must be done than the mere taking of the property. Such taking may make the taker an executor **de son tort,** but it would not make him incur the penalty unless he **entered** upon the administration of the estate without first obtaining letters therefor. Administration implies management, not the mere holding the possession of property. Currie v. Currie, 90 N. C. 553, 556.

§ 28-4. Executor de son tort.—Every person who receives goods or debts of any person dying intestate, or any release of a debt due the intestate, upon a fraudulent intent, or without such valuable consideration as amounts to the value or thereabout, is chargeable as executor of his own wrong, so far as such debts and goods, coming to his hands, or whereof he is released, will satisfy. (Rev., s. 2; Code, s. 1494; 1868-9, c. 113, s. 67; 43 Eliz., c. 8; C. S. 4.)

Claim under Fraudulent Conveyance.—One who sets up a claim to goods of an intestate under a fraudulent conveyance, and thereby injures the sale of them, does not render himself an executor de son tort. Barnard v. Gregory, 14 N. C. 223. But under such a conveyance, which is void as to creditors, he will be liable to the creditors of the estate as an executor de son tort. Norfleet v. Riddick, 14 N. C. 221; McMorine v. Storey, 20 N. C. 83.

Time of Intermeddling.—One who intermeddles with goods of a decedent may be subject to liability as an executor de son tort although letters of administration afterwards issue. If administration is committed to him it entitles him to retain. But an intermeddling after a grant of administration does not make an executor de son tort, because he is answerable to the administrator. Norfleet v. Riddick, 14 N. C. 221; McMorine v. Storey, 20 N. C. 83.

A fraudulently donee of personalty, which he has in his possession after the donor's death, is answerable as executor de son tort. Sturdivant v. Davis, 31 N. C. 365.

Purchaser of Exempt Property.—A purchaser of property exempt from execution under the Homestead Act cannot be held liable as executor de son tort. Winchester v. Gaddy, 72 N. C. 115.

Intermeddling under Colorable Right.—An intermeddling

for which there is a colorable right will not make a wrongful executorship. Turner v. Child, 12 N. C. 25.

Bailee, etc., of Fraudulent Donee.—If a fraudulent donee of goods disposes of them to another who accepts them bona fide upon a purchase, or even to keep for the donee, the vendee or bailee would not be an executor de son tort. Bailey v. Miller, 27 N. C. 444.

An infant of tender years cannot be executor de son tort nor be sued as such. See Bailey v. Miller, 27 N. C. 444.

Character of Title.—It is not the paper title merely that makes one an executor of his own wrong, but it is the disposition, or possession and occupation of the effects. Bailey v. Miller, 27 N. C. 444.

§ 28-5. Form of letters.—All letters must be issued in the name of the state, and tested in the name of the clerk of the superior court, signed by him, and sealed with his seal of office, and shall have attached thereto copies of the section of this chapter requiring an inventory to be filed within three months, and of the section requiring annual accounts to be filed. (Rev., s. 36; Code, ss. 1399, 2172; C. C. P., ss. 471, 478; 1871-2, c. 46; C. S. 5.)

Cross Reference.—As to accounts to be filed, see § 28-117 and the note thereto.

Art. 3. Right to Administer.

§ 28-6. Order in which persons entitled.—Letters of administration, in case of intestacy, shall be granted to the persons entitled thereto and applying for the same, in the following order:

Effect of Appointment Out of Order.—The appointment as administrator of a person other than the one designated by the statute is not void, though the proper person has not renounced; but it may be set aside in favor of such proper person provided he has not waived his right to administer. Garrison v. Cox, 95 N. C. 353.

Where the executor dies, the next of kin, in the order named in the statute, or his appointee, is entitled to administration with the will annexed, in preference to the highest creditor. Little v. Berry, 94 N. C. 433.

Right to Renounce and Nominate Another for Appointment Is Recognized.—There is no express provision requiring the clerk to recognize the right of one belonging to a preferred class to renounce his right to qualify and at the same time nominate another for appointment in his stead, but this construction has been uniformly applied by the courts and has become firmly embedded in the law of administration in North Carolina. In re Estate of Smith, 210 N. C. 622, 624, 188 S. E. 202. See Ritchie v. McAuslin 2 N. C. 220; Carthey v. Webb, 6 N. C. 268; Smith v. Munroe, 23 N. C. 345; Pearce v. Castrix, 53 N. C. 71; Wallis v. Wallis, 60 N. C. 78; Hughes v. Pipkin, 61 N. C. 4; Little v. Berry, 94 N. C. 433; Williams v. Neville, 108 N. C. 559, 13 S. E. 240; In re Meyers, 113 N. C. 545, 18 S. E. 689; Boynton v. Heartt, 158 N. C. 488, 74 S. E. 470, Ann. Cas. 1913D, 616; In re Estate of Jones, 177 N. C. 337, 98 S. E. 827.

1. To the husband or widow, except as hereinafter provided.

Cross Reference.—For appointment of widow under twenty-one, see note to § 28-8, par. 1.

Estoppel against Widow.—Though the widow has a prior right to administration to a brother of the decedent, where it appears that at the time the letters were duly granted to the brother she has shown no disposition to set up her right before the clerk, the appointment of the brother will stand. Tyer v. Blades Lumber Co., 188 N. C. 268, 124 S. E. 305.

2. To the next of kin in the order of their degree, where they are of different degrees; if of equal degree, to one or more of them, at the discretion of the clerk.

Clerk's Discretion. — Where there are several persons entitled in equal degree to administer, the clerk may select the one who, in his discretion, is most fit. Garrison v. Cox, 95 N. C. 353.

Right Not Absolute or Exclusive. — The right of the next of kin to letters of administration is not absolute and exclusive; and if the next of kin does not apply for letters of administration or fail to give bond, some other person may be appointed. Stoker v. Kendall, 44 N. C. 242.

Nominee of Next of Kin.—The nominee of deceased's nearest of kin will be appointed administrator, if a fit and suitable person, as against those of lesser degree of kinship, provided that no person of the same class as the next of kin renouncing the right files a personal application for appointment. In re Estate of Smith, 210 N. C. 622, 188 S. E. 202.

Next of Kin Best Qualified.—The next of kin of a deceased person, after the widow, have the right, amongst themselves, of administration; but this right is not vested in one more than another, and the degree of propinquity does not give a legal priority. The court should select from the class, the person best qualified to take care of the estate. Atkins v. McCormick, 49 N. C. 274.

Between brothers, administration will be committed to the one most interested to execute it faithfully. Moore v. Moore, 12 N. C. 352.

Illiteracy of Next of Kin.—If none of the next of kin can read or write, it is proper for the clerk to refuse to appoint any one of them. In re Saville, 156 N. C. 172, 72 S. E. 220.

Appointee of Next of Kin.—When the next of kin resides abroad, it is in the power and is the duty of the court to grant administration to the appointee of such next of kin. Smith v. Munroe, 23 N. C. 345. See Ritchie v. McAuslin, 2 N. C. 220.

3. To the most competent creditor who resides within the state, and proves his debt on oath before the clerk.

Creditor Postponed to Next of Kin.—If administration cannot be granted to the nearest of kin owing to some incapacity, it shall be granted to the next after him, qualified to act, and the creditor shall be postponed, if such next of kin claims the right to administer within the time prescribed. Carthey v. Webb, 6 N. C. 268.

Assignee after Death Not a Creditor.—An assignment of debts of a person after his death does not make the assignee such a creditor as to entitle him to administer the estate of the deceased. Pearce v. Castrix, 53 N. C. 71.

Applied in Price v. Askins, 212 N. C. 583, 194 S. E. 284.

4. To any other person legally competent. (Rev., s. 3; Code, s. 1376; C. C. P., s. 456; R. C., c. 46, ss. 2, 3; 1868-9, c. 113, s. 115; C. S. 6.)

Cross References.—As to corporation acting as executor or administrator, see §§ 58-113 and 55-117. As to who may act in the event the executor fails to apply to have the will proved, see § 31-13. As to public administrator, see § 28-20.

Possessor of Insurance Policy.—The possession of a policy of life insurance authorizes the possessor to administer on the estate of the assured, a nonresident. Page v. Life Ins. Co., 131 N. C. 115, 42 S. E. 543. See Shields v. Union Cent. Life Ins. Co., 119 N. C. 380, 25 S. E. 951.

§ 28-7. Husband to administer wife's estate; right in surplus.—If any married woman dies wholly or partially intestate, the surviving husband shall be entitled to administer on her personal estate, and shall hold the same, subject to the claims of her creditors and others having rightful demands against her, to his own use, except as hereinafter provided. If the husband dies after his wife, but before administering, his executor or administrator or assignee shall receive the personal property of the said wife, as a part of the estate of the husband, subject as aforesaid, and except as provided by law. (Rev., s. 4; Code, s. 1479; 1871-2, c. 193, s. 32; C. S. 7.)

Exclusive Right to Administer.—The statute of distribution does not apply to the estate of feme covert dying intestate, and the husband is entitled to administer for his own benefit. Any other person administering is in equity considered as a trustee for the husband with respect to the residue after payment of debts. Hoppiss v. Eskridge, 37 N. C. 54.

Wife Intestate or Testate.—A husband has right to administer the estate of wife, whether she dies intestate or leaves a will without naming an executor. In re Meyer's Estate, 113 N. C. 545, 18 S. E. 689.

Transfer of Right.—He may transfer this right to another by appointment, or may cause another to be associated with him. And the right is not affected by the filing and probating in common form of a writing purporting to be the will of the wife. In re Meyer's Estate, 113 N. C. 545, 18 S. E. 689.

Realty under Equitable Conversion.—Where a wife devised real property under circumstances which by the doctrine of equitable conversion is reduced to personalty, her husband after her death is, under this section, entitled to the estate as personalty, subject to demands of creditors. McIver v. McKinney, 184 N. C. 393, 399, 114 S. E. 399.

Death of Husband before Administering.—If the husband dies after his wife, without having administered, there is no authority to appoint an administrator upon her estate. In such a case the representative of the husband is to administer the wife's estate. Wooten v. Wooten, 123 N. C. 219, 31 S. E. 491.

Partial Intestacy as to Damages for Wrongful Death.—Where a wife dies by wrongful death the recovery therefor is not a part of her personal assets. And where she has left a will disposing of all her property and naming another executor, her husband may not administer upon the theory that the wife died "partially intestate" as to damages recoverable for wrongful death. Hood v. American Tel., etc., Co., 162 N. C. 92, 77 S. E. 1094.

Wife's Estate in Remainder for Benefit of Husband.—Where wife, a remainderman in personal property after a life estate, dies before the life tenant, her administrator upon the death of life tenant will be entitled to such property for the benefit of her husband. Colson v. Martin, 62 N. C. 125.

Husband's Administrator as against Wife's Administrator.—Where a legacy is given to a trustee for the use of a married woman who dies without receiving the same, the personal representative of the husband (the husband surviving the wife, but dying before receiving the legacy in his wife's favor) is entitled to the legacy as against the wife's administrator. Coleman v. Hallowell, 54 N. C. 204.

Husband Entitled to Annuity Payable to Wife.—Where the beneficiary of an annuity dies intestate before the death of the testator, leaving a husband, the bequest which vests an interest in such beneficiary shall be paid to her husband. In re Shuford's Will, 164 N. C. 133, 80 S. E. 420.

Intestate Succession.—Insured named his wife as beneficiary in policies of insurance on his life. His wife predeceased him. There were no children born to the marriage. Upon the wife's death the husband was entitled to the wife's vested interest in the policies, even before reducing same to possession by administration, the provision of this section not having been modified by § 28-149, par. 8, in cases in which there are no surviving children; and upon the husband's death his heirs are entitled to the distribution of the proceeds of the policies. Wilson v. Williams, 215 N. C. 407, 2 S. E. (2d) 19.

Husband Becoming Non Compos Mentis.—Where a husband has qualified as the administrator of his deceased wife but removed on account of his since becoming non compos mentis, the administrator of the wife, de bonis non, and guardian of the husband, is entitled to her assets to be held by him for the benefit of the husband. Neill v. Wilson, 146 N. C. 242, 59 S. E. 674.

Applied in Bank v. Gilmer, 116 N. C. 684, 701, 22 S. E. 2, for the protection of creditors where there was an unfulfilled verbal executory contract that property was to be held in trust for children.

Cited in In re Estate of Wallace, 197 N. C. 334, 335, 148 S. E. 456.

§ 28-8. Disqualifications enumerated.—The clerk shall not issue letters of administration or letters testamentary to any person who, at the time of appearing to qualify—

1. Is under the age of twenty-one years.

A widow under 21 is not eligible to appointment as administratrix. The court may, however, appoint an administrator during her minority and, on arriving at full age, grant her the administration; or it may give the office to her appointee. Wallis v. Wallis, 60 N. C. 78.

2. Is a nonresident of this state; but a nonresident may qualify as executor.

Editor's Note.—Until the revisal of 1905, this subsection disqualified "an alien who is a nonresident of this state." And prior to 1868 there was no disqualification imposed upon aliens or nonresidents. It was formerly held that if a nonresident administrator took the oath and gave the bond required by law, he was not included in the disqualifications of this section. See Moore v. Eure, 101 N. C. 11, 16, 7 S. E. 471.

Nonresident Executor.—It is not a valid defense to a suit brought by an executor, that such executor was a nonresident. Batchelor v. Overton, 158 N. C. 395, 74 S. E. 20.

Nonresident Disqualified as Administrator.—A nonresident cannot be appointed an administrator; nor, having been appointed in the state of his intestate's residence, can he sue in the courts of this state. Hall v. Southern R. Co., 146 N. C. 345, 348, 59 S. E. 879; In re Estate of Banks, 213 N. C. 382, 196 S. E. 351.

Public administrator cannot be removed at the instance of nonresidents who have no right of appointment as administrator in consequence of not having the right to administer upon the estate in this state. Boynton v. Heartt, 158 N. C. 488, 74 S. E. 470.

Appointee of Nonresident Kin.—But a nonresident next of kin may appoint a resident, and it is within the power as well as the duty of the court to grant administration to the appointee. Smith v. Munroe, 23 N. C. 345; Ritchie v. McAuslin, 2 N. C. 220.

3. Has been convicted of a felony.

4. Is adjudged by the clerk incompetent to execute the duties of such trust by reason of drunkenness, improvidence or want of understanding.

Illiteracy as Incompetency.—Under this provision a person who can not write or read, and has no experience in keeping accounts or in settling estates, is "incompetent." Stephenson v. Stephenson, 49 N. C. 472.

5. Fails to take the oath or give the bond required by law.

Collateral Attack for Mere Irregularity.—When, in disregard of the requirements of this subsection, letters are issued to a foreign executor, this is a mere irregularity and cannot be collaterally attacked in an action by the executor. Batchelor v. Overton, 158 N. C. 395, 74 S. E. 20.

6. Has renounced his right to qualify. (Rev., s. 5; Code, ss. 1377, 1378, 2162; C. C. P., s. 457; C. S. 8.)

§ 28-9. Effect of disqualification of person entitled.—Where an executor named in the will, or any person having a prior right to administer, is under the disqualification of nonage, or is temporarily absent from the state, such person is entitled to six months, after coming of age or after his return to the state, in which to make application for letters testamentary, or letters of administration. (Rev., s. 6; Code, ss. 1379, 2165; C. C. P., ss. 452, 460; R. C., c. 46, s. 12; C. S. 9.)

During Widow's Minority.—The court may appoint an administrator during a widow's minority and, on her arriving at full age, grant her the administration. Wallis v. Wallis, 60 N. C. 78.

Application after Lapse of Six Months.—If those entitled to administration apply for letters at any time prior to the appointment of a public administrator, even though six months' period has elapsed, they will have priority to administer unless otherwise disqualified. In re Bailey's Will, 141 N. C. 193, 53 S. E. 844.

§ 28-10. Divorce a vinculo or felonious slaying is forfeiture.—When a marriage is dissolved a vinculo, the parties respectively, or when either party is convicted of the felonious slaying of the other, or of being accessory before the fact of such felonious slaying, the party so convicted shall thereby lose all his or her right to administer on the estate of the other, and to a distributive share in the personal property of the other, and every right and estate in the personal estate of the other. (Rev., s. 7; Code, s. 1480; 1889, c. 499; 1871-2, c. 193, s. 42; C. S. 10.)

Cross Reference.—As to acts barring reciprocal property rights of husband and wife, see §§ 52-19, 52-20, and 52-21.

Editor's Note.—In Owens v. Owens, 100 N. C. 240, 6 S. E. 794, it was held that a widow convicted as accessory before the fact to her husband's murder and confined in prison is entitled to dower. But this rule has in terms been abrogated by the provisions of this section, as to the right of the wife to administer and obtain her distributive share.

Where a husband has taken out a policy of life insurance on his own life with his wife as beneficiary and has feloniously killed his wife and then himself, under this section and sections 28-149 and 52-19, his heirs may not claim under him the proceeds of the policy since the law will not allow a man or those claiming under him to benefit by his own

wrong, and the proceeds of the policy are descendible to the next of kin of the wife and not to his heirs at law. Parker v. Potter, 200 N. C. 348, 157 S. E. 68.

§ 28-11. Elopement and adultery of wife is forfeiture.—If any married woman elopes with an adulterer, and shall not be living with her husband at his death, she shall thereby lose all right to a distributive share in the personal property of her husband, and all right to administer on his estate. (Rev., s. 8; Code, s. 1481; 1871-2, c. 193, s. 44; C. S. 11.)

Cross Reference.—See § 52-20.

§ 28-12. Husband's conduct forfeiting rights in wife's estate.—If any husband shall separate himself from his wife, and be living in adultery at her death, or if she has obtained a divorce a mensa et thoro, and shall not be living with her husband at her death, or if the husband has abandoned his wife, or has maliciously turned her out of doors, and shall not be living with her at her death, he shall thereby lose all his right and estate of whatever character in and to her personal property, and all right to administer on her estate. (Rev., s. 9; Code, s. 1482; 1871-2, c. 193, s. 45; C. S. 12.)

Cross Reference.—See § 52-21.

Failure to Provide Support Tantamount to Abandonment.—Where the husband made his wife leave, or where she had to leave because he would not give her anything to eat, it was held that his conduct amounted to abandonment. High v. Bailey, 107 N. C. 70, 12 S. E. 45.

§ 28-13. Executor may renounce.—Any person appointed an executor may renounce the office by a writing signed by him, and on the same being acknowledged or proved to the satisfaction of the clerk of the superior court, it shall be filed. (Rev., s. 10; Code, s. 2163; C. C. P., s. 450; C. S. 13.)

Cross Reference.—As to resignation of executor or administrator, see § 36-9 et seq.

Common Law and Present Rule.—At common law an administrator or executor who has qualified and entered upon the performance of his duties had no right to resign his office at his own convenience. Nor can he resign now except for causes specified in the statute or for equivalent causes. McIntyre v. Proctor, 145 N. C. 288, 59 S. E. 39; Washington v. Blunt, 43 N. C. 253.

Must Appear on Record.—Renunciation of executor must appear of record to enable the court to appoint an administrator with the will annexed. Springs v. Irwin, 28 N. C. 27.

Time of Renunciation.—An executor may, by permission of the superior court, renounce all right to the executorship and withdraw from a suit. Sawyer v. Dozier, 27 N. C. 97.

A court of probate may accept this renunciation at any time before the executor intermeddled with the effects of his testator, even after he has proved the will. Mitchell v. Adams, 23 N. C. 298.

The same rule applies to an executor of an executor under a prior will. Mitchell v. Adams, 23 N. C. 298.

But after probate an executor cannot renounce at his own pleasure, and must do so by leave of the court. Mitchell v. Adams, 23 N. C. 298.

Powers of Administrator c. t. a.—After renunciation of the executor, the administrator with the will annexed is competent to exercise his (executor's) powers under the will. Saunders v. Saunders, 108 N. C. 327, 12 S. E. 909.

Revocation of Letters for Cause Only.—The clerk should revoke letters testamentary, where the executor has entered upon performance of his duties, only by reason of some unfitness or unfaithfulness on the part of trustee, and never simply because the parties desire it. McIntyre v. Proctor, 145 N. C. 288, 59 S. E. 39.

Retraction of Renunciation.—A renouncing executor may retract his renunciation at any time before administration granted, and then administer. Any intermeddling with the estate before qualifying is evidence of such retraction. Davis v. Inscoe, 84 N. C. 396.

Renunciation by Some of Several.—Where there are several persons of the same class entitled to administer renunciation by some of them does not affect the rights of those not renouncing to administer. In re Jones' Estate, 177 N. C. 337, 341, 98 S. E. 827.

Right of Reinstatement.—There are decisions that an executor who has renounced can, under some circumstances come in and qualify. See Davis v. Inscoe, 84 N. C. 396, 401; Wood v. Sparks, 18 N. C. 389. But there is no case in which he has renounced with the formalities of this statute and afterwards has qualified, certainly not after the lapse of twenty years. Ryder v. Oates, 173 N. C. 569, 92 S. E. 508.

§ 28-14. Renunciation of prior right required.—When any person applies for administration, and any other person has prior right thereto, a written renunciation of the person or persons having such prior right must be produced and filed with the clerk. (Rev., s. 11; Code, s. 1378; C. C. P., s. 459; C. S. 14.)

Expression of Intent Insufficient.—The mere expressed intent of such person entitled to administration by prior rights that he would not have anything to do with the administration is no valid renunciation. Williams v. Neville, 108 N. C. 559, 13 S. E. 240.

§ 28-15. Failure to apply as renunciation.—If any person, entitled to letters of administration, fails or refuses to apply for such letters within thirty days after the death of the intestate, the clerk, on application of any party interested, shall issue a citation to such person to show cause, within twenty days after service of the citation, why he should not be deemed to have renounced. If, within the time named in the citation, he neglects to answer or to show cause, he shall be deemed to have renounced his right to administer, and the clerk must enter an order accordingly, and proceed to grant letters to some other person. If no person entitled to administer applies for letters of administration on the estate of a decedent within six months from his death, then the clerk may, in his discretion, deem all prior rights renounced and appoint some suitable person to administer such estate. (Rev., s. 12; Code, s. 1380; C. C. P., s. 460(a); 1868-9, c. 203; C. S. 15.)

Cross Reference.—See note to § 28-20.

In General.—The true intent and meaning of this and the previous section is that the persons primarily entitled to administration may have six months after the death of the intestate to assert their rights and comply with the law; and a party wishing to quicken their diligence within that time must do so by citation—he (the latter) may not by obtaining letters within the six months, deprive the party primarily entitled to administration should such party apply for letters before the expiration of six months period. Williams v. Neville, 108 N. C. 559, 562, 13 S. E. 240.

Applicable to Intestacy Only. — The provisions of this section contemplate the cases of intestacy. Hence in cases of testacy where no executor is appointed in the will, the rights of the parties to administer are governed by section 28-6, without reference to the six months limitation contained in this section. In re Jones' Estate, 177 N. C. 337, 340, 98 S. E. 827.

Renunciation Presumed after Six Months. — After the expiration of six months from the death of the decedent, those entitled to prior rights having failed to apply, all rights of preference may be treated as renounced, and a suitable person to administer upon the estate may be appointed. Hill v. Alspaugh, 72 N. C. 402, 404.

Appointment within Six Months.—If the next of kin, in answer to citation, name his appointee, and such person, after appointment, fails to qualify, then, though six months had not expired, the clerk would be authorized to appoint another. Williams v. Neville, 108 N. C. 559, 13 S. E. 240.

Appointment Not Revoked after Six Months. — If the parties who have precedence to administer fail to apply within six months from the death of the deceased, an appointment by the clerk of a proper person after that period will not be revoked. Withrow v. DePriest, 119 N. C. 541, 26 S. E. 110.

Failure to Apply within Six Months—Public Administrator.—Though it is the duty of the public administrator to apply after six months, if, before his appointment at any time,

even after six months, persons prior in rights to administer apply, they are entitled to appointment. In re Bailey's Will, 141 N. C. 193, 53 S. E. 844.

Unreasonable Delay.—No one who has precedence in a claim for letters loses such rights by delay merely, but by unreasonable delay, which is a matter of law. Hughes v. Pipkin, 61 N. C. 4.

Right Not Absolute or Exclusive.—The right of next of kin to letters of administration is not absolute and exclusive, but dependent upon their proper and due application therefor and their giving bond and security as the law requires. Stoker v. Kendall, 44 N. C. 242.

Effect of Appointment by Clerk.—Where the clerk has appointed an administrator under this section a debtor of the estate cannot maintain the position that the appointment of a public administrator was necessary to receive payment of the debt. Brooks v. Clement Co., 201 N. C. 768, 161 S. E. 403.

§ 28-16. Person named as executor failing to qualify or renounce.—If any person appointed an executor does not qualify or renounce within sixty days after the will is admitted to probate, the clerk of the superior court, on the application of any other executor named in the same will, or any party interested, shall issue a citation to such person to show cause why he should not be deemed to have renounced. If, upon service of the citation, he does not qualify or renounce within such time, not exceeding thirty days, as is allowed in the citation, an order must be entered by the clerk decreeing that such person has renounced his appointment as executor.

Where more than one executor is appointed in any last will and testament duly probated in any court of this State, and one or more of such executors shall have qualified before the clerk of such court, and the other executor or executors shall have failed, within thirty days thereafter to qualify or shall have renounced in writing, then the qualifying executor or executors shall be clothed with all the powers, rights and duties, and be subject to all the obligations imposed upon all of said executors, in and by the terms of said will and the laws of this State, in like manner as if the non-qualifying executor or executors had not been named in said will. This paragraph shall apply to all wills heretofore or hereafter probated. (Rev., s. 13; Code, s. 2164; C. C. P., s. 451; 1931, c. 183; C. S. 16.)

Cross Reference.—See § 28-20 and note thereto.

Editor's Note.—The Act of 1931 added the second paragraph to this section.

Sale by One of Joint Executors.—If one of the joint executors fails to qualify, a sale of lands by the one qualifying is sufficient to pass the estate, without its appearing that the other either has renounced the executorship or refused to join in the sale. Wood v. Sparks, 18 N. C. 389, 390.

Art. 4. Public Administrator.

§ 28-17. Appointment and term.—There may be a public administrator in every county, appointed by the clerk of the superior court for the term of four years. (Rev., s. 18; Code, s. 1389; 1868-9, c. 113; 1925, c. 253; C. S. 17.)

Editor's Note.—The amendment of 1925, ch. 253, reduced the number of years, for which a public administrator could be appointed, from "eight" to "four".

Property Right.—His office is a property right which can not be divested without due process of law. Trotter v. Mitchell, 115 N. C. 190, 20 S. E. 386.

Mistake of Clerk as to Term.—The appointment of public administrator is for the time specified in the section, and is not affected by a mistake of the clerk in stating in the appointment that it was for the unexpired term of his predecessor, or fixing the term of the new appointee for less period. Boynton v. Heartt, 158 N. C. 488, 74 S. E. 470.

Not an Office within Constitutional Prohibition.—A public administrator is not a holder of a public office within the constitutional prohibition against holding more than one office, and hence a quo warranto proceeding will not lie against him simply because he is also holding the office of recorder. State v. Smith, 145 N. C. 476, 59 S. E. 649.

§ 28-18. Oath.—The public administrator shall take and subscribe an oath (or affirmation) faithfully and honestly to discharge the duties of his trust; and the oath so taken and subscribed must be filed in the office of the clerk of the superior court. (Rev., s. 19; Code, s. 1393; 1868-9, c. 113, ss. 2, 5; C. S. 18.)

Cross Reference.—As to form of oath, see § 11-11.

§ 28-19. Bond.—The public administrator shall enter into bond, payable to the state of North Carolina, with two or more sufficient sureties to be justified before and approved by the clerk, or with a duly authorized surety company, in the penal sum of four thousand dollars ($4,000.00), conditioned upon the faithful performance of the duties of his office and obedience to all lawful orders of the clerk or other court touching the administration of the several estates that may come into his hands and such bonds, if executed by individual sureties, shall be renewed every two years. Whenever the aggregate value of the personal property belonging to the several estates in the hands of the public administrator exceeds one-half of his bond, if the bond is signed by personal sureties, or three-fourths of his bond, if the bond shall be executed by a duly authorized surety company, the clerk shall require him to enlarge his bond in an amount so as to cover at all times at least double the aggregate of the assets of the estates in the hands of said public administrator if the bond is signed by personal sureties or one and one-third times the assets if the bond shall be executed by a duly authorized surety company. If the personal property of any decedent is insufficient to pay his debts and the charges of administration and it becomes necessary for the said public administrator to apply for the sale of real estate for assets, upon the signing of a judgment ordering the said sale by the clerk of the superior court, or any other court, the clerk shall include the value of the real estate proposed to be sold in the aggregate value of the property belonging to the several estates in the hands of the public administrator. Whenever the aggregate value of the personal property and the real estate that the said administrator has been authorized to sell exceeds one-half of his bond, if the bond is executed by personal surety, or three-fourths of his bond if the bond shall be executed by a duly authorized surety company, the clerk shall require him to enlarge his bond as hereinbefore provided as though the aggregate consisted only of personal property. (Rev., s. 320; Code, ss. 1390, 1391, 1392; 1868-9, c. 113, ss. 2, 3, 4; 1915, c. 216; 1941, c. 243; C. S. 19.)

Editor's Note.—The 1941 amendment made changes in the first two sentences with reference to surety on bond, and added the remainder of the section.

Notice for Failure to Renew Bond. — A public administrator can not be removed for failure to renew his bond without being notified to show cause. Trotter v. Mitchell, 115 N. C. 190, 20 S. E. 386.

Quoted In re Brinson, 73 N. C. 278.

§ 28-20. When to obtain letters.—The public administrator shall apply for and obtain letters on the estates of deceased persons in the following cases:

1. When the period of six months has elapsed from the death of any decedent, and no letters

testamentary, or letters of administration or collection, have been applied for and issued to any person.

Due Qualification Prerequisite. — A public administrator acquires no rights or interest to administer an estate until he is qualified after the period allowed to the relatives to qualify in the order prescribed. In re Neal's Will, 182 N. C. 405, 109 S. E. 70.

Six Months Is Reasonable Time to Apply for Appointment of Administrator.—Construing this section and §§ 28-15 and 28-16, together, the legislative intent is manifest that six months after the death of testator is a reasonable time within which application should be made, in proper instances, for appointment of administrator c. t. a. In re Estate of Smith, 210 N. C. 622, 188 S. E. 202.

Prior Right of Others after Six Months. — While after the expiration of six months prior rights to administration may be deemed renounced and a public administrator appointed, yet even after lapse of six months, if he is not as yet appointed, persons of prior right to administration may be appointed in preference to him. In re Bailey's Will, 141 N. C. 193, 53 S. E. 844; Hill v. Alspaugh, 72 N. C. 402.

After the expiration of six months, should the public administrator fail to apply, the field is open to the clerk of the superior court to treat all right of preference as renounced and to appoint, in the exercise of his discretion, some suitable person to administer the estate. Brooks v. Clement Co., 201 N. C. 768, 771, 161 S. E. 403.

2. When any stranger, or person without known heirs, shall die intestate in any county.

3. When any person entitled to administration shall request, in writing, the clerk to issue the letters to the public administrator. (Rev., s. 20; Code, s. 1394; 1868-9, c. 113, s. 6; C. S. 20.)

§ 28-21. Powers generally and on expiration of term.—The public administrator shall have, in respect to the several estates in his hands, all the rights and powers, and be subject to all the duties and liabilities of other administrators. On the expiration of the term of office of a public administrator, or his resignation, he may continue to manage the several estates committed to him prior thereto until he has fully administered the same, if he then enters into a bond as required by law for administrators. (Rev., s. 21; Code, s. 1395; 1868-9, c. 113, s. 7; 1876-7, c. 239; C. S. 21.)

Art. 5. Administrator with Will Annexed.

§ 28-22. When letters c. t. a. issue.—If there is no executor appointed in the will, or if, at any time, by reason of death, incompetency adjudged by the clerk of the superior court, renunciation, actual or decreed, or removal by order of the court, or on any other account there is no executor qualified to act, the clerk of the superior court shall issue letters of administration with the will annexed to one or more of the legatees named in said will; but if no legatee qualifies, then letters may be issued to some suitable person or persons in the order prescribed in this chapter. (Rev., s. 14; Code, s. 2166; C. C. P., s. 453; 1923, c. 63; C. S. 22.)

Editor's Note.—The effect of the amendment of 1923, ch. 63, was to give precedence, with respect to grant of letters c. t. a., to legatees named in the will over other persons entitled to administration under section 28-6. See 1 N. C. L. R. 315.

Appointment of Trustee Void.—The powers and duties (at least those personal) of an executor named in a will, devolve, upon his renunciation, on the administrator with the will annexed, and the appointment by the clerk of a trustee in place of the executor is void. Clark v. Peebles, 120 N. C. 31, 26 S. E. 924; Creech v. Grainger, 106 N. C. 213, 10 S. E. 1032. Council v. Averett, 95 N. C. 131; Hester v. Hester, 37 N. C. 330. He becomes a trustee for all trusts declared in the will as if he had been named executor. Jones v. Jones, 17 N. C. 387.

Powers of Administrator with the Will Annexed.—An administrator cum testamento annexo has all the rights, powers, and is subject to the same duties as if he had been named as executor. Smathers v. Moody, 112 N. C. 791, 17 S. E. 532.

Appointment When There is Executor. — An administrator cum testamento annexo cannot be appointed where there is an executor laboring under no disability, until the renunciation by the latter. And an appointment in derogation of this rule is void—not merely voidable. Springs v. Irwin, 28 N. C. 27.

Principle applied in Suttle v. Turner, 53 N. C. 403, 404.

Waiver of Right to Appointment.—Where a legatee entitled to preferential appointment as administrator c. t. a., fails to object to the appointment of an administrator c. t. a., but waits until after the death of the administrator appointed more than a year after testator's death before asserting his right and renouncing in favor of a third person, the legatee has waived his right, and his nominee is not entitled to appointment as against the nominee of the surviving sisters of testator. In re Estate of Smith, 210 N. C. 622, 188 S. E. 202.

And Right of Nomination and Substitution.—The right of nomination and substitution is confined to those themselves qualified for appointment, and where a legatee has waived his right to be appointed administrator c. t. a. by failing to apply within a reasonable time, he also waives his right of nomination and substitution. In re Estate of Smith, 210 N. C. 622, 188 S. E. 202. See § 28-6 and the note thereto.

§ 28-23. Qualifications and bond.—Administrators with the will annexed shall have the same qualifications and give the same bond as other administrators; but the executor of an executor shall not be entitled to qualify as executor of the first testator. (Rev., s. 15; Code, s. 2167; C. C. P., s 454; 1905, c. 286; C. S. 23.)

§ 28-24. Administrator c. t. a. must observe will.—In all cases where letters of administration with the will annexed are granted, the will of the testator must be observed and performed by the administrator with the will annexed, both in respect to real and personal property, and an administrator with the will annexed has all the rights and powers, and is subject to the same duties, as if he had been named executor in the will. (Rev., s. 3146; Code s. 2168; C. C. P., s. 455; C. S. 4170.)

Administrator, d. b. n., c. t. a., Not on Same Footing with Executor in All Respects.—The administrator de bonis non, cum testamento annexo, although clothed with the power, and required to execute the will, according to its legal effect as if he were executor, does not stand upon the same footing in all respects with an executor. He derives his authority, not from the will simply, but from the statute (this section) and he would not be treated as an executor in another state, nor would he have the power to sue there as administrator, because his authority is conferred by the law, and not by the will. Grant v. Reese, 94 N. C. 720, 730.

Duties and Liability of Administrator, c. t. a.—Ancillary Administration.—Where a testator died domiciled in this State, leaving debts due by parties in Virginia, the administrator de bonis non, cum testamento annexo, and the sureties on the bond, are not liable for a failure to return such notes on the inventory in this State and collect the same, when there is administration on the estate in Virginia. Grant v. Reese, 94 N. C. 720.

Personal Powers in Executor Extinct upon His Death.—Where the powers conferred upon the executor by the will are personal to and discretionary with the executor and become extinct at his death they can not be judicially prolonged and vested either in the administrator, c. t. a., nor in a substituted trustee. Young v. Young, 97 N. C. 132, 2 S. E. 78; Lewin on Trusts, 435; Creech v. Grainger, 106 N. C. 213, 219, 10 S. E. 1032.

Under a will directing the executor therein named to continue testator's business as long as the executor should think it profitable, and such of the profits as the executor might think actually necessary for the support of testator's wife and children to be paid to the wife; also, to invest six thousand dollars, bequeathed by testator to his children, and apply the interest, annually, to the education of the children; also, to have entire control of testator's business, to continue or discontinue it all, or any department of it, at any time he might find it not yielding a reasonable profit,

and out of the profits pay to testator's wife, from time to time, such amounts as he might consider actually necessary for her support and the support of the children: Held, that upon the death of the executor and the appointment of an administrator d. b. n., c. t. a., the trust in respect to the investment of six thousand dollars, for the education of testator's children, passed to the administrator; the other trusts were personal to and discretionary with the executor, and became extinct at his death. Creech v. Grainger, 106 N. C. 213, 10 S. E. 1032.

Administrator c. t. a. as Trustee.—An administrator, with the will annexed, becomes a trustee for any trusts declared in the will which could pass and be transferred to any one, as much as if he had been named executor. Creech v. Grainger, 106 N. C. 213, 10 S. E. 1032.

Same—Recovery of Lands Held in Trust.—An administrator cum testamento annexo has all the rights and powers and is subject to the same duties as if he had been named as executor; therefore, where an executor was charged with the management of land, which implied the right of possession until the trust should be fully carried out, upon his death and the appointment of an administrator de bonis non, cum testamento annexo, the latter became entitled to the possession of the land, and can recover the same from those withholding it. Smathers v. Moody, 112 N. C. 791, 17 S. E. 532.

Will Presumed Executed in Contemplation of Section.—It will be presumed that a will is executed in contemplation of the statutes providing that an administrator c. t. a. succeeds to all the rights, powers and duties of the executor. Wachovia Bank, etc., Co. v. King Drug Co., 217 N. C. 502, 8 S. E. 593.

Power to Sell Real Estate.—Administrator c. t. a. may exercise all powers of sale granted the executors by the will regardless of whether they are given the executor virtute officii or nominatim, unless the language of the will definitely limits the exercise of the power of sale to the person named executor or unless the executor is made the donee of a special trust, given by reason only of peculiar or special confidence in him, and the mere appointment of an executor and the granting of power to him to sell real estate in his discretion, although evidencing confidence, does not necessarily constitute him the donee of a special trust so as to preclude the exercise of the power of sale by the administrator c. t. a. Wachovia Bank, etc., Co. v. King Drug Co., 217 N. C 502, 8 S. E. (2d) 593.

Applied in Jones v. Warren, 213 N. C. 730, 197 S. E. 599.

Art. 6. Collectors.

§ 28-25. Appointment of collectors.—When, for any reason, a delay is necessarily produced in the admission of a will to probate, or in granting letters testamentary, letters of administration, or letters of administration with the will annexed, the clerk may issue to some discreet person or persons, at his option, letters of collection, authorizing the collection and preservation of the property of the decedent. When, for any reason, a delay is necessary in the production of positive proof of the death of any one who may have disappeared under circumstances indicating death of such person, any person interested in the estate of such person so disappearing as heir at law, prospective heir at law, a creditor, a next friend, or any other person or persons interested, either directly or indirectly, in the estate of such person so disappearing, may file with the clerk of the superior court of the county in which the person so disappearing last resided, or in case such person so disappearing was at the time of his disappearance a nonresident of the State of North Carolina, with the clerk of the superior court of any county in which any property was or might have been located at the time of such disappearance, a petition for the appointment of a collector of the estate of such person so disappearing, or the property of such person so disappearing, located within the county of the clerk to whom application is made, which petition shall set forth the facts and circumstances surrounding the disappearance of such person, and which petition shall be duly verified and supported by affidavit of persons having knowledge of the circumstances under which such person so disappeared, and if from such petition and such affidavits it should appear to the clerk that the person so disappearing is probably dead, then it shall be the duty of the clerk to so find and to issue to some discreet person or persons, at his option, letters of collection authorizing the collection and the preservation of the property of such person so disappearing. (Rev., s. 22; Code, s. 1383; C. C. P., s. 463; R. C., c. 46, s. 9; 1868-9, c. 113, s. 115; 1924, c. 43; C. S. 24.)

Editor's Note.—That part of this section which provides for the appointment of collectors in case of delay in the production of positive proof of the unknown death of any person, was enacted by the amendment of 1924, ch. 43.

As to the effect upon this section of the amendment of 1924, see 3 N. C. L. R. 14.

Appointee in Discretion of Clerk. — It is discretionary with the clerk to appoint as collector either the person named as executor in the writing purporting to be the will, or some other person. In re Little's Will, 187 N. C. 177, 121 S. E. 453.

After a Will Admitted to Probate. — After a will has been admitted to probate in common form and letters testamentary have been issued, the clerk cannot remove the executor and appoint a collector, without a hearing based on notice to show cause why he should not be removed. In re Palmer's Will, 117 N. C. 133, 134, 23 S. E. 104.

Appointment When Proper.—A collector is appointed only when there is no one in rightful charge of the estate, and this section is applicable only to cases where there are difficulties in limine disconnected with controversy or contest over the will, preventing the admission of the will to probate or the issuing of letters testamentary, e. g., protracted absence of witnesses, illness of the executor, etc., also where a caveat is entered at the time the will is offered to probate. In re Palmer's Will, 117 N. C. 133, 134, 23 S. E. 104.

§ 28-26. Qualifications and bond.—Every collector shall have the qualifications and give the bond prescribed by law for an administrator. (Rev., s. 23; Code, s. 1384; C. C. P., s. 464; C. S. 25.)

§ 28-27. Powers of collectors.—Every collector has authority to collect the personal property, preserve and secure the same, and collect the debts and credits of the decedent, and for these purposes he may commence and maintain or defend suits, and he may sell, under the direction and order of the clerk, any personal property for the preservation and benefit of the estate. He may be sued for debts due by the decedent, and he may pay funeral expenses and other debts. (Rev., s. 24; Code, s. 1385; C. C. P., s. 465; R. C., c. 46, s. 6; 1868-9, c. 113, s. 115; C. S. 26.)

Power to Lease Land.—A collector has no power to enter upon and make leases of land. Lee v. Lee, 74 N. C. 70.

§ 28-28. When collector's powers cease; duty to account.—When letters testamentary, letters of administration or letters of administration with the will annexed are granted, the powers of such collector shall cease, but any suit brought by the collector may be continued by his successor, the executor or the administrator, in his own name. Such collector must, on demand, deliver to the executor or administrator all the property, rights and credits of the decedent under his control, and render an account, on oath, to the clerk of all his proceedings. Such delivery and account may be enforced by citation, order or attachment. (Rev., s. 25; Code, s. 1386; C. C. P., s. 466; R. C., c. 46, s. 7; 1868-9, c. 113, s. 115; C. S. 27.)

Allowance of Counsel Fee. — A collector who resists the claim of the executor is not entitled to an allowance for

counsel fees paid by him in such litigation, where the executor prevails in the litigation. Johnson v. Marcom, 121 N. C. 83, 28 S. E. 58.

Art. 7. Appointment and Revocation.

§ 28-29. Facts to be shown on applying for administration.—On application for letters of administration, the clerk must ascertain by affidavit of the applicant or otherwise—

1. The death of the decedent and his intestacy.

Administration of Living Person's Estate.—Grant of administration upon the estate of a living man and a decree for the sale of his lands are void for lack of jurisdiction. Springer v. Shavender, 118 N. C. 33, 23 S. E. 976.

Appointment Based on Legal Presumption of Death.—Upon an affidavit showing that a person had been absent for over seven years and had not been heard from by relatives or friends, the fact that at the time of the appointment it was contemplated that an action should be brought to determine any question that might arise contrary to the legal presumption of death does not invalidate the appointment or nullify the proof afforded by the jurisdictional affidavit. Chamblee v. Security Nat. Bank, 211 N. C. 48, 188 S. E. 632.

2. That the applicant is the proper person entitled to administration, or that he applies after the renunciation of the person or persons so entitled.

3. The value and nature of the intestate's property, the names and residence of all parties entitled as heirs or distributees of the estate, if known, or that the same cannot, on diligent inquiry, be procured; which of said parties are minors, and whether with or without guardians, and the names and residences of such guardians, if known. Such affidavit or other proof must be recorded and filed by the clerk. (Rev., s. 26; Code, s. 1381; C. C. P., s. 461; C. S. 28.)

§ 28-30. Right to contest application for letters; proceedings. — Any person interested in the estate may, on complaint filed and notice to the applicant, contest the right of such applicant to letters of administration, and on any issue of fact joined, or matter of law arising on the pleadings, the cause may be transferred to the superior court for trial, or an appeal be taken, as in other special proceedings. (Rev., s. 27; Code, s. 1382; C. C. P., s. 462; C. S. 29.)

Cross Reference.—As to the running of the statute of limitations when there is contest, see § 1-24.

Title of Property Not Question of Fact. — A dispute as to the title of property of the decedent is not such an issue of fact as is contemplated by this section and required by this section to be transferred to the superior court for trial. In re Tapp's Estate, 114 N. C. 248, 19 S. E. 150.

Collateral Attack after Letters Issued.—Once the letters are issued and appointment made, they cannot be collaterally attacked. Thus in an action by the administrator against defendant for damages for killing the decedent negligently, the legality of his appointment on the ground of residence cannot be raised. Fann v. North Carolina R. Co., 155 N. C. 136, 71 S. E. 81; Batchelor v. Overton, 158 N. C. 395, 74 S. E. 20.

§ 28-31. Letters of administration revoked on proof of will.—If, after the letters of administration are issued, a will is subsequently proved and letters testamentary are issued thereon; or if, after letters testamentary are issued, a revocation of the will or a subsequent testamentary paper revoking the appointment of executors is proved and letters are issued thereon, the clerk of the superior court must thereupon revoke the letters first issued, by an order in writing to be served on the person to whom such first letters were issued; and, until service thereof, the acts of such person, done in good faith, are valid. (Rev., s. 37; Code, s. 2170; C. C. P., s. 469; C. S. 30.)

Cross References.—As to action begun before revocation, see §§ 28-33 and 28-181. As to resignation of executor or administrator, see § 36-9 et seq.

Applied in Shober v. Wheeler, 144 N. C. 403, 57 S. E. 152; In re Estate of Suskins, 214 N. C. 218, 198 S. E. 661.

Cited in Edwards v. McLawhorn, 218 N. C. 543, 11 S. E. (2d) 562.

§ 28-32. Letters revoked on application of surviving husband or widow or next of kin, or for disqualification or default. — If, after any letters have been issued, it appears to the clerk, or if complaint is made to him on affidavit, that the surviving husband or widow or next of kin in the order of priority set out in subsections one and two of § 28-6 applies for letters of administration on said estate, and notwithstanding said applicants may have renounced their right to administer, if otherwise qualified, or that any person to whom they were issued is legally incompetent to have such letters, or that such person has been guilty of default or misconduct in the due execution of his office, or that issue of such letters was obtained by false representations made by such person, the clerk shall issue an order requiring such person to show cause why the letters should not be revoked. On the return of such order, duly executed, if the objections are found valid, the letters issued to such person must be revoked and superseded, and his authority shall thereupon cease. (Rev., s. 38; Code, s. 2171; C. C. P., s. 470; 1921, c. 98; C. S. 31.)

Editor's Note.—That part of this section which authorizes the revocation of letters upon the application of the surviving husband or widow or the next of kin, is introduced by the amendment of 1923, ch. 63. Prior to that, revocation was confined to causes of incompetency, default or misconduct of the representative in office.

Power to Revoke, Power to Refuse. — The power vested in clerk under this section to revoke letters for good cause carries with it the power to refuse to grant letters for cause for which a revocation would be justified. In re Will of Gulley, 186 N. C. 78, 80, 118 S. E. 839.

Clerk Has Primary and Original Jurisdiction.—The clerk under this section has original and primary jurisdiction of a probate judge to revoke letters, subject to review upon appeal by either party, and to this end he may require issues of fact to be tried by a jury in the superior court. Murrill v. Sandlin, 86 N. C. 54.

Clerk Exercises Discretion.—The exigencies of administration require the exercise of sound judgment, and this necessarily implies discretion in its supervision. Hence, the removal of administrators calls for the exercise of discretion by the clerk. Jones v. Palmer, 215 N. C. 696, 2 S. E. (2d) 850.

Refusal to Disclose Information. — Refusal on the part of the executor named in the will to disclose information as to the amount and nature of personalty coming into his possession, as to other matters relative to his fitness, is a ground for withholding or revoking letters testamentary and granting them to some other person. In re Will of Gulley, 186 N. C. 78, 118 S. E. 839.

Appeal from Order of Clerk.—The powers of the clerk to remove executors and administrators, conferred by this section, are reviewable on appeal to the judge of the Superior Court of the county. Wright v. Ball, 200 N. C. 620, 158 S. E. 192.

Where the Superior Court judge, upon appeal from the order of the clerk of the court removing executors or administrators of an estate, has exercised his discretion in retaining the cause in the Superior Court instead of remanding it to the clerk, the exercise of this discretion is not reviewable on appeal to the Supreme Court. Wright v. Ball, 200 N. C. 620, 158 S. E. 192.

It is in the province of the clerk to pass upon the matter of qualification of an executor, subject to the right of review by the superior court judge, and as to matters of law by the Supreme Court on appeal. In re Will of Gulley, 186 N. C. 78, 118 S. E. 839; In re Battle's Estate, 158 N. C. 388, 74 S. E. 23; Tulburt v Hollar, 102 N. C. 406, 9 S. E. 430; Edwards v. Cobb, 95 N. C. 4; Barnes v. Brown, 79 N. C. 401.

It is not required that he transfer the cause to the superior court for the trial of the issue. In re Battle, supra.

Necessity of Order to Show Cause. — The clerk cannot appoint a collector, (when the will has been probated and executor qualified) and remove the executor without a hearing based on notice to show cause why he should not be removed. In re Palmer's Will, 117 N. C. 133, 134, 23 S. E. 104. Nor can he remove a public administrator without such notice. Trotter v. Mitchell, 115 N. C. 190, 20 S. E. 386.

The procedure to remove an executor or administrator for default or misconduct is by order issued by the clerk to the executor or administrator to show cause, and in such proceeding the respondent must be given notice and an opportunity to be heard, with right of appeal. Edwards v. McLawhorn, 218 N. C. 543, 11 S. E. (2d) 562.

Statement of Belief in Affidavit.—A statement in an affidavit for the removal of executor, of a mere belief that he will misapply the funds is not sufficient for removal. It should state the facts or reasons upon which such belief is based. Neighbors v. Hamlin, 78 N. C. 42.

Failure to Discharge Duties — Ground of Removal. — Where the executor becomes bankrupt and is the owner of no property, and has neglected for six years to file an inventory or return of any sort, and has failed to convert the personal property into money, upon application of creditors he may be required to give bond or, in default, be removed, Barnes v. Brown, 79 N. C. 401; for failure to make statement of account, Armstrong v. Stowe, 77 N. C. 360.

Insolvency in Lifetime of Testator. — But an executor will not be removed for insolvency, if such was his condition in the lifetime of his testator and known to him, when there is no evidence of waste or misapplication of funds. In re Knowles' Estate, 148 N. C. 461, 62 S. E. 549.

Poverty of an executor is not of itself a reason for restraining him from administering the estate. There must be some maladministration or some danger of loss from his misconduct or negligence for which he will not be able to answer by reason of his insolvency. Wilkins v. Harris, 60 N. C. 592.

Nor is poverty a ground to require him to give bond as an alternative of giving up his office. Fairbairn v. Fisher, 57 N. C. 390.

Disqualification for Adverse Interest.—Where there is no evidence of bad faith or fraudulent concealment, a claim by the administrator that he owned jointly with the decedent a part of the personal estate of the latter, is not such an adverse interest as to disqualify him in his office. Morgan v. Morgan, 156 N. C. 169, 72 S. E. 206.

Pleading and Procedure.—The application to remove an executor may be made by any person rightfully interested, by petition or motion in writing, or formal complaint, setting forth the grounds of application supported by affidavit. The allegations thus made may be met by a demurrer in a proper case, or by answer. Edwards v. Cobb, 95 N. C. 4, 5, 9.

Filing of "Final Report" Does Not Create Vacancy.—The filing of a "final report" by an executor does not have the effect of removing him from office if in fact the estate has not been fully settled, and therefore the filing of the report does not create a vacancy and does not give the clerk authority to appoint an administrator c. t. a., d. b. n. Edwards v. McLawhorn, 218 N. C. 543, 11 S. E. (2d) 562.

Cited in In re Estate of Suskin, 214 N. C. 218, 198 S. E. 661.

§ 28-33. On revocation, successor appointed and estate secured.—In all cases of the revocation of letters, the clerk must immediately appoint some other person to succeed in the administration of the estate; and pending any suit or proceeding between parties respecting such revocation, the clerk is authorized to make such interlocutory order as, without injury to the rights and remedies of creditors, may tend to the better securing of the estate. (Rev., s. 35; Code, s. 1521; 1868-9, c. 113, s. 92; C. S. 32.)

Order to Make Return and Settlement. — The removed administrator may be ordered to make immediate return and settlement of the estate in his hands. Until that is done he is within the jurisdiction of the court. In re Brinson, 73 N. C. 278. See also, Taylor v. Biddle, 71 N. C. 1, where administrator was removed and an administrator de bonis non appointed.

Order to Surrender Funds. — It is proper for the clerk to order the displaced representative to surrender the funds in his possession belonging to the estate. Battle v. Duncan, 90 N. C. 546, 550.

Clerk Cannot Appoint until Vacancy Exists.—Since a person to whom letters testamentary have been issued has authority to represent the estate until his death, resignation or until he has been removed or the letters testamentary revoked in accordance with statutory procedure, the appointment by the clerk of an administrator c. t. a., d. b. n., upon petition of the residuary legatee alleging failure of the executor to account to the estate for rents and profits, is void, the clerk being without jurisdiction to make the appointment. Edwards v. McLawhorn, 218 N. C. 543, 11 S. E. (2d) 562.

Amount of Bond Dependent on What. — The framers of this section must have contemplated that the amount of bond should depend upon the application and examination of the principal named in it, unless the clerk preferred to examine another person. Williams v. Neville, 108 N. C. 559, 565, 13 S. E. 240.

Upon the examination of the applicant, the clerk may value the property at a higher figure than he had previously done. Williams v. Neville, 108 N. C. 559, 565, 13 S. E. 240.

Effect of Failure to Give Proper Bond. — The mere fact the bond of the representative is not justified before or approved by the clerk does not render the appointment void, or necessarily voidable. The provisions of this section requiring bond are directory and not essential to the appointment. It is only in the exercise of their jurisdictional functions that the clerks must observe these provisions as a condition precedent to the validity of their act. The only effect of noncompliance with these requirements is that the representative may be made to give the proper bond required. Garrison v. Cox, 95 N. C. 353, 357.

Good faith and the exercise of ordinary care and reasonable diligence are all that is required of executors and administrators, and covered by their bond. Moore v. Eure, 101 N. C. 11, 7 S. E. 471; Smith v. Patton, 131 N. C. 396, 42 S. E. 849; Atkinson v. Whitehead, 66 N. C. 296.

Money Received Covered by Bond.—Money applied for by an administrator, and paid to him as such, is received under color of his office and is covered by his bond. Lafferty v. Young, 125 N. C. 296, 34 S. E. 444.

Bond When Not Essential.—The execution of a bond, though incidental, is not an essential condition of an order admitting the plaintiff to prosecute an action as administrator. Hughes v. Hodges, 94 N. C. 56, 61.

Nor is the giving of the bond essential to the efficiency of the act of appointment itself. Howerton v. Sexton, 104 N. C. 75, 86, 10 S. E. 148; Hoskins v. Miller, 13 N. C. 360; Spencer v. Cahoon, 15 N. C. 225; Spencer v. Cahoon, 18 N. C. 27; Garrison v. Cox, 95 N. C. 353, 357.

When a foreign executor was regularly appointed and qualified his failure to give the bond specified by this section is only an irregularity and cannot be collaterally attacked. Batchelor v. Overton, 158 N. C. 395, 74 S. E. 20.

Cited in Carolina Power & Light Co. v. Reeves, 198 N. C. 404, 405, 151 S. E. 871.

Art. 8. Bonds.

§ 28-34. Bond; approval; condition; penalty. — Every executor from whom a bond is required by law, and every administrator and collector, before letters are issued, must give a bond payable to the state, with two or more sufficient sureties, to be justified before and approved by the clerk, conditioned that such executor, administrator or collector shall faithfully execute the trust reposed in him and obey all lawful orders of the clerk or other court touching the administration of the estate committed to him. Where such bond is executed by personal sureties, the penalty of such bond must be, at least, double the value of all the personal property of the deceased, but where such bond shall be executed by a duly authorized surety company, the penalty in such bond may be fixed at not less than one and one-fourth times the value of all the personal property of the deceased. The value of said personal property shall be ascertained by the clerk by examination, on oath, of the applicant or of some other competent person. If the personal property of any decedent is insufficient to pay his debts and

the charges of administration, and it becomes necessary for his executor or administrator to apply for the sale of real estate for assets, and the bond previously given is not double the value of both the real and personal estate of the deceased, such executor (if bond is required of him by law) or administrator shall, before or at the time of filing his petition for such sale, give another bond payable and conditioned as the one above prescribed and with like security, in double the value of the real estate for the sale of which application is made, provided, however, that where such bond shall be executed by a duly authorized surety company, the penalty of said bond need not exceed one and one-fourth times the value of said real estate. (Rev., s. 319; Code, s. 1388; 1870-1, c. 93; C. C. P., s. 468; 1935, c. 386; C. S. 33.)

Cross Reference.—As to when evidence as to default of principal admissible against sureties in actions on bonds of personal representatives, see § 109-38.

Editor's Note.—The amendment of 1935 changed the penalty of the bond as formerly prescribed by the second sentence and added the proviso appearing at the end of the section.

Action May Be Brought on Bond to Recover Amount Due Estate.—Where an administrator, who has not fully administered the estate of his intestate, has died or has been removed from his office, an action may be maintained against his personal representative or against him, as the case may be, and the surety on his bond, to recover the amount due by him to the estate of his intestate, by one who has been duly appointed and has duly qualified as administrator d. b. n. of his intestate. Tulburt v. Hollar, 102 N. C. 406, 9 S. E. 430. The failure to account for and to pay such amount is a breach of the statutory bond. State v. Dunn, 206 N. C. 373, 374, 173 S. E. 900.

Applied in State v. Purvis, 208 N. C. 227, 180 S. E. 88.

Cited in Carolina Power & Light Co. v. Reeves, 198 N. C. 404, 405, 151 S. E. 871; Hicks v. Purvis, 208 N. C. 657, 182 S. E. 151.

§ 28-35. When executor to give bond.—Executors shall give bond as prescribed by law in the following cases:

Bankrupt Executor.—When an executor who is no owner of property has become bankrupt and has failed to file an inventory or return, the court (now the clerk) upon application of creditors may require him to give bond or in default remove him. Barnes v. Brown, 79 N. C. 401. But his insolvency known to the testator is no ground for requiring bond. Neighbors v. Hamlin, 78 N. C. 42.

Converting Assets into Money and Notes.—Where an executor converts his real and personal estate into notes and money, so as to lead to a reasonable apprehension that the assets are not sufficiently secure in his hands, it becomes the duty of the court to order that he give bond for the protection of the assets. Gray v. Gaither, 74 N. C. 237.

1. Where the executor resides out of the state. Except in the cases otherwise provided in this chapter, no foreign executor has any authority to intermeddle with the estate, until he has entered into bond, and the bond must be given not later than one year after the death of the testator.

Local Modification.—Buncombe, Madison, Yancey: Pub. Loc. Ex. Sess. 1924, c. 202.

Foreign Executors.—Under this subsection a foreign executor must apply to the clerk of the superior court for ancillary letters of administration and give bond. First Nat. Bank v. Pancake, 172 N. C. 513, 515, 90 S. E. 515.

Owing to the prohibition contained in this subsection, deeds made by foreign executors transferring lands situated in this state, under a power in the will to sell, convey no title until the statutory requirements have been complied with. Glascock v. Gray, 148 N. C. 346, 62 S. E. 433. But by section 28-39 of this chapter, (enacted subsequently) such conveyances executed under circumstances referred to prior to 1911, are validated by the express terms of that section.

But where such executor has been regularly appointed in all other respects, his failure to give bond under this subsection is only an irregularity and cannot be collaterally attacked in an action brought by him. Batchelor v. Overton, 158 N. C. 395, 396, 74 S. E. 20.

Removal to Federal Court.—A foreign executor will be required to give bond required by this section to remove a cause, instituted against his testate in his lifetime, to the Federal court on the ground of diversity of citizenship. First Nat. Bank v. Pancake, 172 N. C. 513, 514, 90 S. E. 515.

Meaning of Estate.—The use of the word "estate" in this subsection denotes real as well as personal estate. Glascock v. Gray, 148 N. C. 346, 62 S. E. 433.

2. When a man marries a woman who is an executrix, and if the husband in such case fail to give bond, the clerk, on application of any creditor or other party interested in the estate, shall revoke the letters issued to the wife and grant letters of administration with the will annexed to some other person.

Executrix's Remarriage and Wasting the Assets.—Where it appeared that a wife, executrix of her first husband, remarried and was using the estate carelessly and without accounting therefor, it was held proper to require her to account and give bond. Godwin v. Watford, 107 N. C. 168, 169, 11 S. E. 1051.

3. Where an executor, other than such as may have already given bond, obtains an order to sell any portion of the real estate for the payment of debts, as hereinafter provided, the court or clerk to whom application is made shall require, before granting any order of sale, such executor to enter into bond. (Rev., s. 28; Code, s. 1515; R. C., c. 46, ss. 12, 13; C. S. 34.)

§ 28-36. When executor may give bond after one year.—Where a nonresident of the state by will sufficient according to the laws of the state, and duly probated and recorded in the proper county, devises real property situated in this state, the executor acting under the will, if he has not intermeddled with the property devised in the will, and if no letters of administration in this state on the estate have been issued subsequent to the probate of the will, may, after the expiration of one year from the testator's death, give bond in double the value of the property devised, and he shall then be entitled to all the rights, powers and privileges of a resident executor. (1909, c. 825; C. S. 35.)

§ 28-37. No bond in certain cases of executor with power to convey.—Where a citizen or subject of a foreign country, or of any other state of the United States, by will sufficient according to the laws of this state, and duly probated and recorded in the proper county, devises to his executor, with power to sell and convey, real property situated in this state in trust for a person named in the will, the power being vested in the executor as such trustee, the executor may execute the power without giving bond in this state. (1909, c. 901; 1925, c. 284; C. S. 36.)

Editor's Note.—By the amendment of 1925, c. 284, citizens of other states of the United States were brought into the operation of this section.

§ 28-38. No bond where will does not require bond and co-executor a resident.—A nonresident executor appointed under a will which does not require the executor's bond shall not be required to give bond, if a resident of the state is appointed and qualifies as co-executor, unless the clerk of the court of the county where the will is first probated shall, upon the petition of the creditors or beneficiaries of the estate, deem the bond of the nonresident executor necessary for the protection of the creditors or beneficiaries. This

section applies to nonresident executors who qualified before its enactment as well as to those qualifying afterwards. (1911, c. 176; Ex. Sess. 1920, c. 86; C. S. 37.)

Editor's Note.—The only effect of the amendment of 1920, c. 86, was to substitute the words "does not require the executor's bond," near the beginning of this section, for the original words "dispenses with the executor's bond."

§ 28-39. Certain executor's deeds without bond before 1911 validated.—Where prior to January first, one thousand nine hundred and eleven, a nonresident executor has sold and conveyed lands in this state under a power in the will of a citizen of another state or of a foreign country, and the will was executed according to the laws of this state and was duly proved and recorded in the state or foreign country where the testator and his family and the executor resided, the sale and conveyance is valid although the executor prior to the execution of the deed had not given bond or obtained letters in this state. (1911, c. 90; C. S. 38.)

Constitutionality.—This section validating conveyances therein referred to is not unconstitutional as impairing a vested right. Vaught v. Williams, 177 N. C. 77, 97 S. E. 737.

§ 28-40. Oath and bond required before letters issue.—Before letters testamentary, letters of administration with the will annexed, letters of administration or letters of collection are issued to any person, he must give the bond required by law and must take and subscribe an oath or affirmation before the clerk, or before any other officer of any state or country authorized by the laws of North Carolina to administer oaths, that he will faithfully and honestly discharge the duties of his trust, which oath must be filed in the office of the clerk. (Rev., s. 29; Code, ss. 1387, 1388, 2169; C. C. P., ss. 467, 468; 1870-1, c. 93; 1923, c. 56; C. S. 39.)

Cross Reference.—As to form of oath, see § 11-11.
Editor's Note.—See 1 N. C. L. R. 315.

§ 28-41. Oath before notary; curative statute.—In all cases prior to January the first, one thousand nine hundred and twenty-two, in which any foreign executor qualified or attempted to qualify as such executor by taking and subscribing the oath or affirmation required by law, before a notary public of this or any other state or territory of the United States, instead of taking and subscribing said oath or affirmation before the clerk, and having in all other respects complied with the laws of North Carolina prescribed for and pertaining to the qualification and appointment of foreign executors, such qualification and the letters testamentary issued in all such cases are hereby validated and made legal and binding. In all cases mentioned in this section, wherein such foreign executor has entered upon the discharge of the duties of such office and has performed any duty or exercised the powers and authority of such office regularly and according to law, except for the defect in the qualification and issuance of letters testamentary, then all such acts of any such foreign executor are validated and are declared to be legal and binding. (1923, c. 19.)

§ 28-42. Right of action on bond.—Every person injured by the breach of any bond given by an executor, administrator or collector may put the same in suit and recover such damages as he may have sustained. (Rev., s. 30; Code, s. 1516; 1868-9, c. 113, s. 87; C. S. 40.)

Only Good Faith Cuaranteed.—Bonds of administrators, executors, guardians, etc., guarantee only good faith. Smith v. Patton, 131 N. C. 396, 397, 42 S. E. 849; Moore v. Eure, 101 N. C. 11, 7 S. E. 471.

Action in Whose Name.—Actions upon the bonds of guardians, administrators, executors and collectors must be brought in the name of the state. Norman v. Walker, 101 N. C. 24, 7 S. E. 468.

In fact actions on all bonds payable to the state must be brought in the name of the state. The statute requiring the real party in interest to prosecute does not apply to such actions. Carmichael v. Moore, 88 N. C. 29.

But the objection to the omission to bring in state's name may be obviated by a motion to amend. Wilson v. Pearson, 102 N. C. 290, 291, 9 S. E. 707. Amendment will be allowed even in the Supreme Court. Grant v. Rogers, 94 N. C. 755.

When an administrator dies, no one but an administrator de bonis non of his intestate can call his representative to account for the assets or sue on his bond. Merrill v. Merrill, 92 N. C. 657; State v. Goodman, 72 N. C. 508; Carlton v. Byers, 70 N. C. 691. And the next of kin cannot call for an account or settlement without having an administrator before the court. Lansdell v. Winstead, 76 N. C. 366, 367. (But see the dissenting opinion in Merrill v. Merrill, supra. See also, Neal v. Becknell, 85 N. C. 299, holding that the bond of an administrator whose appointment has been revoked may be sued on by his successor in office or by the next of kin.)

Thus where an administrator sells lands for assets to pay debts, and expends only a part of the fund for that purpose and dies before filing a final account, only an administrator de bonis non (not the next of kin) of his intestate can maintain an action on the bond to recover the unexpended balance. Neagle v. Hall, 115 N. C. 415, 20 S. E. 516; Tulburt v. Hollar, 102 N. C. 406, 9 S. E. 430. But where the administrator refuses to sue, creditors may sue, making him a party defendant. Wilson v. Pearson, 102 N. C. 290, 291, 9 S. E. 707.

Breach Not Merged in Judgment.—A judgment for damages on the breach of an administrator's bond does not merge the cause of action. The latter is satisfied only by actual payment. Wilson v. Pearson, 102 N. C. 290, 291, 9 S. E. 707.

Action against Sureties.—An action can be maintained on an administration bond against the sureties before obtaining judgment against the administrator. Chairman of Court v. Moore, 6 N. C. 22; Williams v. Hicks, 5 N. C. 437; Strickland v. Murphy, 52 N. C. 242; Bratton v. Davidson, 79 N. C. 423.

What Constitutes Breach of Bond.—Bonds of administrators, executors, etc., guarantee good faith and reasonable care only. Smith v. Patton, 131 N. C. 396, 42 S. E. 849; Moore v. Eure, 101 N. C. 11, 7 S. E. 471; Atkinson v. Whitehead, 66 N. C. 296; Syme v. Badger, 92 N. C. 706. Executors are not insurers. Nelson v. Hall, 58 N. C. 32; Beall v. Darden, 39 N. C. 76.

It is not breach of an administrator's bond to refuse to pay a claim until the same is established by judgment. Gill v. Cooper, 111 N. C. 311, 16 S. E. 316.

Where an administrator pays taxes out of the fund of the estate assessed against his intestate as guardian, it is an improper disbursement and his bond is liable therefor. Worthy v. Brower, 93 N. C. 344. So also where he pays inferior debts. Id.

Where a **devastavit** is charged the primary liability rests upon the administration bond. But a failure to apply for license to sell land for assets is not of itself a breach of such bond. Hawkins v. Carpenter, 88 N. C. 403.

Where an administrator fails to exhibit in court his final account at the end of two years from his qualification, the distributees may bring suit upon his bond, alleging such failure as a breach of the bond. Bratton v. Davidson, 79 N. C. 423.

An act of administrator done with the concurrence of the creditor will not entitle the latter to charge the former with a devastavit. Cain v. Hawkins, 50 N. C. 192.

Venue of Suit.—An administrator or executor must be sued as such in the county in which he took out letters of administration or letters testamentary, provided he or any one of his sureties lives in that county, whether he is sued upon his bond or simply as administrator or executor. Stanley v. Mason, 69 N. C. 1; Foy v. Morehead, 69 N. C. 512.

§ 28-43. Rights of surety in danger of loss.—Any surety on the bond of an executor, administrator or collector, who is in danger of sustaining loss by his suretyship, may exhibit his petition on oath to the clerk of the superior court wherein

the bond was given, setting forth particularly the circumstances of his case, and asking that such executor, administrator or collector be removed from office, or that he give security to indemnify the petitioner against apprehended loss, or that the petitioner be released from responsibility on account of any future breach of the bond. The clerk shall issue a citation to the principal in the bond, requiring him, within ten days after service thereof, to answer the petition. If, upon the hearing of the case, the clerk deem the surety entitled to relief, he may grant the same in such manner and to such extent as may be just. And if the principal in the bond gives new or additional security, to the satisfaction of the clerk, within such reasonable time as may be required, the clerk may make an order releasing the surety from liability on the bond for any subsequent act, default or misconduct of the principal. (Rev., s. 33; Code, s. 1519; 1868-9, c. 113, s. 90; C. S. 41.)

§ 28-44. On revocation of letters, bond liable to successors.—When the letters of an executor, administrator or collector are revoked, his bond may be prosecuted by the person or persons succeeding to the administration of the estate, and a recovery may be had thereon to the full extent of any damage, not exceeding the penalty of the bond, sustained by the estate of the decedent by the acts or omissions of such executor, administrator or collector, and to the full value of any property received and not duly administered. Moneys so recovered shall be assets in the hands of the person recovering them. (Rev., s. 31; Code, s. 1517; 1868-9, c. 113, s. 88; C. S. 42.)

Cross Reference.—See annotations to § 28-42.

Administrator Must Sue.—The administrator de bonis non must first sue on the bond of a defaulting executor who preceded him, before he can obtain a license to sell the real estate for the payment of the debts. Carlton v. Byers, 70 N. C. 691. But where the preceding administrator is insolvent, his bond lost, and sureties unknown, the administrator de bonis non need not bring suit before he can obtain such license. Brittain v. Dickson, 104 N. C. 547, 10 S. E. 701.

Action—By Whom Brought.—The action on the bond of the removed representative must be brought by the administrator de bonis non, and not by the next of kin. Tulburt v. Hollar, 102 N. C. 406, 9 S. E. 430.

Cited in Edwards v. McLawhorn, 218 N. C. 543, 11 S. E. (2d) 562.

§ 28-45. When new bond or new sureties required.—If complaint be made on affidavit to the clerk of the superior court that the surety on any bond of an executor, administrator or collector is insufficient, or that one or more of such sureties is or is about to become a nonresident of this state, or that the bond is inadequate in amount, the clerk must issue an order requiring the principal in the bond to show cause why he should not give a new bond, or further surety, as the case may be. On the return of the order duly executed, if the objections in the complaint are found valid, the clerk shall make an order requiring the party to give further surety or a new bond in a larger amount within a reasonable time. (Rev., s. 32; Code, s. 1518; 1868-9, c. 113, s. 89; C. S. 43.)

Mortgage Instead of Bond. — An administrator who is also the heir of the intestate can not satisfy the requirement of an additional bond or security by mortgaging lands of his intestate, as such lands are already liable for the debts. In re Sellars, 118 N. C. 573, 24 S. E. 430.

§ 28-46. On failure to give new bond, letters revoked.—If any person required to give a new bond, or further security, or security to indemnify, under §§ 28-43 and 28-45, fails to do so within the time specified in any such order, the clerk must forthwith revoke the letters issued to such person, whose right and authority, respecting the estate, shall thereupon cease. (Rev., s. 34; Code, s. 1520; 1868-9, c. 113, s. 91; C. S. 44.)

Notice to Show Cause Essential. — A judgment removing a public administrator for failure to renew his bond, without notice to show cause, is not only irregular but void. Trotter v. Mitchell, 115 N. C. 190, 20 S. E. 386.

Clerk Has Jurisdiction.—The clerks of the superior courts have jurisdiction of proceedings for the removal of executors and administrators. Edwards v. Cobb, 95 N. C. 4.

Cited in Edwards v. McLawhorn, 218 N. C. 543, 11 S. E. (2d) 562.

Art. 9. Notice to Creditors.

§ 28-47. Advertisement for claims.—Every executor, administrator and collector, within twenty days after the granting of letters, shall notify all persons having claims against the decedent to exhibit the same to such executor, administrator or collector, at or before a day to be named in such notice; which day must be twelve months from the day of the first publication of such notice. The notice shall be published once a week for six weeks in a newspaper, if any there be published in the county. If there is no newspaper published in the county, then the notice shall be posted at the courthouse and four other public places in the county. (Rev., s. 39; Code, ss. 1421, 1422; 1868-9, c. 113, s. 29; 1881, c. 278, s. 2; C. S. 45.)

Local Modification.—Nash: 1931, c. 64.

Cost of Publication.—The last sentence of this section formerly provided "The cost of publishing in a paper shall in no case exceed two dollars and fifty cents". This provision was enacted by the Revisal of 1905, and appeared in all codes since that time. Section 1-596, which provides in substance that payment for legal advertising shall not be in excess of the local commercial rate of the newspaper selected, was enacted by P. L. 1919, c. 45, and had the effect of repealing the two dollar and fifty cent provision in view of the fact that section 1-596 was enacted by the General Assembly of 1919 and it was provided by C. S. 8101 that "all public and general statutes passed at the present session of the general assembly shall be deemed to repeal any conflicting provisions contained in the Consolidated Statutes." Therefore, the provisions of section 1-596 control the publication cost.

Time of Presenting Claims.—Before distribution of the estate to the next of kin, it is the duty of the administrator to pay the debts of the estate, provided such debts are presented within twelve months next after publication under this section. As against claims presented after that period he will not be chargeable with any distribution he may have made in good faith. Mallard v. Patterson, 108 N. C. 255, 13 S. E. 93.

Advertisement Essential to Bar Claims.—The mere lapse of time does not bar the creditor's claims against the estate. Only where the advertisement provided under this section has been made does the statute of limitation begin to run. Love v. Ingram, 104 N. C. 600, 10 S. E. 77. But see, Morissey v. Hill, 142 N. C. 355, 55 S. E. 193, where it was held that this section was enacted more for the protection of the representative, and hence a claim would be barred independent of whether the advertisement provided by this section was published or not. To the same effect, see also, Andres v. Powell, 97 N. C. 155, 2 S. E. 235; but see the dissenting opinion of Judge Merrimon.

Where the administrator neither avers nor proves that he gave the notice required by this section, the objection that the creditor has not shown that he ever presented his claim will not avail. Valentine v. Britton, 127 N. C. 57, 59, 37 S. E. 74; Love v. Ingram, supra. But see, Morissey v. Hill, supra.

Cited, in Park View Hospital Ass'n v. Peoples Bank, etc., Co., 211 N. C. 244, 189 S. E. 766.

§ 28-48. Proof of advertisement.—A copy of the advertisement directed to be posted or published

in pursuance of § 28-47, with an affidavit, taken before some person authorized to administer oaths, of the proprietor, editor or foreman of the newspaper wherein the same appeared, to the effect that such notice was published for six weeks in said newspaper, or an affidavit stating that such notices were posted, shall be filed in the office of the clerk by the executor, administrator or collector. The copy so verified or affidavit shall be deemed a record of the court, and a copy thereof, duly certified by the clerk, shall be received as conclusive evidence of the fact of publication in all the courts of this state. (Rev., s. 40; Code, s. 1423; 1868-9, c. 113, s. 31; C. S. 46.)

Necessity of Proof. — When an administrator pleads to a bill the provision of law which prescribes the time of bringing suits against him, he is bound to show by proof that he advertised as required by the statute. Gilliam v. Willey, 54 N. C. 128.

§ 28-49. Personal notice to creditor.—The executor, administrator or collector may cause the notice to be personally served on any creditor, who shall, thereupon, within six months after personal service thereof, exhibit his claim, or be forever barred from maintaining any action thereon. (Rev., s. 41; Code, s. 1424; 1868-9, c. 113, s. 32; 1885, c. 96; C. S. 47.)

Cross Reference.—See annotations under § 28-47.

Art. 10. Inventory.

§ 28-50. Inventory within three months.—Every executor, administrator and collector, within three months after his qualification, shall return to the clerk, on oath, a just, true and perfect inventory of all the real estate, goods and chattels of the deceased, which have come to his hands, or to the hands of any person for him, which inventory shall be signed by him and be recorded by the clerk. He shall also return to the clerk, on oath, within three months after each sale made by him, a full and itemized account thereof, which shall be signed by him and recorded by the clerk. (Rev., s. 42; Code, s. 1396; R. C., c. 46, s. 16; 1868-9, c. 113, s. 8; C. S. 48.)

Conclusiveness of Inventory. — An inventory is but prima facie evidence to charge the executor with assets, so as to call on him for proof to rebut it. Hoover v. Miller, 51 N. C. 79. It is prima facie evidence of the solvency of persons owing debts to the estate and described in the inventory. It may be shown that the personal representative made errors in describing and noting the debts. But it seems that it is not evidence against an administrator de bonis non. Grant v. Reese, 94 N. C. 720.

Statement of Doubtful Debts. — Where an executor returns an inventory of debts without stating that some of the debts are doubtful, he will be held responsible for them, unless he can show that there were set offs against them, or that the debtors were insolvent. Graham v. Davidson, 22 N. C. 155. But where he inventories them as "doubtful", prima facie he will not be chargeable with them. Gay v. Grant, 101 N. C. 206, 8 S. E. 99, 106.

Return of Joint Executors. — Either one of joint executors making a joint return of inventory are answerable for what appears thereon, if it does not show what came to the hand of the other alone. Graham v. Davidson, 22 N. C. 155.

Barred of Commissions. — Failure to file an inventory coupled with acts of gross negligence and want of care in the management of the estate: Held, to deprive the personal representative of his right to commissions. Grant v. Reese, 94 N. C. 720; Stonestreet v. Frost, 125 N. C. 640, 31 S. E. 836.

Removal from Office. — Where the executor failed to file the inventory required and was also guilty of other acts of mismanagement it was held that he could be required to give bond or be removed from his office. Barnes v. Brown, 79 N. C. 401.

May Be Compelled to Account or File Inventory. — If the personal representative has failed to file his inventory or his accounts, he can be compelled to do so upon application to the clerk of the superior court. Atkinson v. Ricks, 140 N. C. 418, 53 S. E. 230.

Transfer of Funds to Other Jurisdiction. — The inventory required by this section must be filed before the transfer of moneys to another jurisdiction. Grant v. Rogers, 94 N. C. 755, 762.

Cited in In re Hege, 205 N. C. 625, 172 S. E. 345.

§ 28-51. Compelling the inventory.—If the inventory and account of sale specified in § 28-50 are not returned as therein prescribed, the clerk must issue an order requiring the executor, administrator or collector to file the same within the time specified in the order, which shall not be less than twenty days, or to show cause why an attachment should not be issued against him. If, after due service of the order, the executor, administrator, or collector does not, on the return day of the order, file such inventory or account of sale, or obtain further time to file the same, the clerk shall have power to vacate the office of administrator, executor or collector. And under all proceedings provided for in this section, the defaulting executor, administrator or collector shall be personally liable for the costs of such proceeding to be taxed against him by the clerk of the superior court, or deducted from any commissions which may be found due such executor, administrator or collector upon final settlement of the estate. And the sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. (Rev., s. 43; Code, s. 1397; 1868-9, c. 113, s. 9; 1929, c. 9, s. 1; 1933, c. 100; C. S. 49.)

Editor's Note.—The Act of 1929 added next to the last sentence to this section. Public Laws 1933, c. 100 added the last sentence of this section as it now reads.

Clerk's Original Jurisdiction. — Under this section the clerk has original jurisdiction to remove the representative for not filing the inventory required. Edwards v. Cobb, 95 N. C. 4, 8.

Clerk Has Power to Remove even Independent of Statute. —The clerk has power of removal for the failure of the administrator to discharge the duties of his office as prescribed by law. And even without invoking the aid of statute the power of removal is inherent in the office at common law, and must of necessity be so to prevent a failure of justice. Taylor v. Biddle, 71 N. C. 1, 5.

Cited in In re Hege, 205 N. C. 625, 172 S. E. 345.

§ 28-52. New assets inventoried.—When further property of any kind, not included in any previous return, comes to the hands or knowledge of any executor, administrator or collector, he must cause the same to be returned, as hereinbefore prescribed, within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as in the case of the first inventory. (Rev., s. 44; Code, s. 1398; 1868-9, c. 113, s. 10; C. S. 50.)

§ 28-53. Trustees in wills to file inventories and accounts.—Trustees appointed in any will admitted to probate in this state, into whose hands assets come under the provisions of the will, shall file in the office of the clerk of the county where the will is probated inventories of the assets and annual and final accounts thereof, such as are required of executors and administrators. The power of the clerk to enforce the filing and his duties in respect to audit and record shall be the same as in such cases. This section shall not apply to any will in which a different provi-

sion is made for filing inventories and accounts. (1907, c. 804; C. S. 51.)

Art. 11. Assets.

§ 28-54. Distinction between legal and equitable assets abolished.—The distinction between legal and equitable assets is abolished, and all assets shall be applied in the discharge of debts in the manner prescribed by this chapter. (Rev., s. 45; Code, s. 1406; 1868-9, c. 113, s. 14; C. S. 52.)

What Constitutes Assets — Rents Liable for Debts. — The rents on devised land may be subjected by the personal representative to the payment of the debts of deceased. Shell v. West, 130 N. C. 171, 41 S. E. 65.

Same—Rent Accruing before and after Death. — Rent due for the occupation of an equitable estate in land, in the lifetime of the cestui que trust, goes to his personal representative, that accruing after his death goes to his heirs. Fleming v. Chunn, 57 N. C. 422; Rogers v. McKenzie, 65 N. C. 218.

Same — All Chattels Assets. — All the chattels of an intestate are assets, if the administrator by reasonable diligence might have possessed himself, of them. Gray v. Swain, 9 N. C. 15.

Same—Warrant for Pension Not Asset. — A warrant for a pension issued after death of pensioner does not become a part of his assets, but must be returned to the state for cancellation. In re Smith, 130 N. C. 638, 41 S. E. 802.

Same — Lands as Assets. — Land is not an asset until it is sold and the proceeds received by the personal representative. Wilson v. Bynum, 92 N. C. 718; Fike v. Green, 64 N. C. 665; Edenton v. Wool, 65 N. C. 379; Hawkins v. Carpenter, 88 N. C. 403.

Same — Damages for Death by Wrongful Act. — The right to recover damages for wrongful death rests entirely on statute, and when a recovery is had therefor it is not a part of the personal assets of the deceased. Hood v. American Tel., etc., Co., 162 N. C. 92, 77 S. E. 1094.

Such damages when recovered are not assets of the estate available to creditors. Hines v. Foundation Co., 196 N. C. 322, 145 S. E. 612.

Duration of Homestead Exemptions.—The personal exemptions in Art. X of the Constitution exist only during the life of the "homesteader," and after his death pass to his personal representative, to be disposed of in a due course of administration. Johnson v. Cross, 66 N. C. 167.

§ 28-55. Trust estate in personalty.—If any trustee, or any person interested in any trust estate, dies leaving any equitable interest in personal estate which shall come to his executor, administrator or collector, the same estate shall be deemed personal assets. (Rev., s. 46; Code, s. 1403; 1868-9, c. 113, s. 11; C. S. 53.)

§ 28-56. Crops ungathered at death.—The crops of every deceased person, remaining ungathered at his death, shall, in all cases, belong to the executor, administrator or collector, as part of the personal assets, and shall not pass to the widow with the land assigned as dower; nor to the devisee by virtue of any devise of the land, unless such intent be manifest and specified in the will. (Rev., s. 47; Code, s. 1407; 1868-9, c. 113, s. 15; C. S. 54.)

The Principle Is Declaratory of the Common Law.—Flynt v. Conrad, 61 N. C. 190, 194.

This section does not control the title to crops not planted at the time of the death of the testator or devisor. Manifestly, in the forum of common sense, a crop could not be a crop until the seed were in the soil. The statute uses the expression, "crops . . . remaining ungathered at his death," etc. An ungathered crop is certainly not an unplanted crop. Carr v. Carr, 208 N. C. 246, 247. 180 S. E. 82.

Applied.—Upon the death of a cropper his personal representative is entitled to his share of the crop. Parker v Brown, 136 N. C. 280, 48 S. E. 657; Thomas v. Lines, 83 N C. 191.

§ 28-57. Proceeds of real estate sold to pay debts are personal assets.—All proceeds arising from the sale of real property, for the payment of debts, as hereinafter provided, shall be deemed personal assets in the hands of the executor, administrator or collector, and applied as though the same were the proceeds of personal estate. (Rev., s. 48; Code, s. 1404; 1868-9, c. 113, s. 12; C. S. 55.)

Stamped with Character of Realty. — Proceeds of sale of realty are in fact personalty, although they are stamped with the character of realty to indicate the channel in which they shall go. Lafferty v. Young, 125 N. C. 296, 300, 34 S. E. 444.

Applied in Linker v. Linker, 213 N. C. 351, 196 S. E. 329.

§ 28-58. Surplus of proceeds of realty sold for debts is real asset.—All proceeds from the sale of real estate, as hereinafter provided, which may not be necessary to pay debts and charges of administration, shall, notwithstanding, be considered real assets, and as such shall be paid by the executor, administrator or collector to such persons as would have been entitled to the land had it not been sold. (Rev., s. 49; Code, s. 1405; 1868-9, c. 113, s. 13; C. S. 56.)

Cross Reference.—See annotations to § 28-57.

Proceeds of Sale Held for Heirs. — Proceeds of sale of real estate in the hands of administrator are held, after payment of debts, for the heirs who upon the death of the administrator, may alone proceed against his personal representative. Alexander v. Wolfe, 88 N. C. 398. Such proceeds may not be applied to a judgment for widow's year's allowance. Denton v. Tyson, 118 N. C. 542, 24 S. E. 116.

But where he also holds other proceeds than from the sale of realty, the administrator de bonis non of the estate must join with such heirs in proceeding against the personal representative of the deceased administrator. Alexander v. Wolfe, supra. But see Neagle v. Hall, 115 N. C. 415, 20 S. E. 516, where it was held that only administrator de bonis non of the estate can sue for the unexpended proceeds of realty sold.

Applied in Linker v. Linker, 213 N. C. 351, 196 S. E. 329.

§ 28-59. Personalty fraudulently conveyed recoverable.—If there are not sufficient real and personal assets of the deceased to satisfy all the debts and liabilities of deceased, together with the costs and charges of administration, the personal representative shall have the right to sue for and recover any and all personal property which the deceased may in any wise have transferred or conveyed with intent to hinder, delay, or defraud his creditors, and any money or property so recovered shall constitute assets of the estate in the hands of the personal representative for the payment of debts. But if the fraudulent alienee of deceased has sold the property or estate so fraudulently acquired by him to a bona fide purchaser for value without notice of the fraud, then such fraudulent alienee shall be liable to the personal representative for the value of the property and estate so acquired and disposed of. If the whole recovery from any fraudulent alienee of a decedent shall not be necessary for the payment of the debts of decedent and the costs and charges of administration of his estate, the surplus shall be returned to such fraudulent alienee or his assigns. (Rev., s. 50; C. S. 57.)

Cross References.—As to realty, see § 28-84. As to fraudulent conveyances, see § 39-15 et seq.

§ 28-60. Debt due from executor not discharged by appointment.—The appointing of any person executor shall not be a discharge of any debt or demand due from such person to the testator. (Rev., s. 51; Code, s. 1431; 1868-9, c. 113, s. 40; C. S. 58.)

Applies to Executor whether He Acts or Not. — This section applies to an executor who acts as well as to one who does not act under the appointment. Moore v. Miller, 62 N. C. 359.

§ 28-61. Joint liability of heirs, etc., for debts.—All persons succeeding to the real or personal property of a decedent, by inheritance, devise, bequest or distribution, shall be liable jointly, and not separately, for the debts of such decedent. (Rev., s. 52; Code, s. 1528; 1868-9, c. 113, s. 99; C. S. 59.)

Editor's Note. — Not only persons succeeding to the property of the deceased are jointly liable (to the proper extent) for the payment of the debts, but also third persons who purchase the property. See post, section 28-83.

Purpose of Section. — This and the following sections are intended to limit the liability of heirs, devisees and distributees. Andres v. Powell, 97 N. C. 155, 160, 2 S. E. 235.

Claim for Unliquidated Damages Not a "Debt."—An action based on a claim for unliquidated damages, until reduced to judgment liquidating the amount of the claim, is not a debt under this section. Suskin v. Maryland Trust Co., 214 N. C. 347, 350, 199 S. E. 276.

In a stockholders' derivative suit to recover from the directors and officers the damages which they caused a corporation to suffer by unlawfully distributing a portion of the corporation's profits under a by-law alleged to be illegal, the action for unliquidated damages was not a debt within this section. Healey v. Reynolds Tobacco Co., 48 F. Supp. 207.

As between Legatees and Devisees.—See Badger v. Daniel, 79 N. C. 372.

Proportion of Devisee's Liability.—The whole debt, not exceeding the value of the devise, may be collected from the devisee; but in such a case he is entitled to contribution from the other devisees. That is, each devisee, heir, etc., is, to the extent of his share, a surety. Badger v. Daniel, 79 N. C. 372; Hinton v. Whitehurst, 71 N. C. 66, 68.

Executor as Sole Devisee and Legatee.—Where judgment was rendered against the estate of plaintiff's deceased guardian for money due the guardianship estate, and after reaching his majority plaintiff instituted this action alleging that defendant as executrix of the deceased guardian had paid over to herself, as sole devisee and legatee, money sufficient to discharge plaintiff's claim, the action is not against defendant as executrix but against her individually on a liability imposed upon her by this section as legatee and devisee, and defendant's motion to remove from the county of plaintiff's residence to the county in which she qualified as executrix, was properly denied. Rose v. Patterson, 218 N. C. 212, 10 S. E. (2d) 678.

Pleading.—Complaint alleged cause against defendant as devisee for personal enrichment at the expense of creditors of the estate, and not against her in her capacity as executrix, and her motion to remove to the county of her qualification was properly denied, notwithstanding that plaintiff's evidence tends to show devastavit, since an action is governed by the pleadings. Rose v. Patterson, 220 N. C. 60, 16 S. E. (2d) 458.

Variance.—Where the complaint alleges that defendant, as executrix, turned over to herself as legatee, personalty of the estate of plaintiff's debtor, and thus obtained personal enrichment at the expense of creditors of the estate, but the evidence tends to show, at most, devastavit, defendant's motion to nonsuit is properly allowed on the ground of variance between the allegation and the proof, since the burden is on plaintiff to prove the cause alleged in the complaint. Rose v. Patterson, 220 N. C. 60, 16 S. E. (2d) 458.

Applied in Moffitt v. Davis, 205 N. C. 565, 172 S. E. 317; Price v. Askins, 212 N. C. 583, 194 S. E. 284.

§ 28-62. Extent of liability of heirs, etc.—No person shall be liable, under § 28-61, beyond the value of the property so acquired by him, or for any part of a debt that might by action or other due proceeding have been collected from the executor, administrator or collector of the decedent, and it is incumbent on the creditor to show the matters herein required to render such person liable. (Rev., s. 53; Code, s. 1529; 1868-9, c. 113, s. 100; C. S. 60.)

Cross Reference.—See annotations to § 28-61.

The provisions in this section are intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and after reasonable time, to give quiet and repose to the estates of dead men. Moffitt v. Davis, 205 N. C. 565, 567, 172 S. E. 317.

Devisee's Liability.—In an action under this section judgment can be entered against the devisee only to the extent of the property received under the will and no personal judgment can be entered against the devisee. Moffitt v. Davis, 205 N. C. 565, 172 S. E. 317.

Hence the heirs, by making personal appearance in an action against the estate for the recovery of money, in which attachment is issued against the lands of the estate, are not estopped to deny plaintiff's contention that the attachment gives priority to his judgment. Price v. Askins, 212 N. C. 583, 194 S. E. 284.

§ 28-63. Judgment against heirs, etc., apportioned; costs.—In any such action the recovery must be apportioned in proportion to the assets or property received by each defendant, and judgment against each must be entered accordingly. Costs in such actions must be apportioned among the several defendants, in proportion to the amount of the recovery against each of them. (Rev., s. 54; Code, s. 1530; 1868-9, c. 113, s. 101; C. S. 61.)

Cross Reference.—As to provision prohibiting creation of lien by suit against representative, see § 28-114 et seq.

§ 28-64. Persons liable for debts to observe priorities.—Every person who is liable for the debts of a decedent must observe the same preferences in the payment thereof as are established in this chapter; nor shall the commencement of an action by a creditor give his debt any preference over others. (Rev., s. 55; Code, s. 1531; 1868-9, c. 113, s. 102; C. S. 62.)

Cited in Price v. Askins, 212 N. C. 583, 194 S. E. 284.

§ 28-65. Existence of other debts of prior or equal class.—The defendants in such action may show that there are unsatisfied debts of a prior class or of the same class with that in suit. If it appears that the value of the property acquired by them does not exceed the debts of a prior class, judgment must be rendered in their favor. If it appears that the value of the property acquired by them exceeds the amount of debts which are entitled to a preference over the debt in suit, the whole amount which the plaintiff shall recover is only such a portion of the excess as is a just proportion to the other debts of the same class with that in suit. (Rev., s. 56; Code, s. 1532; 1868-9, c. 113, s. 103; C. S. 63.)

Who Are Defendants. — Debts against deceased persons must be sued by civil action against the personal representative. Hence the "defendants" referred to in this section are the executors and administrators. The phrase "the value of property acquired by them," refers to assets in the hands of the representative. Heilig v. Foard, 64 N. C. 710, 712.

§ 28-66. Debts paid taken as unpaid as against heirs, etc.—If any debts of a prior class to that in which the suit is brought, or of the same class, have been paid by any defendant, the amount of the debts so paid shall be estimated, in ascertaining the amount to be recovered, in the same manner as if such debts were outstanding and unpaid, as prescribed in § 28-65. (Rev., s. 57; Code, s. 1533; 1868-9, c. 113, s. 104; C. S. 64.)

§ 28-67. Compelling contribution among heirs, etc.—The remedy to compel contribution shall be by petition or action in the superior court or before the judge in term time against the personal representatives, devisees, legatees, and heirs also of the decedent if any part of the real estate be undevised, within two years after probate of the will, and setting forth the facts which entitle the party to relief; and the costs shall be within the

discretion of the court. (Rev., s. 58; Code, s. 1534; 1868-9, c. 113, s. 106; C. S. 65.)

Application to Tenants in Common. — This section applies only to contributions sought to be enforced among devisees, and heirs to whom undevised land has descended. It has no application to contributions among tenants in common who claim by descent. Wharton v. Wilkerson, 92 N. C. 408, 414.

Section an Exception to Certain Rule.—The remedy given by this section is an exception to the rule that in actions for contribution, when the amount exceeds $200, the superior court in term has exclusive cognizance. Wharton v. Wilkerson, 92 N. C. 408, 414.

§ 28-68. Payment to clerk of sums not exceeding $300 due and owing intestates.—Where any person dies intestate and at the time of his or her death there is a sum of money owing to the said intestate not in excess of three hundred dollars, such sum may be paid into the hands of the clerk of the superior court, whose receipt for same shall be a full and complete release and discharge for such debt or debts, and the said clerk of the superior court is authorized and empowered to pay out such sum or sums in the following manner: First, for satisfaction of widow's year's allowance, after same has been assigned in accordance with law, if such be claimed; second, for payment of funeral expenses, and if there be any surplus the same to be disposed of as is now provided by law. This section shall apply to the counties of Randolph, Guilford, Edgecombe, Cabarrus, Iredell, Moore, Anson, Watauga, Wilson, Craven, Cumberland, Johnston, Rutherford, Stanly, Davidson, Currituck, Yadkin, Alexander, Stokes, Clay, Greene, Wayne, Franklin, Macon, Beaufort, Swain, Haywood, Caldwell, Burke, Gates, Rockingham, Graham, Lee, Person, Catawba, Dare, Tyrrell, Perquimans, Transylvania, Duplin, Hyde, Pender, Surry, Alamance, Lincoln, Granville, Chowan, Hoke, Vance, Montgomery, Durham, Wake, Harnett, Buncombe, Union, Onslow, Nash, Halifax, Hertford, Mecklenburg, Robeson, Orange, Pasquotank, McDowell, Rowan, New Hanover, Martin, Forsyth, Polk, Warren, Caswell, Yancey, Wilkes and Lenoir. (1921, c. 93; Ex. Sess. 1921, c. 65; Ex. Sess. 1924, cc. 15, 58; 1927, c. 7; 1929, cc. 63, 71, 121; 1931, c. 21; 1933, cc. 16, 94; 1935, cc. 69, 96; 367; 1937, cc. 13, 31, 55, 121, 336, 377; 1939, cc. 383, 384; 1941, c. 176; 1943, cc. 24, 114, 138, 560; C. S. 65(a).)

Local Modification.—Pitt: 1937, c. 336; 1939, cc. 169, 383, 384.

Editor's Note.—The 1943 amendments made this section applicable to Caswell, Yancey, Wilkes and Lenoir counties.

This section provides the debtor a permissive right and is in no wise mandatory upon him, such right as is given is alternative and not exclusive. In re Franks, 220 N. C. 176, 180, 16 S. E. (2d) 831.

Jurisdiction to Appoint Administrator.—This section does not have the effect of fixing the sum of $300.00 as bona notabilia in determining jurisdiction of the clerk of the superior court to appoint an administrator for a person not domiciled in this state who dies leaving assets herein. In re Franks, 220 N. C. 176, 16 S. E. (2d) 831.

Art. 12. Discovery of Assets.

§ 28-69. Examination of persons or corporations believed to have possession of property of decedent. — Whenever an executor or administrator makes oath before the clerk of the superior court of the county where the party to be examined resides or does business that he has reasonable ground to believe, setting forth the grounds of his belief, that any person, firm or corporation has in his or its possession any property of any kind belonging to the estate of his decedent, said clerk shall issue a notice to said person or the member of the firm or officer, agent or employee of the firm or corporation designated in the affidavit, to appear before said clerk at his office at a time fixed in said notice, not less than three days after the issuance of said notice, and be examined under oath by said executor or administrator or his attorney concerning the possession of said property. If upon such examination the person examined admits that he or the firm or corporation for which he works has in his or its possession any property belonging solely to the decedent, and fails to show any satisfactory reason for retaining possession of said property, the clerk of the superior court shall issue an order requiring said person, firm or corporation forthwith to deliver said property to said executor or administrator, and may enforce compliance with said order by an attachment for contempt of court, and commit said person to jail until he shall deliver said property to said executor or administrator: Provided, that in the case of a firm or corporation, whenever any person other than a partner or executive officer of such firm or corporation is examined, no such order shall be made until at least three days after service of notice upon a partner or executive officer of such firm or corporation to show cause why such order should not be made. (1937, c. 209, s. 1.)

Editor's Note.—The purpose of this section is to expedite the settlement of a decedent's estate by permitting the representative to discover assets of the estate through and upon the authority of the probate court without having to resort, independently, to the rather slow and expensive proceeding of claim and delivery. However, since the section seems to provide only for the situation where a party "admits" that the property held belongs to the decedent's estate and refuses for an inadequate reason to give it up, it would seem that the representative would still have to utilize claim and delivery proceedings in the case where the party in possession of the property denies that it belongs to the estate of the deceased. It is doubtful that the section would, by inference, authorize the clerk to try the title to such property. 15 N. C. Law Rev., 352.

§ 28-70. Right of appeal.—Any person aggrieved by the order of the clerk of the superior court may, within five days, appeal to the judge holding the next term of the superior court of the county after said order is made or to the resident judge of the district, but as a condition precedent to his appeal he shall give a justified bond in a sum at least double the value of the property in question, conditioned upon the safe delivery of the property and the payment of damages for its detention, to the executor or administrator in the event that the order of the clerk should be finally sustained. When said bond is executed and delivered to the court no attachment shall be served upon the appealing party, or, if he has already been committed, he shall be released pending the final determination of the appeal. If the appellant fails to have his appeal heard at the next term of the superior court held in his county, or by the resident judge of the district, within thirty days after giving notice of appeal, the clerk of the court may recommit the appellant to jail until he shall deliver the property to the executor or administrator as aforesaid. (1937, c. 209, s. 2.)

§ 28-71. Costs.—The party against whom the final judgment is rendered shall be adjudged to pay the costs of the proceedings hereunder. (1937, c. 209, s. 3.)

§ 28-72. Remedies supplemental.—The remedies provided in this article shall not be exclusive, but shall be in addition to any remedies which are now or may hereafter be provided. (1937, c. 209, s. 4.)

Art. 13. Sales of Personal Property.

§ 28-73. Executor or administrator may sell without court order.—Every executor and administrator shall have power in his discretion and without any order, except as hereinafter provided, to sell, as soon after his qualification as practicable, all the personal estate of his decedent. (Rev., s. 62; Code, s. 1408; 1868-9, c. 113, s. 16; C. S. 66.)

Cross Reference.—As to sale of property by a guardian, see §§ 33-31 and 33-32.

For Application of Proceeds Purchaser Not Responsible.—A purchaser of personalty from the personal representative does not, by virtue of the latter's absolute power to dispose of the personalty, have to see to the proper application of the purchase price. This, even though the decedent has created a particular separate fund for the payment of his debts. But if the purchase be tainted with collusion, he will be held responsible for its proper application. Tyrrell v. Morris, 21 N. C. 559; Bradshaw v. Simpson, 41 N. C. 243; Gray v. Armistead, 41 N. C. 74; Cox v. First Nat. Bank, 119 N. C. 302, 26 S. E. 22.

The purchaser gets good title, unless he purchased **mala fide** and for the purpose of **devastavit.** Polk v. Robinson, 42 N. C. 235; Wilson v. Doster, 42 N. C. 231. Where he receives the property in payment of fiduciary's **personal** debt, the transaction is presumptively **mala fide.** Hendrick v. Gidney, 114 N. C. 543, 546, 19 S. E. 598; Dancy v. Duncan, 96 N. C. 111, 117, 1 S. E. 455; Wilson v. Doster, supra; Latham v. Moore, 59 N. C. 167.

§ 28-74. Collector may sell only on order of court.—All sales of personal property by collectors shall be made only upon order obtained, by motion, from the clerk of the superior court, who shall specify in his order a descriptive list of the property to be sold. (Rev., s. 61; Code, s. 1409; 1868-9, c. 113, s. 17; C. S. 67.)

§ 28-75. Terms and notice of public sale.—All public sales of personal estate by executors, administrators or collectors shall be made on credit or for cash after twenty days' notification posted at the court house and four public places in the county. (Rev., s. 63; Code, ss. 1410, 1411; 1868-9, c. 113, ss. 18, 19; C. S. 68.)

Editor's Note.—This section was rewritten by the codifiers and, as rewritten, adopted by the General Assembly of 1943. As formerly written, it seemed to require that all sales of personal property should be publicly made. The view expressed in Pate v. Kennedy, 104 N. C. 234, 10 S. E. 188, that this statute, as formerly written, was mandatory, has not found acceptance in later cases, and it is now well established that a personal representative may sell at private sale under certain prescribed conditions. Felton v. Felton, 213 N. C. 194, 195 S. E. 533. See also § 28-76.

The case of Wynns v. Alexander, 22 N. C. 58, held that the common-law rule on this point is not repealed by this section and that the section is merely directory. See also Dickson v. Crawley, 112 N. C. 629, 17 S. E. 158; Cox v. First Nat. Bank, 119 N. C. 302, 305, 26 S. E. 22; Odell v. House, 144 N. C. 647, 648, 57 S. E. 395.

Liability of Fiduciary.—If the fiduciary sells at public sale the price actually obtained is his justification. But if he sells at a private sale, he is liable for the true value without reference to the price obtained. Cannon v. Jenkins, 16 N. C. 422, 427.

It seems, however, that a private sale of a chose in actions if made in **good faith,** is valid; though it is safer to follow the direction of this section to avoid any personal liability in case the fiduciary fails to obtain as much from the private sale as he would have obtained had he sold at public sale. Dickson v. Crawley, 112 N. C. 629, 632, 17 S. E. 158; Wynns v. Alexander, 22 N. C. 58; Gray v. Armistead, 41 N. C. 74.

Thus, in the absence of fraud or collusion, notes may be sold at private sale. But the burden of proof of fair and full price, in such a case, rests upon the representative Odell v. House, 144 N. C. 647, 57 S. E. 395.

What Constitutes Sale Other than Public.—Giving a part of the standing crop for hauling the remainder does not, within the meaning of this section, constitute selling otherwise than at public auction. McDaniel v. Johns, 53 N. C. 414.

§ 28-76. Clerk may order private sale in certain cases; advance bids.—Whenever the executor or administrator of any estate shall be of the opinion that the interests of said estate will be promoted and conserved by selling the personal property belonging to it at private sale instead of selling same at public sale, such executor or administrator may, upon a duly verified application to the clerk of the Superior Court, obtain an order to sell, and may sell, such personal property at private sale for the best price that can be obtained, and shall report such sales to the clerk for confirmation; and upon satisfactory proof that said personal property has been sold for a fair and adequate price, such sale shall be confirmed by the said clerk.

The said sale or sales of personal property shall not be deemed closed under ten days from the filing of such report; and if in ten days from the filing of such report the sale price is increased by the deposit of ten (10) per cent with the said clerk, the said clerk shall order a new sale thereof. The clerk may in his discretion, require the person making such advance bid to execute a good and sufficient bond in a sufficient amount to guarantee compliance with his said offer. If no advance bid is offered for the property and if no exception is filed thereto within said period of ten (10) days, the same shall be confirmed.

Where the estate consists in whole or in part of perishable property the executor or administrator may sell such perishable property at private sale without order or confirmation by the clerk of the Superior Court.

Where the property to be sold consists of stocks, bonds, or other securities, having a known or readily ascertainable market value, and which are bought or sold on any stock or securities exchange, supervised or regulated by the United States government or any of its agencies or departments, the executor or administrator may, upon first obtaining an order approving the sale from the clerk of superior court having jurisdiction of the estate, sell the same privately at the current market price, and such sale shall be valid and final. (Rev., s. 64; 1893, c. 346; 1919, c. 66; 1925, c. 267; 1939, c. 167; C. S. 69.)

Editor's Note.—The 1925 Act repealed the former law and substituted in lieu thereof the first, second, and third paragraphs of this section. The 1939 Act added the last paragraph. See also 4 N. C. L. Rev. 19.

This section was enacted for the protection of administrators in making private sales, a course which an administrator may, but is not required, to pursue. Felton v. Felton, 213 N. C. 194, 198, 195 S. E. 533.

Effect of Section upon Discretion of Judge and Clerk.—The provisions of this section do not take away from the clerk, or judge on appeal, the sound discretionary power of determining whether a public or a private sale would best subserve the interests of the parties, or prevent them from authorizing a private sale in proper cases. The section is permissive and not mandatory upon them. In re Brown's Estate, 185 N. C. 398, 117 S. E. 291; Felton v. Felton, 213 N. C. 194, 195 S. E. 533.

Presumption as to Refusal to Confirm.—In an appeal upon refusal to confirm the sale under this section, the presumption is that there was sufficient evidence to sustain the findings of fact upon which the refusal is based. In re Brown's Estate, 185 N. C. 398, 117 S. E. 291.

Review by Federal Court.—Where the clerk of the superior court of a county, upon a petition by the executors, authorized and approved a sale of certain shares of stock, bequeathed to the trustees of a church, to pay the debts of the estate, the court had jurisdiction of the parties and the subject matter, and the sale of stock under its order was not subject to review by the federal district court, as the sale was authorized by this section. King v. Richardson, 46 F. Supp. 510, 515.

§ 28-77. Confirmation required on objection of interested party.—When any person interested, either as creditor or legatee, on the day of sale objects to the completion of any sale on account of the insufficiency of the amount bid, title to such property shall not pass until the sale is reported to and confirmed by the clerk. (Rev., s. 63; Code, s. 1411; 1868-9, c. 113, s. 19; C. S. 70.)

Fair Sale at Inadequate Price. — In the absence of such objection, where the sale is perfected in all fairness and in compliance with the law, the mere fact that the property was sold to the widow of the decedent at a nominal price where the public would not bid, does not render the administrator liable for the inadequacy of the price. Woody v. Smith, 65 N. C. 116.

Creditor Consenting Estopped.—Where the creditor consents to the sale at an inadequate price at the time of the sale, he cannot thereafter raise the question. Cain v. Hawkins, 50 N. C. 192, 194.

§ 28-78. Security required; representative's liability for collection.—The proceeds of all sales of personal estate and rentings of real property by public auction or privately shall be secured by bond and good personal security, and such proceeds shall be collected as soon as practicable; otherwise the executor, administrator or collector shall be answerable for the same. (Rev., s. 65; Code, s. 1413; 1893, c. 346, s. 2; 1868-9, c. 113, s. 21; C. S. 71.)

Provisions Peremptory.—The provisions of this section are peremptory and leave no discretion in the representative. Hence a noncompliance with them renders him liable. Pate v. Kennedy, 104 N. C. 234, 10 S. E. 188.

What "Real Estate" Includes.—The "real estate" which the representative is authorized to lease under this section has reference to leasehold estates which belonged to the decedent. Reeves v. McMillan, 101 N. C. 479, 7 S. E. 906; Lee v. Lee, 74 N. C. 70.

Mere Bond Not Sufficient.—Taking no other security than the bond of the purchaser constitutes gross laches on the part of the representative. Roseman v. Pless, 65 N. C. 374, 375.

The amount and kind of security to constitute "good security" within the meaning of this section, differs in selling on short credit and in making a permanent investment. Camp v. Smith, 68 N. C. 537, 541.

§ 28-79. Hours of public sale; penalty.—All public sales or rentings provided for in this chapter shall be between the hours of ten o'clock a. m. and four o'clock p. m. of the day on which the sale or renting is to be made, except that in towns or cities of more than five thousand inhabitants public sales of goods, wares, and merchandise may be continued until the hour of ten o'clock p. m. Provided, a certain hour for such sales shall be named and the sale shall begin within one hour after the time fixed, unless postponed as provided by law, or delayed by other sales; and every executor, administrator or collector who otherwise makes any sale or renting shall forfeit and pay two hundred dollars to any person suing for the same. (Rev., s. 66; Code, s. 1414; 1893, c. 346, s. 3; 1868-9, c. 113, s. 22; 1927, c. 19, s. 2; C. S. 72.)

Editor's Note.—The part of this section which provides for forfeiture, must be construed strictly in accordance with the meaning of the words employed, and must not be extended by implication or construction when the act to be penalized does not clearly fall within the spirit and letter thereof. See Alexander v. Atlantic, etc., R. Co., 144 N. C. 93, 56 S. E. 697.

The proviso as to the hours designated was added by the Public Laws of 1927.

Object of Section.—This section was enacted to provide a way for the representative to relieve himself of liability, and realize something from the choses in action which were not collectible but which might have some prospective value. Odell v. House, 144 N. C. 647, 57 S. E. 395.

Application to Private Sales.—The provisions of this section do not apply to private sales. Odell v. House, 144 N. C. 647, 57 S. E. 395.

Provisions Peremptory.—The provisions of this section are peremptory and leave no discretion in the representative. Pate v. Kennedy, 104 N. C. 234, 10 S. E. 188. But for qualification to this rule, see annotations to section 28-75.

§ 28-80. Debts uncollected after year may be sold; list filed.—Every executor, administrator and collector, at any time after one year from the grant of letters, is authorized to sell at public auction, in the manner prescribed in this chapter, all bills, bonds, notes, accounts, or other evidences of debt belonging to the decedent, which he has been unable to collect or which may be deemed insolvent. Before offering such evidences of debt at public sale he shall file with the clerk a descriptive list thereof, and obtain an order of sale therefor from the clerk, and shall make return of the proceeds of such sale as in other cases of assets. (Rev., s. 67; Code, s. 1412; 1868-9, c. 113, s. 20; C. S. 73.)

Editor's Note.—This section is merely directory in two respects: (1) in that the representative under it is merely empowered and not directed to sell; (2) in that a purchaser from the representative at a sale made not in compliance with the terms of the statute, e.g., a private sale, nevertheless gets good title. See Odell v. House, 144 N. C. 647, 57 S. E. 395; Felton v. Felton, 213 N. C. 194, 195 S. E. 533.

Purpose of Statute.—This section was enacted to provide a way for the administrator to relieve himself of liability and at the same time realize something from choses in action which were not collectible but which might have some prospective value. Odell v. House, 144 N. C. 647, 57 S. E. 395.

Good Faith as to Insolvency.—A finding that the representative sold some of the assets belonging to the estate believing them to be insolvent will discharge him from liability although they were in fact collectible assets. Weisel v. Cobb, 118 N. C. 11, 22, 24 S. E. 782.

Art. 14. Sales of Real Property.

§ 28-81. Sales of realty ordered, if personalty insufficient for debts.—When the personal estate of a decedent is insufficient to pay all his debts, including the charges of administration, the executor, administrator or collector may, at any time after the grant of letters, apply to the superior court of the county where the land or some part thereof is situated, by petition, to sell the real property for the payment of the debts of such decedent. When there is dower or right of dower in the land petitioned to be sold as aforesaid, the person entitled thereto shall be made a party to said proceeding, and upon the consummation of sale pursuant to decree of confirmation, the fiduciary shall, based on the completed age of the person so entitled on such day of consummation, compute the value of her annuity at six per cent (6%) on one-third of the net sale price during her probable life or expectancy, and shall pay same to her absolutely out of the proceeds; or in lieu of such payment of the value of her annuity of six per cent (6%) on such one-third of the net sale price, at her election, one-third of the net proceeds shall be paid into the office of the clerk of the superior court and the income on said one-third shall be paid to her annually: Provided, that nothing herein contained shall be construed to deprive

the widow from claiming her dower right by metes and bounds in her husband's land: Provided, further, if the person entitled to said dower shall not claim the same by metes and bounds in her husband's lands, or elect to receive the income from one-third of the net proceeds of said sale, within the time allowed by law for filing pleadings in such special proceeding, such person shall be presumed to have elected to receive said dower interest in cash as provided in this section.

Where land is sold as provided in this section, and in lieu of paying cash therefor the purchaser executes a note or notes secured by a mortgage or deed of trust, and there are insufficient funds from said sale with which to pay the person entitled to dower her interest in full as provided in this section, said person shall be entitled to the legal rate of interest on the unpaid balance of her dower interest until same is paid in full.

Proceedings for the sale of the real estate of a decedent brought by his personal representative to create assets with which to pay debts must be instituted in the county where the land or some part thereof lies. If the land to be sold consists of one or more contiguous tracts lying in more than one county or consists of two or more separate tracts lying in different counties, proceedings may be instituted in any county in which a part of the land is situate, and the court of such county wherein the proceedings for sale are first brought shall have jurisdiction to proceed to a final disposition of said proceedings as if all of said land were situate in the county where the proceedings were instituted. Where the land to be sold consists of one or more contiguous tracts lying in more than one county, said land shall be advertised in all counties in which any part of said land lies, but the sale shall be conducted at the courthouse door of the county in which the proceeding was instituted unless the court making the order of sale shall fix some place other than at the courthouse door of the county in which the proceeding was instituted; the place and time of sale shall be as directed in the order of the court. Where the land consists of two or more distinct tracts lying in different counties, each tract shall be advertised in and sold at the courthouse door of the county in which it lies. Certified copies of the proceedings under the seal of the court of the county in which the proceedings were instituted, together with certified copies of the letters testamentary or letters of administration of the personal representative, shall be filed in the office of the clerk of superior court of each county wherein any part of the land lies and shall be recorded in the record of orders and decrees in special proceedings in said office. (Rev., s. 68; Code, s. 1436; 1868-9, c. 113, s. 42; 1923, c. 55; 1935, c. 43; 1937, c. 70; 1943, c. 637; C. S. 74.)

Editor's Note.—The 1937 amendment inserted that part of the third sentence of the third paragraph beginning with the word "unless."

This amendment would seem to meet the demands of convenience where the part of the land to be sold is situated in a county different from that in which the proceedings to sell were instituted. It is likely that more interested purchasers will be found in the county where the land lies. 15 N. C. Law Rev. 352.

The provisions relating to the widow's dower were inserted by the Public Laws of 1923, ch. 55.

The amendment of 1935 added the third paragraph as it appeared before the 1937 amendment.

The 1943 amendment rewrote the second sentence of the first paragraph and inserted the second paragraph.

Rule Prior to This Section.—Before the enactment of this section the lands of the decedent could not be sold for the payment of his debts upon which a judgment **quando** had been rendered against the administrator. But this section changed this rule. Wilson v. Bynum, 92 N. C. 718.

Nature of Authority. — The authority of the representative under this section is a naked power without title or interest in the estate. He is a mere agent of the court. Floyd v. Herring, 64 N. C. 409, 411.

Land Not Assets until Sold.—Lands are not assets for the payment of the debts until they are sold and the proceeds received by the administrator. Wilson v. Bynum, 92 N. C. 718, 723.

Contents of Petition to Sell Lands.—In proceedings to sell lands to make assets the petition should set forth, inter alia, as required by § 28-86, the value of the personal estate, as near as may be ascertained, and the application thereof, and an allegation merely that the personalty is insufficient is defective. Neighbors v. Evans, 210 N. C. 550, 187 S. E. 796.

May Be Compelled to Sell.—Upon failure of the personal representative to apply for the sale of the lands for the payment of the debts, he may either be compelled by the clerk to do so or the creditor may file a creditor's bill. Whether he will be held liable on his bond for such failure, quaere. Wilson v. Bynum, 92 N. C. 718; Yarborough v. Moore, 151 N. C. 116, 65 S. E. 763; Pelletier v. Saunders, 67 N. C. 261; Clement v. Cozart, 109 N. C. 173, 181, 13 S. E. 862; Hobbs v. Cashwell, 152 N. C. 183, 67 S. E. 495; Lee v. McKoy, 118 N. C. 518, 24 S. E. 210.

Who May Sell.—The personal representative is the proper party to sell the homestead of deceased for distribution. Tarboro v. Pender, 153 N. C. 427, 69 S. E. 425, 636.

He has, however, no concern with the realty until a situation justifying a sale thereof under this section exists. Coggins v. Flythe, 113 N. C. 102, 119, 18 S. E. 96; Gilchrist v. Middleton, 108 N. C. 705, 715, 13 S. E. 227.

Claimant of Sole Seizin May Have Claim Adjudicated and Pay Debts to Prevent Sale of Lands.—While under this section, an administrator is entitled to sell lands of the deceased to make assets to pay debts of the estate when the personalty is insufficient, when a person claims sole seizin under a contract to devise as against the heirs of intestate, such person is entitled to adjudication of her claim of sole seizin before a sale of the property to make assets is ordered, since she may elect to discharge the debts of the estate and the costs of administration to prevent a sale of the lands. Chambers v. Byers, 214 N. C. 373, 199 S. E. 398.

Amount of Realty Which May Be Sold.—This section authorizing the sale of the lands of a decedent is in derogation of the common law and hence the Courts will not deny to an administrator the discretion of selling less land than is ordered to be sold if necessity should not arise for such sale; and, conversely, the administrator will be allowed to continue to sell lands embraced in the license so long as the necessity to raise assets exists. Sledge v. Elliott, 116 N. C. 712, 21 S. E. 797.

Personalty Must Be First Applied. — While the lands may be sold where the personal estate is insufficient, the general rule is that the personalty must be first applied before resorting to the realty; and this, even though the debts are secured by mortgage on realty. Mahoney v. Stewart, 123 N. C. 106, 31 S. E. 384; Sanderson v. Overman, 98 N. C. 235, 3 S. E. 502; Mosely v. Mosely, 192 N. C. 243, 134 S. E. 645, and cases cited; Wadford v. Davis, 192 N. C. 484, 135 S. E. 353; Gurganus v. McLawhorn, 212 N. C. 397, 193 S. E. 844.

Even though the debts are secured by a mortgage upon land, they must be paid out of personalty first; and only in the event this latter proves insufficient is a sale of the land under this section authorized. Moseley v. Moseley, 192 N. C. 243, 134 S. E. 645.

The creditor who has a judgment against the debtor which constitutes a lien upon the land, is not, after the death of the latter, permitted to sell the land under execution. Personalty is the primary source to satisfy the debt, and in case of its insufficiency the sale of the land may be effected by the procedure prescribed in this section. Tuck v. Walker, 106 N. C. 285, 288, 11 S. E. 183; Baker v. Carter, 127 N. C. 92, 94, 37 S. E. 81.

Under this section an administrator has the right, and it becomes his duty under certain conditions, to apply for license to sell the real estate of his intestate to make assets with which to pay debts, but it is necessary that the personal property shall first be exhausted. When this has been done and it has been ascertained that the personalty is insufficient to discharge the debts, resort may be had to the realty. The personalty, however, is always the primary fund for the payment of debts. Parker v. Porter, 203 N. C. 31, 34, 179 S. E. 28.

If the personalty has been wasted by the representative, his successor must first resort to his bond before proceeding against the lands. Lilly v. Wooley, 94 N. C. 412; Clement v. Cozart, 107 N. C. 695, 12 S. E. 254. Though not where the former is insolvent, his bond lost, and sureties unknown. Brittain v. Dickson, 104 N. C. 547, 10 S. E. 701.

Application of Personal Assets.—This section, construed in connection with the second clause of section 28-86, confers upon the representative the duty and the power to apply for license whenever the insufficiency of personalty, whether before or after an actual application thereof, can be shown. Shields v. McDowell, 82 N. C. 137, 140; Blount v. Pritchard, 88 N. C. 445; Clement v. Cozart, 107 N. C. 695, 697, 12 S. E. 254.

The cases of Wiley v. Wiley, 63 N. C. 182, and Bland v. Hartsoe, 65 N. C. 204, which contain expressions that no authority exists to decree a sale until the personal estate is actually exhausted, are distinguished in Shields v. McDowell, supra, and the true rule is announced to be that the mere showing of the insufficiency of the personal estate without showing its actual application is sufficient.

Statute of Limitations Does Not Bar Performance of Duty to Sell Realty.—As long as the estate remained unsettled, and real property of the decedent remained subject to sale, the administrator could unquestionably proceed by proper petition in the original proceeding to have the real property sold for the payment of outstanding debts and for the final settlement of the estate. No statute of limitations barred that right or the performance of that duty. Rocky Mount Savings, etc., Co. v. McDearman, 213 N. C. 141, 144, 195 S. E. 531.

As long as the estate remains unsettled no statute of limitations bars the right and duty of the personal representative to sell lands to make assets to pay the debts of the estate. Gibbs v. Smith, 218 N. C. 382, 11 S. E. (2d) 140.

Debts Barred. — But a representative cannot sell land to pay debts barred, Robinson v. McDowell, 133 N. C. 182, 45 S. E. 545; and, to an application for license to sell for the payment of debts upon which **no judgment is obtained** the heirs or devisees may plead the statute of limitations or any other defense. Bevers v. Park, 88 N. C. 456; Syme v. Riddle, 88 N. C. 463; Proctor v. Proctor, 105 N. C. 222, 10 S. E. 1036; Speer v. James, 94 N. C. 417, 418; Person v. Montgomery, 120 N. C. 111, 26 S. E. 645.

But if a judgment has been previously obtained for such debt the heirs or devisees are concluded thereby (except where fraud and collusion can be shown) and they **cannot** now plead any defense which could be, but was not plead by the representative. Long v. Oxford, 108 N. C. 280, 13 S. E. 112. See also, Woodlief v. Bragg, 108 N. C. 571, 13 S. E. 211; Lassiter v. Upchurch, 107 N. C. 411, 12 S. E. 63; Proctor v. Proctor, 105 N. C. 222, 10 S. E. 1036; Brittain v. Dickson, 104 N. C. 547, 10 S. E. 701; Smith v. Brown, 101 N. C. 347, 7 S. E. 890. (But see contra, Person v. Montgomery, 120 N. C. 111, 26 S. E. 645; apparently contra, Tilley v. Bivins, 112 N. C. 348, 16 S. E. 759.)

Even in such a case, however, the heirs or devisees may show that the personalty has not been administered, or remedies against representative's bond for **devastavit** have not been exhausted. Smith v. Brown, supra.

"May Apply to Superior Court, etc." — The phrase "may * * * apply to the superior court" as used in this section means "**shall** apply to the **clerk** of that court." Pelletier v. Saunders, 67 N. C. 261. It is the duty of the representative to apply. Clement v. Cozart, 109 N. C. 173, 13 S. E. 862. But the jurisdiction of the **clerk** is not exclusive. The order of sale may be obtained from the **judge** of the superior court. Johnson v. Futrell, 86 N. C. 122. Doubtful expression as to the soundness of this last announced rule is found in Moore v. Ingram, 91 N. C. 376; Creech v. Wilder, 212 N. C. 162, 193 S. E. 281.

"At Any Time."—The phrase "at any time" presupposes an application without undue delay. Pelletier v. Saunders, 67 N. C. 261; Clement v. Cozart, 109 N. C. 173, 13 S. E. 862; Creech v. Wilder, 212 N. C. 162, 193 S. E. 281.

Same — Homestead of Minors. — But the homestead of a minor child of a testator cannot be sold **durante minoriate** of such child. Bruton v. McRea, 125 N. C. 206, 34 S. E. 397; Hinsdale v. Williams, 75 N. C. 430. The child, however, who was made a party must have claimed homestead rights, otherwise he cannot subsequently claim as against the purchaser of the land. Dickens v. Long, 112 N. C. 311, 17 S. E. 150.

Proper Venue.—The proper venue to make the application provided by this section, is the superior court of the county where the land or some part thereof is situated. Ellis v. Adderton, 88 N. C. 472, 477.

County in Which Application Must Be Filed.—It is in the Superior Court of the county where the land or some part thereof lies, and not in the Superior Court of the county where the decedent was domiciled and administration granted, that the application for sale must be filed. Though formerly it could be filed in the county last referred to. Ellis v. Adderton, 88 N. C. 472, 477.

Removal to Proper County. — A petition filed in the wrong county may, upon application, be removed to the proper county. See Manufacturing Co. v. Brower, 105 N. C. 440, 11 S. E. 313.

Allotment of Dower in Lands in Another County.—Deceased died seized of lands lying in two counties, and an administrator, appointed in the county of his residence, instituted proceedings in the other county to sell lands to make assets. The widow appeared therein asking that the lands be sold subject to dower and averring that she would later institute proceedings for the allotment of dower by metes and bounds. The clerk, with the widow's consent, ordered that the widow's dower be allotted and that the remaining lands be sold to make assets, and a sheriff and jury from that county went into the county of deceased's residence and allotted dower by metes and bounds. It was held that the allotment was invalid, that the clerk of the other county was without authority to enter the order for the allotment of dower notwithstanding he had jurisdiction of the proceedings to sell lands to make assets, and might have ordered the lands sold subject to dower, that the only provisions of this section giving the clerk jurisdiction in regard to dower in lands outside his county was where the widow consents that the lands be sold clear of dower and that a certain part of the proceeds of sale be set apart to her in commutation of dower. High v. Pearce, 220 N. C. 266, 17 S. E. (2d) 108.

When Application Filed.—The application may be filed at any time after the administrator ascertains that there is an insufficiency of assets, even before he can possibly convert the personal estate into money and make an application of it to the debt. Blount v. Pritchard, 88 N. C. 445.

Notice to Creditors.—No notice to creditors is required to be given under this section. Thompson v. Cox, 53 N. C. 311.

Not Applicable to Executor Authorized to Sell. — The provisions of this section do not apply where the executor has, under the will, full power to sell the realty. It applies only to cases where otherwise the creditor would be compelled to resort to a scire facias against the heirs. Wiley v. Wiley, 61 N. C. 131.

Sale though Parties Not in Esse.—The application for sale may be made notwithstanding the existence of devises to parties not in esse. Carraway v. Lassiter, 139 N. C. 145, 51 S. E. 968.

Compulsory Sale by Judgment Creditor.—After the docketing of the judgment the judgment debtor conveyed the property. After the death of the judgment debtor, execution was issued, and the judgment creditor instituted this action to compel the sheriff to sell the land under the execution, the judgment debtor having left no estate, real or personal, and therefore no administrator having been appointed. Held: The execution issued after the death of the judgment debtor was not warranted by law, and a sale thereunder would be void. Flynn v. Rumley, 212 N. C. 25, 192 S. E. 868.

The Federal District Court has jurisdiction of a bill in equity by the United States to subject to payment of a judgment land situated in this state which had descended to the heirs of the judgment debtor, there being no personal assets. United States v. Minor, 254 Fed. 57.

Converting into Creditor's Suit. — When proceedings for the sale of land are instituted under this section by the representative, they cannot be converted into a creditor's suit. Brittain v. Dickson, 111 N. C. 529, 531, 16 S. E. 326.

Presumption of Regularity. — The regularity of the proceedings under this section will be presumed. Wadford v. Davis, 192 N. C. 484, 485, 135 S. E. 353.

Creditor Attacking Debt as Fraudulent. — A judgment creditor of a devisee desiring to attack a debt set forth in the petition to sell land as being fraudulent must do so in the same proceedings, and not by independent action. Wadford v. Davis, 192 N. C. 484, 135 S. E. 353.

Parties and Their Defenses. — In proceedings to sell land heirs and devisees are necessary parties. They may resist the sale by showing sufficient personal assets, or that the debts are not due by the estate. In such a case the usual course is to refer the matter for determination. Person v. Montgomery, 120 N. C. 111, 113, 26 S. E. 645.

Enforcement by Creditor.—It is only after the personal representative fails to perform his duty to sell the land under this section that the creditor can enforce the sale. Lee v. McKoy, 118 N. C. 518, 525, 24 S. E. 210.

Nature of Proceedings.—A proceeding to sell the land under this section is a special proceeding before the clerk

who has original and exclusive jurisdiction of the matter. If, however, equities are involved in the case upon which the superior court acquires jurisdiction of a part, it will determine the whole matter. Baker v. Carter, 127 N. C. 92, 94, 37 S. E. 81.

Applied in Odom v. Palmer, 209 N. C. 93, 182 S. E. 741; Caffey v. Osborne, 210 N. C. 252, 186 S. E. 364; Toms v. Brown, 213 N. C. 295, 195 S. E. 781.

Cited in Graham v. Floyd, 214 N. C. 77, 197 S. E. 873.

§ 28-82. When representatives authorized to rent, borrow or mortgage.—Such executor, administrator or collector, in lieu of asking for an order for the immediate sale of real estate, may ask for an order authorizing him to rent out the same for a term of not exceeding three years, and if it appears to the court that the best interests of the heirs at law and devisees of the deceased will be promoted by granting such order and that it is probable that the rents derived from the real estate during the term will be sufficient to pay off and discharge the debts and the costs of the administration, the superior court may, with the consent of the creditors, make such order upon such terms as may be best for the heirs at law, devisees and creditors of the estate; or if it is made to appear to the court that such executor, administrator or collector is able to borrow sufficient money with which to pay off and discharge all valid and just claims against the estate of the deceased, then the court shall have the power to authorize said executor or administrator to borrow money for the purpose of paying off and discharging such claims and authorizing him to rent the real estate for a term not exceeding three years and to apply the rents to the repayment of the money thus borrowed, and the said estate shall be and remain liable for the payment of such sums as may be borrowed under such order of the court to the same extent and no further as the estate was liable for the indebtedness of the deceased to pay off and discharge the debt for which the said sums were borrowed. All orders made by the court pursuant to this section shall be approved by the judge residing in or holding the courts of the district in which such county is situated.

In lieu of renting said property or borrowing on the general credit of the estate, as hereinbefore authorized, the said executor, or administrator, may apply by petition, verified by oath, to the Superior Court, showing that the interest of the beneficiaries of the estate, for which he is executor or administrator, would be materially promoted by mortgaging the said estate, in whole or in part to secure funds to be used for the benefit of said estate, setting out the application to be made of the proceeds of said loan and if all or a part of its creditors have agreed to accept an amount less than the full amount of their debt that fact shall appear, which proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition having been ascertained by satisfactory proof, a decree may thereupon be made that a mortgage be made by such executor, or administrator, in his representative capacity, in such way and on such terms as may be most advantageous to the interest of said estate: but no mortgage shall be made until approved by the judge of the court, nor shall the same be valid unless the order or decree therefor is confirmed and directed by the judge and the proceeds of the mortgage shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify: Provided, the proceeds from said sale shall be used exclusively for the discharge of all existing creditors, except such as shall file a writing in said cause agreeing to other terms set out in said writing.

The said executor or administrator shall not mortgage the property of said estate for a term of years in excess of the term fixed by the court in its decree. The word "mortgage" wherever used herein, shall be construed to include "deeds of trust." (Acts 1913, c. 49, s. 1; 1927, c. 222, s. 1; C. S. 75.)

Where an administrator, in good faith pending the mortgaging of property of the estate to pay debts, personally pays the debts of the estate, he is entitled to be subrogated to the rights of the creditors whose debts he had paid, and upon the execution of the mortgage, upon order of court, is entitled to repay himself from the proceeds of the loan. Caffey v. Osborne, 210 N. C. 252, 186 S. E. 364.

§ 28-83. Conveyance of lands by heirs within two years voidable; judicial sale for partition.—All conveyances of real property of any decedent made by any devisee or heir at law within two years of the death of the decedent shall be void as to the creditors, executors, administrators and collectors of such decedent, except as hereinafter provided, but such conveyances to bona fide purchasers for value and without notice, if made after two years from the death of the decedent, shall be valid even as against creditors: Provided, that if the decedent was a non-resident, such conveyances shall not be valid unless made after two years from the grant of letters. But such conveyances shall be valid, if made five years from the death of a non-resident decedent, notwithstanding no letters testamentary or letters of administration shall have been granted. Such conveyances, if made before the expiration of the time required by this section to have elapsed in order for same to be valid as against creditors, shall, upon the expiration of such time, become good and valid to the same effect as if made after the expiration of such time, unless in the meantime an action or proceeding shall have been instituted in the proper court to subject the land therein described to payment of the decedent's debts.

A judicial sale of real property of a decedent hereafter made under order of a court of competent jurisdiction for partition shall be valid as to creditors, executors, administrators and collectors of such decedent irrespective of the time made. If such sale is made within two years of death of such decedent or before the estate shall have been fully administered, the personal representative of such decedent must be joined as plaintiff or made a party defendant. The court shall in the order of confirmation of any sale made within two years of the death of a decedent set aside such part of the proceeds of sale representing the interest of such decedent for application upon the debts, if any, of the decedent by requiring payment of the same into the hands of such personal representative or of the court itself, to be held by such personal representative or the court subject to claims of creditors for a period of two years from date of death of decedent, or until such estate is fully administered. Personal representatives shall be allowed commissions on only so much of said proceeds of sale, so coming into

their hands, as may be necessary to discharge the claims of creditors. (Rev., s. 70; Code, s. 1442; 1868-9, c. 113, s. 105; 1935, c. 355; 1939, c. 16; 1943, cc. 411, 763; C. S. 76.)

Editor's Note.—The amendment of 1935 made the limitation begin to run from the death of the decedent rather than from the grant of letters and added the proviso to the first sentence.

The 1939 amendment inserted the second sentence of the first paragraph. For comment on the 1939 amendatory act, see 17 N. C. L. Rev. 359.

The first 1943 amendment inserted in the first sentence the words "except as hereinafter provided." It also added the last sentence of the first paragraph. The amendatory act, which was ratified March 3, 1943, provided: "This act shall apply to conveyances heretofore made as well as to those hereafter made, except that conveyances heretofore made, if invalid at that time, shall not in any event become valid as against creditors until expiration of six months from the ratification of this act."

The second 1943 amendment added the second paragraph.

Many of the following cases were decided prior to the 1935 amendment which fact accounts for the references to two years from grant of letters rather than to two years from death of decedent.

Only Purchaser without Notice Protected. — Prior to 1869, a purchaser from the heirs after 2 years of the grant of letters, even though **with** notice of the existence of the debts, obtained a good title under this section. Brandon v. Phelps, 77 N. C. 44. It is noteworthy to observe that under the present section he must be a **bona fide purchaser** —without notice. Hooker v. Yellowley, 128 N. C. 297, 38 S. E. 889. For example actual notice of insolvency was held to invalidate purchaser's title. Arrington v. Arrington, 114 N. C. 151, 19 S. E. 351. But a judgment against the representative is not notice of insolvency. Id. Nor are proceedings for dower alleging insolvency such notice. Lee v. Giles, 161 N. C. 541, 77 S. E. 852.

Of course, even a purchaser **with** notice from a purchaser **without** notice shall be protected. Arrington v. Arrington, supra.

Heirs Liable for the Price. — The heirs having sold the land, even after 2 years of the grant of letters, are liable to the creditor for the price received, and for the **whole** price, not for aliquot shares of the debt. Hinton v. Whitehurst, 71 N. C. 66; Davis v. Perry, 96 N. C. 260, 1 S. E. 610; Andres v. Powell, 97 N. C. 155, 166, 2 S. E. 235.

Conditionally Void. — The conveyances under this section, are only conditionally void, i. e., contingent upon the personal estate proving insufficient to pay the debts. Davis v. Perry, 96 N. C. 260, 1 S. E. 610. See also First Nat. Bank v. Zollicoffer, 199 N. C. 620, 623, 155 S. E. 449.

Conveyances of real property within two years from the grant of letters are only void as to creditors and personal representatives, and as to them, only in case the personal assets are insufficient to pay the debts and costs of administration; they are not void—they never cease to operate as to the parties to them. Jefferson Standard Life Ins. Co. v. Buckner, 201 N. C. 78, 81, 159 S. E. 1. See also, Cox v. Wright, 218 N. C. 342, 11 S. E. (2d) 158.

Voidable Merely.—A conveyance to a purchaser not for value is not, under this section, ipso facto void, but at the most merely voidable. Gilbert v. Hopkins, 204 Fed. 196, 202.

Mortgage after Two Years Followed by Sale Is Valid. —Where an heir executed a deed of trust more than two years after the granting of letters testamentary, and it was foreclosed, and the purchaser at the sale transferred title to a bona fide purchaser who had no actual knowledge that the personal assets were insufficient to pay debts of the estate, it was held that the fact that it appeared from the records that the estate had not been settled does not amount to notice that the personalty was insufficient, and the purchaser was a bona fide purchaser without notice, and the land is not subject to sale. Johnson v. Barefoot, 208 N. C. 796, 182 S. E. 471.

Purchaser after, from a Purchaser before Two Years. — If the land is sold within the two years, and after the two years have expired resold by the vendee to a purchaser for value without notice, the latter gets good title. Murchison v. Whitted, 87 N. C. 465.

Agreement Consummated after Two Years.—An agreement by the heir for the sale of land, though entered into before the expiration of two years, if consummated **after** such time is valid as against creditors of the estate. Donoho v. Patterson, 70 N. C. 649.

To What Extent Purchaser Protected.—The purchaser for value contemplated by this section is, with respect to consideration paid by him, to be assimilated to a purchaser for value under the statute of 13 Eliz., viz.: he need not have paid all of the purchase money. The test of "purchaser for value" is not the same under this section with the test in certain equity cases where the purchaser is protected pro tanto, i. e., to the extent of his payment before he receives notice. Arrington v. Arrington, 114 N. C. 151, 166, 19 S. E. 351. Hence even a purchaser upon credit is a "purchaser for value." Arrington v. Arrington, supra; Beasley v. Bray, 98 N. C. 266, 3 S. E. 497.

Deed of trust creditor is a purchaser for value within the meaning of this section. Francis v. Reeves, 137 N. C. 269, 272, 49 S. E. 213.

A deed conveying the timber on the land descended falls within the purview of this section. Camp Mfg. Co. v. Liverman, 128 N. C. 52, 38 S. E. 27.

Admissibility of Evidence.—In proceeding for partition, defendants claimed sole seizin. The evidence tended to show that defendants' grantor owned an undivided interest in the locus in quo as tenant in common with her brother, that defendants' grantor was the sole heir at law of her brother and executed deed to defendants purporting to convey the entire tract of land less than two months after her brother's death. Plaintiff introduced in evidence testimony of the brother's administrator that he had sold the brother's interest in the land to make assets to pay debts of the estate, and offered in evidence court records of the summons, pleadings, judgment and confirmation, and deed executed by the commissioner to plaintiff in the proceeding to sell lands to make assets, and the judgment in plaintiff's favor against the estate of the brother. Held: Since a deed by an heir executed within two years of the intestate's death is ineffective as against creditors of intestate's estate, the record evidence, properly authenticated, was competent to prove plaintiff's title as tenant in common. Cox v. Wright, 218 N. C. 342, 11 S. E. (2d) 158.

Cited in Price v. Askins, 212 N. C. 583, 194 S. E. 284.

§ 28-84. Conveyance by deceased in fraud of creditors.—The real estate subject to sale under this chapter shall include all the deceased may have conveyed with intent to defraud his creditors, and all rights of entry and rights of action and all other rights and interest in lands, tenements and hereditaments which he may devise, or by law would descend to his heirs: Provided, that lands so fraudulently conveyed shall not be taken from any one who purchased them for a valuable consideration and without a knowledge of the fraud. (Rev., s. 72; Code, s. 1446; 1868-9, c. 113, s. 51; C. S. 77.)

Cross References.—As to personalty see § 28-59. As to fraudulent conveyances, see § 39-15 et seq.

Conveyance Must Be by the Deceased.—Where A, being in embarrassed circumstances, purchased land from B, and caused B to convey to his (A's) son, it was held that the land could not be sold for the payment of A's debts. Rhem v. Tull, 35 N. C. 57.

Conveyance to Wife and Children. — Property conveyed by the decedent to his wife and children without consideration in fraud of his creditors while insolvent may, under this section, be recovered and sold by the administrator on behalf of the creditors. Webb v. Atkinson, 122 N. C. 683, 29 S. E. 949; Webb v. Atkinson, 124 N. C. 447, 32 S. E. 737.

Relation of Section 28-81 to This Section.—The provisions of this and section 28-81 hinge together. Hence a compliance with both is necessary. Clement v. Cozart, 107 N. C. 695, 697, 12 S. E. 254.

Conveyance Must Be in Fraud of Creditors. — Under this section lands conveyed cannot be sold unless it can be shown that they were conveyed in fraud of creditors. McCaskill v. Graham, 121 N. C. 190, 28 S. E. 264.

Innocent Purchasers Protected. — Under this section an administrator cannot be compelled to sell property fraudulently conveyed and in the hands of an innocent purchaser. Harrington v. Hatton, 129 N. C. 146, 39 S. E. 780.

Fraudulent Grantee's Rights as Creditor.—Where the wife is the fraudulent grantee and the creditor of her husband, in proceedings to set aside the conveyance to her, under this section, she is entitled to her pro rata claim out of the proceeds of the land the same as the other creditors are. Nadal v. Britton, 112 N. C. 188, 16 S. E. 915.

§ 28-85. Effect of bona fide purchase from fraudulent grantee.—When an executor, administrator or collector files his petition to sell lands which have been fraudulently conveyed, and of which

there has been a subsequent bona fide sale, whereby he cannot have a decree of sale of the land, the court may give judgment in favor of such executor, administrator or collector for the value of the land, against all persons who may have fraudulently purchased the same; and if the whole recovery is not necessary to pay the debts and charges, the residue shall be restored to the person of whom the recovery was made. (Rev., s. 73; Code, s. 1447; 1868-9, c. 113, s. 52; C. S. 78.)

§ 28-86. Contents of petition for sale.—The petition, which must be verified by the oath of the applicant, shall set forth, as far as can be ascertained:

1. The amount of debts outstanding against the estate.

2. The value of the personal estate, and the application thereof.

3. A description of all the legal and equitable real estate of the decedent, with the estimated value of the respective portions or lots.

4. The names, ages and residences, if known, of the devisees and heirs at law of the decedent. (Rev., s. 77; Code, s. 1437; 1868-9, c. 113, s. 43; C. S. 79.)

The Purpose of Requisites in Application.—The personal estate, in law, is the primary fund and land is the secondary fund for the payment of debts, and the design of the act giving authority to the personal representative to sell and administer on the proceeds of lands in the requisites prescribed to a petition for a license to sell, evidently is to inform the Court of the condition of the estate with reference to its debts and the value and application of the personal estate, so that it may be seen that the personal estate is insufficient to pay the debts. If a petition be drawn in accordance with these requirements so as to show the insufficiency of the personal fund, the necessity to resort to the real estate to supply the deficiency will then be apparent. Shields v. McDowell, 82 N. C. 137, 138; Neighbors v. Evans, 210 N. C. 550, 187 S. E. 796. See also, Barkley v. Thomas, 220 N. C. 341, 346, 17 S. E. (2d) 482.

As the purpose of this section is to enable the court to see whether a sale is necessary, a petition which simply states that the personal estate "is wholly insufficient to pay intestate's debts," without setting forth the value of the personal estate, is defective. McNeill v. McBryde, 112 N. C. 408, 411, 16 S. E. 841.

A petition which simply states that the personal estate "is wholly insufficient to pay his (intestate's) debts and the costs and charges of administration," is deficient and fails to comply with this section. Barkley v. Thomas, 220 N. C. 341, 346, 17 S. E. (2d) 482.

Petition Should Set Forth Value of Personalty and Application Thereof.—In a proceeding to sell lands to make assets to pay debts of the estate, an averment that insufficient personalty remained in the hands of the petitioner to pay debts and legacies is insufficient and the petition is demurrable, since this section prescribed that the petition should set forth the value of the personal estate and the application thereof. Watson v. Peterson, 216 N. C. 343, 4 S. E. (2d) 881.

Statement "as Far as Can Be Ascertained."—The main and essential fact to be stated in the petition, is that there is an insufficiency of assets to pay the debts, and that the court may know this, the statute requires a statement of the amount of the debts and the value of the personal estate; but these statements are not required to be made with exact particularity, but only "as far as can be ascertained," for these quoted words used in this section, according to grammatical construction qualify each of the sub-divisions of this section. Blount v. Pritchard, 88 N. C. 446, 448.

Indebtedness Must Be Ascertained. — The fact that this section requires an oath to be made implies that the indebtedness ought to be ascertained, approximately at least, to show the necessity of a resort to the land. Williams v. McNair, 98 N. C. 332, 336, 4 S. E. 131, 133.

The petition must show by a direct allegation or by implication the requirements of this section. Clement v. Cozart, 107 N. C. 695, 697, 12 S. E. 254; Shields v. McDowell, 82 N. C. 137.

Burden of proof that the conveyance was fair and for a full consideration is upon the grantee. Webb v. Atkinson, 122 N. C. 683, 689, 29 S. E. 949.

Salable Interest.—Every interest in real estate, whether legal or equitable, is subject to sale. Mannix v. Ihrie, 76 N. C. 299; Waugh v. Blevins, 68 N. C. 167.

Only Debtor's Interest Subject to Sale.—Under this section only the interest of the deceased debtor in land which he may have conveyed in fraud of creditors, is subject to sale. Heck v. Williams, 79 N. C. 437; Egerton v. Jones, 107 N. C. 284, 290, 12 S. E. 434.

The petition need not show that the bond of the former administrator was sued on and exhausted. Monger v. Kelly, 115 N. C. 294, 20 S. E. 374. But see Lilly v. Wolley, 94 N. C. 412; Clement v. Cozart, 107 N. C. 695, 12 S. E. 254, which declare that such bond must have been exhausted.

Allegation that the assets of the decedent are insufficient to pay the debts, and that a sale of property fraudulently conveyed is necessary, is held sufficient. Sullivan v. Field, 118 N. C. 358, 24 S. E. 735.

A petition which fails to state the value of the personal estate and the application thereof is defective and demurrable. McNeill v. McBryde, 112 N. C. 408, 16 S. E. 841. See Blount v. Pritchard, 88 N. C. 445, where it is said that license may be granted even where there has been no application of the personalty, though where there **has** been an application the petition must so state.

Verification of Application.—In Stradley v. King, 84 N. C. 635, where the application for the sale of land was not verified by the administrator's oath, and the guardian for the infant defendant had not answered, the court said with regard to verification: "While we consider the statutory requirement that the petition for an order of sale of the decedent's lands shall be supported by oath and that an answer be put in on behalf of infant defendants, directory, and its nonobservance not fatal to the validity of the decree of sale made without, yet this departure from the statute, followed by the precipitate action of the Court in confirming the sale on the very day when it was reported and without opportunity afforded for objection, in our opinion warrants the order which reopens the case for such defenses as the infant defendants may be able to set up."

§ 28-87. Heirs and devisees necessary parties.—No order to sell real estate shall be granted till the heirs or devisees of the decedent have been made parties to the proceeding, by service of summons, either personally or by publication, as required by law: Provided, that in any proceedings for the sale of land to make assets, when there are heirs of said decedent, or there may be heirs of said decedent whose names and residences are unknown, and it is desired to make all unknown heirs of said decedent parties to said proceedings, and the personal representative shall make such representation in his petition, then all unknown heirs of the said decedent shall be made parties defendant in the same as the unknown heirs of said decedent naming him, and as thus denominated and under this name all said unknown heirs shall be served with summons by publication as now regularly provided by law for the service of summons by publication in the Superior Court, and upon such service being had, the court shall appoint some discreet person as guardian ad litem, for said unknown heirs, and summons shall issue to him as such. Said guardian ad litem shall file answer for said unknown heirs, and defend for them, and he may be paid such sum as the court may fix, to be paid as other costs out of the estate. Upon the filing of the answer by said guardian ad litem, all said unknown heirs shall be before the court for the purposes of the action to the same extent as if each had been served with summons by name, and any claim that they may make to said real estate so sold shall be transferred to the funds in the hands of the personal representative to the same extent as other distributees of said estate and no further. This proviso shall apply to ac-

tions now pending, and all proceedings to sell land for assets heretofore had, where unknown heirs have been summoned by publication, are hereby validated. (Rev., s. 74; Code, s. 1438, 1868-9, c. 113, s. 44; Ex. Sess. 1924, c. 3, s. 1; C. S. 80.)

Cross Reference.—As to joinder of beneficiary when the executor or administrator institutes an action, see § 1-63.

Editor's Note.—The proviso with regard to method of service of process upon unknown heirs, and the appointment of guardian ad litem to represent them, was introduced by the amendment of 1924, ch. 3, sec. 1.

"It has been held by the Supreme Court that generally the designation of the parties to an action as 'the heirs of M.' is insufficient. (Kerlee v. Corpening (1887), 97 N. C. 330, 2 S. E. 664.) Provision has been made for the joinder of unknown parties in a special proceeding for partition, (C. S., secs. 3218, 3245 [now G. S. §§ 46-6, 46-34]; Thompson v. Rospigliosi (1913), 162 N. C. 145, 77 S. E. 113), and for the sale of estates subject to contingent interest, (C. S., sec. 1744 [now G. S. § 41-11]; Ryder v. Oates (1917), 173 N. C. 569, 92 S. E. 508) and this amendment makes the same practice apply in the sale of land for assets. The Code of Civil Procedure provides for the service of summons by publication upon unknown parties who are interested in real estate as the subject of a civil action, and in actions to foreclose mortgages on real estate; (C. S., sec. 484 [now G. S. § 1-98] 6, 7) and the same rules of procedure apply in special proceedings; (C. S., sec. 752 [now G. S. § 1-393]) so that the case of unknown parties seems to be provided for under the general law. It places the question beyond controversy, however, to have it specially provided for in the cases mentioned." 3 N. C. L. R. 15.

All Heirs Necessary Parties.—An heir who was not made a party, or served, may subsequently assail the validity of the decree and proceed against the purchaser. Dickens v. Long, 109 N. C. 165, 13 S. E. 841. See also, Webb v. Atkinson, 122 N. C. 683, 29 S. E. 949.

As to him, whether he be an adult or an infant, the decree is absolutely void, not merely voidable, and can be collaterally attacked. Card v. Finch, 142 N. C. 140, 54 S. E. 1009. Harrison v. Harrison, 106 N. C. 282, 11 S. E. 356. Nor would the fact that he had knowledge of the sale and took no steps to prevent cure the lack of service. Id.

Applies to Infant Parties as Well.—This section applies to making heirs and devisees parties, whether infants or adults. Perry v. Adams, 98 N. C. 167, 3 S. E. 729; Stancill v. Gay, 92 N. C. 462; Harrison v. Harrison, 106 N. C. 282, 283, 11 S. E. 356.

Cited in Barkley v. Thomas, 220 N. C. 341, 17 S. E. (2d) 482.

§ 28-88. Adverse claimant to be heard.—When the land, which is sought to be sold, is claimed by another person under any pretense whatsoever, such claimant shall be admitted to be heard as a party to the proceeding, upon affidavit of his claim, and if the issue be found for the petitioner he shall have his writ of possession and order of sale accordingly. (Rev., s. 76; Code, s. 1441; 1868-9, c. 113, s. 47; C. S. 81.)

Issue as to Title.—Where the order of sale is granted without determining an issue of title raised under this section, the order is void, and the title of the purchaser with notice of such issue is voidable. Perry v. Peterson, 98 N. C. 63, 3 S. E. 834.

Any person who claims to be the owner of the land has the right to be made a party and to have an inquiry made as to his title. Gibson v. Pitts, 69 N. C. 155.

Claims of Undivided Interest.—One who claims an undivided interest in lands sought to be sold to pay debts, may be properly made a party to the proceedings. McKeel v. Holloman, 163 N. C. 132, 79 S. E. 445.

§ 28-89. Upon issues joined, transferred to term.—When an issue of law or fact is joined between the parties, the course of the procedure shall be as prescribed in such cases for other special proceedings. (Rev., s. 78; Code, s. 1440; 1868-9, c. 113, s. 46; C. S. 82.)

Issue of Law Submitted to Judge.—Where a demurrer is filed to the petition filed before the clerk, the issue of law thereby raised must, under this section, be certified to the judge at chambers. Then the judge must transmit his decision thereon to the clerk; it is error for him to direct an order of sale after overruling the demurrer. Jones v. Hemphill, 77 N. C. 42.

Procedure.—The rulings or decisions of the clerk must be transferred for trial to the next succeeding term of the Superior Court, if determinative issues arise on the pleadings; and if there be issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers, or appeal taken. In passing upon these questions of fact, the court may act on the evidence already received, or may require the production of other evidence. Mills v. McDaniel, 161 N. C. 112, 76 S. E. 551.

§ 28-90. Order granted, if petition not denied.—As soon as all proper parties are made to the proceeding, the clerk of the superior court before whom it is instituted, if the allegations in the petition are not denied or controverted, shall have power to hear the same summarily, and to decree a sale. (Rev., s. 79; Code, s. 1443; 1868-9, c. 113, s. 48; C. S. 83.)

Capacity of the Clerk.—The clerk of the Superior Court, for the purpose of decreeing a sale in case provided by this section represents and is the court, and has authority to exercise the discretionary powers conferred. Tillett v. Aydlett, 90 N. C. 551, 553.

§ 28-91. Notice of sale as on execution.—Notice of sale under this proceeding shall be the same as for the sale of real estate by sheriffs on execution: Provided, however, that in case a re-sale of such real property shall become necessary under such proceeding, that such real property shall then be re-sold only after notice of re-sale has been duly posted at the courthouse door in the county for fifteen days immediately preceding the re-sale and also published at any time during such fifteen day period once a week for two successive weeks of not less than eight days in some newspaper published in the county, if a newspaper is published in the county, but if there be no newspaper published in said county the notice of re-sale must be posted at the courthouse door and three other public places in the county for fifteen days immediately preceding the re-sale. (Rev., s. 81; Code, s. 1445; 1868-9, c. 113, s. 50; 1933, c. 187; C. S. 84.)

Cross Reference.—For execution sales, see § 1-325 et seq.

Editor's Note.—All of the proviso, now appearing in this section, was added by Public Laws 1933, c. 187.

§ 28-92. Court fixes terms of sale; title on confirmation.—The court may decree a sale of the whole or any specified parcel of the premises in such a manner, as to size of lots, place of sale, terms of credit, and security for payment of purchase money, as may be most advantageous to the estate, and may also authorize and empower the petitioner or any commissioner appointed by the court to subdivide the land in question, or any part thereof, in such manner as he may deem proper and for the best interest of the estate, and in making such division, to dedicate to the public such parts thereof as he may find necessary for public streets, alleys, and highways, and to sell such premises, either in bulk or in separate lots, with such streets, alleys, and highways excepted or reserved; but no sale, whether public or private, shall be concluded until reported to and approved and confirmed by the court. When any order for a public sale hereunder has been made or may hereafter be made by the court and the personal representative of a decedent, a commissioner or any other person is or has been appointed by the court to make such sale the provisions of § 45-28 shall apply and the provisions

of § 1-404 shall not apply. Upon the coming in of the report of the sale and the confirmation thereof, title shall be made by such person, and at such time as the court may prescribe, and in all cases where the persons in possession have been made parties to the proceeding, the court may grant an order for possession. (Rev., s. 80; Code, s. 1444; 1868-9, c. 113, s. 49; 1917, c. 127, s. 1; 1935, c. 72; C. S. 85.)

Editor's Note.—The 1935 amendment inserted the next to the last sentence of the section relating to the nonapplicability of section 1-404.

Discretion. — This section confers upon the court a large power of discretion; but this discretion as to the quantity to be sold and the manner of selling is not an arbitrary one, but a sound legal discretion. Tillett v. Aydlett, 90 N. C. 551; Tillett v. Aydlett, 93 N. C. 15.

When Entitled to Possession.—The purchaser is not entitled to an order for possession if the defendants are not in possession when the order of sale is made. Marcom v. Wyatt, 117 N. C. 129, 23 S. E. 169.

Confirmation Necessary.—Before a purchaser at a judicial sale can be held to his bid, the sale must be confirmed by the court, and then in the same proceedings a rule issued to show cause why he should not be compelled to comply with his bid. An independent action for damages does not lie against him. Hudson v. Coble, 97 N. C. 260, 1 S. E. 688.

Conversely, the purchaser acquires no rights under such sale until confirmation—until then he being considered as a mere proposer. The bid may be rejected in the sound discretion of the court at any time before confirmation. Harrell v. Blythe, 140 N. C. 415, 53 S. E. 232.

Confirmation of the sale is a condition precedent to the exercise of the executor's right to convey title. Joyner v. Futrell, 136 N. C. 301, 47 S. E. 649.

Confirmation is also necessary to divest the title out of the party applying for the order of sale, and to validate the commissioner's deed to the purchaser. Foushee v. Durham, 84 N. C. 56.

Inadequacy of the bid or its being for the benefit of the administrator, warrants the exercise of the discretion to reject the bid. Harrell v. Blythe, 140 N. C. 415, 53 S. E. 232; Shearin v. Hunter, 72 N. C. 493.

After Confirmation.—After the confirmation of the sale, however, the jurisdiction of the court is at an end, and the biddings under such sale may not be opened. Thompson v. Cox, 53 N. C. 311, 312. Nor can the order to collect and make title be revoked. Evans v. Singletary, 63 N. C. 205.

Nor can the decree be collaterally attacked after confirmation of the sale; for it then becomes final and can only be assailed, in the absence of substantial irregularity, in a direct and independent proceeding. McLaurin v. McLaurin, 106 N. C. 331, 10 S. E. 1056; Coffin v. Cook, 106 N. C. 376, 11 S. E. 371.

Unsigned Decree of Sale.—It is not essential to the validity of the decree that it should be signed. Sledge v. Elliott, 116 N. C. 712, 21 S. E. 797.

Decree Not Conclusive of Debts.—The decree of the sale is not conclusive of the debts recited by the personal representative in his application for the sale of the land. Latta v. Russ, 53 N. C. 111.

Setting Aside Decree and Confirmation.—A decree and confirmation of sale will not be set aside as against bona fide purchasers, at the instance of infant heirs not served with process, if not made within a reasonable time, and in the absence of a valid defense to the sale. Glisson v. Glisson, 153 N. C. 185, 69 S. E. 55.

After decree of sale and the confirmation the judgment is final and can only be set aside in a direct proceeding for that purpose. Smith v. Gray, 116 N. C. 311, 21 S. E. 200.

Recital of Authority in the Deed.—When the representative exercises the power of sale conferred under an order of the court, but fails to recite in the deed the source of his authority, the implication is that he exercised the power so conferred. Coffin v. Cook, 106 N. C. 376, 11 S. E. 371.

§ 28-93. Court may order private sale; terms; sale reopened.—If it is made to appear to the court by petition and by satisfactory proof that it will be more for the interest of said estate to sell such real estate by private sale, the court may authorize said petitioner, or any commissioner appointed by the court, to sell the same at private sale, either in whole or in part, for cash in hand, or upon deferred payments, with interest from date of sale, in such a manner as to size of lots, place of sale, terms of credit and security for payment of purchase money as shall be fixed in the order of sale, and if upon a time sale the deferred payments to be secured by mortgage or deed of trust upon the property, or by the retention of the title thereto until the purchase money is paid. When any order for private sale has been or may hereafter be made by any superior court of the state, the provisions of § 45-28, not inconsistent with this section shall apply; and the court may also, upon motion of any person interested in the proceeds of such sale, filed in writing within ten days from the date and report of said sale, together with satisfactory proof that said real property has not been sold for its real value, require the sale to be reopened, and thereupon the court may issue an order for the sale of such premises at public sale, as required by § 45-28, and in such order the court may require such premises to be sold in such parcels and on such terms as to the court may seem most advantageous to the estate. All sales of land conducted prior to February 10, 1927 under authority of this section in which the deferred payments were extended over a period longer than two years, are hereby validated. (1917, c. 127, s. 2; 1927, c. 16; C. S. 86.)

Cross References.—See annotations under § 28-92. As to proceeds of realty sold to pay debts, see §§ 28-57 and 28-58.

Editor's Note. — The Public Laws of 1927 c. 16, omitted from this section the restriction limiting deferred payments to a period of two years, and added certain provisions as to the manner of sale.

Resale.—In a special proceeding by an administrator to sell land to make assets to pay debts whether the bid be raised under authority of this section and § 45-28, or motion be made by a party interested in the proceeds for an order of resale under this section only, it is clear that a private sale is open to either course for ten days from the date and report of sale. During that period the bidder acquires no right of possession or title. He is merely a preferred bidder. Howard v. Ray, 222 N. C. 710, 24 S. E. (2d) 529.

Cited in Graham v. Floyd, 214 N. C. 77, 197 S. E. 873.

§ 28-94. Undevised realty first sold.—When any part of the real estate of the testator descends to his heirs by reason of its not being devised or disposed of by the will, such undevised real estate shall be first chargeable with payment of debts, in exoneration, as far as it will go, of the real estate that is devised, unless from the will it appears otherwise to be the wish of the testator. (Rev., s. 69; Code, s. 1430; 1868-9, c. 113, s. 39; C. S. 87.)

Cross Reference.—As to proceeds of realty sold to pay debts, see §§ 28-57 and 28-58.

Will Not Be Disturbed.—By virtue of this section a decree for the sale of the land should direct a sale in such a way as to disturb as little as practicable the will of the testator. Tillett v. Aydlett, 90 N. C. 551, 553.

Principle applied in Camp Mfg. Co. v. Liverman, 123 N. C. 7, 31 S. E. 346.

Cited in Anderson v. Bridgers, 209 N. C. 456, 184 S. E. 78.

§ 28-95. Specifically devised realty; contribution.—If, upon the hearing of any petition for the sale of real estate to pay debts, under this chapter, the court decrees a sale of any part that may have been specifically devised, the devisee shall be entitled to contribution from other devisees, according to the principles of equity in respect to contribution among legatees. And the children and issue provided for in this chapter shall be regarded as specific devisees in such contribu-

tion. (Rev., s. 86; Code, s. 1535; 1868-9, c. 113, s. 107; C. S. 88.)

Cited in Anderson v. Bridgers, 209 N. C. 456, 184 S. E. 78.

§ 28-96. Under power in will, sales public or private.—Sales of real property made pursuant to authority given by will, unless the will otherwise directs, may be public or private, and on such terms as, in the opinion of the executor, are most advantageous to those interested therein. (Rev., s. 84; Code, s. 1503; 1868-9, c. 113, s. 75; C. S. 89.)

§ 28-97. Where executor with power dies, power executed by survivor, etc.—When any or all of the executors of a person making a will of lands to be sold by his executors die, fail or for any cause refuse to take upon them the administration; or, after having qualified, shall die, resign, or for any cause be removed from the position of executor; or when there is no executor named in a will devising lands to be sold, in every such case such executor or executors as survive or retain the burden of administration, or the administrator with the will annexed, or the administrator de bonis non, may sell and convey such lands; and all such conveyances which have been or shall be made by such executors or administrators shall be effectual to convey the title to the purchaser of the estate so devised to be sold. (Rev., s. 82; Code, s. 1493; 1889, c. 461; C. S. 90.)

Effect of Section on Common Law Rule.—At common law an executor had no control over realty, and hence a power conferred upon him by the will to sell the realty did not pass upon his death to the administrator d. b. n. c. t. a. But this section has changed the common law rule in this respect. Creech v. Grainger, 106 N. C. 213, 219, 10 S. E. 1032.

Sale by Administrator c. t. a.—The case of an administration with the will annexed where no executors were appointed is (at present) both within the letter and the spirit of this section. Hence where a testator empowers his executor to sell lands, but fails to designate any executor, the administrator c. t. a. can, under this section exercise that right. Hester v. Hester, 37 N. C. 330, 339.

Upon the death or removal of the executors named in the will, the administrator c. t. a. succeeds to all rights, powers and duties of the executors, and he may exercise all powers of sale granted the executors by the will regardless of whether they are given the executor virtute officii or nominatim, unless the language of the will definitely limits the exercise of the power of sale to the person named executor or unless the executor is made the donee of a special trust, given by reason only of peculiar or special confidence in him, and the mere appointment of an executor and the granting of power to him to sell real estate in his discretion, although evidencing confidence, does not necessarily constitute him the donee of a special trust so as to preclude the exercise of the power of sale by the administrator c. t. a. Wachovia Bank, etc., Co. v. King Drug Co., 217 N. C. 502, 8 S. E. (2d) 593.

Waiving Condition of Option.—Under this section, one of the two executors may not, in the absence of express power, waive the condition of time of an option given by them for the purchase of lands. Trogden v. Williams, 144 N. C. 192, 204, 56 S. E. 865.

It will be presumed that a will is executed in contemplation of the statutes providing that an administrator c. t. a. succeeds to all the rights, powers and duties of the executor. Wachovia Bank, etc., Co. v. King Drug Co., 217 N. C. 502, 8 S. E. (2d) 593.

Applied to sale by administrator c. t. a., and administrator d. b. n. c. t. a. in Saunders v. Saunders, 108 N. C. 327, 331, 12 S. E. 909; Orrender v. Call, 101 N. C. 399, 7 S. E. 878. Applied to sale by surviving executor in Simpson v. Simpson, 93 N. C. 373.

§ 28-98. Death of vendor under contract; representative to convey.—When any deceased person has bona fide sold any lands, and has given a bond or other written contract to the purchaser to convey the same, and the bond or other written contract has been duly proved and registered in the county where the lands are situated, if within the state, or, if not in the state, shall be proved before the clerk of the superior court and registered in the county where the obligee lives or obligor died, his executor, administrator or collector may execute a deed to the purchaser conveying such estate as shall be specified in the bond or other written contract; and such deed shall convey the title as fully as if it had been executed by the deceased obligor: Provided, that no deed shall be made but upon payment of the price, if that be the condition of the bond or other written contract. (Rev., s. 83; Code, s. 1492; 1868-9, c. 113, s. 65; 1874-5, c. 251; C. S. 91.)

Editor's Note.—Before the enactment of this section, the **heirs** of the vendor were the proper persons on whom the purchaser had the right to call for the conveyance. See Earle v. McDowell, 12 N. C. 16. Osborne v. McMillan, 50 N. C. 109; Twitty v. Lovelace, 97 N. C. 54, 2 S. E. 661.

Formerly this section applied only to cases where the vendor had executed a **bond.** It did not extend to agreements to convey made upon other considerations. Hodges v. Hodges, 22 N. C. 72.

Registration and Payment Prerequisites.—Unless the contract for the sale is proved and registered and the purchase money is paid in full, a deed made by the representative is inoperative. Taylor v. Hargrove, 101 N. C. 145, 7 S. E. 647.

Not Applicable to Restore Lost Deeds.—This section does not apply to cases where a deed is executed in performance of the condition of the bond to convey, but is lost after the death of the vendor and before its registration. Hodges v. Hodges, 22 N. C. 72.

Equitable Defense Against Bond.—Where the representative in compliance with this section executes the deed to the purchaser, any equitable defense against the bond may be set up against such deed. McCraw v. Gwin, 42 N. C. 55.

Remedy of Heirs for Purchase Money. — It was formerly held that the heirs may not enjoin the representative from making a deed, upon the ground that the purchase money had not been paid. Their remedy is to call the representative to account for the money, or call for specific performance of the contract. White v. Hooper, 59 N. C. 152, 154. (But now see the proviso at the end of section.)

Showing of Consideration.—The person claiming under the contract must, under this section, show that there was a valuable consideration therefor, and such other circumstances as would be equivalent to a payment of that consideration. Lindsay v. Coble, 37 N. C. 602.

Heirs as Necessary Parties.—In an action brought by the personal representative of an obligor in a bond for title to subject the land to the payment of the purchase money, the heirs of the obligor are necessary parties. But if the bond referred to in this section is proved and registered and the section has been complied with, in proceedings for the sale of such land, the presence of the heirs is perhaps not necessary. Grubb v. Lookabill, 100 N. C. 271, 6 S. E. 390.

Bilateral Contracts Contemplated. — This section contemplates only contracts of conveyance of a bilateral nature. Hence where the optionee of a vendor dies before the option is exercised the representative has, under this section, no power to convey; and the optionee's remedy is against the heir or the devisees. Mizell v. Dennis Simmons Lumber Co., 174 N. C. 68, 93 S. E. 436.

Warranty of Title. — This section empowers the representative to convey only such interest as the vendor could sell. Hence where the vendor contracts to sell **his interest** in the land, the representative cannot be expected to warrant the title of the land. Twitty v. Lovelace, 97 N. C. 54, 2 S. E. 661.

Deed Inoperative.—A deed executed by the representative before the contract for sale has been proven and registered and the purchase money paid in full, is inoperative. Taylor v. Hargrove, 101 N. C. 145, 7 S. E. 647.

Cited in Sears v. Braswell, 197 N. C. 515, 149 S. E. 846.

§ 28-99. Title in representative for estate; he or successor to convey.—When land is conveyed to a personal representative for the benefit of the estate he represents, he may sell and convey same upon such terms as he may deem just and for the advantage of said estate; which sale shall be public, after due advertisement, as for judicial sales, unless the conveyance is made to the party entitled to the proceeds. If such land is not conveyed by such personal representative during his

life or term of office, his successor may sell and convey such land as if the title had been made to him: Provided, if the predecessor has contracted in writing to sell said lands, but fails to convey same, his successor in office may do so upon payment of the purchase price. (Rev., s. 71; 1905, c. 342; C. S. 92.)

§ 28-100. Sales of realty devised upon contingent remainder, executory devise or other limitation validated.—In all cases where real property devised upon contingent remainder, executory devise, or other limitation, shall have been sold and conveyed for a fair price in good faith by the executor named in said will, or by an administrator with the will annexed, for the purpose of making assets with which to pay the debts of said estate, under the mistaken belief that said will authorized such sale, and the proceeds of such sale shall have been applied to the payment of the indebtedness of such estate, and it shall be made to appear in any action brought by the purchaser of said land, or those claiming under such purchaser, that such executor, or other personal representative would have been entitled in a proper proceeding brought for that purpose to an order of court to sell said land for the purpose of making assets with which to pay the indebtedness of such estate, then such sale so made by such executor, or other representative, shall be valid and binding upon all such contingent remaindermen, executory devisees, or other person, who would have taken such property under said will upon the contingency or contingencies therein mentioned, notwithstanding said sale shall have been made by such executor or other personal representative without obtaining such order of the court. And in any such action instituted by the purchaser of such land, or those claiming under him, for the purpose of removing a cloud from the title thereto all contingent remaindermen, executory devisees, or other persons entitled to claim under any limitation in said will, if in being, and known to be residents of this state, shall be made parties defendant to such action, and served with summons as in other civil actions; all nonresidents, or persons whose names and residences are unknown, shall be served with summons by publication as now required by law, or such service in lieu of publication as now provided by law. In cases where the contingent remainder, executory devise, or other limitation will, or may, go to minors, or persons under other disabilities, or to persons not in being, or whose names and residences are not known, or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the judge of the superior court shall, in any such action brought for the purpose aforesaid, after due inquiry of persons who are in no way interested in or connected with such proceedings, designate and appoint some discreet person as guardian ad litem to represent such contingent remaindermen, or executory devisees, upon whom summons shall be served in such action as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such action, and when counsel is needed to represent him, to make this known to the judge, who shall by an order give instructions as to the employment of counsel and the payment of fees. And all contingent remaindermen, executory devisees, or other persons, who may be entitled to claim a contingent interest in said land, whether known or unknown, in being or not in being, shall be conclusively bound by any final judgment entered in such action, if made parties thereto, and represented therein in the manner hereinbefore provided: Provided, however, that this law shall not apply to any sale of land made in which the executor or other personal representative shall have been either directly or indirectly the purchaser thereof. (1923, c. 70, s. 1; C. S. 92(a).)

Editor's Note.—This section is confined in application to sales occurring prior to January 1, 1925. See § 28-102.

For a review of this act in the North Carolina Law Review, see 1 N. C. L. R. 315.

Validity, Operation and Effect. — This statute is curative and retrospective, and is constitutional, legal, and does not interfere with or destroy vested rights. A retrospective law, as in the case of this statute, curing defects in acts that have been done, or authorizing or confirming the exercise of powers, is valid in those cases in which the Legislature originally had authority to confer the power or to authorize the act. Charlotte Consol. Const. Co. v. Brockenbrough, 187 N. C. 65, 77, 121 S. E. 7.

§ 28-101. Presumption; burden of proof. — Where the purchaser of any lands made under the circumstances narrated in § 28-100, or any person holding or claiming the same under or through such purchaser, shall have been in the peaceable possession thereof for more than twenty years without any adverse claim having been asserted to the same by any person claiming under such will, and the records of the administration of the said estate do not affirmatively show what disposition has been made of the proceeds of the sale of such land, then it shall be presumed, prima facie, that the proceeds of the sale of the said land have been applied to the payment of the necessary indebtedness of the said estate and the cost of the administration thereof, and the burden of proof to the contrary shall be upon the defendants in said action. (1923, c. 70, s. 2; C. S. 92(b).)

Cross Reference.—See note under § 28-100.

Editor's Note.—This section is confined in application to sales occurring prior to January 1, 1925. See § 28-102.

§ 28-102. Application of sections 28-100 and 28-101.—Sections 28-100 and 28-101 shall apply only to sales of lands made under the circumstances narrated in those sections, occurring prior to January 1, 1925. (1923, c. 70, s. 3; 1925, c. 48; C. S. 92(c).)

Cross Reference.—See note under § 28-100.

Editor's Note. — Prior to the act of 1925, ch. 48, the application of the two preceding sections was confined to sales occurring prior to February 24, 1923.

§ 28-103. Validation of certain bona fide sales of real estate to pay debts made without order of court.—In all cases where sales of real estate have been made by administrators of deceased persons, in good faith and upon a valuable consideration, to obtain assets to pay debts of the estate, and deeds have been executed by such administrators to the purchasers, who have paid the purchase price thereof, and no action has been taken by the heirs of such deceased persons to annul such sales by litigation or otherwise, such sales are hereby validated. The recitals contained in such a deed that the sale was made under order or license of the court for the purpose of obtaining assets to pay debts of the estate and that the proceeds of sale of said land have been applied to the payment

of the necessary indebtedness of the estate and the cost of administration thereof shall be presumed to be prima facie correct: Provided, however, that this section shall not apply to any sale of land in which the administrator of such deceased person shall have been directly or indirectly the purchaser thereof, and nothing herein shall prevent such sale from being impeached for fraud.

This section shall only apply to sales by administrators made prior to January 1, 1920. (1931, c. 146; 1935, c. 31.)

Editor's Note.—This Act became effective March 21, 1931. By the amendment of 1935, the section was made applicable to sales prior to 1920 rather than prior to 1900, as formerly provided.

As stated in 9 N. C. L. Rev. 404, the preamble of the act indicates that it is to apply where no order of court was obtained or where the court proceedings authorizing and confirming the sales have been lost without being recorded. As to its constitutionality against the charge of disturbing vested rights, see Charlotte Consol. Const. Co. v. Brockenbrough, 187 N. C. 65, 121 S. E. 7. As to validation of sales of real estate devised upon limitation made prior to January 1, 1925, see §§ 28-100 to 28-102.

§ 28-104. Validation of sales of realty by administrators d. b. n. of deceased trustees.—In all cases, prior to January first, nineteen hundred thirty-one, where a sale of real estate has been made by an administrator de bonis non of a deceased trustee in a deed in trust, and such administrator de bonis non advertised and conducted such sale prior to his qualification as administrator de bonis non of the deceased trustee, but qualified as such before the execution of the trustee's deed made pursuant to such sale, said sale and deed shall be valid and as effectual as though such advertisement and sale had occurred after the qualification of such administrator de bonis non. (1935, c. 381.)

Art. 15. Proof and Payment of Debts of Decedent.

§ 28-105. Order of payment of debts. — The debts of the decedent must be paid in the following order:

The intention of the Legislature is that the assets of a decedent shall be administered, as far as may be done, in one proceeding upon proper safeguards, for the benefit of all the creditors. Atkinson v. Ricks, 140 N. C. 418, 421, 53 S. E. 230.

Design of Section.—This section was only designed to recognize priorities among the creditors of the deceased and to establish the order of payment between claimants who have valid debts against the deceased. It was never intended to create a liability which did not otherwise exist. Bower v. Daugherty, 168 N. C. 242, 84 S. E. 265.

Recognizing priority of classes, this section provides for the administration of assets for the benefit of all the creditors according to definite and established rules. Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 339, 171 S. E. 368.

Strict Construction. — This section being in derogation of the equity of a pro rata distribution, should be strictly construed so as not to confer a priority over other creditors unless clearly called for. Baker v. Dawson, 131 N. C. 227, 228, 42 S. E. 588; Park View Hospital Ass'n v. Peoples Bank, 211 N. C. 244, 189 S. E. 766.

Section Construed to Favor Bankruptcy Rule.—Upon the death of an obligor the administration laws step in and determine the settlement of his estate. These have heretofore been construed by the supreme court to favor the bankruptcy rule. Thus a secured creditor is required to exhaust his security and then prove his claim for any balance still remaining or unpaid. Rierson v. Hanson, 211 N. C. 203, 205. 189 S. E. 502.

If decedent's estate be not sufficient to pay his debts in full, then they are to be paid in classes, with those of the last class, if and when reached, sharing ratably in what is left. Rigsbee v. Brogden, 209 N. C. 510, 512, 184 S. E. 24, citing Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 171 S. E. 368; First Security Trust Co. v. Lentz, 196 N. C. 398, 145 S. E. 776; Murchison v. Williams, 71 N. C. 135.

The fees of a referee taxed against an administrator are not a preferred debt under this section. Cobb v. Rhea, 137 N. C. 295, 49 S. E. 161.

This section creates no preference for payment on bank stock out of the assets of the estate of a deceased stockholder and none results from the application of the pertinent principles of equity. Hood v. Darden, 206 N. C. 566, 174 S. E. 460.

Duty of Representative. — To carry out the order designated by this section is a duty of the representative. State v. Oliver, 104 N. C. 467, 10 S. E. 709.

Testator Can Not Change Statutory Priority.—A testator may not so dispose of his estate as to avoid the payment of his debts in accordance with the priorities fixed by this section. First Security Trust Co. v. Lentz, 196 N. C. 398, 145 S. E. 776.

First class. Debts which by law have a specific lien on property to an amount not exceeding the value of such property.

A deed of trust executed to secure a debt which by law had a specific lien on property, as provided by the first class, has priority over the payment of taxes provided for eo nomine in the third subdivision of the statute. Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 339, 171 S. E. 368.

The lien of a docketed judgment, which is eo nomine put in the fifth class, is not such a "specific lien on property," unless made so by its terms, as to come within the first class mentioned in the statute. Stewart v. Doar, 205 N. C. 37, 38, 169 S. E. 804.

Applied in State v. Oliver, 104 N. C. 467, 10 S. E. 709.

Second class. Funeral expenses.

Editor's Note. — The burial expenses, from the nature of things, are not an indebtedness of the deceased, for they accrue after his death; nor are they cost of administration. Yet from necessity they are chargeable upon the assets in preference to other claims hereinafter enumerated, both at common law and under our statute.

Expenses of Debtor Only. — The funeral and medical expenses referred to in this subdivision and subdivision 6 mean those of the debtor, and not of his wife, child or tenants. Baker v. Dawson, 131 N. C. 227, 42 S. E. 588.

See subsequent case, Bowen v. Daugherty, 168 N. C. 242, 84 S. E. 265, where it was held that the husband's estate is liable for the funeral expenses of his predeceased wife, in preference to the beneficiaries under his will.

Third Party Paying.—The provisions of this subdivision enures to the benefit of one who after having paid such expenses as a matter of affection and duty wants to recover the same from the estate. Ray v. Honeycutt, 119 N. C. 510, 26 S. E. 127.

Third class. Taxes assessed on the estate of the deceased previous to his death.

Scope.—Provisions of this section that taxes should be paid by the personal representative in the third class of priority has no application to the statutory action to foreclose the tax sale certificate. Guilford County v. Estates Administration, 213 N. C. 763, 197 S. E. 535.

This section has no application to the payment of assessments made against land by a municipality for the purpose of improving streets. Saluda v. County of Polk, 207 N. C. 180, 184, 176 S. E. 298; High Point v. Brown, 206 N. C. 664, 667, 175 S. E. 169.

Method of Collecting Taxes.—Section 105-412 construed in the light of this subdivision of this section indicates that the ordinary methods of collecting taxes by a sheriff do not apply to collection of taxes from a decedent's estate. Sherrod v. Dawson, 154 N. C. 525, 529, 70 S. E. 739.

Relation to and Effect of § 105-408.—The General Assembly by enacting § 105-408, providing that taxes assessed against land be paid from the proceeds of a foreclosure sale, did not intend to abolish the method definitely prescribed by this section for administering the estate of a person deceased or to modify the statutory direction as to the order in which the decedent's debts should be paid. Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 339, 171 S. E. 368.

Tax-Sale Certificate Is Not a Preferred Claim.—A tax-sale certificate in the hands of a remainderman, representing taxes paid by the remainderman during the lifetime of the life tenant, may not be proved as a preferred claim against the estate of the life tenant, since the remainderman's sole remedy upon the tax-sale certificate is by foreclosure under the provisions of § 8028. Rigsbee v. Brogden, 209 N. C. 510, 184 S. E. 24. [C. S. 8028 was repealed by 1939, c. 310, s. 1725. Ed. note.]

Taxes Assessed Are Preferred Claim.—As a life tenant is liable for taxes assessed against the property during his lifetime, under § 105-410, when he dies without paying the same they constitute a claim against his estate and are payable in the third class. Rigsbee v. Brogden, 209 N. C. 510, 184 S. E. 24.

Charges for Water and Gas Connection Are Not a Preferred Claim as Taxes.—Charges for water and gas connections, incurred during the lifetime of a life tenant and unpaid at his death, do not constitute a preferred claim against his estate as taxes assessed on the estate prior to his death, since in no event would such charges stand upon a higher plane than assessments for permanent improvements. Rigsbee v. Brogden, 209 N. C. 510, 184 S. E. 24.

Nor Are Assessments for Public Improvements.—See Rigsbee v. Brogden, 209 N. C. 510, 184 S. E. 24.

Fourth class. Dues to the United States and to the state of North Carolina.

Fifth class. Judgments of any court of competent jurisdiction within this state, docketed and in force, to the extent to which they are a lien on the property of the deceased at his death.

Judgments Paid Out of Personalty.—The provision of this clause does not mean that the judgment shall be paid out of the realty of the decedent upon which it has become a lien. When a debtor dies, against whom there is a judgment docketed, his land descends to his heirs or vests in his devisees, and his personal property vests in his administrator or executor, just as if there were no judgment against him, and the whole estate is to be administered just as if there were no judgment, that is to say, the personal property must be sold if necessary and all the personal assets collected, and out of these personal assets all the debts must be paid, if there be enough to pay all docketed judgments as well as others. The reason for this mode of administration is that, although a lien on land exists, the judgment should be paid out of the personal estate, if any, in exoneration of the land for the benefit of the heir or devisee. Lee v. Eure, 82 N. C. 428.

When Priorities Determined.—The priorities among judgment creditors, which are dependent upon the date of their respective recordation, are to be determined as they existed at the death of the debtor, after which they remain unaffected by lapse of time until barred by the statute of limitations or by executions issued upon the judgment. Tarboro v. Penders, 153 N. C. 427, 430, 69 S. E. 425, 636; Mauney v. Holmes, 87 N. C. 431; Galloway v. Bradfield, 86 N. C. 163, 166; Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 171 S. E. 368.

Expired Judgment Lien. — The expiration of the judgment lien terminates the authority of the representative to pay such lien. The judgment lien must be in force at the time of payment. Matthews v. Peterson, 150 N. C. 132, 134, 63 S. E. 721, 722.

Statute of Limitations not Affected. — The fact that under this subdivision judgments docketed and in force, which have become a lien upon decedent's property at the date of his death, have priority over certain other claims, does not stop the running of the statute of limitation upon such judgments. Daniel v. Laughlin, 87 N. C. 433, 436.

Application of Proceeds under a Consent Judgment to Sell Lands.—Where a consent judgment provides that a commissioner appointed for the purpose sell certain lands of a deceased person, and pay the net proceeds to the administratrix of the deceased to pay the debts of his estate, the distribution of these proceeds are thereunder to be made under the provisions of this section, and a judgment ordering them to be paid to a lien of a judgment creditor on the lands of the estate, adjudging it a prior lien, is reversible error. First National Bank v. Mitchell, 191 N. C. 190, 131 S. E. 656.

Application to Funds in Administrator's Hands. — The provision of this clause applies to funds in the administrator's hands. Matthews v. Peterson, 150 N. C. 134, 135, 63 S. E. 721.

Extent of the Lien.—If the real estate upon which the judgment is a lien is of less value than the amounts of the judgment, then the extent of the lien under this subdivision is the value of the land only. Jerkins v. Carter, 70 N. C. 500, 501. And if, in such a case, a part of the lien has been paid out of the personalty (which is first liable for the payment) the extent of the lien is the difference between the value of the land and amount paid out of the personalty. It is not the difference between the amount of the lien and the amount paid from the personalty. Murchison v. Williams, 71 N. C. 137.

Applied.—In Murchison v. Williams, 71 N. C. 137, 138.

Sixth class. Wages due to any domestic servant or mechanical or agricultural laborer employed by the deceased, which claim for wages shall not extend to a period of more than one year next preceding the death; or if such servant or laborer was employed for the year current at the decease, then from the time of such employment; for medical services within the twelve months preceding the decease; for drugs and all other medical supplies necessary for the treatment of such deceased person during the last illness of such person, said period of last illness not to exceed twelve months.

Cross Reference.—See annotation under Class 2 of this section.

Editor's Note.—The 1941 amendment added to the paragraph designated "Sixth class" the provision relating to drugs and medical supplies.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 546.

The words "medical services," include all services rendered to the deceased, because of his illness, upon the advice of his physician, which were reasonably necessary for his care and comfort, and for his proper treatment by his physicians. Park View Hospital Ass'n v. Peoples Bank, etc., Co., 211 N. C. 244, 249, 189 S. E. 766.

The funeral and medical expenses referred to in this subdivision and subdivision two mean those of the debtor and not those of his wife, child, or tenants. Baker v. Dawson, 131 N. C. 227, 42 S. E. 588.

Board of Nurses Included in Medical Services.—The board of graduate nurses, who attended the deceased while he was a patient in plaintiffs' hospital, was a claim included in the term "medical services" as used in this section. Park View Hospital Ass'n v. Peoples Bank, etc., Co., 211 N. C. 244, 189 S. E. 766.

Seventh class. All other debts and demands. (Rev., s. 87; Code, s. 1416; 1868-9, c. 113, s. 24; 1941, c. 271; C. S. 93.)

Cited in Statesville v. Jenkins, 199 N. C. 159, 163, 154 S. E. 15; Brown v. Brown, 199 N. C. 473, 154 S. E. 731; Price v. Askins, 212 N. C. 583, 194 S. E. 284; Rodman v. Stillman, 220 N. C. 361, 17 S. E. (2d) 336.

§ 28-106. No preference within class.—No executor, administrator or collector shall give to any debt any preference whatever, either by paying it out of its class or by paying thereon more than a pro rata proportion in its class. (Rev., s. 88; Code, ss. 1417, 1418; 1868-9, c. 113, ss. 25, 26; C. S. 94.)

Editor's Note. — The prohibition embodied in this section is against the representative. Hence a solvent person in his lifetime may by his will make preferences in favor of persons who would otherwise be postponed. But, as upon his death his effects and property vest in his representative who must pay the debts first, if the estate is insolvent the representative cannot assent to the payment of preferences before the payment of prior debts as prescribed in the preceding section. The result is that preferences made by an insolvent decedent are rendered ineffective for all purposes. See Moore v. Byers, 65 N. C. 242.

Paying by Honest Mistake. — If the representative pays a debt belonging to an inferior class in preference to a superior debt, even though he does it through an honest mistake, he is chargeable for the same. Moye v. Albritton, 42 N. C. 62.

Stated in Park View Hospital Ass'n v. Peoples Bank, etc., Co., 211 N. C. 244, 189 S. E. 766.

§ 28-107. When payment out of class held valid.—Where any executor or administrator has paid any debt of his testator or intestate before all the debts of higher dignity have been paid and satisfied, and the estate of such testator or intestate was at the time of such payment solvent, but has since been rendered insolvent by the insolvency of the debtors of the estate, or other cause, without any fault or want of diligence on the part of the executor or administrator, in all

such cases payments thus made shall be deemed and held valid in law, and shall be allowed to such executor or administrator in all suits by creditors of the estate seeking to charge such executor or administrator with assets of the estate or with devastavit thereof, without regard to the dignity of the debt thus paid, or on which such suit may be brought. (Rev., s. 96; Code, s. 1496; 1869-70, c. 150; C. S. 95.)

Section Declaratory of Existing Law.—Even in the absence of this section the principle which it inculcates would hold true under legal and equitable principles. Coggins v. Flythe, 113 N. C. 102, 114, 18 S. E. 96.

§ 28-108. Debts due representative not preferred.—No property or assets of the decedent shall be retained by the executor, administrator or collector in satisfaction of his own debt, in preference to others of the same class; but such debt must be established upon the same proof and paid in like manner and order as required by law in case of other debts. (Rev., s. 89; Code, s. 1420; 1868-9, c. 113, s. 28; C. S. 96.)

§ 28-109. Debts not due rebated.—Debts not due may be paid on a rebate of interest thereon for the time unexpired. (Rev., s. 90; Code, s. 1419; 1868-9, c. 113, s. 27; C. S. 97.)

§ 28-110. Affidavit of debt may be required.—Upon any claim being pesented against the estate, the executor, administrator or collector may require the affidavit of the claimant or other satisfactory evidence that such claim is justly due, that no payments have been made thereon, and that there are no offsets against the same, to the knowledge of the claimant; or if any payments have been made, or any offsets exist, their nature and amount must be stated in such affidavit. (Rev., s. 91; Code, s. 1425; 1868-9, c. 113, s. 33; C. S. 98.)

§ 28-111. Disputed debt may be referred.—If the executor, administrator or collector doubts the justness of any claim so presented, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy, whether the same be of a legal or equitable nature, to one or more disinterested persons, not exceeding three, whose proceedings shall be the same in all respects as if such reference had been ordered in an action. Such agreement to refer, and the award thereupon, shall be filed in the clerk's office where the letters were granted, and shall be a lawful voucher for the personal representative. The same may be impeached in any proceeding against the personal representative for fraud therein: Provided, that the right to refer claims under this section shall extend to claims in favor of the estate as well as those against it. (Rev., s. 92; Code, s. 1426; 1868-9, c. 113, s. 34; 1872-3, c. 141; C. S. 99.)

Purpose of Section. — The section was intended to create an expeditious and inexpensive mode by which controversies between executors, administrators or collectors and claimants against the estate of testators and intestates may be settled and determined. State v. Potter, 107 N. C. 415, 12 S. E. 55; In re Reynolds' Estate, 221 N. C. 449, 20 S. E. (2d) 348.

The proceeding authorized by this section is based upon agreement of the parties. It is not an action, nor a consent reference under the code. It lacks the ordinary incidents of a special proceeding which is begun before the clerk. In re Reynolds' Estate, 221 N. C. 449, 20 S. E. (2d) 348.

Effect of Agreement to Arbitrate. — An agreement to arbitrate and to award under this section is competent evidence to prove the indebtedness of the estate. Such an agreement is, where there is no fraud or collusion, binding upon the heirs even though they were not parties to the proceedings. Lassiter v. Upchurch, 107 N. C. 411, 12 S. E. 63.

Finding as Judgment. — The finding of arbitrators under this section is equivalent to a judgment, and the proceedings in which it is rendered can be impeached only for fraud or collusion. Lassiter v. Upchurch, 107 N. C. 411, 12 S. E. 63.

Fairly interpreting this section, the award of the referees, unless impeached for fraud and collusion, should have the effect, at least, to determine and put an end to the controversy, if not of a judgment in an action between the parties. In re Reynolds' Estate, 221 N. C. 449, 20 S. E. (2d) 348.

Only those having a pecuniary interest in the estate may be heard to impeach the result for collusion or fraud. In re Reynolds' Estate, 221 N. C. 449, 20 S. E. (2d) 348.

Not Applicable to Creditor's Suit under Sec. 28-122.—The proceedings authorized by this section are between a creditor and the personal representative, and have no application to creditor's bill under section 28-122 instituted to take the administration into the hands of the court. Dunn v. Beaman, 126 N. C. 766, 36 S. E. 172.

When Action on Claim against Executor Barred.—Where a claim against an executor is rejected by him in writing and is not referred in accordance with the provisions of this section, an action thereon is barred if not brought within six months after the rejection of the claim by the executor. Batts v. Batts, 198 N. C. 395, 151 S. E. 868.

Thus, while § 28-105 classifies funeral expenses as a debt of the estate, the amount due therefor cannot be regarded as a legacy in this State, and where a husband who has paid the funeral expenses of his wife makes claim therefor upon her executor and the claim is rejected, and is not referred in accordance with this section, an action on the claim is barred by his failure to bring it within six months from the time of its rejection by the executor. Batts v. Batts, 198 N. C. 395, 151 S. E. 868.

Vacation of Reference.—Where clerk appointed a referee to hear claims against the estate of a deceased under this section, and thereafter approved the report of the referee, but on appeal the superior court ruled that the clerk had no authority in the premises and this ruling was unchallenged, such ruling vacated the supposed reference, and ended the matter. In re Shutt, 214 N. C. 684, 200 S. E. 372.

Appeal.—Where a claimant and the personal representative voluntarily execute a written agreement referring the claim to disinterested persons under this section, the referees are not required to decide the matter according to law, and their report is conclusive and neither party is entitled to appeal therefrom upon exceptions, there being no provision in this section for appeal, the proceeding being neither a civil action nor a special proceeding nor a judicial order. In re Reynolds' Estate, 221 N. C. 449, 20 S. E. (2d) 348.

§ 28-112. Disputed debt not referred, barred in six months.—If a claim is presented to and rejected by the executor, administrator or collector, and not referred as provided in § 28-111, the claimant must, within six months, after due notice in writing of such rejection, or after some part of the debt becomes due, commence an action for the recovery thereof, or be forever barred from maintaining an action thereon. (Rev., s. 93; Code, s. 1427; 1868-9, c. 113, s. 35; 1913, c. 3, s. 1; C. S. 100.)

Cross Reference.—As to effect of admission of claim by personal representative upon running of statute of limitations, see § 1-22.

Strictly Construed. — The language of this section is positive and explicit, and must be enforced in accordance with the plain meaning of its terms. Morrisey v. Hill, 142 N. C. 355, 358, 55 S. E. 193.

A party asserting the right as assignee of an insurance policy to retain the proceeds thereof for obligations he contends were secured by the assignment is not barred, under this section, from asserting such right after the lapse of more than six months as against the administrator of the deceased insured in the administrator's action to recover the funds, the defense not constituting a prosecution of a claim against the administrator which had been denied. Sellars v. The First Nat. Bank, 214 N. C. 300, 199 S. E. 266.

Counterclaim Barred.—A claim barred under this section

can not be pleaded even by way of counterclaim, in an action by the representative against the claimant, and this, regardless of the fact that the general notice provided for in section 28-47 had not been given. Morrisey v. Hill, 142 N. C. 555, 55 S. E. 193.

§ 28-113. If claim not presented in twelve months, representative discharged as to assets paid. —In an action brought on a claim which was not presented within twelve months from the first publication of the general notice to creditors, the executor, administrator or collector shall not be chargeable for any assets that he may have paid in satisfaction of any debts, legacies or distributive shares before such action was commenced; nor shall any costs be recovered in such action against the executor, administrator or collector. (Rev., s. 94; Code, s. 1428; 1868-9, c. 113, s. 37; C. S. 101.)

The purpose of this section is to relieve administrators, executors and collectors from liability for assets they may pay or distribute to a person or persons entitled to have the same as to claims not presented within the prescribed time, and as well to facilitate and encourage the prompt settlement of the estates of deceased persons. Mallard v. Patterson, 108 N. C. 255, 259, 13 S. E. 93.

Administrator May Hold Funds for Twelve Month Period.—Under this section a bank, acting as an administrator, has a legal right to hold the funds of the estate for one year after appointment and to refuse to settle claims of heirs during this period. Security Nat. Bank v. Bridgers, 207 N. C. 91, 176 S. E. 295.

Effect of Failure to Present Claim within Twelve Months. —Under this section a claimant who has not presented his claim within twelve months from the first publication of the general notice to creditors, is allowed to assert his demand only as against undistributed assets of the estate and without cost against the executor. In re Estate of Bost, 211 N. C. 440, 443, 190 S. E. 756.

Cited in Jackson v. Thomas, 211 N. C. 634, 191 S. E. 327; Strayhorn v. Aycock, 215 N. C. 43, 200 S. E. 912, treated under § 1-49.

§ 28-114. No lien by suit against representative. —No lien shall be created by the commencement of a suit against an executor, administrator or collector. (Rev., s. 95; Code, s. 1432; 1868-9, c. 113, s. 41; C. S. 102.)

Cited in Price v. Askins, 212 N. C. 583, 194 S. E. 284.

§ 28-115. When costs against representative allowed.—No costs shall be recovered in any action against an executor, administrator or collector, unless it appears that payment was unreasonably delayed or neglected, or that the defendant refused to refer the matter in controversy, in which case the court may award such costs against the defendant personally, or against the estate, as may be just. (Rev., s. 97; Code, s. 1429; 1868-9, c. 113, s. 38; C. S. 103.)

The purpose of this section is to urge the representatives to an early and prompt settlement of claims against the deceased, and to protect the estate, when proper diligence was used, from cost needlessly incurred by the creditors in prosecuting their claims. May v. Darden, 83 N. C. 239.

Exception to Secs. 6-18 to 6-20.—This section forms an exception to sections 6-18 to 6-20 which are general provisions as to cost. Whitaker v. Whitaker, 138 N. C. 205, 50 S. E. 630. See also, Bailey v. Hayman, 222 N. C. 58, 22 S. E. (2d) 6.

Unreasonable Delay or Neglect. — Where an action was brought within fifty-two days of the qualification of the administrator, it was held that payment had not been "unreasonably delayed or neglected" within the meaning of this section. Whitaker v. Whitaker, 138 N. C. 205, 207, 50 S. E. 630. A fortiori the same rule was applied, in May v. Darden, 83 N. C. 239, when the suit was instituted twenty days after appointment. See also, Morris v. Morris, 94 N. C. 617.

Appeal for Cost.—Although the general rule is that an appeal lies from a judgment for cost only, there is an exception to this rule in favor of fiduciaries, inferred from this section. May v. Darden, 83 N. C. 239.

Not Applicable When Funds Misapplied. — In proceedings to subject a representative to liability for misapplication of the funds, as distinguished from proceedings to recover a debt out of the estate, this section does not apply, and the representative is chargeable with the cost. Valentine v. Britton, 127 N. C. 57, 59, 37 S. E. 74.

Burden of Proof.—The burden is on the plaintiffs to show that they are entitled to recover cost under this section. Whitaker v. Whitaker, 138 N. C. 205, 207, 50 S. E. 630.

Land Chargeable with Cost.—In proceedings by the creditor to subject the land to the payment of debts, the land is subject to the payment of the cost, wherever the representative can be charged with the cost under the circumstances referred to in this section. Long v. Oxford, 108 N. C. 280, 13 S. E. 112.

§ 28-116. Obligations binding heirs collected as other debts.—Bonds and other obligations in which the ancestor has bound his heirs shall not be put in suit against the heirs or devisees of the deceased, but shall be paid as other debts of the same class in the manner provided in this chapter. (Rev., s. 98; Code, s. 1404; 1868-9, c. 113, s. 12; C. S. 104.)

Art. 16. Accounts and Accounting.

§ 28-117. Annual accounts.—Every executor, administrator and collector shall, within twelve months from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file, in the office of the clerk of the superior court, an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and, having carefully revised and audited such account, if he approve the same, he must endorse his approval thereon, which shall be deemed prima facie evidence of correctness. (Rev., s. 99; Code, s. 1399; C. C. P., s. 478; 1871-2, c. 46; C. S. 105.)

The word "accounts" as used in this section means "a statement in writing of debts and credits, or of receipts and payments; a list of items of debts and credits, with their respective dates." It does not include the idea of payment and settlement. State v. Dunn, 134 N. C. 663, 668, 46 S. E. 949.

Prima Facie Evidence Only. — The sworn account referred to in this section is only prima facie evidence. It is not conclusive as against any person adversely interested. The statute merely shifts the burden of proof. Allen v. Roysster, 107 N. C. 278, 282, 12 S. E. 134; Turner v. Turner, 104 N. C. 566, 571, 10 S. E. 606; In re Hege, 205 N. C. 625, 172 S. E. 345: Brady v. Pfaff, 210 N. C. 808, 186 S. E. 340.

A report showing all debts paid except a mortgage indebtedness cannot constitute a final account, since the duties and obligations of administraton continue until all debts are paid or all assets exhausted under this section. Creech v. Wilder, 212 N. C. 162, 193 S. E. 281.

Recorded Account Is Competent Evidence in Collateral Suit.—The account required by this section must be recorded as required in § 2-42. Such account therefore is not hearsay but is competent evidence in a collateral suit. Braddy v. Pfaff, 210 N. C. 248, 186 S. E. 340.

Duty of Clerk to Accept Executor's Annual Account.—Where property is devised or bequeathed by a will, upon certain trusts, and the testator does not appoint a trustee, it is the duty of the executor, to carry out the provisions of the will. It is error for the clerk to refuse to accept an annual account tendered by the executor for a year more than two years after the executor qualified but during the life of the trust estate. In re Wachovia Bank, etc., Co.,

210 N. C. 385, 390, 186 S. E. 510. See § 28-121 and the note thereto.

And the representative himself is not estopped to impeach the account. Bean v. Bean, 135 N. C. 92, 47 S. E. 232.

Transfer of Funds to Other Jurisdiction. — The administrator in this state of the estate of a nonresident dying in his own state, before transferring the funds to the state of the domicile, must comply with the provisions of this section. Grant v. Rogers, 94 N. C. 755, 762.

Ex Parte Proceeding. — The jurisdiction for auditing accounts conferred upon the clerk by this section is an ex parte jurisdiction of examining the accounts and vouchers of such persons, and does not conclude parties interested or affect suits inter partes upon the same matter. Heilig v. Foard, 64 N. C. 713; Bean v. Bean, 135 N. C. 92, 93, 47 S. E. 253; Grant v. Hughes, 94 N. C. 231.

Meaning of "Auditing Accounts". — The provisions as to auditing the accounts of executors, administrators, have reference to the duty of examining the accounts to see that the account of charges correspond with the inventories, passing upon the vouchers and striking a balance after allowing commissions. Heilig v. Foard, 64 N. C. 713.

§ 28-118. Clerk may compel account.—If any executor, administrator or collector omits to account, as directed in § 28-117, or renders an insufficient and unsatisfactory account, the clerk shall forthwith order such executor, administrator or collector to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such executor, administrator or collector fail to appear or refuse to exhibit such account, the clerk may issue an attachment against him for a contempt and commit him till he exhibit such account, and may likewise remove him from office. And the sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. (Rev., s. 100; Code, s. 1400; C. C. P., s. 479; 1933, c. 99; C. S. 106.)

Editor's Note.—The last sentence of this section as it now reads was added by Public Laws 1933, c. 99.

Original Jurisdiction.—Under this section the clerk has original jurisdiction to remove. Edwards v. Cobb, 95 N. C. 8.

Applied in In re Hege, 205 N. C. 625, 172 S. E. 345.

§ 28-119. Vouchers presumptive evidence. — Vouchers are presumptive evidence of disbursement, without other proof, unless impeached. If lost, the accounting party must, if required, make oath to that fact, setting forth the manner of loss, and state the contents and purport of the voucher. And this section shall apply to guardians, collectors, trustees and to all other persons acting in a fiduciary character. (Rev., s. 101; Code, s. 1401; C. C. P., s. 480; C. S. 107.)

Independent of this section receipts of living persons are not strictly legal evidence to show a full administration. Drake v. Drake, 82 N. C. 443.

What the Vouchers Must Show. — This section makes vouchers presumptive evidence of disbursements actually made, but not of their nature and purpose and the necessity for them. To make such vouchers presumptive evidence, they should state with reasonable particularity the purpose of them, the particular account upon which they were made, the time, etc., so as to make it appear that the expenditure or disbursement was a proper one. McLean v. Breese, 109 N. C. 564, 566, 13 S. E. 910.

Proof of Handwriting.—The handwriting of the person signing the voucher need be proven only when the voucher is relied on as presumptive evidence under this section. Costen v. McDowell, 107 N. C. 546, 549, 12 S. E. 432.

Presumptive Though Not Primary Evidence.—While this section makes the vouchers presumptive proof, it by no means provides that they shall be primary evidence, and therefore, actual payment may still be established in the same way as before the enactment of this section when the receipts of living persons were not strictly legal evidence to show a full administration. Costen v. McDowell, 107 N. C. 546, 549, 12 S. E. 432; Drake v. Drake, 82 N. C. 443, 445.

§ 28-120. Gravestones authorized.—It is lawful for executors and administrators to provide suitable gravestones to mark the graves of their testators or intestates, and to pay for the cost of erecting the same, and the cost thereof shall be paid as funeral expenses and credited as such in final accounts. The cost thereof shall be in the sound discretion of the executor or administrator, having due regard to the value of the estate and to the interests of creditors and needs of the widow and distributees of the estate. Where the executor or administrator desires to spend more than one hundred dollars for such purpose he shall file his petition before the clerk of the court, and such order as will be made by the court shall specify the amount to be expended for such purpose. Provided, however, that if the net estate is of a value in excess of fifteen thousand dollars ($15,000), the executor or administrator may, in his discretion, expend not more than five hundred dollars ($500) for this purpose without securing the order of court required herein. (Rev., s. 102; 1905, c. 444; 1925, c. 4; 1941, c. 102; C. S. 108.)

Editor's Note.—The third sentence of this section as it formerly stood provided that the order be approved by the resident judge of the district. This was omitted by the act of 1925.

The 1941 amendment added the proviso at the end of the section. For comment on this amendment, see 19 N. C. Law Rev. 546.

Scope of Section.—This section was held inapplicable where executors, in obedience to testamentary instructions, expended more than $100 for a gravestone without order of court when the estate appeared to be solvent though in fact it was insolvent. In re Estate of Bost, 211 N. C. 440, 190 S. E. 756.

§ 28-121. Final accounts.—An executor or administrator may be required to file his final account for settlement in the office of the clerk of the superior court by a citation directed to him, at any time after two years from his qualification, at the instance of any person interested in the estate; but such account may be filed voluntarily at any time; and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk. (Rev., s. 103; Code, s. 1402; C. C. P., s. 481; C. S. 109.)

Jurisdiction.—Formerly the probate court had jurisdiction to make the representative account. Rowland v. Thompson, 65 N. C. 110, 112. Under this section the clerk of the superior Court has jurisdiction. McNeill v. Hodges, 105 N. C. 52, 54, 11 S. E. 265.

When Section Not Applicable.—This statutory requirement is not applicable where the duties imposed upon the executor by the will cannot be fully performed within two years from his qualification. In re Wachovia Bank, etc., Co., 210 N. C. 385, 390, 186 S. E. 510. See § 28-192.

Review of Order to File Final Account and Turn Over Assets.—Where the clerk orders an executor to file final account and turn over the assets of the trust estate to itself as trustee, which order is made as a matter of law upon the facts found and not as a matter of discretion, the order is reviewable by the Superior Court upon appeal. In re Wachovia Bank, etc., Co., 210 N. C. 385, 186 S. E. 510.

Ex Parte Proceeding No Estoppel.—The auditing by the clerk, whether under this or under § 28-117, is an **ex parte proceeding,** and does not work an estoppel upon the parties as a judgment in inter parte proceedings would. In this respect this section and the section just referred to are alike. Bean v. Bean, 135 N. C. 92, 93, 47 S. E. 232.

Presumption of Correctness of Account.—When ex parte accounts are filed under this section, they are, as a matter of law, to be taken as correct until shown to be erroneous. Turner v. Turner, 104 N. C. 566, 572, 10 S. E. 606.

Auditing a Judicial Act.—The phrase "audit an account"

means something more than the statement of an account by an unauthorized person. It means the act of a court. Rowland v. Thompson, 65 N. C. 110, 112. Hence the auditing under this section must be performed by the clerk, and not by one of his ministerial officers for a clerk for his judicial functions can have no deputy. Id.

Auditing and Appeal Therefrom.—This section, which directs that the probate judge shall "audit" the account, implies that he shall pursue the usual course which has been found to be just and convenient in such cases. Consequently an appeal may not be had from the decision of the probate judge upon every question collaterally arising in the course of his investigation, in view of the inconveniences incident to such practice peculiar to common law action of account now superseded by the more expeditious proceedings in equity. Rowland v. Thompson, 64 N. C. 714, 717.

Filing of "final report" by executor does not have effect of removing him from office if in fact estate has not been fully settled, and therefore filing of report does not create vacancy and does not give clerk authority to appoint administrator c. t. a., d. b. n. Edwards v. McLawhorn, 218 N. C. 543, 11 S. E. (2d) 562.

Limitation for Action Against Representative.—An action against an administrator or executor is barred in ten years after the two years allowed under this section, even though no express demand is made by any party interested for the settlement of the estate. Edwards v. Lemmond, 136 N. C. 329, 332, 48 S. E. 737.

Applied in Security Nat. Bank v. Bridgers, 207 N. C. 91, 176 S. E. 295.

Cited in In re Hege, 205 N. C. 625, 172 S. E. 345.

§ 28-122. Creditor's proceeding for accounting.—Any creditor of a deceased person may, within the times prescribed by law, prosecute a special proceeding or a civil action before the judge in his own name and in behalf of himself and all other creditors of the deceased without naming them, against the personal representative of the deceased, to compel him to an account of his administration, and to pay the creditors what may be payable to them respectively. (Rev., s. 104; Code, s. 1448; 1871-2, c. 213; 1876-7, c. 241, s. 6; C. S. 110.)

The purpose of this section was to unite all the creditors in one special proceeding, in order to bring the personal representative to an account after two years and to compel an application of the assets by payment to the creditors whose debts have been ascertained. Graham v. Tate, 77 N. C. 120, 125.

Other Creditors May Come In.—Where a creditor has instituted a special proceeding under this section, all or any of the creditors not designated by name are at liberty to come in and share the benefits of the suit. Every creditor has an inchoate interest in the suit, and is, in an essential sense, a party to the action. Dobson v. Simonton, 93 N. C. 268.

Process or General Notice Essential.—Unless personally served with notice, or unless a general notice is published as prescribed by section 28-126, creditors are not bound by special proceedings instituted under this section by another creditor. Hester v. Lawrence, 102 N. C. 319, 8 S. E. 915.

Summons and Complaints Necessary. — Special proceedings under this section must be by summons and complaint in the first instance. But creditors subsequently coming in need not file a complaint unless their claim is denied. Isler v. Murphy, 76 N. C. 52.

Enjoining Creditor.—A creditor who chooses not to come in, and resorts to an independent action, may be enjoined by the court as soon as the decree for an account is rendered in the main suit. Dobson v. Simonton, 93 N. C. 268, 270.

Creditor's Suit Distinguished.—A special proceeding under this section differs from a creditor's bill in that in the latter case all the creditors **may** make themselves parties, while in the former case they are required to do so. Patterson v. Miller, 72 N. C. 516.

Mere Filing of Claim.—The mere filing by a creditor of a claim with the clerk gives him a standing in the court, and is all that is required of him unless the claim is contested. Warden v. McKinnon, 94 N. C. 378.

Equitable Character of Proceedings.—The special proceedings under this section are of equitable character. Hence the court may in the same proceedings make the heirs and the next of kin parties, and compel the latter to account for the personalty received by him, or may order the realty to be sold for the payment of the debts. Warden v. McKinnon, 94 N. C. 378; Devereux v. Devereux, 81 N. C. 12.

Stops Running of Statute of Limitations. — Proceedings under this section instituted by one creditor not only prevent the running of the statute of limitations as to the claim of that creditor, but also of those in whose behalf they are instituted. Dobson v. Simonton, 93 N. C. 268, 271.

Personal Judgment Against Representative.—It is intimated that in special proceedings under this section the clerk has jurisdiction to render a personal judgment against the representative where the latter has committed **devastavit,** as well as a judgment in his representative capacity. Hester v. Lawrence, 102 N. C. 319, 325, 8 S. E. 915.

Termination of Special Proceedings.—Special proceedings commenced under this section are not terminated by being let off the docket, but continue until all the debts are discharged and there is a final judgment. When so dropped from the docket, they may be brought forward on a motion. Warden v. McKinnon, 94 N. C. 378.

Nor does the termination of collateral issues, such as on contested claims, terminate such proceedings. Id.

Concurrent Jurisdiction of Courts.—The act of 1876-77, ch. 241, sec. 6, which embodied also this section, which provided that action against the personal representative may be brought originally to the Superior Court at term time, and stipulated for the repeal of conflicting laws, is not in conflict with the jurisdiction of the Probate Court (before the clerk), and the jurisdiction is concurrent. Hence the court first acquiring jurisdiction of the controversy will retain it.

Thus, where under this section special proceedings were instituted by a creditor, in the Superior Court, and the representative thereafter instituted proceedings in the Probate Court (before the clerk) for the sale of land, it was held that the Superior Court had acquired jurisdiction of the matter and the representative could be restrained from further proceeding in the Probate Court. Haywood v. Haywood, 79 N. C. 42, 43; Pegram v. Armstrong, 82 N. C. 326.

Remedy against Settlement before Payment of Debts.—If an administrator should file a petition for the settlement of the estate before he has paid the debts the remedy of the creditor is by a creditor's bill in accordance with this section, or an action upon the administration bond. They cannot seek to be made parties to the settlement proceedings, Carlton v. Byers, 93 N. C. 302, 304; or to a petition by the representative to sell land for the payment of debts. Dickey v. Dickey, 118 N. C. 956, 24 S. E. 715.

Allegations as to Exhaustion of Personalty.—Whether the suit be by the representative to set aside fraudulent conveyances of the decedent, under § 28-84, or by the creditor under this section or under the general equity jurisdiction of the court, allegations and proof of the exhaustion or insufficiency of the personalty are necessary. Clement v. Cozart, 107 N. C. 695, 697, 12 S. E. 254; Clement v. Cozart, 109 N. C. 173, 181, 13 S. E. 862.

Effect of Irregularities.—Where, under this section, the court has jurisdiction of the person and subject matter, mere irregularities in the proceedings will not render them void, no objection being made as to such irregularities. Brooks v. Brooks, 97 N. C. 136, 1 S. E. 487.

Thus where the plaintiff does not purport to sue for himself and on behalf of all other creditors, in the absence of objection, the proceedings are not void. Id.

Jurisdiction of Judge in Term.—The proceedings under this section are exceptions to the rule that the judge in term has no jurisdiction over the settlement of intestate's estate. Moore v. Ingram, 91 N. C. 376, 379.

Each Complaint Distinct Proceedings.—In proceedings under this section each complaint of the several creditors constitutes a distinct proceeding to be proceeded in separately. Graham v. Tate, 77 N. C. 120.

Motion to Issue Execution.—In view of the remedy given to the creditors under this section and other sections of this chapter, a motion for leave to issue execution against the estate of a decedent cannot be allowed. Cowles v. Hall, 113 N. C. 359, 18 S. E. 329.

The costs of proceedings under this section are determined by the same provisions as are applicable to other proceedings. Patterson v. Miller, 72 N. C. 516, 518.

Nature of Superior Court's Jurisdiction.—Under this section the Superior Court has original jurisdiction over proceedings instituted against the representative. Bratton v. Davidson, 79 N. C. 423.

Correlation of Sec. 28-111 to This Section.—The proceedings authorized by section 28-111 are between a creditor and the representative, and have no application to situations arising under this section whose primary object is to take the administration into the hands of the court. Dunn v. Beaman, 126 N. C. 766, 36 S. E. 172.

Special Proceedings or Civil Action Optional.—Originally this section authorized the creditor to bring a "special proceeding" (which is always before the clerk of the court) and did not provide for "civil action." But the amendment of 1876-77 inserted the words "civil action." The effect of the

amendment was to give the creditor an option to bring his action either before the clerk or at a regular term of the Superior Court. See Clement v. Cozart, 107 N. C. 695, 698, 12 S. E. 254.

Cited in In re Hege, 205 N. C. 625, 172 S. E. 345; Buchanan v. Oglesby, 207 N. C. 149, 176 S. E. 281.

§ 28-123. Rules which govern creditor's proceeding.—The special proceeding shall be governed by the rules of practice prescribed for special proceedings, except so far as the same are modified by this chapter. (Rev., s. 105; Code, s. 1449; 1871-2, c. 213, s. 2; C. S. 111.)

Cross Reference.—For general statutes governing procedure in special proceedings, see § 1-393 et seq.

Summons and Complaint.—As the proceedings under the preceding section are not ex parte proceedings, within the contemplation of section 1-400, but are adverse within the meaning of section 1-394, they must, under the provisions of this section, be commenced by summons and complaint. Isler v. Murphy, 76 N. C. 52, 53.

The creditors subsequently coming in, however, need not file a new complaint, unless their claim is denied. Id.

§ 28-124. When and where summons returnable.—The summons in said special proceeding shall be returnable before the clerk of the superior court of the county in which letters testamentary or of administration were granted, and on a day not less than forty nor more than one hundred days from the issuing thereof, and not less than twenty days after the service thereof. (Rev., s. 106; Code, s. 1450; 1871-2, c. 213, s. 3; C. S. 112.)

Effect of Irregularity in the Time of Return.—Notwithstanding the irregularity in the time of the return as required by this section, the proceedings are valid unless objected to. Brooks v. Brooks, 97 N. C. 136, 141, 1 S. E. 487.

§ 28-125. Clerk to advertise for creditors.—On issuing the summons, the clerk shall advertise for all creditors of the deceased to appear before him on or before the return day and file the evidences of their claims. (Rev., s. 107; Code, s. 1451; 1871-2, c. 213, s. 4; C. S. 113.)

Failure to Publish Assignable on Appeal.—Failure to publish as required by this and the succeeding section, is an error which may be assigned by the representative in an appeal from a judgment of the clerk to the Superior Court in term, even though no exception on this ground has been taken before the clerk. Hester v. Lawrence, 102 N. C. 319, 8 S. E. 915.

It is the duty of the clerk to advertise as directed by statute. Warden v. McKinnon, 94 N. C. 378, 388.

The proceedings, however, are not void for lack of advertisement (which is considered as a mere irregularity), unless objected to. Brooks v. Brooks, 97 N. C. 136, 12 S. E. 487.

The mode of advertisement under this section is regulated by the provisions of section 28-126. Hester v. Lawrence, 102 N. C. 319, 8 S. E. 915.

§ 28-126. Publication of advertisement. — The advertisement shall be published at least once a week for not less than four weeks in some newspaper which may be thought by the clerk the most likely to inform all the creditors, and shall also be posted at the courthouse door for not less than thirty days. If, however, the estate does not exceed three thousand dollars in value, and the creditors are supposed by the clerk all to reside within the county or to be known, publication in a newspaper may be omitted, and in lieu thereof the advertisement shall be posted at four public places in the county, besides the courthouse door. Proof of personal service on a creditor or that a copy of the advertisement was sent to him by mail at his usual address shall be as to him equivalent to publication. (Rev., s. 108; Code, s. 1452; 1903, c. 134; 1871-2, c. 213, s. 5; C. S. 114.)

Cross Reference.—See annotations under § 28-125.

Advertisement Both Published and Posted.—The advertisement under this section must be both published in a newspaper, and posted at the court house door. Hester v. Lawrence, 102 N. C. 319, 8 S. E. 915.

§ 28-127. Creditors to file claims and appoint agent.—The creditors of the deceased on or before the required day shall file with the clerk the evidences of their demands, and every creditor on filing such claim shall endorse thereon or otherwise name some person or place within the town in which the court is held, upon whom or where notices in the cause may be served or left; otherwise he shall be deemed to have notice of all motions, orders and proceedings in the cause filed or made in the clerk's office. (Rev., s. 109; Code, s. 1453; 1871-2, c. 213, s. 6; C. S. 115.)

§ 28-128. Proof of claims.—If the evidence of the demand is other than a judgment, or some writing signed by the deceased, it shall be accompanied by the oath of the creditor, or, if he be nonresident or infirm or absent, or in any other proper case, of some witness of the transaction, or of some agent of the creditor, that to the best of his knowledge and belief the claim is just, and that all due credits have been given. (Rev., s. 110; Code, s. 1454; 1871-2, c. 213, s. 7; C. S. 116.)

§ 28-129. Representative to file claims; notice to creditors.—On the day of his appearance the personal representative shall on oath give to the clerk a list of all claims against the deceased of which he has received notice or has any knowledge, with the names and residences of the claimants to the best of his knowledge and belief; and if any person so named has failed to file evidence of his claim, the clerk shall immediately cause a notice requiring him to do so to be served on him, which may be done by posting the same, directed to him at his usual address. (Rev., s. 111; Code, s. 1455; 1871-2, c. 213, s. 8; C. S. 117.)

§ 28-130. Clerk to exhibit to representative claims filed.—On the day fixed for the appearance of the personal representative, the clerk shall exhibit to him a list of all the claims filed in his office, with the evidences thereof. (Rev., s. 112; Code, s. 1456; 1871-2, c. 213, s. 9; C. S. 118.)

§ 28-131. If representative denies claim, creditor notified.—Within five days thereafter the personal representative shall state in writing on said list, or on a separate paper, which of said claims he disputes in whole or in part. The clerk shall then notify the creditor, as above provided, that his claim is disputed, and the creditor shall thereupon file in the office of the clerk a complaint founded on his said claim, and the pleadings shall be as in other cases. (Rev., s. 113; Code, s. 1457; 1871-2, c. 213, s. 10; C. S. 119.)

Each Complaint Distinct Proceeding.—Where, under this section, the claims of two or more creditors have been disputed and the issue joined upon the complaints sent to the superior court in pursuance of the succeeding section, the complaint of each creditor constitutes a distinct proceeding to be proceeded separately so as to "let each tub stand on its own bottom." Graham v. Tate, 77 N. C. 120, 124.

§ 28-132. Issues joined; cause sent to superior court.—If the issues joined be of law, the clerk shall send the papers to the judge of the superior court for trial, as is provided for by the chapter on Civil Procedure in like cases. If the issue shall be of fact, the clerk shall send so much of the record

as may be necessary to the next term of the superior court for trial. (Rev., s. 114; Code, s. 1458; 1871-2, c. 213, s. 11; C. S. 120.)

Title of the Proceeding.—When, under this section, issues upon several complaints have been sent to the superior court, although the title of the cause should be in the name of the creditors who instituted the special proceedings, it is proper to make a further title setting out the name of the creditor upon whose complaint the issues are raised. Graham v. Tate, 77 N. C. 120, 124.

For example: x, (the original creditor) v. y. (administrator). Issues on the complaint of z. In this way the complaint of the several creditors will be kept separate and unnecessary confusion avoided.

§ 28-133. When representative personally liable for costs.—If any personal representative denies the liability of his deceased upon any claim evidenced as is provided in this chapter, and the issue is finally decided against him, the costs of the trial shall be paid by him personally, and not allowed out of the estate, unless it appears that he had reasonable cause to contest the claim and did so bona fide. (Rev., s. 115; Code, s. 1459; 1871-2, c. 213, s. 12; C. S. 121.)

Cross Reference.—See annotation under § 28-115.

Correlation of This and Section 28-122.—This section applies to cases where the administrator unreasonably denies a claim filed under section 28-122. Valentine v. Britton, 127 N. C. 57, 59, 37 S. E. 74.

§ 28-134. Court may permit representative to appear after return day.—If the personal representative fails to appear on the return day, the clerk or judge of the superior court may permit him afterward to appear and plead on such terms as may be just. (Rev., s. 116; Code, s. 1460; 1871-2, c. 213, s. 13; C. S. 122.)

§ 28-135. Clerk to state account.—Immediately after the return day the clerk or judge shall proceed to hear such evidence as shall be brought before him, and to state an account of the dealings of the personal representative with the estate of his deceased according to the course of his court. (Rev., s., 117; Code, s. 1461; 1871-2, c. 213, s. 14; C. S. 123.)

§ 28-136. Exception to report; final report and judgment.—After the clerk has stated the account and prepared his report, he shall notify all the parties to examine and except to the same. Any party may then except to the same in whole or in part. The clerk shall then pass on the exceptions and prepare and sign his final report and judgment, of which the parties shall have notice. (Rev., s. 118; Code, s. 1462; 1871-2, c. 213, s. 15; C. S. 124.)

Applied in In re Estate of Bost, 211 N. C. 440, 190 S. E. 756.

§ 28-137. Appeal from judgment; security for costs.—Any party may appeal from a final judgment of the clerk to the judge of the superior court in term time, on giving an undertaking with surety, or making a deposit, to pay all costs which shall be recovered against him. If any creditor appeals and gives such security, his appeal shall be deemed an appeal by all who are damaged by the judgment, and no other creditor shall be required to give any undertaking. (Rev., s. 119; Code, s. 1464; 1871-2, c. 213, s. 17; C. S. 125.)

Applied in In re Estate of Bost, 211 N. C. 440, 190 S. E. 756.

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

§ 28-139. Prior creditors not affected by appeal may docket judgments.—If the exceptions and questions, from the decision on which the appeal is taken, affect only the creditors in one or more classes, the creditors in the prior classes by the leave of the clerk, or of the judge of the superior court, may docket their judgments and issue execution thereon. (Rev., s. 121; Code, s. 1466; 1871-2, c. 213, s. 19; C. S. 127.)

§ 28-140. Judgment where assets sufficient to pay a class.—If upon taking the account it is admitted, or is found, without appeal, that the defendant has assets sufficient, after the deduction of all proper costs and charges, to pay all the claims which have been presented of any one or more of the classes, the clerk shall give judgment in favor of the creditors whose debts of such classes have been admitted, or adjudged by any competent court; and if any claim in any preferred class is in litigation, the amount of such claim, with the probable cost of the litigation, shall be left in the hands of the personal representative, and not carried to the credit of any subsequent class until the litigation is ended. (Rev., s. 122; Code, s. 1467; 1871-2, c. 213, s. 20; C. S. 128.)

§ 28-141. Judgment where assets insufficient to pay a class.—If the assets are insufficient to pay in full all the claims of any class, the amounts thereof having been found or admitted as aforesaid, the clerk may adjudge payment of a certain part of such claims, proportionate to the assets applicable to debts of that class. (Rev., s. 123; Code, s. 1468; 1871-2, c. 213, s. 21; C. S. 129.)

§ 28-142. Contents of judgment; execution.—All judgments given by a judge or clerk of the superior court against a personal representative for any claim against his deceased shall declare—

1. The certain amount of the creditor's demand.

2. The amount of assets which the personal representative has applicable to such demand. Execution may issue only for this last sum with interest and costs. (Rev., s. 124; Code, s. 1469; 1871-2, c. 213, s. 22; C. S. 130.)

§ 28-143. When judgment to fix with assets.—No judgment of any court against a personal representative shall fix him with assets, except a judgment of the judge or clerk, rendered as aforesaid, or the judgment of some appellate court rendered upon an appeal from such judgment. All other judgments shall be held merely to ascertain the debt, unless the personal representative by pleading expressly admits assets. (Rev., s. 125; Code, s. 1470; 1871-2, c. 213, s. 23; C. S. 131.)

A judgment against an executor or administrator in his representative capacity merely establishes the debt sued on and does not constitute a lien upon the lands of the estate, in the absence of a stipulation in the judgment to the contrary, until leave of court is granted for execution for failure of the representative to pay the ratable part of such judgment. Tucker v. Almond, 209 N. C. 333, 183 S. E. 407.

An absolute judgment against the representative neither fixes the defendant with assets nor disturbs the order of administration. It merely ascertains the debt sued on. Dunn v. Barnes, 73 N. C. 273, 277.

Where a warranty deed was not registered until several

years after the death of the grantor, during which time several judgments were obtained against the personal representative of the grantor, and the grantee in the deed sold same after the judgments had been docketed to a purchaser for value by warranty deed, it was held that under the provisions of this and §§ 28-144 and 28-148 the judgments did not constitute a lien on the land in violation of the warranty against encumbrances. Tucker v. Almond, 209 N. C. 333, 183 S. E. 407.

Principle applied in Grant v. Bell, 91 N. C. 495; Holmes v. Foster, 78 N. C. 35.

Applied in Hood v. Stewart, 209 N. C. 424, 184 S. E. 36.

§ 28-144. Form and effect of execution.—All executions issued upon the order or judgment of the judge or clerk or of any appellate court against any personal representative, rendered as aforesaid, shall run against the goods and chattels of the deceased, and if none, then against the goods and chattels, lands and tenements of the representative. And all such judgments docketed in any county shall be a lien on the property for which execution is adjudged as fully as if it were against him personally. (Rev., s. 126; Code, s. 1471; 1871-2, c. 213, s. 24; C. S. 132.)

§ 28-145. Report is evidence of assets only at date.—The account and report and adjudication by the judge, clerk or any appellate court shall not be evidence as to the assets except on the day to which such adjudication relates. (Rev., s. 127; Code, s. 1472; 1871-2, c. 213, s. 25; C. S. 133.)

§ 28-146. Creditor giving security may show subsequent assets.—Any creditor may afterwards, on filing an affidavit by himself or his agent that he believes that assets have come to the hands of the personal representative since that day, and on giving an undertaking, with surety, or making a deposit for the costs of the personal representative, sue out a summons against him alleging subsequent assets, and the proceedings thereon shall be as hereinbefore prescribed, so far as the same may be necessary. (Rev., s. 128; Code, s. 1473; 1871-2, c. 213, s. 26; C. S. 134.)

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

In Nature of Bill in Equity.—A suit by the beneficiaries under a will to have the executor account for mismanagement of the estate is in the nature of a bill in equity to surcharge and falsify the executor's account. Thigpen v. Farmers' Banking, etc., Co., 203 N. C. 291, 165 S. E. 720.

Extent of Jurisdiction.—The jurisdiction and the powers of the court in actions of this nature is very comprehensive as to the purposes contemplated by them. Hence the court is vested with all powers, such as the power to grant injunctions, appoint receivers, etc., to effectuate a just and equitable settlement of the controversy. Godwin v. Watford, 107 N. C. 168, 171, 11 S. E. 1051.

Under this section the superior court has jurisdiction to entertain suits brought not only by creditors, but also by any party interested in the proper administration of an estate. It may bring the creditors in as defendants and protect the right of the parties by the appointment of a receiver. Fisher v. Trust Co., 138 N. C. 91, 98, 50 S. E. 592.

In an action instituted under this section to declare trust and to adjudge the liability of certain lands to the payment of legacies, the superior court (and also the supreme court) once having acquired jurisdiction of the controversy may retain the cause and incidentally grant the application of the personalty. Devereux v. Devereux, 81 N. C. 12, 18.

An action for the breach of representative's bond and for an account may, under this section, be brought before the superior court in term, without first seeking an account in the probate court. Bratton v. Davidson, 79 N. C. 423.

The venue of an action under this section is the county of decedent's last domicile where the will is probated. No objection, however, as to the wrong venue can be raised on an appeal if not raised in the court below. Devereux v. Devereux, 81 N. C. 12, 18.

Concurrent Jurisdiction.—This section was construed in Haywood v. Haywood, 79 N. C. 42; Fisher v. Trust Co., 138 N. C. 91, 50 S. E. 592; Pegram v. Armstrong, 82 N. C. 326; Bratton v. Davidson, 79 N. C. 423, 425, and other cases, in all of which it is held that concurrent original jurisdiction with the probate court is conferred on the Superior Court in a civil action to settle estates and subject real estate to the payment of debts. Shober v. Wheeler, 144 N. C. 403, 57 S. E. 152; Pegram v. Armstrong, 82 N. C. 326; Bratton v. Davidson, 79 N. C. 423. The jurisdiction of the clerk of the Superior Court in such cases is not exclusive but concurrent with that of the Superior Court. State v. McCanless, 193 N. C. 200, 204, 136 S. E. 371.

Under this section the distributees of an estate may bring suit originally in the Superior Court against the administrator for an accounting and for a breach of his bond. Leach v. Page, 211 N. C. 622, 191 S. E. 349.

"A special proceeding before the clerk, instituted by the personal representative of a decedent to sell land to make assets, is, by consent, converted into an administration suit and heard by the judge. C. S., 135 [this section]. Rigsbee v. Brogden, 209 N. C. 510, 184 S. E. 24. If the parties are content to proceed in this way, perhaps the court ought not to object sua sponte. Its jurisdiction is not questioned. Tillett v. Aydlett, 93 N. C. 15." Edney v. Mathews, 218 N. C. 171, 172, 10 S. E. (2d) 619.

Action to recover for personal services rendered testator's wife is properly brought in the Superior Court where it involves a construction of the will and an accounting. Meares v. Williamson, 209 N. C. 448, 184 S. E. 41.

Power of Judge in Term.—The expression in Moore v. Ingram, 91 N. C. 376, that "the judge in term has no jurisdiction over the settlement of intestates' estates" was made by inadvertence and only with reference to the situation presented in that case, not with reference to this section which confers this jurisdiction in express terms. Tillett v. Aydlett, 93 N. C. 15, 22.

Administration of Recovery.—In an action by the beneficiaries to recover assets of the estate alleged to have been wrongfully dissipated by defendant administrator to the profit of the other defendants alleged to have been in collusion with him, the fact that the administrator had been discharged will not preclude plaintiff's right to maintain the action for want of personal representative to administer any recovery that might be had, since the court has power by proper action to safeguard the rights of all parties. Johnson v. Hardy, 216 N. C. 558, 5 S. E. (2d) 853.

Applied in In re Hege, 205 N. C. 625, 172 S. E. 345.

Cited in Gurganus v. McLawhorn, 212 N. C. 397, 193 S. E. 844.

§ 28-148. Proceedings against land, if personal assets fail.—If it appears at any time during, or upon, or after the taking of the account of a personal representative that his personal assets are insufficient to pay the debts of the deceased in full, and that he died seized of real property, it is the duty of the judge or clerk, at the instance of any party, to issue a summons in the name of the personal representative or of the creditors generally, to the heirs, devisees and others in possession of the lands of the deceased, to appear and show cause why said lands should not be sold for assets. Upon the return of the summons the proceeding shall be as is directed in other like cases. (Rev., ss. 130, 131; Code, ss. 1474, 1475; 1871-2, c. 213, ss. 27, 28; C. S. 136.)

Necessity of Summons.—In a case falling under the provisions of this section it is unnecessary for the clerk to issue the summons referred to in this section where the parties are all in court. Dickey v. Dickey, 118 N. C. 956, 958, 24 S. E. 715.

Exhaustion of Personalty. — Whether the proceedings to sell the real estate be under this section or section 28-122, it is essential that the insufficiency of the personalty be made to appear. Clement v. Cozart, 109 N. C. 173, 181, 13 S. E. 862.

Applied in Hood v. Stewart, 209 N. C. 424, 184 S. E. 36.

Cited in Gurganus v. McLawhorn, 212 N. C. 397, 193 S. E. 844.

Art. 17. Distribution.

§ 28-149. Order of distribution.—The surplus of the estate, in case of intestacy, shall be distributed in the following manner, except as hereinafter provided:

In General.—At early common law the king took all the personalty. Afterwards the crown passed this prerogative to the church, which took all the personalty except the reasonable parts for the widow and the children, and the church officials claimed to dispose of it in **pios usus.** They were neither accountable for it nor required to pay the debts of the estate. By statute 13 Ed. III. (A. D. 1358) the churchmen were required to appoint an administrator who should be next of blood kin, and this relationship was computed by the civil law, and not by the common law, which was used in computing relationship in the descent of land. Subsequently by statute 21 Henry VIII (A. D. 1530) the administrator was appointed by the ordinary and was required to be the widow or next of kin, or both, who after paying the intestate's debts and the reasonable parts for the widow and children retained the surplus in their own right until the statutes of 22-23 and 29 Charles II, which required the surplus to be distributed among the next of kin in the manner provided in those statutes which became known as the Statute of distribution.

Under the English statutes 22, 23, and 29, Charles II, the mother as well as the father succeeded to all the personal effects of their children who died intestate and without wife or issue, to the exclusion of brothers and sisters of the deceased. And this is the law now in this state.

For an analysis of this section and the classification of the interest of the various classes of distributees thereunder, see Wells v. Wells, 158 N. C. 330, 333, 74 S. E. 114.

Distribution under Equitable Conversion. — While this section, as its subject matter implies, concerns the distribution of decedent's personalty, under circumstances which bring in the application of the doctrine of equitable conversion even realty or its proceeds is subject to the order of distribution prescribed under this section as if it had been personalty. McIver v. McKinney, 184 N. C. 393, 114 S. E. 399.

Wife Dissenting from the Will. — Even though a husband die testate, leaving a will in which he has provided for the wife, if she dissents from the will, as to her her husband has died intestate and she is entitled to her distributive right in accordance with this section, as if he had left no will. Hunter v. Husted, 45 N. C. 97.

Per Capita or Per Stirpes.—Where a fund consist of personalty and the claimants at the death of the intestate, were, and now are, all in equal degree the next of kin of the intestate, the distribution under this section must be per capita. Representation in the distribution of this kind of property, when allowed, is resorted to only when it is necessary to bring the claimants to equality of position as next of kin. Ellis v. Harrison, 140 N. C. 444, 53 S. E. 299.

Distribution Per Capita Where Heirs Are of Equal Degree.—Where intestate dies owning personalty and leaving as his sole heirs at law children of two deceased brothers and one deceased sister, the personalty must be equally divided among all his nephews and nieces per capita and not per stirpes, since each of the heirs at law are of equal degree of kinship. Nixon v. Nixon, 215 N. C. 377, 1 S. E. (2d) 828.

Husband as Next of Kin. — The husband of a deceased wife is not her next of kin so as to be entitled to a distributive share as such, within the purview of this section. Peterson v. Webb, 39 N. C. 56.

Illegitimate Child.—See note under § 28-152.

Applied in Lopez v. United States, 82 F. (2d) 982.

Cited in In re Estate of Pruden, 199 N. C. 256, 257, 154 S. E. 7.

1. If there are not more than two children, one-third part to the widow of the intestate, and all the residue by equal portions to and among the children of the intestate and such persons as legally represent such children as may then be dead.

2. If there are more than two children, then the widow shall share equally with all the children and be entitled to a child's part.

"Child's Part" Interpreted. — The phrase "child's part" as used in this section refers to the personal estate of the intestate, not to the real estate. McKrow v. Painter, 89 N. C. 438, 440.

3. If there is no child nor legal representative of a deceased child, then one-half the estate shall be allotted to the widow, and the residue be distributed equally to every of the next of kin of the intestate, who are in equal degree, and to those who legally represent them.

Intestate's Mother His Next of Kin. — When an intestate leaves no children, but a widow, a mother and sisters, the distribution of his estate is governed by this subdivision, and his mother is his next of kin and entitled to share equally in his personalty with his widow. His sisters are one degree farther than his mother. Wells v. Wells, 158 N. C. 330, 74 S. E. 114.

Representation among Collateral Relations.—This subsection changes the former rule under the Revised Code of 1854, so as to allow representation among collateral relations as to personalty to the same extent as in the descent of real property; and where the aunts and uncles of the deceased must take, the children of those who have died may take the part of the personalty their parents would have taken if living. Moore v. Rankin, 172 N. C. 599, 601, 90 S. E. 759.

Reason Where Terms Are Plain.—The terms of this subsection are plain and it is the duty of the court to observe them, even if it (the court) cannot supply the legislative reason therefor. Wells v. Wells, 156 N. C. 246, 72 S. E. 311.

4. If there is no widow, the estate shall be distributed, by equal portions, among all the children, and such persons as legally represent such children as may be dead.

5. If there is neither widow nor children, nor any legal representative of the children, the estate shall be distributed equally to every of the next of kin of the intestate, who are in equal degree, and those who legally represent them.

Mother as Next of Kin. — If there are no children, no widow of an intestate, there is no one in equal degree with the mother; and she as the next of kin is entitled to the personal estate of her son, under this subdivision. Wells v. Wells, 158 N. C. 330, 333, 74 S. E. 114.

Extent of Representation among Collaterals.—Under the former law (Rev. Code, ch. 64, sec. 2) it was held, in cases falling under this subsection, that among collateral kindreds no representative after brother's and sister's children shall be allowed to share in the distribution. See Nelson v. Blue, 63 N. C. 659; Johnson v. Chesson, 59 N. C. 146.—Ed. Note. But the provision upon which this conclusion is based no more appears.

The father and mother of an intestate under this subsection are next of kin of equal degree. Davis v. Railroad Co., 136 N. C. 115, 120, 48 S. E. 591.

Brother and Children of Deceased Brother—Husband of Deceased Niece.—The estate of the intestate descends to his surviving brother and the children of his deceased brother living at his death, who are entitled to the distribution of the estate as his next of kin, as also the husband of a deceased niece who was living at the death of the intestate, under the facts of this case. In re Estate of Wallace, 197 N. C. 334, 148 S. E. 456.

Sisters and Descendants of Brothers and Sisters.—Where intestate died leaving surviving him two sisters and the descendants of three brothers and two sisters who predeceased him, in the division of the personalty, the estate should be divided in seven equal parts, the surviving sisters each taking a part per capita, and the descendants of the deceased brothers and sisters taking the share of their ancestor per stirpes. In re Poindexter's Estate, 221 N. C. 246, 20 S. E. (2d) 49, 140 A. L. R. 1138.

Applied in In re Estate of Mizzelle, 213 N. C. 367, 196 S. E. 364.

6. If, in the lifetime of its father and mother, a child dies intestate, without leaving husband, wife or child, or the issue of a child, its estate shall be equally divided between the father and

mother. If one of the parents is dead at the time of the death of the child, the surviving parent shall be entitled to the whole of the estate. The terms "father" and "mother" shall not apply to a step-parent, but shall apply to a parent by adoption: Provided, that a parent, or parents, who has willfully abandoned the care, custody, nurture and maintenance of such child to its kindred, relatives or other person, shall forfeit all and every right to participate in any part of said child's estate under the provisions of this section.

Editor's Note. — Prior to the amendment of 1915, (Pub. Laws, 1915, c. 37) this section entitled the father to the whole estate of his deceased child, to the exclusion of the mother. Hence it was formerly held that the mother of a deceased child in the lifetime of the father, may not recover for the mutilation of the child's body. Floyd v. Atlantic Coast Line R. Co., 167 N. C. 55, 83 S. E. 12. By the Public Laws of 1927, c. 231, the proviso to this section was added.

Natural and Adopting Parents. — Natural parents, in case of adoption, are allowed to prevail over adopting parents in the distribution of a child's estate. Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19; 5 N. C. L. R. 73.

Right of Divorced Husband to Share in Recovery for Death of His Child.—Where the husband has abandoned his wife and infant child, and the wife has obtained a divorce, and a recovery is had for the wrongful death of the child by her mother, who has again married, and has qualified as administratrix of her infant child, under the provisions of this clause of this section casting the inheritance upon the father and mother under stated conditions when both are living, the father is entitled to half the money recovered by the mother for the wrongful death of their infant child, though under a separate statute he has lost the right to its care and custody by a former adjudication of the court in the wife's action for divorce. Avery v. Brantley, 191 N. C. 396, 131 S. E. 721.

Right of Action for Mutilation of Child's Dead Body. — A father's relation to his minor child and the consequent duties imposed on him by law clothes him with a preferential right of action over the mother of the child to bring an action to recover damages for the mutilation of its dead body, and the provisions of this section do not affect the result. Stephenson v. Duke University, 202 N. C. 624, 163 S. E. 698.

Distribution of Proceeds for Wrongful Death.—Where the right of action created by statute for wrongful death does not constitute an asset of the estate, but belongs to the beneficiaries designated by this section and § 28-173 as the beneficiaries of the recovery, the administrator in bringing the action is pro hac vice their representative and not the representative of the estate. In such cases the prevailing view is to the effect that the negligence of the parent, directly or proximately contributing to the death of a child non sui juris, will bar the recovery in an action by the administrator, at least to the extent that the recovery, if any, would inure to the benefit of the parent so guilty of contributory negligence. Pearson v. National Manufacture, etc., Corp., 219 N. C. 717, 722, 14 S. E. (2d) 811.

Distributee of Proceeds of War Risk Insurance Policy. —Where the mother of a deceased soldier was dead at the time of his death, but his father was living, and the soldier had no wife or child or issue of a child at the time of his death, it was held that under this section the proceeds of a war risk insurance policy vested in the father as sole distributee under the intestate laws of this State. In re Hall, 205 N. C. 241, 243, 171 S. E. 61.

Funds Due under Policy as Assets of Estate.—Where a soldier having a war risk insurance policy died intestate, leaving his father and mother surviving him as sole heirs at law, and where neither had received as beneficiary in the war risk insurance policy any installment from the government during his or her life, it was held that the whole fund in contemplation of law was assets of the estate of the dead soldier, to be distributed immediately to the estates of his father and mother. The fact that one beneficiary lived longer than the other and was, therefore, entitled to receive more money in installments from the government, has nothing to do with the right of property as distributee. The intestate law of this State pegged that right at the death of the soldier. In re Estate of Reid, 206 N. C. 102, 103, 173 S. E. 49.

In McCullough v. Smith, 293 U. S. 228, 231, 55 S. Ct. 157, it was held that unpaid installments which accrued under a war risk insurance policy in favor of the father and mother of the deceased soldier as beneficiaries during their lives became the property of their respective estates. Also that installments which accrued to the assured during his lifetime, and the commuted value of the installments payable subsequent to the mother's death, became the property of his estate, thereby reversing In re Estate of Reid, 206 N. C. 102, 173 S. E. 49, which held that the installments which accrued to the beneficiaries—father and mother—during their lives should be treated as parts of the estate of the insured.

Cited in In re Peaden, 199 N. C. 486, 154 S. E. 832.

7. If there is no child nor legal representative of a deceased child nor any of the next of kin of the intestate, then the widow, if there is one, shall be entitled to all the personal estate of such intestate.

8. If a married woman die intestate leaving one child and a husband, the estate shall be equally distributed between the child and husband; if she leaves more than one child and a husband, the estate shall be distributed in equal portions and the husband shall receive a child's part, the child or children of any child or children of the intestate, who may have died prior to the mother, to represent his, her, or their parent in such distribution.

Editor's Note. — The provision at the end of this clause, that the child of the intestate's child shall represent his parent in the event such parent dies before the intestate's mother, was added by the act of 1921, ch. 54.

Husband's Note Set Up as a Counterclaim.—Where a husband is under this clause entitled to his distributive part in the personal property of his deceased wife, and she had a certain amount of money deposited in a bank, which has become insolvent and is in a receiver's hands, he may not successfully set up this interest under the provisions of section 1-137, as a counterclaim against his note, in an action by the receiver therein, until his wife's administrator has accounted for his trust or distributed the assets of his intestate's estate. Williams v. Williams, 192 N. C. 405, 135 S. E. 39.

Husband Entitled to His Distributive Share Only. — In Kilpatrick v. Kilpatrick, 176 N. C. 182, 96 S. E. 988, it was held that under this section as amended by the laws of 1923, the administrator of the wife may recover from the husband notes made payable to the wife and husband in consideration of the sale of her real property, and that the husband was entitled only to his distributive share through the administration.

9. If a married woman dies intestate, leaving a husband but no children, the surviving husband shall be entitled to all the personal estate of which his wife died intestate. (Rev., s. 132; Code, s. 1478; R. C., c. 64, s. 1; R. S., c. 64, s. 1; 1893, c. 82; 1868-9, c. 113, s. 53; 1913, c. 166; 1915, c. 37; 1921, c. 54; 1927, c. 231; C. S. 7, 137.)

Cross References.—As to husband's right to wife's personalty where she dies intestate without children, see § 28-7. As to inheritance under insurance policy where insured killed beneficiary and himself, see note to § 28-10. As to rules of descent, see § 29-1.

§ 28-150. Advancements to be accounted for.—Children who shall have any estate by the settlement of the intestate, or shall be advanced by him in his lifetime, shall account with each other for the same in the distribution of the estate in the manner as provided by the second rule in the chapter entitled descents, and shall also account for the same to the widow of the intestate in ascertaining her child's part of the estate. (Rev., s. 133; Code, s. 1483; 1868-9, c. 113, s. 54; C. S. 138.)

Advancement Defined. — An advancement is defined to be an irrevocable gift in presenti of money or property, real or personal, by a parent to a child to enable the latter to anticipate the inheritance or succession of the property of the former to the extent of the gift. Thompson v. Smith, 160 N. C. 256, 257, 75 S. E. 1010.

Creature of Statute Law.—Advancements are the creatures of statute law. Kiger v. Terry, 119 N. C. 456, 458, 26 S. E. 38.

Advancements are restricted by this section to gifts from a parent to a child, and ordinarily grandchildren may not be held accountable for gifts to themselves, but must account for gifts from their grandparents to their parent before they can inherit from their grandparent. Parker v. Eason, 213 N. C. 115, 195 S. E. 360.

Advancement a Matter of Intention.—The question whether a transfer of property from a parent to the child was a gift, loan or advancement is to be settled by the intention of the parent and surrounding circumstances at the time of the transfer, which may be shown by parol evidence. Kiger v. Terry, 119 N. C. 456, 26 S. E. 38.

Consideration and Presumption of Advancement.—Where a valuable and adequate consideration is recited, the presumption is against the conveyance being an advancement, and the burden to overcome this presumption is upon him who alleges it to be an advancement. Kiger v. Terry, 119 N. C. 456, 26 S. E. 38.

Presumption of Advancement Rebuttable.—The presumption is that property transferred or money paid by the parent is prima facie an advancement. But, this presumption being prima facie, is rebuttable by parol even where there is recital of consideration in deed, by a showing that the parent had a contrary intention at the time. The rule is not altered by this section. Thompson v. Smith, 160 N. C. 256, 75 S. E. 1010; Hollister v. Attmore, 58 N. C. 373; Harper v. Harper, 92 N. C. 300, 301.

Advancements by the Mother. — The original statute (1 Rev. Stat. ch. 64, sec. 2.) which provides for the accounting of advancements used the pronouns "he" and "she", and under this terminology it was held that the statute applied to advancements made by the mother as well as by the father. Daves v. Haywood, 54 N. C. 253, 256. Ed. Note.—The present section uses the words "advanced by **him** in **his** lifetime." It is believed that the construction put upon the original statute would still hold true.

But gifts made to the grandchildren are not so required. Daves v. Haywood, 54 N. C. 253; Skinner v. Wynne, 55 N. C. 41.

Return of Advancements as to the Widow.—Before the act of 1784, advancements were not required to be brought into the hotchpot for the benefit of the widow. But since that act, the policy of equality between the widow and the children as well as between the children themselves, is pronounced by the express terms of this section. Davis v. Duke, 1 N. C. 526, 527. This principal is applied in Eller v. Lillard, 107 N. C. 486, 491, 12 S. E. 462.

Dying Seized of Land Not a Prerequisite.—The advancements are to be accounted for even though the intestate has not died seized of any real estate. Headen v. Headen, 42 N. C. 159.

§ 28-151. Children advanced to render inventory; effect of refusal.—Where any parent dies intestate, who had in his or her lifetime given to, or put in the actual possession of, any of his or her children any personal property of what nature or kind soever, such child shall cause to be given to the administrator or collector of the estate an inventory, on oath, setting forth therein the particulars by him or her received of the intestate in his or her lifetime. In case any child who had, in the lifetime of the intestate, received a part of said estate, refuses to give such inventory, he shall be considered to have had and received his full share of the deceased's estate, and shall not be entitled to receive any further part or share. (Rev., ss. 134, 135; Code, ss. 1484, 1485; 1868-9, c. 113, ss. 55, 56; C. S. 139.)

Restricted Meaning of Section. — The general words of this section requiring the child to give an inventory of "any personal property of what nature or kind soever" have uniformly been held to have a restricted meaning, in that every gift of personal property by a donor is not necessarily an advancement. Bradsher v. Cannady, 76 N. C. 445, 446.

Expenses for Schooling, etc., Properly Charged as Advancements.—Intestate's grandchild, a daughter of intestate's deceased daughter, was charged with advancements for sums paid by intestate for her schooling and expenses incurred after she was eighteen or twenty years old, but no charge was made for expenses of rearing the grandchild. Upon the facts found by the referee the charge of advancements was correct. Wolfe v. Galloway, 211 N. C. 361, 190 S. E. 213.

§ 28-152. Illegitimates next of kin to mother and to each other.—Every illegitimate child of the mother dying intestate, or the issue of such illegitimate child deceased, shall be considered among her next of kin, and as such shall be entitled to a share of her personal estate as prescribed in this chapter. Illegitimate children, born of the same mother, shall be considered legitimate as between themselves and their representatives, and their personal estate shall be distributed in the same manner as if they had been born in lawful wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall be distributed among his mother and all such persons as would be his next of kin if all such children had been born in lawful wedlock. (Rev., ss. 136, 137; Code, ss. 1486, 1487; 1868-9, c. 113, ss. 57, 58; C. S. 140.)

Cross References.—As to effects of legitimation, see § 49-11. As to descent of real property to and among illegitimates, see § 29-1, rules 9 and 10.

Editor's Note.—At common law bastards were incapable of being heirs, and no inheritable blood flows in their veins; hence, in the absence of other persons lawfully entitled to the property, the property escheated to the lord. They were considered the children of nobody, and consequently could have no ascending heirs, but only the issue of their own body. The reason of this rule was the uncertainty of the bastard's paternity. But this has been changed in this state in cases where there is no such uncertainty.

Brothers and Sisters of Bastard's Mother Do Not Inherit.—Under this section the mother and brothers and sisters of a bastard may inherit from him, but the rule extends no further, and the brothers and sisters of the bastard's mother may not inherit from him. Sharpe v. Carson, 204 N. C. 513, 168 S. E. 829.

Distributive Share of a Bastard's Niece. — Where a bastard died intestate leaving the daughter of a bastard brother, born of the same mother, his next of kin and a widow, it was held that the widow was entitled only to one-third of the personal estate and the daughter of his bastard brother to two-thirds. Coor v. Starling, 54 N. C. 243. Ed. Note.—This decision, however, now seems to be subject to the modifications in the amount of widow's distributive share under section 28-149.

Inheritance from Father of Mother who Predeceased Him.—An illegitimate child may not inherit as heir at law from her deceased grandfather, dying intestate, through her legitimate mother who predeceased him, under this section and section 28-149, clauses 4 and 5. In re Estate of Bullock, 195 N. C. 188, 141 S. E. 577, citing Waggoner v. Miller, 26 N. C. 480; Wilson v. Wilson, 189 N. C. 85, 126 S. E. 181; Wallace v. Wallace, 181 N. C. 158, 106 S. E. 501; and distinguishing Skinner v. Wynne, 55 N. C. 41.

Conflict of Laws.—In the case of Kenny v. Seaboard, etc., R. Co., 167 N. C. 14, 82 S. E. 968, an action was brought to recover damage for wrongful death under the Federal employers liability act which made the "next of kin," in the absence of other specified persons, the distributee of the decedent. It was held that the persons included in the phrase "next of kin" are to be determined by the laws of this state; and hence, the half brothers and sisters of the illegitimate child deceased were his "next of kin" within the meaning of this section, and entitled to their respective distributive shares as such.

§ 28-153. Allotment to after-born child in real estate.—The share of an after-born child in real estate shall be allotted to him out of any lands not devised, if there is enough for that purpose; and if there is none undevised, or not enough, then the whole share, or the deficiency, as the case may be, shall be made up of the lands devised; and so much thereof shall be taken from the several devisees according to their respective values, as near as may be convenient, as will make the proper share of such child. (Rev., s. 138; Code, s. 1536; 1868-9, c. 113, s. 108; C. S. 141.)

Cross References.—See § 31-45. As to compelling contribution among heirs, see § 28-67.

§ 28-154. Allotment to after-born child in personal property.—The share of an after-born child

in the personal estate shall be paid and delivered to him out of any such estate not bequeathed, if there is enough for that purpose; and if there is none undisposed of, or not enough, then the whole share or the deficiency, as the case may be, shall be made up from the estate bequeathed; and so much shall be taken from the several legacies, according to their respective values, as will make the proper share of such child. (Rev., s. 139; Code, s. 1537; 1868-9, c. 113, s. 109; C. S. 142.)

Child Not en Ventre Sa Mere. — Before a child can be entitled to a distributive share under the statute of distribution in general, it must appear that he was either in being or **en ventre sa mere** at the time of the death of the intestate. Thus a half brother of the intestate born ten months and a half after her death is not entitled to a distributive share, though born before distribution. Grant v. Bustin, 21 N. C. 77.

Contributions as of What Time.—Contribution to make up the share of a child born after the execution of his father's will, must be made by the legatees in proportion to their respective interests under the will, dated as of the time when the estate was settled, or should have been settled, by the executor, bearing interest from such time. Johnson v. Chapman, 54 N. C. 130.

§ 28-155. Allotment of personalty from proceeds of realty.—If, after satisfaction of the child's share of real estate out of undevised lands, there is a surplus of such lands, and there is no personal estate undisposed of, or not enough to make up his share of such estate, then the surplus of undevised land, or as much as be necessary, shall be sold and the proceeds applied to making up his share of personal estate. And if, after satisfaction of the child's share of personal estate out of property undisposed of by the will, there is a surplus of such property, then the surplus thereof shall be applied, as far as it will go, in exoneration of land, both devised and descended; and the same shall be set apart and secured as real estate to such child, if an infant or non compos. (Rev., s. 140; Code, s. 1538; 1868-9, c. 113, s. 110; C. S. 143.)

§ 28-156. Effect of allotment of realty; contribution to equalize burden.—Upon the allotment to such child of any real estate in the manner aforesaid, he shall thenceforth be seised thereof in fee simple; and the court shall give judgment severally, in favor of such of the devisees and legatees of whose lands and legacies more has been taken away than in proportion to the respective values of said lands and legacies, against such of said devisees and legatees of whose lands and legacies a just proportion has not been taken away, for such sums as will make the contribution on the part of each and every of them equitable, and in the ratio of the values of the several devises and legacies. (Rev., s. 141; Code, s. 1539; 1868-9, c. 113, s. 111; C. S. 144.)

Cross Reference.—As to compelling contribution among heirs, see § 28-67.

§ 28-157. After-born child on allotment deemed devisee or legatee.—An after-born child after such decrees shall be considered and deemed in law a legatee and devisee as to his portion, shall be styled as such in all legal proceedings, and shall be liable to all the obligations and duties by law imposed on such: Provided, that all judgments or decrees bona fide obtained against the devisees and legatees previously to the preferring of any petition, and which were binding upon or ought to operate upon the lands and chattels devised or bequeathed, shall be carried into execution and effect notwithstanding, and the petitioner shall take his portion completely subject thereto: Provided further, that any suit instituted against the devisees and legatees previously to such petition shall not be abated or abatable thereby nor by the decree thereon, but shall go on as instituted, and the judgment and decree, unless obtained by collusion, be carried into execution; but on the filing of the petition, during the pendency of such suit, the petitioner, by guardian, if an infant, may become a defendant in the suit. (Rev., s. 142; Code, s. 1540; 1868-9, c. 113, s. 112; C. S. 145.)

§ 28-158. Before settlement executor may have claimants' shares in estate ascertained.—In case no petition is filed within two years, as herein prescribed, the executor or administrator with the will annexed, before he shall pay or deliver the legacies in the will given, or before paying to the next of kin of the testator any residue undisposed of by the will, shall call upon the legatees, devisees, heirs and next of kin, and the said after-born child, by petition in the superior court, to litigate their respective claims, and shall pray the court to ascertain the share to which said child shall be entitled, and to apportion the shares and sums to which the legatees, devisees, heirs or next of kin shall severally contribute toward the share to be allotted to said child, and the court shall adjudge and decree accordingly. (Rev., s. 143; Code, s. 1541; 1868-9, c. 113, s. 113; C. S. 146.)

§ 28-159. Legacy or distributive share recoverable after two years.—Legacies and distributiye shares may be recovered from an executor, administrator or collector by petition preferred in the superior court, at any time after the lapse of two years from his qualification, unless the executor, administrator or collector shall sooner file his final account for settlement. The suit shall be commenced and the proceeding therein conducted as prescribed in other cases of special proceedings. (Rev., s. 144; Code, s. 1510; 1868-9, c. 113, s. 83; C. S. 147.)

What Court Has Jurisdiction. — Under this section the Probate Court (i. e., the clerk of the Superior Court) has exclusive jurisdiction of proceedings for the recovery of legacies and distributive shares. When, however, a specific pecuniary legacy has been given, and has been assented to by the executor it becomes a debt, and must be recovered by action brought to the regular term of the Superior Court. Hendrick v. Mayfield, 74 N. C. 626, 632.

Proof of Assets.—While under this section a petition may be filed before the clerk of the Superior Court for the recovery of a legacy and prosecuted as in other cases of special proceedings unless the personal representative has assented to the legacy or the admission of assets is otherwise made to appear, a recovery can be had only upon proof that assets have either come or should have come into his hands applicable to the payment of the legacy. Unless this is done a judgment in legatee's favor is reversible error. York v. McCall, 160 N. C. 276, 278, 76 S. E. 884.

Jurisdiction in Special Proceeding. — Under this section the clerk of the superior court has original jurisdiction by special proceedings for the recovery of legacies, etc. But where an **action** is brought for the same to the regular **term** of the superior court, the defect is cured by the act of 1870, 1871, ch. 108 (Bat. Rev. ch. 17, secs. 425, 426). Bell v. King, 70 N. C. 330.

In special proceeding to remove administratrix, her rights as distributee may not be determined; such rights being determinable only in an action or proceeding in which both she and the administrator are parties. In re Banks' Estate, 213 N. C. 382, 196 S. E. 351.

Applied in Security Nat. Bank v. Bridgers, 207 N. C. 91, 176 S. E. 295.

§ 28-160. Payment to clerk after one year discharges representative pro tanto.—It is compe-

tent for any executor, administrator or collector, at any time after twelve months from the date of letters testamentary or of administration, to pay into the office of the clerk of the superior court of the county where such letters were granted, any moneys belonging to the legatees or distributees of the estate of his testator or intestate, and such payment shall have the effect to discharge such executor, administrator or collector and his sureties on his official bond to the extent of the amount so paid. (Rev., s. 145; Code, s. 1543; 1881, c. 305, s. 1; C. S. 148.)

The purpose of this section is to provide a safe public depository for such moneys and the exoneration of the personal representative. Ex parte Cassidey, 95 N. C. 225, 228.

Provisions Directory. — The provisions of this section are directory, and not mandatory. Moore v. Eure, 101 N. C. 11, 15, 7 S. E. 471; Thomas v. Connelly, 104 N. C. 342, 348, 10 S. E. 520.

Clerk's Responsibility. — Moneys paid to the clerk under this section, do not pass into the jurisdiction of the superior court, but the clerk receives and is chargeable with them, not, however, by virtue of his duties in connection with the court as a clerk, but as a safe public depository. Ex parte Cassidey, 95 N. C. 225, 227.

He receives them by virtue of his office as a clerk, and hence (his bond covering all moneys coming into his hands by virtue or color of his office) he is liable upon his bond. Presson v. Boone, 108 N. C. 78, 84, 12 S. E. 897, see Thomas v. Connelly, 104 N. C. 342, 10 S. E. 520.

Deposit of Moneys of Heirs. — The deposit authorized by this section refers to moneys belonging to the legatees or distributees of the estate. It does not refer to funds belonging to the heirs, such as proceeds of realty after payment of debts, which by the terms of sec. 28-58 are considered as realty belonging to the heirs or devisees. Thomas v. Connelly, 104 N. C. 342, 348, 10 S. E. 520.

Liability for Interest.—Where funds belonging to a minor are paid into the hands of the clerk of the Superior Court by an administrator under the provisions of this section, discharging the administrator and his sureties from liability in regard thereto, it is not required by §§ 28-166 and 2-46 that the clerk invest the funds, upon interest, unless so directed, the clerk being liable for such funds as an insurer, and the clerk and his sureties are not liable for the amount of interest the funds would have drawn if they had been so invested, but if the funds are actually invested by the clerk he is liable for the interest actually received therefrom, since a fiduciary will not be allowed to make a personal profit out of funds committed to his custody. Williams v. Hooks, 199 N. C. 489, 154 S. E. 828.

Where on appeal there is no agreed statement of fact or finding as to whether a deceased clerk of court invested and received interest, for which his estate must account, on a sum paid into his hands under the provisions of this section, the case will be remanded for a specific finding in regard thereto. Williams v. Hooks, 199 N. C. 489, 490, 154 S. E. 828.

§ 28-161. On payment clerk to sign receipt.—It is the duty of the clerk, in the cases provided for in § 28-160, to receive such money from any executor, administrator or collector, and to execute a receipt for the same under the seal of his office. (Rev., s. 146; Code, s. 1544; 1881, c. 305, s. 3; C. S. 149.)

Cross Reference.—See annotations under § 28-160.

Recovery of Moneys Paid into Clerk's Office.—A similar proceeding as provided in sections 28-147 and 28-159 may be maintained against the clerk either by special proceedings or civil action in the superior court in cases where the representative has paid the money in his hands into the office of the clerk under section 28-160. Ex parte Cassidey, 95 N. C. 225, 228.

Art. 18. Settlement.

§ 28-162. Representative must settle after two years. — No executor, administrator, or collector, after two years from his qualification, shall hold or retain in his hands more of the deceased's estate than amounts to his necessary charges and disbursements and such debts as he shall legally pay; but all such estate so remaining shall, immediately after the expiration of two years, be divided and be delivered and paid to the person to whom the same may be due by law or the will of the deceased; and the clerk of the superior court in each county shall require settlement of the balance in hand due distributees as shown by the final account of any administrator, executor, or guardian, and shall audit same: Provided, that the several clerks of the superior courts of this State may, in their discretion, for good cause shown, extend the time for the final settlement of any administrator or executor; provided, that nothing herein contained shall relieve any such administrator or executor of the duty of administering and distributing such funds and property in his hands as may be available for such purposes; provided, further, that any party having an interest in any such estate may, within ten days from the entry of an order extending the time for final settlement, appeal from such order to the resident or presiding judge of the district, which appeal shall be heard as is now or may hereafter be prescribed by law for the hearing of other appeals from the clerk. (Rev., s. 147; Code, s. 1488; 1868-9, c. 113, s. 59; 1919, c. 69; 1933, c. 188; 1935, c. 377; C. S. 150.)

Editor's Note.—The allowance of two years in this section is intended as a maximum limitation beyond which the representative may not retain any part of the estate; it is not a permissive limitation for a period of two years. It is based upon the supposition that many estates which are complicated cannot be settled in less time. Hence where there are no debts due from the estate, the representative will not be permitted to suspend the settlement for a period of two years. See Turnage v. Turnage, 42 N. C. 127.

By the 1935 amendment the proviso added by the 1933 amendment giving the clerk power to extend the time was changed and the two provisos at the end of the section were added.

The general policy of the laws regarding the settlement of the estate which is more specifically expressed in this section is that the personal representative shall regularly prepare the estate in his hands for final distribution immediately after the lapse of two years next after his qualification. The dissenting opinion in Andres v. Powell, 97 N. C. 156, 164, 2 S. E. 235.

Settlement within Two Years. — This section merely marks an utmost limit of time in which the representative must settle; it does not authorize him to withhold settlement for that length of time (two years) where there is no justification therefor. Hence the parties interested may call on him to account within that period. Snow v. Boylston, 185 N. C. 321, 117 S. E. 14. See also, Clements v. Rogers, 91 N. C. 63.

Time of Final Account and Settlement. — The final account always precedes the settlement, for without it there is no way of telling what is due. Self v. Shugart, 135 N. C. 185, 196, 47 S. E. 484.

Statute of Limitation.—After ten years from the expiration of the two years' period prescribed by this section, an action for settlement against the personal representative will be barred by the statute of limitation. Edwards v. Lemmond, 136 N. C. 329, 330, 48 S. E. 737.

This section gives the personal representative two years to make a final settlement but he may be sued within ten years thereafter. Healey v. Reynolds Tobacco Co., 48 F. Supp. 207, 210.

Cited in In re Hege, 205 N. C. 625, 172 S. E. 345.

§ 28-163. Extension of time for final accounts when funds are in closed banks.—Where as much as twenty-five per cent of the estate of any decedent is represented by deposits in a bank or trust company in course of liquidation, the personal representative of such decedent shall, in the discretion of the clerk of the superior court, have ninety days after the payment of the final dividend in which to file his final account. The several

clerks of the superior court of this State may, in their discretion, upon good cause shown, extend the time for the final settlement of any executor or administrator: Provided, that this section shall not relieve any personal representative of the duty of administering and distributing other funds and property in his hands, as now required by law. (1935, c. 244.)

§ 28-164. Retention of funds to satisfy claims not due or in litigation.—If, on a final accounting before the judge or clerk, it appears that any claim exists against the estate which is not due, or on which suit is pending, the judge or clerk shall allow a sum sufficient to satisfy such claim, or the proportion to which it may be entitled, to be retained in the hands of the executor, administrator or collector, for the purpose of being applied to the payment when due or when recovered, with the expense of contesting the same. The order allowing such sum to be retained must specify the amount and nature of the claim. (Rev., s. 148; Code, s. 1489; 1868-9, c. 113, s. 60; C. S. 151.)

No Allowance for Contingent Liabilities. — Claims for which an allowance will be made to the representative, within the contemplation of this section, are such claims as are existing and capable of being ascertained and not a mere contingent liability which may never ripen into a cause of action, such as the contingent liability of a surety or co-security on an administration bond. Adams v. Durham, etc., R. Co., 110 N. C. 325, 14 S. E. 857.

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

Payment of Debt Necessary. — The personal representative should pay all debts before beginning a proceeding under this section. Carlton v. Byers, 93 N. C. 302, 304.

Allegations of Petition.—Where the petition filed under this section does not state that the personal representative has filed a final account or that he has the funds ready in hand for distribution, the petition will be dismissed. Moore v. Rankin, 172 N. C. 599, 602, 90 S. E. 759; Self v. Shugart, 135 N. C. 185, 196, 47 S. E. 484.

Applied in In re Hege, 205 N. C. 625, 172 S. E. 345.

Cited in In re Estate of Wallace, 197 N. C. 334, 148 S. E. 456.

§ 28-166. Payment into court of fund due absent defendant or infant.—When any balance of money or other estate which is due an absent defendant or infant without guardian is found in the hands of an executor, administrator or collector who has preferred his petition for settlement, the court or judge may direct such money or other estate to be paid into court, to be invested upon interest, or otherwise managed under the direction of the judge, for the use of such absent person or infant. (Rev., s. 151; Code, s. 1526; 1868-9, c. 113, s. 97; 1893, c. 317; C. S. 153.)

Cross Reference.—As to the manner of investment of funds in the hands of clerks of court under color of their office, see § 2-54 et seq. It has been suggested in 9 N. C. L. R. 399 that this section is impliedly repealed in part by those sections.

§ 28-167. Procedure where person entitled unheard of for seven years.—When the party entitled to the money has not been heard of for seven years or more, the fund shall be distributed among the next of kin of the absent deceased person as prescribed by statute, in the following manner: An administrator shall be appointed and made a party to a special proceeding in which a verified petition shall be filed setting forth the facts, with names of the parties entitled, and the proceedings conducted as other special the clerk in whose office said fund was deposited, and the proceedings conducted as other special proceedings; and the order disposing of the fund shall be approved and confirmed by the judge, either at term or at chambers. (Rev., s 151; Code, s. 1526; 1868-9, c. 113, s. 97; 1893, c. 317; C. S. 154.)

§ 28-168. Parties to proceeding for settlement.—In all actions and proceedings by administrators or executors for a final settlement of their estates and trusts, whether at the instance of distributees, legatees or creditors or of themselves, if the personal representative dies or is removed pending such actions or proceedings, the administrator de bonis non or administrator with the will annexed, as the case may be, shall be made party as provided in other cases, or in such judgment shall be rendered on the con- or proceeding shall be conducted to its end, and such way as the court may order, and the action firmation of the report, or upon the terms of settlement, if any shall be agreed upon by the parties, as will fully protect and discharge all parties to the record. (Rev., s. 154; 1893, c. 206; C. S. 155.)

§ 28-169. When legacies may be paid in two years.—It is in the power of the judge or court, on petition or action, within two years from the qualification of an executor, administrator or collector, to adjudge the payment in full or partially, of legacies and distributive shares, on such terms as the court deems proper, when there is no necessity for retaining the fund. (Rev., s. 155; Code, s. 1512; C. S. 156.)

Expiration of Two Years Not Prerequisite. — The provision of this section is only a legislative affirmance of the law as it existed before the code. The allowance of two years to the representative is intended as an indulgence; it does not authorize him to defer the settlement until the expiration of that time, without necessity. Clements v. Rogers, 91 N. C. 63, 65.

It follows that in a petition filed against the representative for settlement absence of allegation that two years have elapsed since his qualification is immaterial, where it is alleged that the estate is solvent and that there is no reason why the representative should further retain the fund. Leonard v. Leonard, 107 N. C. 168, 170, 11 S. E. 1051.

Call for Account within Two Years. — The representative may be called upon by the legatees or the next of kin to account for the distributive shares and legacies even before the expiration of two years from the time of grant of administration. Hobbs v. Craige, 23 N. C. 332.

§ 28-170. Commissions allowed representatives.—Executors, administrators, testamentary trustees, collectors, or other personal representatives or fiduciaries shall be entitled to commissions to be fixed in the discretion of the clerk not to exceed five per cent upon the amount of receipts, includ-

ing the value of all personalty when received, and upon the expenditures made in accordance with law, which commissions shall be charged as a part of the costs of administration and, upon allowance, may be retained out of the assets of the estate against creditors and all other persons claiming an interest in the estate. In determining the amount of such commissions, both upon personalty received and upon expenditures made, the clerk shall consider the time, responsibility, trouble and skill involved in the management of the estate. Where land is sold to pay debts or legacies, the commission shall be computed only on the proceeds actually applied in the payment of debts or legacies. The clerk may make allowances on account of commissions on receipts of personalty and expenditures at any time during the course of the administration, but the total commissions allowed shall be determined on final settlement of the estate and shall not exceed the limit herein fixed. Nothing in this section shall prevent the clerk allowing reasonable sums for necessary charges and disbursements incurred in the management of the estate. Nothing in this section shall be construed to allow commissions on allotment of dower, on distribution of the shares of heirs, on distribution of the shares of distributees of personal property or on distribution of shares of legatees; and nothing herein contained shall be construed to abridge the right of any interested party to such administration to appeal from the clerk's order to the judge of the superior court. (Rev., s. 149; Code, s. 1524; 1868-9, c. 113, s. 95; 1869-70, c. 189; 1941, c. 124; C. S. 157.)

Editor's Note.—The 1941 amendment rewrote this section. For comment on the amendment, see 19 N. C. Law Rev. 543.

Object of Compensation. — The compensation is allowed to the representative in order to reward him not only for his time, labor and trouble but also for the responsibility incurred, and the fidelity with which he discharged the duties of his trust. It should not, however, be allowed where due to his neglect the estate has suffered loss. Kelly v. Odum, 139 N. C. 278, 280, 51 S. E. 953.

This same rule applies to the allowance of necessary charges and disbursements—such as counsel fees. Id. For example, where he resists a claim which has been adjudged against him in a prior litigation. Johnson v. Marcom, 121 N. C. 83, 28 S. E. 58.

Not Entitled at All Events. — The representative is not, under this section, entitled to commission at all events. He must have earned them by a just and reasonable discharge of his duties. It must appear that the "receipts and expenditures" referred to have been fairly made in the course of administration. The law will not allow compensation to one who disregards its commands. Grant v. Reese, 94 N. C. 720.

Commission on Specific Property Administered. — Specific articles merely inventoried by an executor and delivered to the legatee, are not "receipts," within the meaning of this section, upon which a commission is to be calculated. It may be proper, in estimating the commission, to take into consideration the trouble of managing such articles, but the value of such articles is not to be the basis of such computation. Walton v. Avery, 22 N. C. 405, 412.

Appeal on Commission under 5%. — Notwithstanding the fact that the amount of commissions allowed in a given case has not exceeded 5% on the receipts and disbursements, the allowance is reviewable upon appeal for inadequacy or excessiveness. It cannot strictly be said that the lower court has **exclusive** discretion within the limit of 5%. Bank v. Bank, 126 N. C. 531, 537, 36 S. E. 39.

Order for Commissions Final Judgment. — An order allowing commissions is a final judgment upon which an appeal may be taken. Bank v. Bank, 126 N. C. 531, 36 S. E. 39.

Commission on Both Receipts and Disbursements. — Commissions may be allowed to the representative on both receipts and disbursements, as separate acts. Bank v. Bank, 126 N. C. 531, 540, 36 S. E. 39.

Bank as Administrator and Guardian of Distributee.— Commissions are allowed where one person is both administrator and guardian of distributee. Rose v. Bank of Wadesboro, 217 N. C. 600, 9 S. E. (2d) 2.

Counsel Fees as Necessary Charges. — Besides commissions, the representative is allowed to retain his expenses for necessary charges and disbursements in the settlement of the estate. Among these necessary charges fees paid to counsel are embraced. Hester v. Hester, 38 N. C. 9; Love v. Love, 40 N. C. 201; Fairbairn v. Fisher, 58 N. C. 385, 387.

Attorney as Executor.—When a lawyer voluntarily becomes executor he assumes the office cum onere, and the exercise by him of his professional skill in the management of the estate does not entitle him to counsel fees, but his compensation is limited to the five per cent maximum allowed by this section. Lightner v. Boone, 221 N. C. 78, 19 S. E. (2d) 144.

Dower as an "Interest in the Estate". — Manifestly, a claim of dower is an "interest" in the estate. Hence the wording of this section lends direct support to a judgment giving priority to commissions due executors, reasonable attorney's fees and costs. Parsons v. Leak, 204 N. C. 86, 92, 167 S. E. 563.

Applied in In re Hege, 205 N. C. 625, 172 S. E. 345.

§ 28-171. Liability and compensation of clerk.— Every clerk of the superior court who may be intrusted with money or other estate in such case shall be liable on his official bond for the faithful discharge of the duties enjoined upon him by the judge in relation to said estate, and he may receive such compensation for his services as the judge may allow. (Rev., s. 152; Code, s. 1527; 1868-9, c. 113, s. 98; C. S. 158.)

Art. 19. Actions by and against Representative.

§ 28-172. Action survives to and against representative.—Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate. (Rev., s. 156; Code, s. 1490; 1868-9, c. 113, s. 63; C. S. 159.)

Cross Reference.—As to abatement of actions, see § 1-74.

Editor's Note.—The rule of the common law is that a person's right of action dies with the person. But great changes in this respect have been wrought by legislation and the decisions of the courts, and the maxim **actio personalis moritur cum persona** has thereby lost much of its validity. As to pure torts to person, feeling or reputation, it still retains its ancient force and vigor, but it does not now apply to torts committed to property, personal or real. As to the first kind of property, it was repealed by the act, 4 Edward III, ch. 7, and as to the second kind by 3 and 4 William IV, ch. 42. These provisions have been substantially adopted by our legislature. See Mast v. Sapp, 140 N. C. 533, 536, 53 S. E. 350.

The rule of the common law that a personal right of action dies with the person has been changed by this section and § 1-74 and, except in the instances specified in § 28-175, an action originally maintainable by or against a deceased person is now maintainable by or against his personal representative. Suskin v. Maryland Trust Co., 214 N. C. 347, 350, 199 S. E. 276.

It was formerly held that this section did not change the common law rule that a right of action sounding in tort for personal injuries does not survive the tort feasor or the injured person where the injury did not cause death, in view of the express terms of sec. 28-175, which then declared inter alia, that injuries to person, not causing death to the injured party shall not survive, see Watts v. Vanderbilt, 167 N. C. 567, 83 S. E. 813; Harper v. Commissioners, 123 N. C. 118, 31 S. E. 384; Bolick v. Railroad, 138 N. C. 370, 50 S. E. 689; Strauss v. Wilmington, 129 N. C. 99, 39 S. E. 772.

So also, under the same provision, it was held that an action against a telegraph company for mental anguish caused by failure to deliver a telegram abates upon the death of the plaintiff under sec. 1-74, and does not survive. Morton v. Western Union Tel. Co., 130 N. C. 299, 302, 41 S. E. 484.

But this provision of section 28-175 no more exists. The inference, therefore, is that such actions, at least those based on a tangible physical injury do survive, under the

broad provisions of this section, irrespective of whether the injury has caused death or not; and that the provisions of section 28-175 specifying the actions which will not survive are limited to actions therein designated. See Fuguay v. A. & W. Ry. Co., 199 N. C. 499, 500, 155 S. E. 167.

As to those actions which are not based on a tangible physical injury, however, such as for mental anguish, etc., this last conclusion is somewhat doubtful, in view of the analogy between such actions and actions for libel and slander which by express terms of section 28-175 are still declared not to survive.

Relation of Revival and Survival.—The general rule is that wherever an action can be revived against the representative, it will also survive against him. Butner v. Keelhn, 51 N. C. 60.

This section does not revive the action against a distributee, but against the personal representative. Healey v. Reynolds Tobacco Co., 48 F. Supp. 207, 210.

The breach of the condition subsequent contained in a deed entitles the grantor during his life, of his heirs after his death, to bring suit for the land or to declare the estate forfeited, but does not entitle the administrator to bring such suit, this section not being applicable. Barkley v. Thomas, 220 N. C. 341, 17 S. E. (2d) 482.

Vindictive Damages.—Though the cause of action for trespass may survive against the representative of the trespasser, no vindictive damages may be recovered in such action. Rippey v. Miller, 33 N. C. 247.

Applied in Baird Co. v. Boyd, 41 F. (2d) 578.

Cited in Price v. Askins, 212 N. C. 583, 194 S. E. 284.

§ 28-173. Death by wrongful act; recovery not assets; dying declarations.—When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy.

In all actions brought under this section the dying declarations of the deceased as to the cause of his death shall be admissible in evidence in like manner and under the same rules as dying declarations of the deceased in criminal actions for homicide are now received in evidence. (Rev., s. 59; Code, ss. 1498, 1500; 1868-9, c. 113, ss. 70, 72, 115; R. C., c. 46, ss. 8, 9; 1919, c. 29; 1933, c. 113; C. S. 160.)

I. In General.
II. Limitation of the Action.
III. Parties to the Action.
IV. Distribution of Recovery.
V. Admission of Declarations.

I. IN GENERAL.

Cross Reference.—See note under § 1-183.

Editor's Note.—For critical appraisal of this section, see 11 N. C. Law Rev. 263. And see 16 N. C. Law Rev. 211.

Under the common law there was no civil action for the wrongful death of a human being. Although the harshness of this doctrine was obvious it was not until 1846 that the English Parliament passed the statute known as Lord Campbell's Act (9 & 10 Vict., c. 93) which made such actions possible.

The wrongful death acts in the different states in this country are generally based upon Lord Campbell's Act, although there are distinct differences. The English Statute seems to have been especially designed to aid the families of the deceased but in regard to the North Carolina Act the Supreme Court in Russell v. Windsor Steamboat Co., 126 N. C. 961, 965, 36 S. E. 191, says: This section unlike Lord Campbell's Act does not regard the family relation and is not for the purpose of "compensating the families of persons killed by accident."

The exception as to burial expenses to the exemption of the amount from payment of debts was inserted by Public Laws 1933, c. 113.

Not a Common-Law Right.—The right of recovery for death by wrongful act did not exist at common law, and rests entirely upon this section. Broadnax v. Broadnax, 160 N. C. 432, 76 S. E. 216; Hall v. Southern R. Co., 149 N. C. 108, 110, 62 S. E. 899; Harper v. Commissioners, 123 N. C. 118, 119, 31 S. E. 384; Hinnant v. Tidewater Power Co., 189 N. C. 120, 121, 126 S. E. 307.

Purpose of Section. — The purpose of this section was to withdraw claims of this kind from the effect and operation of the maxim actio personalis moritur cum persona, and to continue, as the basis of the claim of his estate, the wrongful injury to the person resulting in death. Mitchell v. Talley, 182 N. C. 683, 109 S. E. 882.

It Is Similar to the Georgia Statute.—The wrongful death statute of Georgia is not so dissimilar from this section in scope, meaning, and practical application as to deprive the trial courts of this state of jurisdiction to hear and determine a cause for the negligent killing in the state of Georgia of a resident of this state. Rodwell v. Camel City Coach Co., 205 N. C. 292, 171 S. E. 100.

Creates New Cause of Action. — The cause of action for personal injuries ceases with the death of the injured party and the action under this section is not a survival of the former but an entirely new action. Harper v. Commissioners, 123 N. C. 118, 119, 31 S. E. 384; Bolick v. Railroad, 138 N. C. 370, 50 S. E. 689; Taylor v. Cranberry, etc., Iron Co., 94 N. C. 526.

It creates a new cause of action, however, only in the sense that at common law the right did not survive to the personal representative. Mitchell v. Talley, 182 N. C. 683, 109 S. E. 882.

Liberal Construction. — This section is not penal but remedial in its nature, and it should be given such construction as will effectuate the intention of the legislature in enacting it. Hall v. Southern R. Co., 149 N. C. 108, 62 S. E. 899; Vance v. Railroad, 138 N. C. 460, 464, 50 S. E. 860.

Writ of Attachment May Issue.—A writ of attachment will issue under section 1-440, subsec. 4, to enforce the right created by this section. Mitchell v. Talley, 182 N. C. 683, 109 S. E. 882.

A Property Right. — This section gives clear indication of the purpose of the Legislature to impress upon the right of action the character of property as a part of the intestate's estate. Neill v. Wilson, 146 N. C. 242, 245, 59 S. E. 674.

Decedent Fully Compensated before Death. — Where the injured party has received in his lifetime full compensation for the injury which resulted in his death, a right of action arising from the same injury will not lie after his death for further damages for the benefit of his estate. Edwards v. Interstate Chemical Co., 170 N. C. 551, 87 S. E. 635.

What Constitutes a Cause of Action.—It is entirely immaterial for the purpose of establishing a cause of action under the provisions of this section whether the act was wanton or cruel. Facts showing a legal duty and neglect thereof on the part of defendant with a resulting injury to the plaintiff are sufficient to constitute a cause of action. Western Union Tel. Co. v. Catlett, 177 Fed. 71, 74.

For a discussion of the right of husband or wife to recover damages for the loss of consortium by reason of injury or death, see 3 N. C. L. R. 98.

Cited in Hawkins v. Rowland Lumber Co., 198 N. C. 475, 476, 152 S. E. 169; Harper v. Bullock, 198 N. C. 448, 449, 152 S. E. 405; Wilson v. Clement Co., 207 N. C. 541, 543, 177 S. E. 797; Peterson v. McManus, 208 N. C. 802, 182 S. E. 483; Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403; Taylor v. Atlantic Coast Line R. Co., 213 N. C. 671, 197 S. E. 159.

Applied in Hancock v. Wilson, 211 N. C. 129, 189 S. E. 631; Lemings v. Southern Ry. Co., 211 N. C. 499, 191 S. E. 39; Mack v. Marshall Field & Co., 217 N. C. 55, 6 S. E. (2d) 889.

II. LIMITATION OF THE ACTION.

In General.—The limitation of the section is stated in Davis v. Norfolk Southern R. Co., 200 N. C. 345, 157 S. E. 11.

Condition Affecting Cause. — The provision that the action must be brought within one year is not a statute of limitation but is a condition affecting the cause of action itself. Trull v. Seaboard Air Line R. Co., 151 N. C. 545, 547, 66 S. E. 586. See also Mathis v. Camp Mfg. Co., 204 N. C. 434, 435, 168 S. E. 515; Curlee v. Duke Power Co., 205 N. C. 644, 647, 172 S. E. 329.

Hence it must be alleged and proved by the plaintiff to make out a cause of action and is not required to be pleaded as a statute of limitations. Bennett v. North Carolina R. Co., 159 N. C. 345, 74 S. E. 883; Hatch v. Alamance R. Co., 183 N. C. 617, 112 S. E. 529; Hanie v. Penland, 193 N. C. 800, 138 S. E. 165.

The requirement that the action shall be brought within one year is a condition annexed to the right of action and not to the person of the defendant and it must be shown by the plaintiff that he has complied therewith, and it is not necessary for the defendant to plead it as a statute of limitations. Neely v. Minus, 196 N. C. 345, 145 S. E. 771.

Provision as to Time Strictly Construed. — This provision requiring suit to be brought within one year after the death must be strictly complied with. Taylor v. Cranberry Iron, etc., Co., 94 N. C. 525, 526; Whitehead v. Branch, 220 N. C. 507, 17 S. E. (2d) 637. And no explanation as to why the action was not brought within such time can avail. Best v. Kinston, 106 N. C. 205, 10 S. E. 997. Therefore, the fact that no administrator was appointed does not vary the rule. Best v. Kinston, 106 N. C. 205, 10 S. E. 997.

Applies to Nonresident Defendant.—The provision that the action must be brought within one year applies with full force whether the defendant be a resident or a nonresident. Neely v. Minus, 196 N. C. 345, 347, 145 S. E. 771, citing McGuire v. Lumber Co., 190 N. C. 806, 131 S. E. 274.

After Nonsuit.—A new action under this section may be commenced within one year after a nonsuit, as provided in sec. 1-25. Neekins v. Norfolk, etc., R. Co., 131 N. C. 1, 2, 42 S. E. 333; Trull v. Seaboard, etc., R. Co., 151 N. C. 545, 548, 66 S. E. 586. See also Swainey v. Great Atlantic, etc., Tea Co., 204 N. C. 713, 715, 169 S. E. 618; Jones v. Bagwell, 207 N. C. 378, 388, 177 S. E. 170. See also, Blades v. Southern Ry. Co., 218 N. C. 702, 12 S. E. (2d) 553.

This section, construed with § 1-25, extends the time within which the action must be brought in case of nonsuit to the extreme limit of two years, and where the defendant has, under the Federal statutes, removed the cause from the State to the Federal Court, and there taken a nonsuit, and has commenced his action again in the State court, the fact that the second action between the same parties, upon the same subject-matter, was commenced in the State court more than one year after the date of the death does not bar the plaintiff's right of action. Brooks v. Suncrest Lumber Co., 194 N. C. 141, 138 S. E. 532, citing Fleming v. R. R., 128 N. C. 80, 38 S. E. 253.

After Discontinuance.—Where there is a break in the continuity in the issuance of alias and pluries summonses in a civil action to recover damages for a wrongful death there is a discontinuance, and service of a summons thereafter commences a new action, and if issued more than one year after the wrongful death of the action will be dismissed. Neely v. Minus, 196 N. C. 345, 145 S. E. 771.

Conflict of Laws.—This section confers a right not existing at common law, and the provision that the action be brought within one year is a condition annexed to the cause of action and also a statute of limitation in regard thereto, and an action brought against a resident defendant by a nonresident plaintiff for a wrongful death occurring in another State is controlled by our statute prescribing the time within which such action can be brought and not a general statute of the State in which the deatn occurred which allows a longer period. Tieffenbrun v. Flannery, 198 N. C. 397, 151 S. E. 857.

The fact that an action is not instituted within the limitation prescribed may be taken advantage of by demurrer when the dates appear as a matter of record. George v. Atlanta, etc., Ry. Co., 210 N. C. 58, 185 S. E. 431.

Where it appeared upon the face of the record that more than one year had elapsed between the accrual of the cause of action and the filing of the amended complaint, the demurrer of the corporate defendants was properly sustained, the action against them not having been instituted within the limitation prescribed by this section. Id.

Cited in Webster v. Charlotte, 222 N. C. 321, 22 S. E. (2d) 900.

III. PARTIES TO THE ACTION.

Action against Estate of One Causing Wrongful Death.—Where a person is alleged to have caused the death of another by his wrongful act, neglect, or default, and suit has been brought against him and is pending at his death, within one year after the wrongful death caused by him, an action will lie against the executor and administrator of the deceased defendant under the provisions of this section. Tonkins v. Cooper, 187 N. C. 570, 122 S. E. 294.

Where Deceased Is an Infant. — Under this section the administrator may sue for the death of an infant a few months old. Russell v. Windsor Steamboat Co., 126 N. C. 961, 36 S. E. 191; Davis v. Railroad Co., 136 N. C. 115, 116, 48 S. E. 591.

Action by Administrator of Child against Parents.—An unemancipated child living with his parents may not maintain an action in tort against them, nor can the administrator of the child recover damages against them for the child's wrongful death, as this section gives a right of action for wrongful death only where the injured party, if he had lived, could have maintained such action. Goldsmith v. Samet, 201 N. C. 574, 160 S. E. 835.

Joinder of Employer with Employee.—The right to maintain an action for the wrongful death of a deceased rests exclusively upon this section, and where the death is caused by the negligence of an employee while acting within the scope of his authority the employer may be joined as a defendant under the doctrine of respondeat superior. Brown v. Southern R. Co., 202 N. C. 256, 162 S. E. 613.

Action by Administrator of Employee Who Has Received Workman's Compensation.—Although an administratrix of a deceased employee who has received compensation for the employee's death under the provisions of the Workmen's Compensation Act is thereby barred from prosecuting any other remedy for the injury, she may, under this section, pending the hearing before the Industrial Commission, institute an action against a third person whose negligent acts caused the death of the intestate, and where the insurance carrier has paid the compensation later awarded, it is subrogated to the rights of the employer and may maintain the action against such third person in the name of the administratrix. Phifer v. Berry, 202 N. C. 388, 163 S. E. 119.

Since the North Carolina Workmen's Compensation Act expressly provides that the subrogated right of action against the third person tort-feasor in favor of the insurance carrier paying compensation for which the employer is liable, must be maintained in the name of the injured employee or his personal representative the act does not change or modify the requirement of this section that an action for wrongful death must be maintained by the administrator of the deceased, and the insurance carrier cannot maintain the action for wrongful death in its own name against the third person tort-feasor. Whitehead v. Branch, 220 N. C. 507, 17 S. E. (2d) 637.

Suit Must Be Brought by Personal Representative — The personal representative of the deceased, his executor or administrator, etc., can alone maintain an action for damages for his wrongful death under the provisions of this section. Hanes v. Southern Pub. Utilities Co., 191 N. C. 13, 16, 131 S. E. 402; Hood v. American Tel., etc., Co., 162 N. C. 70, 71, 77 S. E. 1096. See also, White v. Holding, 217 N. C. 329, 7 S. E. (2d) 825.

Nature of Suit. — The statute requires the suit to be brought by the administrator in his official and not in his private or individual capacity. He must sue as administrator. Hall v. Southern R. Co., 146 N. C. 345, 348, 59 S. E. 879.

Under this section an administrator sues in his own right and not **en autre droit.** Christian v. Railroad Co., 136 N. C. 321, 322, 48 S. E. 743.

Hence under this section an action cannot be maintained by a widow as such, but must be brought by the personal representative of the deceased. Bennett v. North Carolina R. Co., 159 N. C. 345, 74 S. E. 883; Howell v. Commissioners, 121 N. C. 362, 28 S. E. 362; Craig v. Suncrest Lumber Co., 189 N. C. 137, 126 S. E. 312, 313.

Nor can a husband as such sue for the wrongful death of his wife. Hood v. American Tel., etc., Co., 162 N. C. 70, 77 S. E. 1096. A father cannot maintain an action in his individual capacity for the death of his son. Killian v. Southern R. Co., 128 N. C. 261, 38 S. E. 873. Nor for the wrongful death of his daughter resulting from seduction. Scarlett v. Norwood, 115 N. C. 284, 285, 20 S. E. 459.

Appointment of Administrator. — A cause of action under this section is sufficient for the appointment of an administrator. Vance v. Railroad, 138 N. C. 460, 464, 50 S. E. 860. But where a deceased has left a will disposing of all his property and therein naming an executor, the right of action against a defendant for his wrongful death must be by the executor named. Hood v. American Tel., etc., Co., 162 N. C. 70, 93, 77 S. E. 1096.

Foreign Administrator Cannot Sue. — A foreign administrator cannot bring an action under this section. Hall v. Southern R. Co., 149 N. C. 108, 62 S. E. 899. Therefore when an administrator does not qualify in this state until after the commencement of the suit and the expiration of one year from the death of his intestate he cannot bring the action. Id. Vance v. Railroad, 138 N. C. 460, 50 S. E. 860.

Since an action for wrongful death exists solely by virtue of this section, it must be maintained and prosecuted in

strict accord herewith, and an administratrix appointed by the court of another state may not maintain an action for wrongful death in this state. Such holding does not impinge Article IV, § 1, of, or the 14th Amendment to, the federal Constitution. Monfils v. Hazlewood, 218 N. C. 215, 10 S. E. (2d) 673.

Where an action for wrongful death is instituted in this state by an administratrix appointed by the court of another state, the defect may be taken by demurrer, since such plaintiff does not have legal capacity to sue and the complaint does not state facts sufficient to constitute a cause of action. Id.

IV. DISTRIBUTION OF RECOVERY.

In General.—With reference to the disposition of the recovery this section materially differs from the English statute and the statute in most of the states which generally provide for designated classes, such as the wife, the children. Furthermore, in some states the measure of damages is made to depend upon who takes the benefit of the recovery. In this state the measure of damages is not determined by such considerations, but is, in all cases, dependent upon considerations of fair and just compensation for the pecuniary injury resulting from such death.

The damages when recovered are not to be simply distributed, but **disposed of** as provided in case of intestacy and the complaint need not allege that intestate left next-of-kin. Warner v. Western, etc., R. Co., 94 N. C. 250, 255, 257.

Existence of Beneficiaries Immaterial. — The existence of persons who will be entitled to the recovery under section 28-149 is not a condition precedent to the right to bring the action. The purpose of the section is to give the action irrespective of who may become beneficiaries of the recovery. Warner v. Western, etc., R. Co., 94 N. C. 250, 258.

Rights of Distributees Fixed. — Under this section the rights of the distributees are fixed as of the time when the intestate died. Neill v. Wilson, 146 N. C. 242, 245, 59 S. E. 674.

Not Assets of Deceased's Estate. — The provision that the recovery is not to be applied as assets in the payment of debts or legacies extends to creditors of the intestate and not to creditors of the distributees. Neill v. Wilson, 146 N. C. 242, 245, 59 S. E. 674.

Damages for a wrongful death are not assets of the estate available to creditors, and are to be disposed of according to the canons of descent and distribution. Hines v. Foundation Co., 196 N. C. 322, 145 S. E. 612.

Not Subject to Widow's Year's Support. — The damages recovered are not subject to the widow's year's support, as such support is not provided for "in this chapter" as specified by the section. Broadnax v. Broadnax, 160 N. C. 432, 76 S. E. 216.

Recovery Held in Trust. — The administrator holds the amount recovered in trust for those that may be entitled thereto as distributees. Avery v. Brantley, 191 N. C. 396, 399, 131 S. E. 721; Baker v. Raleigh, etc., R. R., 91 N. C. 308.

Contributory Negligence of Beneficiary.—In an action to recover for wrongful death of a 2½-year-old child, contributory negligence on the part of its mother is a bar to so much of the recovery as would accrue to her as a beneficiary of the child's estate, but negligence of the child's mother will not be imputed to the child's father, and is no bar to the recovery of the amount which would inure to his benefit as beneficiary of the child's estate. Pearson v. National Manufacture, etc., Corp., 219 N. C. 717, 14 S. E. (2d) 811.

When Recovery Goes to University. — In action under this section for damages for negligently causing the death of the intestate, if there be no next-of-kin who are entitled to the recovery, under the statute of distributions, the recovery goes to the University. Warner v. Western, etc., R. Co., 94 N. C. 250.

Law of This State Governs. — Where a person was domiciled in another state and was killed in this state, and an administrator sues in this state, the funds recovered must be distributed under the laws of this state, though a prior administration had been taken out in the state of his domicile. Hartness v. Pharr, 133 N. C. 566, 45 S. E. 901. See Hall v. Southern R. Co., 146 N. C. 345, 350, 59 S. E. 879.

Recovery under Federal Employer's Liability Act.—In an action to recover damages under the Federal Employer's Liability Act, this state statute does not apply as to the distribution of the recovery. Horton v. Seaboard, etc., R. Co., 175 N. C. 472, 473, 95 S. E. 883. Overruling In re Stone, 173 N. C. 208, 91 S. E. 852.

V. ADMISSION OF DECLARATIONS.

Rule of Evidence Changed—Applies to Prior Cases.—The amendment of 1919 to this section, enlarging the rule of the admissibility of evidence of dying declarations to instances of wrongful death, does not change any vested rights, and is applicable in cases where such death was caused before its passage. This is a general statute changing the rule of evidence, in which no one has a vested interest and which the law-making power can extend, alter or repeal at will. Williams v. Randolph, etc., R. Co., 182 N. C. 267, 108 S. E. 915. And this change is valid and constitutional. Tatham v. Andrews Mfg. Co., 180 N. C. 627, 105 S. E. 423.

What Declarations Permitted. — This section permits in evidence declarations of the act of killing and circumstances immediately attendant on the act, which constitutes a part of the res gestae, uttered when the declarant was in actual danger of death, and made in full apprehension thereof, and when the death accordingly ensued. Tatham v. Andrews Mfg. Co., 180 N. C. 627, 105 S. E. 423.

The dying declarations of a deceased person for whose death an action has been brought under this section are competent as evidence, provided the preliminary facts are made to appear. Southwell v. R. R., 189 N. C. 417, 127 S. E. 361. Otherwise they are not admissible. Holmes v. Wharton, 194 N. C. 470, 475, 140 S. E. 93.

Where declarant was fatally injured in an automobile accident, declarations made by him the night before and two days before undertaking the journey are not admissible as dying declarations. Gassaway v. Gassaway, 220 N. C. 694, 18 S. E. (2d) 120.

Declarations Must Have Been Voluntary.—In case of the admission of dying declarations, as in criminal actions for homicide, the dying declarations of one whose wrongful death has been caused to be admissible upon the trial in an action to recover damages for his wrongful death, must have been voluntarily made while the declarant was in extremis or under a sense of impending death, and confined to the act of killing and the attendant circumstances forming a part of the res gestae. Dellinger v. Elliott Building Co., 187 N. C. 845, 123 S. E. 78.

§ 28-174. Damages recoverable for death by wrongful act.—The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death. (Rev., s. 60; Code, s. 1499; 1868-9, c. 113, s. 71; R. C., c. 1, s. 10; C. S. 161.)

Mental Anguish Not to Be Considered. — Where the plaintiff brings an action, under this section, as administrator of his son, his recovery is limited to the value of the life and he is not entitled to any damages for mental anguish in this form of action, nor for the loss of the services of his child. Byrd v. Express Co., 139 N. C. 273, 51 S. E. 851.

Evidence as to Number of Children Inadmissible. — In an action for death under this section, evidence of the number of children left by the deceased is inadmissible as irrelevant and calculated to mislead the jury. Kesler v. Smith, 66 N. C. 154.

Annuity Act Not to Be Considered.—In estimating the damages under this section the court should not permit the jury to consider the provisions of sec. 8-47 (the Annuity Act) for the purposes of ascertaining the present value of intestate's life. Poe v. Railroad, 141 N. C. 525, 54 S. E. 406.

No "Hard and Fast Rule" Prescribed.—"This court has not prescribed any 'hard and fast rule' by which to bind the jury in making the estimate of what sum should be given or to require them to make the assessment of damages in any particular way." Poe v. Railroad, 141 N. C. 525, 528, 54 S. E. 406.

Nature and Quantum of Damages Recoverable. — It is well settled that no damages are to be allowed as a **solatium** or a punishment. Kesler v. Smith, 66 N. C. 154, 157; Bradley v. Ohio River, etc., R. Co., 122 N. C. 972, 974, 30 S. E. 8; Western Union Tel. Co. v. Catlett, 177 Fed. 71; Collier v. Arrington, 61 N. C. 356.

This section restricts the recovery for malpractice to compensatory damages. Gray v. Little, 127 N. C. 304, 37 S. E. 270.

In an action for wrongful death under this section the jury may consider evidence of the plaintiff's intestate's age, habits, industry, skill, means and business, and the admission of testimony that the deceased had a 200-acre farm, a comfortable home, and a plenty for his family to eat and wear, was not error. Hicks v. Love, 201 N. C. 773, 161 S. E. 394.

The reasonable expectation of pecuniary advantage from the continuance of the life of the deceased must, in all cases, guide the jury in determining the quantum of damages, to which end evidence as to the age, habits, industry,

business, etc., of the deceased is indispensable. Burton v. Wilmington, etc., R. Co., 82 N. C. 505.

The instruction for the determination of the quantum of damages must be so specific as to contain an explanation of the consideration to be given to the whole evidence in fixing the worth of the life. An error due to such a defect will not be cured by judges reducing the amount of damages assessed. Burton v. Wilmington, etc., R. Co., 82 N. C. 505.

"In estimating the pecuniary value of this child to her next of kin, the jury could take into consideration all the probable or even possible benefits which might result to them from her life, modified, as in their estimation they should be, by all the chances of failure and misfortune." Russell v. Windsor Steamboat Co., 126 N. C. 961, 969, 36 S. E. 191.

The correct rule touching the quantum of damages is the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased. Kesler v. Smith, 66 N. C. 154.

The measure of damages for the wrongful killing of a mother of children is the value of her labor or the amount of her earnings if she had lived out her expectancy, without regard to the number of her children and the intellectual and moral training she might have given them. Bradley v. Ohio River, etc., R. Co., 122 N. C. 972, 30 S. E. 8.

"It has been held by this court, in several similar cases, that the statute does not limit the recovery to the actual pecuniary loss proved on the trial." Russell v. Windsor Steamboat Co., 126 N. C. 961, 969, 36 S. E. 191.

Under the statute the jury assesses the value of the life of the decedent in solido, which is disbursed under the statute of distributions. Horton v. Seaboard, etc., R. Co., 175 N. C. 472, 477, 95 S. E. 883; Carpenter v. Asheville Power, etc., Co., 191 N. C. 130, 131 S. E. 400.

In ascertaining the net earnings the jury should deduct only the reasonably necessary personal expenses of the deceased, taking into consideration his age, manner of life, business calling or profession, etc., and the amount spent for his family, or those dependent upon him, should not be deducted. Carter v. Railroad, 139 N. C. 499, 52 S. E. 642.

The total amount or net accumulated income, upon which the compensation is based, must be ascertained as of the time when, according to his expectancy, the intestate would have died in due course of nature; but this total may be composed of many annual incomes of different amounts. The present value of that sum, whatever it may be, is what the jury should allow in the way of damages. Poe v. Railroad, 141 N. C. 525, 528, 54 S. E. 406.

The age, health, strength, skill, industry, habits, and character of the deceased are elements of importance to be considered in fixing the amount of compensation. Burton v. Wilmington, etc., R. Co., 82 N. C. 505; Poe v. Railroad, 141 N. C. 525, 528, 54 S. E. 406.

In such an action the value of the life before twenty-one as well as after twenty-one years of age is recoverable. Gurley v. Southern Power Co., 172 N. C. 690, 695, 90 S. E. 943.

The court cannot instruct the jury in any case, when death by the wrongful act of the defendant is shown, that upon any state of facts it is their duty to render a verdict against the plaintiff, as "the reasonable expectation of pecuniary advantages from the continuance of the life of the deceased," is necessarily an inference of fact from all of the evidence and can only be drawn by the jury. Carter v. Railroad, 139 N. C. 499, 52 S. E. 642.

The meaning of damages, in the case of the wrongful death of a child is the same as in the case of an adult. The difficulty is in the application. Russell v. Windsor Steamboat Co., 126 N. C. 961, 36 S. E. 191. See Gurley v. Southern Power Co., 172 N. C. 690, 695, 90 S. E. 943.

The damages recoverable for the wrongful death of another negligently caused is the net present pecuniary worth of the deceased, to be ascertained by deducting the probable cost of his own living and his ordinary or usual expenses, from the probable gross income derived from his own exertions, based upon his life expectancy. Carpenter v. Asheville Power, etc., Co., 191 N. C. 130, 131 S. E. 400; Purnell v. Rockingham R. Co., 190 N. C. 573, 130 S. E. 313; Russell v. Windsor Steamboat Co., 126 N. C. 961, 967, 36 S. E. 191.

In estimating damages under this section, the question is, did the relative suffer any pecuniary loss by reason of the fact that the deceased failed to live out his expectancy, and in determining it the jury must take into consideration the entire life, character, habits, health, capacity, etc., of the deceased. Carter v. Railroad, 139 N. C. 499, 52 S. E. 642.

In an action for death under this section it is competent to prove the age, strength, health, skill, industry, habits and character of the deceased, with a view to arrive at his pecuniary worth to his family. Kesler v. Smith, 66 N. C. 154.

Instructions as to Damages.—Where the evidence disclosed that intestate was a young man 18 years of age, of sober and industrious habits, that at the time of his death he was a newspaper photographer of skill and ability, and the court correctly instructed the jury as to the method of ascertaining the present net worth of deceased to his family, the refusal of a requested instruction that since the administrator had not shown the amount of any earning on the part of the intestate, the jury should not speculate as to what his earnings had been, is not error. Queen City Coach Co. v. Lee, 218 N. C. 320, 11 S. E. (2d) 341.

Stated in Wise v. Hollowell, 205 N. C. 286, 290, 171 S. E. 82.

Cited in Hines v. Foundation Co., 196 N. C. 322, 145 S. E. 612; McClamroch v. Colonial Ice Co., 217 N. C. 106, 6 S. E. (2d) 850.

§ 28-175. Actions which do not survive.—The following rights of action do not survive:

1. Causes of action for libel and for slander, except slander of title.

2. Causes of action for false imprisonment and assault and battery.

3. Causes where the relief sought could not be enjoyed, or granting it would be nugatory, after death. (Rev., s. 157; Code, s. 1491; 1868-9, c. 113, s. 64; 1915, c. 38; C. S. 162.)

Cross Reference.—As to abatement of actions, see § 1-74.

Editor's Note.—This section formerly contained an additional provision to the effect that "injuries to person, where such injury does not cause the death of the injured party" shall not survive. But this provision was omitted by the amendment of 1915, ch. 38. See Editor's Note under section 28-172.

In General.—Except as specified in this section, an action originally maintainable by or against a deceased person is now maintainable by or against his personal representative. Suskin v. Maryland Trust Co., 214 N. C. 347, 199 S. E. 276.

§ 28-176. To sue or defend in representative capacity.—All actions and proceedings brought by or against executors, administrators or collectors, upon any cause of action or right to which the estate is the real party in interest, must be brought by or against them in their representative capacity. (Rev., s. 160; Code, s. 1507; 1868-9, c. 113, s. 79; C. S. 164.)

Cross References.—As to joinder of beneficiary, see § 1-63. As to when heirs and devisees are necessary parties, see § 28-87.

Heirs and Next of Kin as Parties.—The heirs and next of kin have no right to be made parties to an action on account against the personal representative, although they allege collusion between the plaintiff and the representative. Byrd v. Byrd, 117 N. C. 523, 23 S. E. 324.

Application to Administrator d. b. n.—The provisions of this section apply to suits brought by administrator de bonis non, as well as to original administrator, and are mandatory. There is no middle ground. Rogers v. Gooch, 87 N. C. 442.

§ 28-177. Service on or appearance by one binds all.—In actions against several executors, administrators or collectors they are all to be considered as one person, representing the decedent; and if the summons is served on one or more, but not all, the plaintiff may proceed against those served, and if he recovers, judgment may be entered against all. (Rev., s. 161; Code, s. 1508; 1868-9, c. 113, s. 81; C. S. 165.)

§ 28-178. When creditors may sue on claim; execution in such action.—An action may be brought by a creditor against an executor, administrator or collector on a demand at any time after it is due, but no execution shall issue against the executor, administrator or collector on a judgment therein against him without leave of the court,

upon notice of twenty days and upon proof that the defendant has refused to pay such judgment its ratable part, and such judgment shall be a lien on the property of the defendant only from the time of such leave granted. (Rev., s. 162; Code, s. 1509; 1868-9, c. 113, s. 82; C. S. 166.)

Cross Reference.—See § 28-114.

Any Court May Entertain the Suit.—In construing this section, it was decided at a very early day after its enactment that any court having jurisdiction of the amount sued for could entertain the suit of the creditor so far as to establish his claim and give him judgment therefor. Heilig v. Foard, 64 N. C. 710; Vaughn v. Stephenson, 69 N. C. 212; Shields v. Payne, 80 N. C. 291, 293; Hoover v. Berryhill, 84 N. C. 133, 134.

Court to Grant Leave.—The court which, under this section, may grant leave to issue execution is the court which has jurisdiction of probate matters, and no other court. Vaughan v. Stephenson, 69 N. C. 212, 214.

Jurisdiction for Breach of Contract.—The superior court in term has, under this section, jurisdiction of an action by a creditor against an administrator for breach of a contract made by his intestate. Shields v. Payne, 80 N. C. 291.

§ 28-179. Service by publication on executor without bond.—Whenever process may issue against an executor who has not given bond, and the same cannot be served upon him by reason of his absence or concealment, service of such process may be made by publication in the manner prescribed in other civil actions. (Rev., s. 163; Code, s. 1523; 1868-9, c. 113, s. 94; C. S. 167.)

§ 28-180. Execution by successor in office.—Any executor, administrator or collector may have execution issued on any judgment recovered by any person who preceded him in the administration of the estate, or by the decedent, in the same cases and the same manner as the original plaintiff might have done. (Rev., s. 164; Code, s. 1513; 1868-9, c. 113, s. 84; C. S. 168.)

§ 28-181. Action to continue, though letters revoked.—In case the letters of an executor, administrator or collector are revoked, pending an action to which he is a party, the adverse party may, notwithstanding, continue the action against him in order to charge him personally. If such party does not elect so to do, within six months after notice of such revocation, the action may be continued against the successor of the executor, administrator or collector in the administration of the estate, in the same manner as in case of death. (Rev., s. 165; Code, s. 1514; 1868-9, c. 113, s. 85; C. S. 169.)

Art. 20. Representative's Powers, Duties and Liabilities.

§ 28-182. Representative may maintain appropriate suits and proceedings.—Executors, administrators or collectors may maintain any appropriate action or proceeding to recover assets, and to recover possession of the real property of which executors are authorized to take possession by will; and to recover for any injury done to such assets or real property at any time subsequent to the death of the decedent. (Rev., s. 159; Code, s. 1501; 1868-9, c. 113, s. 73; C. S. 170.)

Cross Reference.—As to discovery of assets, see §§ 28-69 to 28-72.

Recovery of Realty by Administrator d. b. n. c. t. a.—Where an executor is entitled, under this section, to the possession of the land, his successor, an administrator de bonis non, cum testamento annexo, is entitled to the same rights and remedies as his predecessor in office. Smathers v. Moody, 112 N. C. 791, 795, 175 S. E. 532.

§ 28-183. Representative may purchase for estate to prevent loss.—At any auction sale of real property belonging to the estate, the executor, administrator or collector may bid in the property and take a conveyance to himself as executor, administrator or collector for the benefit of the estate when, in his opinion, this is necessary to prevent a loss to the estate. (Rev., s. 85; Code, s. 1505; 1868-9, c. 113, s. 77; C. S. 171.)

In Sale of Realty Only.—This section authorizes the representatives to bid at the sale of realty only. Hence the non-statutory rule that a representative cannot bid at his own sale applies in sales of personalty. Woody v. Smith, 65 N. C. 116, 118.

§ 28-184. Representatives hold in joint tenancy.—Every estate vested in executors, administrators or collectors, as such, shall be held by them in joint tenancy. (Rev., s. 166; Code, s. 1502; 1868-9, c. 113, s. 74; C. S. 172.)

§ 28-185. Representatives liable for devastavit.—The executors and administrators of persons who, as rightful executors or as executors in their own wrong, or as administrators, shall waste or convert to their own use any estate or assets of any person deceased, shall be chargeable in the same manner as their testator or intestate might have been. (Rev., s. 167; Code, s. 1495; 1868-9, c. 113, s. 68; C. S. 173.)

§ 28-186. Nonresident executor or guardian to appoint process agent.—A nonresident qualifying in the state as an executor or guardian shall at the time of his qualification appoint in writing a resident agent in the county of his qualification, on whom may be served citations, notices, and all processes required by law to be served on such executor or guardian. The executor or guardian shall file the appointment with the clerk in the county of his qualification, and the clerk shall record it in the record book immediately after the record of qualification, and shall properly index it in the record book. All citations, notices, and processes served on such process agent shall be as effective as if served on the executor or guardian, but the return date shall not be sooner than ten days from the date of the issuance of the citation, notice, or process. No letters shall be granted to an executor nor shall a guardian be permitted to qualify, unless the process agent is named simultaneously with the application for letters or for qualification. (1917, c. 198, ss. 1, 2, 3; C. S. 174.)

§ 28-187. Executor or guardian removing from state to appoint process agent. — When a resident executor or guardian removes from the state, he shall, before removing or within thirty days thereafter, appoint a process agent in the manner as provided in the case of a nonresident, and upon failure to make the appointment within thirty days, the clerk shall remove him and appoint an administrator with the will annexed, or a new guardian, as the case may be. (1917, c. 198, s. 4; C. S. 175.)

§ 28-188. Nonresident's failure to obey process ground for removal.—The clerk may remove any nonresident executor or guardian who fails or refuses to obey any citation, notice or process served on the process agent appointed as provided in §§ 28-186, 28-187, and appoint a resident. (1917, c. 198, s. 5; C. S. 176.)

§ 28-189. Power to renew obligation; no personal liability.—Whenever a decedent is a maker, a surety, an endorser, or a guarantor of any note, bond or other obligation for the payment of money which is due at his death, or thereafter becomes due prior to the settlement of his estate, such obligation may be renewed under the following conditions:

(1) The executor, administrator or collector of the decedent's estate may execute in his official capacity a new obligation, in the same capacity as decedent was obligated, for an amount equal to or less but not greater than the sum due on the original obligation, which shall be in lieu of the original obligation of decedent, whether made payable to the original holder or another; and the executor, administrator or collector may renew the obligation from time to time, and it shall bind the decedent's estate in the same manner and to the same extent as the original obligation; but the maturity of the obligation or any renewal thereof by the executor, administrator or collector shall not extend beyond a period of two years from the qualification of the original executor, administrator or collector, except as hereinafter provided.

(2) If the court finds that it is for the best interest of the estate that the maturity of any such obligation be extended beyond two years from the qualification of the original executor, administrator or collector, the court in its discretion may authorize the executor, administrator or collector to renew the obligation for such additional period as the court may deem best. This additional period shall be for not more than two years unless the time for final settlement of the estate is extended, in which case, paragraph three, below, applies.

(3) When the time for final settlement of the decedent's estate has been extended from year to year for a longer period by order of the clerk of the superior court, approved by the resident judge of the superior court, the obligation may likewise be further extended, but not beyond the period authorized by the court for the final settlement of the decedent's estate.

(4) No obligation executed under this section shall bind the executor, administrator or collector personally. (1925, c. 86; 1933, cc. 161, 196, 498.)

Local Modification.—Mecklenburg, Pamlico, 1933, c. 161, s. 2.

Editor's Note.—For a descriptive survey of the 1933 amendment to this section, see 11 N. C. Law Rev. 264.

For review of statute, see 4 N. C. L. Rev. 18.

§ 28-190. Continuance of farming operations of deceased persons. — When any person shall die while engaged in farming operations, his executor or administrator shall be authorized to continue such farming operations until the end of the current calendar year, and until all crops grown during that year are harvested: Provided, that only the net income from such farming operations shall be assets of the estate, and any indebtedness incurred in connection with such farming operations shall be a preferred claim as to any heir, legatee, devisee, distributee, general or unsecured creditor of said estate. Nothing herein contained shall limit the powers of an executor under the terms of a will. (1935, c. 163.)

Art. 21. Construction and Application of Chapter.

§ 28-191. Where no time specified, reasonable time allowed; extension.—If no length of notice, or no time for the doing of an act, is stated in this chapter, the time shall be reasonable, and in any case it may be enlarged by the clerk from time to time, or by the judge of the superior court, on application to him or on appeal to him from the clerk. (Rev., s. 169; Code, s. 1463; 1871-2, c. 213, s. 16; C. S. 177.)

§ 28-192. Powers under will not affected.—Nothing in this chapter shall be construed to affect the discretionary powers, trusts and authorities of an executor or other trustee acting under a will, provided creditors be not delayed thereby nor the order changed in which by law they are entitled to be paid. (Rev., s. 170; Code, s. 1415; 1868-9, c. 113, s. 23; R. C., c. 46, ss. 12, 13; C. S. 178.)

Cross Reference.—See §§ 28-117, 28-121 and notes thereto.

Chapter 29. Descents.

Sec.
29-1. Rules of descent.

§ 29-1. Rules of descent. — When any person dies seized of any inheritance, or of any right thereto, or entitled to any interest therein, not having devised the same, it shall descend under the following rules: (Rev., s. 1556; Code, s. 1281; R. C., c. 38, s. 1; C. S. 1654.)

Cross References.—As to right of aliens to take by descent, see § 64-1. As to the distribution of estates, see §§ 28-149 et seq.

Editor's Note.—The English canons of descent were brought to this country by the early colonists and were established and prevailed here in the provincial governments. In North Carolina they survived the Revolution and remained in force until 1784. Certain principles found in the English Act, such as the males inheriting before the females, the eldest son only inheriting, and the half blood being excluded from the inheritance, seemed repugnant to the republican principles of the new land and thus the Legislature was led to make the changes which now distinguish this section from the English Act. For a detailed discussion of this subject, see Clement v. Cauble, 55 N. C. 82.

For cases dealing with the former provision governing descent to aliens, see Campbell v. Campbell, 58 N. C. 246; Rutherford's Heirs v. Wolfe, 10 N. C. 272.

Definition.—Descent is the devolution of real property to the heir or heirs of one who dies intestate, the transmission by succession or inheritance. See Bouvier's Law Dict., vol. 1, p. 550.

Kinds of Descent.—Descents are of two sorts: lineal, as from father to son, or grandfather to son or grandson; and collateral, as from brother to brother, and cousin to cousin, etc. See Levy v. McCarter, 6 Pet. 102, 8 L. Ed. 34.

A descent may be said to be mediate or immediate, in regard to mediate or immediate descent of the estate or right; or it may be said to be mediate or immediate, in regard to the mediateness or immediateness of the pedigree or degree of consanguinity. Id.

Descent Regulated by Statute.—Descents in this State are regulated, not by the common law, but by statutes. University v. Markham, 174 N. C. 338, 340, 93 S. E. 845. And

thus are regulated entirely by the Legislature. Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19.

By virtue of this section an heir takes only the undevised inheritance of which the ancestor was seized at the time of his death. Gosney v. McCullers, 202 N. C. 326, 327, 162 S. E. 746.

Title Vests Immediately.—Upon the death of an intestate ancestor, the title to his estate descends and vests at once in his heirs; it cannot stand in abeyance and vest in the future like an executory devise. Harris v. Russell, 124 N. C. 547, 32 S. E. 958.

"Lawful Heirs" as Used in Will.—The expression "lawful heirs" in a will, applied to describe those who are to take a bequest of personalty, means such as take that sort of property in cases of intestacy. Nelson v. Blue, 63 N. C. 659. As to wills, see chapter 31.

Section Held Not to Apply to Person Dying before Its Enactment.—The provisions of this section held not to affect the distribution of an estate of a person dying prior to the enactment of the statute, the provision of the statute that it should apply to estates of such persons whose estates had not then been distributed being inoperative, and an illegitimate person dying prior to the enactment of the statute leaving only the brothers of his mother, or their legal representatives, him surviving, leaves no person surviving him entitled to inherit from him, and his property, both real and personal held to vest immediately in the University of North Carolina under the Constitution and laws of this state. Carter v. Smith, 209 N. C. 788, 185 S. E. 15.

Rule 1, Lineal descent. Every inheritance shall lineally descend forever to the issue of the person who died last seized, entitled or having any interest therein, but shall not lineally ascend, except as hereinafter provided. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 1; C. S. 1654.)

Cross Reference.—As to seizin, see notes under rule 12.

Actual or Legal Seizin Unnecessary.—By the terms of this paragraph and paragraph 12, neither actual nor legal seizin is necessary to make the stock in the devolution of estates. Sears v. McBride, 70 N. C. 152; Early v. Early, 134 N. C. 258, 267, 46 S. E. 503.

Descent of Remainders.—Where a remainderman dies before the life tenant, upon the death of the life tenant the remainder descends to the heirs at law of the original remainderman. Early v. Early, 134 N. C. 258, 46 S. E. 503. Distinguishing Lawrence v. Pitt, 46 N. C. 344 and King v. Scoggin, 92 N. C. 99, which cases were decided under the former provisions.

Rule 2, Females inherit with males, younger with older children; advancements. Females shall inherit equally with males, and younger with older children: Provided, that when a parent dies intestate, having in his or her lifetime settled upon or advanced to any of his or her children any real or personal estate, such child so advanced in real estate shall be utterly excluded from any share in the real estate descended from such parent, except so much thereof as will, when added to the real estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And any child so advanced in personal estate shall be utterly excluded from any share in the personal estate of which the parent died possessed, except so much thereof as will, when added to the personal estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And in case any one of the children has been advanced in real estate of greater value than an equal share thereof which may come to the other children, he or his legal representatives shall be charged in the distribution of the personal estate of such deceased parent with the excess in value of such real estate so advanced as aforesaid, over and above an equal share as aforesaid. And in case any of the children has been advanced in personal estate of greater value than an equal share thereof which shall come to the other children, he or his legal representatives shall be charged in the division of the real estate, if there be any, with the excess in value, which he may have received as aforesaid, over and above an equal distributive share of the personal estate. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, s. 1, Rule 2; 1784, c. 204, s. 2; 1808, c. 739; 1844, c. 51, ss. 1, 2; C. S. 1654.)

Cross References.—As to advancements generally, see §§ 28-150 and 28-151. As to the right of adopted children to inherit, see § 48-6.

Priority Abolished.—This rule abolishes the priority of the male over the female line, and places them upon a perfect equality, both as to collateral and lineal descents. Bell v. Dozier, 12 N. C. 333, 334.

Provides for Equality.—This section was never intended to interfere in any case where the parent himself had by his will produced an inequality by giving to one of his children either land or chattels and not to the others. But where he dies totally intestate as to all his property of every kind, then the act provides for an equality, as near as it can, by directing that such of the children as have been advanced by the intestate in his lifetime, in either realty or personalty, shall acount for the advancement in the division of both. Jerkins v. Mitchell, 57 N. C. 207, 212.

Owner's Wishes Respected.—This section contains nothing to exclude the intent and circumstances of the case, but leaves in force the ancient principle that the owner of property may dispose of it according to his own desire. Kiger v. Terry, 119 N. C. 46, 458, 26 S. E. 38; Thompson v. Smith, 160 N. C. 256, 258, 75 S. E. 1010.

Where the deceased leaves a will disposing of his estate the doctrine of advancements to his child or children has no application. Prevette v. Prevette, 203 N. C. 89, 164 S. E. 623.

Advancements Regulated Early by Statute.—The doctrine of advancements was the subject of statutory enactments in England as early as the reign of Charles II (22 and 23 Car II., 1682-83). Nobles v. Davenport, 183 N. C. 207, 209, 111 S. E. 180.

Definitions of Advancement.—An advancement is said to be an irrevocable gift in praesenti of money or of property, real or personal, to a child by a parent, to enable the donee to anticipate his inheritance or succession to the extent of the gift. 14 Cyc., 162. Thompson v. Smith, 160 N. C. 256, 257, 75 S. E. 1010; Noble v. Davenport, 183 N. C. 207, 111 S. E. 180. For further definition of advancement, see Hollister v. Attmore, 58 N. C. 373; Meadows v. Meadows, 33 N. C. 148; Southern Distributing Co. v. Carraway, 189 N. C. 420, 127 S. E. 427; Parker v. Eason, 213 N. C. 115, 195 S. E. 360.

An advancement is a gift in praesenti by a parent to a child for the purpose of advancing the latter in life, and thus for the child to anticipate the inheritance to the extent of the advancement. Paschal v. Paschal, 197 N. C. 40, 147 S. E. 680.

Where a son insures his life for the benefit of his mother in case she survives him, and otherwise to his estate, and some of the premiums on the policy are paid by the insured and some by the mother, upon the prior death of the mother her administrator may not recover from the son the premiums paid by the mother on the theory that they were advancements to him to be accounted for, the arrangement appearing to be their joint enterprise. Id.

Same—Small Presents Not Included.—An advancement is a gift of money or property for the preferment and settling of a child in life, and not such as are mere presents of small value or such as are required for the maintenance or education of the child. The latter are the natural duties of the parent which he is required to perform. Meadows v. Meadows, 33 N. C. 148; Bradsher v. Cannady, 76 N. C. 445; Kiger v. Terry, 119 N. C. 456, 25 S. E. 38.

Applies Only in Case of Total Intestacy.—Under the English statute of distributions, as well as under our act on that subject, it has always been held that no advancements were to be accounted for except in cases of total intestacy. Brown v. Brown, 37 N. C. 309; Jerkins v. Mitchell, 57 N. C. 207, 210.

Hence advancements in land by a father are not to be brought into hotchpot and accounted for in the division among his children of his real estate, unless the father dies totally intestate. Jerkins v. Mitchell, 57 N. C. 207.

Presumption and Burden of Proof.—The doctrine of advancements is based on the idea that parents are presumed

to intend, in the absence of a will, an equality of division among their children; hence a gift of property or money is prima facie an advancement, that is, property transferred or money paid in anticipation of a distribution of his estate. Ex parte Griffin, 142 N. C. 116, 54 S. E. 1007; James v. James, 76 N. C. 331; Thompson v. Smith, 160 N. C. 256, 258, 75 S. E. 1010; Noble v. Davenport, 183 N. C. 207, 111 S. E. 180.

Same—Nominal Consideration.—If land is conveyed by a deed reciting a nominal consideration or natural affection an advancement is presumed, and the burden of proof is then on the grantee or donee to show that an advancement was not intended. Kiger v. Terry, 119 N. C. 456, 459, 26 S. E. 38.

Same—Valuable Consideration.—But when the deed recites a valuable and substantial consideration, especially when it is near the full value of the land or other property, the burden then to prove it an advancement is upon the person claiming it to be such. Kiger v. Terry, 119 N. C. 456, 459, 26 S. E. 38.

Same—Intention of Parent Governs.—Making proper allowance for the burden of proof, as fixed by the presumption arising out of the nature or circumstances of the gift, the question of whether there was a clear gift, a loan, or an advancement, is to be settled by ascertaining what was the intention of the parent. Melvin v. Bullard, 82 N. C. 34, 40; Harper v. Harper, 92 N. C. 300; Kiger v. Terry, 119 N. C. 456, 26 S. E. 38; Thompson v. Smith, 160 N. C. 256, 258, 75 S. E. 1010.

Same—Parol Evidence.—And in the determination of whether a loan, a gift or an advancement was intended parol evidence is admissible. Kiger v. Terry, 119 N. C. 456, 458, 26 S. E. 38.

Value Determined.—Ordinarily the value of an advancement is to be determined as of the date of its making, and on an accounting no interest is to be charged against an advancement prior to the death of the testator or intestate, or the time fixed for division, where by will it is extended beyond the death of the parent or testator. Southern Distributing Co. v. Carraway, 189 N. C. 420, 127 S. E. 427. See also, Stallings v. Stallings, 16 N. C. 298, 301; Lamb v. Carroll, 28 N. C. 4.

Where an intestate had put slaves into the possession of his child, and afterwards made a deed of gift of them, the advancement must take effect and be estimated as of the date of the deed and not of the commencement of the possession. Shiver v. Brock, 55 N. C. 137; Ward v. Riddick, 57 N. C. 22.

Examples of Advancement.—Property put into the possession of a child on his setting out in life, suitable to housekeeping and family purposes, is not to be considered as a present but as an advancement. Shiver v. Brock, 55 N. C. 137.

Under this paragraph an estate, pur autre vie, given to a child by an intestate father, is subject to be brought into hotchpot as an advancement in the division of other lands. Dixon v. Coward, 57 N. C. 354.

One-half an estate in land given by an intestate by deed to his daughter and her husband is subject to be brought into hotchpot. Id.

Application to Grandchildren.—Grandchildren are bound to bring in the gift to their parents, but not those to themselves. This rule being restricted to gifts from a parent to a child, and not including donations to grandchildren. Headen v. Headen, 42 N. C. 159, 161. See Shiver v. Brock, 55 N. C. 137.

Rule 3, Lineal descendant represents ancestor. The lineal descendants of any person deceased shall represent their ancestor, and stand in the same place as the person himself would have done had he been living. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 3; 1808, c. 739; C. S. 1654.)

A Copy of English Canon.—This section is an almost verbatim copy of the English canon and should receive the same constructions which have been given to that rule. Clement v. Cauble, 55 N. C. 82, 91.

Right of Representation Indefinite.—In rules of the descent of real estate, the right of representation is indefinite, as well among collateral as lineal kindred. Johnston v. Chesson, 59 N. C. 146, 147.

Realty Descends Per Stirpes.—In the descent of real estate, the next collateral relations of the person last seized, who are of equal degree, take per stirpes, and not per capita. Clement v. Cauble, 55 N. C. 82; Haynes v. Johnson, 58 N. C. 124; Crump v. Fawcett, 70 N. C. 345.

Personalty Distributed Per Capita.—Where a fund consists solely of personalty, and the claimants at the time of the intestate's death were and are now all in equal degree, the next of kin of the intestate, section 28-149 requires that the fund shall be distributed per capita. Ellis v. Harrison, 140 N. C. 444, 53 S. E. 299.

Heirs of Trustee Take Nothing.—Where a trustee, in accordance with a provision of the trust, passes his bare legal title to another, there was nothing to descend to his heirs at his death. Fleming v. Barden, 126 N. C. 450, 36 S. E. 17.

Rule 4, Collateral descent of estate derived from ancestor. On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise or settlement from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 4; 1808, c. 739; C. S. 1654.)

Editor's Note.—Under rule 5, purchased estates—in the popular sense of the term purchase—descend to the nearest relations of the propositus whether of the paternal or maternal line. While under this rule descended estates and certain excepted purchased estates descend to the nearest relations of the propositus, who were of the blood of the ancestors from whom the estate moved. The purchased estates excepted, including those derived by gift, devise or settlement, are those where the purchaser would have been an heir in case of the ancestor's death, that is, these excepted purchasers are put on the same footing with a descent. The question whether the purchaser or donee would have been an heir is determined as of the time of the purchase. And thus where a purchaser at the time of the purchase would not have been an heir had the ancestor died, rule 5 applies and collateral relations of both paternal and maternal lines inherit, even though a subsequent act of the Legislature made such purchaser an heir. See Burgwyn v. Devereux, 23 N. C. 583.

This fourth rule has for its principal object the securing to the family of the man, by whose industry the property was acquired, the enjoyment of such property in preference to those who have no consanguinity with him. Poisson v. Pettaway, 159 N. C. 650, 652, 75 S. E. 930; Wilkerson v. Bracken, 24 N. C. 315.

In General.—When an estate goes to a person through a series of descents or settlements, and that person dies without issue, it results back to those of his collateral relations who would be heirs of the ancestor from whom it originally descended, or by whom it was originally settled. Wilkerson v. Bracken, 24 N. C. 315; Poisson v. Pettaway, 159 N. C. 650, 652, 75 S. E. 930.

Construed with Rule 6.—This rule and rule 6 are in pari materia and should be construed together, and it was clearly intended that they should be. Paul v. Carter, 153 N. C. 26, 27, 68 S. E. 905.

Under Rules 4, 5 and 6 of this section a grandson of the devisor of lands does not take lands by descent from him when his father is living at the time of his grandfather's death, even though he takes the same lands and interest under the devise that he would have taken under the descent had his father not been living, and he acquires a new estate by purchase, descendible to his heirs at law under the canons of descent. Peel v. Corey, 196 N. C. 79, 144 S. E. 559.

Applies When There Is No Will.—This rule is confined to cases where there is no other disposition of the land by the will which would interfere with the prescribed course of descent. Kirkman v. Smith, 174 N. C. 603, 606, 94 S. E. 423.

Blood of Ancestor Necessary.—In order for a collateral relation of the half blood to inherit under this paragraph, he must be of the blood of the purchasing ancestor from whom the lands descend. Poisson v. Pettaway, 159 N. C. 650, 75 S. E. 930; Little v. Buie, 58 N. C. 10; McMichal v. Moore, 56 N. C. 471; Noble v. Williams, 167 N. C. 112, 83 S. E. 180.

Collateral Relations Take Per Stirpes.—When lands descend to collateral relations under this section the collateral

relations of equal degree take per stirpes and not per capita. Cromartie v. Kemp, 66 N. C. 382; Clement v. Cauble, 55 N. C. 82; Haynes v. Johnson, 58 N. C. 124.

Where Contingency Happens.—Under a deed of gift of lands from a father to his son with contingent limitation over to the issue of another son, in the event the former should die without issue, the limitation over is not to the heirs general, but to the children who take on the happening of the contingency which would divest the title of the first taker, and where this contingency has happened and the estate goes over to the contingent remainderman, the latter takes from the grantor under the deed. Stevens v. Wooten, 190 N. C. 378, 130 S. E. 13.

Failure of Contingency.—Where lands were devised to be sold upon the happening of a certain event which failed to happen, it was held that the land was never converted into personalty but remained realty and belonged to the heirs at law of the blood of the testator. Elliott v. Loftin, 160 N. C. 361, 76 S. E. 236.

Examples.—Where a person died intestate and without lineal descendants, the real estate inherited by him from his father descended to his brother, who was his next collateral relation capable of inheriting of the blood of his father. Jones v. Hoggard, 108 N. C. 178, 181, 12 S. E. 906, 907.

Where land was devised to a grandson by his paternal grandfather, and the devisee died in the lifetime of his father, it was held that, the devisee not being an heir or one of the heirs of the devisor, the estate passed to his uncles and aunts on the mother's side as well as those on the side of the father, the devisee's parents then being dead. Osborne v. Widenhouse, 56 N. C. 238.

Rule 5, Collateral descent of estate not derived from ancestor. On failure of lineal descendants, and where the inheritance has not been transmitted by descent or derived as aforesaid from an ancestor, or where, if so transmitted or derived, the blood of such ancestor is extinct, the inheritance shall descend to the next collateral relation, capable of inheriting, of the person last seized, whether of the paternal or maternal line, subject to the second and third rules. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 5; 1808, c. 739; C. S. 1654.)

Cross Reference.—See editor's note under rule 4.

Descended Estate.—Where an estate has been transmitted by descent, and the blood of the acquiring ancestor has become extinct, upon the death of the person last seized intestate and without issue, the estate descends to the nearest collateral relations. University v. Brown, 23 N. C. 387.

Necessary Qualification.—In the descent of acquired estates the only qualifications necessary to a collateral is that he be the nearest relation of the person last seized. Bell v. Dozier, 12 N. C. 333.

Illegitimate Children.—A devise of lands by the testator to his wife for life and at her death to his and her heirs carries the title to the land upon the death of the wife to her illegitimate children as her heirs to the exclusion of his illegitimate child. Battle v. Shore, 197 N. C. 449, 149 S. E. 590.

Illegitimate Not Included.—An illegitimate child is not a collateral relation of, and capable of inheriting from, a legitimate child of the same mother, under this section. Wilson v. Wilson, 189 N. C. 85, 126 S. E. 181, 182.

Whether of Whole or Half Blood.—Where a son acquires land by deed from his father and pays a valuable consideration therefor, and dies without lineal descendants prior to his father's death, intestate, the land descends to the collateral relations of the son whether of the whole or half-blood, and the inheritance is not limited to the collateral relations of the son who are also of the blood of the father, the grantor. Ex parte Barefoot, 201 N. C. 393, 394, 160 S. E. 365.

Rule 6, Half blood inherits with whole; parents from child. Collateral relations of the half blood shall inherit equally with those of the whole blood, and the degrees of relationship shall be computed according to the rules which prevail in descents at common law: Provided, that in all cases where the person last seized leaves no issue capable of inheriting, nor brother, nor sister, nor issue of such, the inheritance shall vest in the father and mother, as tenants in common if both are living, and if only one of them is living, then in such survivor. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 6; 1808, c. 739; 1915, c. 9, s. 1; C. S. 1654.)

In General.—The court, in McMichal v. Moore, 56 N. C. 471, said: "This general provision in favor of the father and mother expressly departs from the principle of keeping the inheritance in the blood of the first purchaser, which, for feudal reasons was strictly adhered to by the common law, and which is retained in our statutes in regard to collateral relations, except for the purpose of preventing an escheat. The parents are by the statute looked upon as lineal relations in the ascending line, and in respect to them the common-law principle is put entirely out of the way." Weeks v. Quinn, 135 N. C. 425, 426, 47 S. E. 596.

Construed with Rule 4.—This rule and rule 4 are in pari materia, and should be construed together and harmonized: and thus construed, the collateral relations of the half blood inherit equally with those of the whole blood, under the provisions of this rule, where, under the requirements of canon 4, they are of the blood of the ancestor from whom the estate was derived. Paul v. Carter, 153 N. C. 26, 68 S. E. 905; Noble v. Williams, 167 N. C. 112, 83 S. E. 180.

Personal Property.—Under this rule, claimants of the half blood are entitled to share equally with claimants of the whole blood in the distribution of personal property. In re Skinner's Estate, 173 N. C. 706, 707, 100 S. E. 882.

When Blood of Ancestor Immaterial.—The surviving father or mother of one seized of land, who dies without leaving issue capable of inheriting, or brothers, or sisters, or the issue of such, will take the inheritance under the proviso in the 6th rule without regard to the question whether such parent is of the blood of the purchasing ancestor. McMichal v. Moore, 56 N. C. 471.

Natural Parent Prevails.—Where a child by adoption dies seized of realty, without leaving a brother or sister, and the property is claimed by both the adopted and natural father, this section confers it upon the latter. Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19. **(By virtue** of § 48-6 this rule no longer governs.)

Proviso Conditional.—The word "if" as used in the proviso to this rule is one of condition, and the estate will not vest if it is not complied with, it being, in this case, a condition precedent. University v. Markam, 174 N. C. 338, 342, 93 S. E. 845.

Thus the fact that the mother was living at the death of her child is made a condition precedent to the vesting of the estate, and the claimant cannot recover should the propositus have outlived the mother. University v. Markham, 174 N. C. 338, 93 S. E. 845.

Widow's Heirs Inherit.—Where one is survived by his daughter and widow, and the daughter inherits an estate from him and dies before the widow, the heirs of the widow, and not those of the husband, inherit the estate, and it is immaterial whether the daughter or widow were in possession. Weeks v. Quinn, 135 N. C. 425, 47 S. E. 596.

Effect of Amendment of 1915.—Upon the death of a minor child who takes an estate in remainder as a new propositus after the death of his mother, under his grandfather's will, without a brother or sister or issue of such, the inheritance is cast, under this rule of the canons of descent before the amendment of 1915, upon the father if living, the amendment having the effect of making the father and mother tenants in common if both are living, and, if only one of them is living then in such survivor. Allen v. Parker, 187 N. C. 376, 121 S. E. 665.

Rule 7, Unborn infant may be heir. No inheritance shall descend to any person, as heir of the person last seized, unless such person shall be in life at the death of the person last seized, or shall be born within ten lunar months after the death of the person last seized. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 7; 1823, c. 1210; C. S. 1654.)

When Rule Applies.—This rule applies only where the person last seized has died since the passage of the rule. Rutherford v. Green, 37 N. C. 121.

Inheritance Vests Immediately.—Upon the death of the father seized of lands, his wife then being enciente, the inheritance will immediately vest in the child en ventre sa mere. Deal v. Sexton, 144 N. C. 157, 56 S. E. 691.

Child Born after Ten Months.—An estate is not divested out of one upon whom it has devolved by the birth of a child more than ten lunar months after the death of the propositus. Britton v. Miller, 63 N. C. 268.

Applied in Severt v. Lyall, 222 N. C. 533, 23 S. E. (2d) 829.

Rule 8, Widow or husband may take as heir. When any person dies intestate, leaving none who can claim as heir to such deceased person, but leaving surviving a widow or husband, such widow or husband shall be deemed his heir and as such inherit his estate. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 8; 1801, c. 575, s. 1; 1925, c. 7; C. S. 1654.)

Editor's Note.—Previous to the amendment of this rule by ch. 7, Pub. Laws 1925, it was provided that a widow should be deemed an heir of her husband when he died leaving none other who could claim as an heir. The amendment makes the rule mutual between husband and wife.

The word "intestate" is inserted in the first line. Construing the original rule before this word was added the Supreme Court held that the rule could only apply to property not devised by the husband. Hence, if the husband's will gave a life estate to the widow, with remainder over to his "legal heirs," and the widow failed to dissent to the will, the rule would not apply. Therefore, in such case, if the husband had no legal heirs, the property, at the death of the wife, would escheat instead of going to the wife's heirs. See Grantham v. Jinnette, 177 N. C. 229, 98 S. E. 724. The addition of the word intestate seems to modify the Grantham v. Jinnette decision. Undoubtedly such terms will be construed to cover a partial, as well as a total, intestacy. See 4 N. C. Law Rev. 15.

When Rule Applies.—In express terms this paragraph provides that the widow shall be heir only when there is no one else who can claim as heir. University v. Markham, 174 N. C. 338, 93 S. E. 845; Powers v. Kite, 83 N. C. 156. Bryant v. Bryant, 190 N. C. 372, 374, 130 S. E. 21.

Same—No Will.—This paragraph applies only if there is no will, or a will not disposing of the entire estate. Grantham v. Jinnette, 177 N. C. 229, 232, 98 S. E. 724.

Widow Prevails Over Illegitimate Half-Brother.—Decedent left a wife and no descendants or collateral relatives except an illegitimate half-brother. The wife and not the half-brother is the heir in such case. Wilson v. Wilson, 189 N. C. 85, 126 S. E. 181.

Rule 9, Illegitimate children inherit from mother. Every illegitimate child of the mother and the descendants of any such child deceased shall be considered an heir: Provided, however, that where the mother leaves legitimate and illegitimate children such illegitimate child or children shall not be capable of inheriting of such mother any land or interest therein which was conveyed or devised to such mother by the father of the legitimate child or children; but such illegitimate child or descendant shall not be allowed to claim, as representing such mother, any part of the estate of her kindred, either lineal or collateral. (Rev., s. 1556, Rule 9; Code, s. 1281; R. C., c. 38, Rule 10; 1799, c. 522; 1913, c. 71; C. S. 1654.)

Cross References.—See also, rule 10 and annotations thereto. As to distribution of property among illegitimate children, see § 28-152. As to effects of legitimation, see § 49-11.

In General.—This rule breaks the connection at the mother in the ascending line when it is necessary to pursue that in order to reach the propositus, and expressly prohibits any direct lineal or collateral descent but that mentioned in the first clause, namely, from the mother herself to the illegitimate child or the descendant of any such child deceased, and the descent provided for in rule 10 as between illegitimates themselves and from them or their issue, as therein specially provided. Bettis v. Avery, 140 N. C. 184, 52 S. E. 584.

Rule Applies Only in Case of Illegitimates.—This rule provides only for descents from a mother who leaves surviving an illegitimate child or descendants of such child. Such a child is an heir of the mother, without regard to whether she leaves or does not leave a legitimate child. Wilson v. Wilson, 189 N. C. 85, 88, 126 S. E. 181. See also Paul v. Willoughby, 204 N. C. 595, 598, 169 S. E. 226.

Same—And Only to Inheritance from Mother.—This rule applies only to inheritance from the mother and not to the inheritance from a legitimate half-brother. Wilson v. Wilson, 189 N. C. 85, 126 S. E. 181.

Estate of Kindred Excluded.—This rule excludes the right to inherit, as the representative of an illegitimate mother, any part of the estate of the latter's kindred, either lineal or collateral. Bettis v. Avery, 140 N. C. 184, 52 S. E. 584.

Inheritance under Will.—Where a testator by his will gave property to a son and three daughters with a provision that, on the death of either of them intestate, or without heirs of his or her body, his or her share should go over, it was held that the intention was not that it should go over on the death of the mother of an illegitimate child, but that the latter was entitled to his mother's share. Fairly v. Priest, 56 N. C. 383.

As "Lawful Issue" of Mother.—An illegitimate child, under this section, is eligible to inherit from his mother, but he cannot take as the lawful issue of his mother under the terms of the will of his grandfather. Brown v. Holland, 221 N. C. 135, 137, 19 S. E. (2d) 255.

Rule 10, Heirs of illegitimate. Illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly in the same manner as if they had been born in wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall descend to such person as would inherit if all such children had been born in wedlock: Provided, that when any illegitimate child dies without issue, his inheritance shall vest in the mother in the same manner as is provided in rule six of this chapter. Provided, further, that when any illegitimate child dies without issue and his mother shall have predeceased said child and left legitimate children, his inheritance shall vest in the legitimate children of his mother in the same manner as provided in rule 6 of this chapter but nothing herein shall be construed to allow such illegitimates to inherit from legitimates of the same mother: Provided, further, that when any illegitimate child dies without any of the foregoing but his mother left brothers and sisters, his inheritance shall vest in said brothers and sisters of his mother, or their legal representatives. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 11; 1935, c. 256; C. S. 1654.)

Editor's Note.—The 1935 act which added the last two provisos to Rule 10 provided: "That this act shall be in full force and effect from and after its ratification (29th April 1935) and shall apply to all estates which have not been actually distributed prior thereto." See Carter v. Smith, 209 N. C. 788, 185 S. E. 15.

Common Law Provision.—At common law there is no collateral descent to or from a bastard. Flintham v. Holder, 16 N. C. 345, 347.

General Effect of Rule.—There is nothing dubious about the rule, but on the contrary its language is plain, direct, and perfectly intelligible. University v. Markham, 174 N. C. 338, 341, 93 S. E. 845.

The construction given to this rule is, that if an illegitimate or natural-born child shall die intestate without leaving any child or children, his or her estate shall descend to and be equally divided among his or her brothers and sisters, born of the body of the same mother, and their representatives, whether legitimate or illegitimate, in the same manner and under the same regulations and restrictions as if they had been born in wedlock. Powers v. Kite, 83 N. C. 156, 157.

The illegitimates mentioned in this rule are those who are the children of the same mother, and they inherit as between themselves and their representatives, as if they were legitimate. Bettis v. Avery, 140 N. C. 184, 189, 52 S. E. 584.

Representatives Must Be Legitimate.—This rule was construed in Powers v. Kite, 83 N. C. 156. In considering that construction it will be noted that the words "whether

legitimate or illegitimate" follow the words "and their representatives." But in Tucker v. Tucker, 108 N. C. 235, 236, 13 S. E. 5, Clark, J., held that while the rule allows illegitimate children to be legitimate as between themselves and their representatives, it contemplates that such representatives shall themselves be legitimate representatives of the illegitimate child. Bryant v. Bryant, 190 N. C. 372, 374, 130 S. E. 21.

Bastards Cannot Inherit from Legitimate.—The rule does not apply to descents from a legitimate child, and the law in this State, with respect to such descents, is the same now as it was when the opinion in Flintham v. Holder, 16 N. C. 345, 351, was delivered at December Term, 1829. It was then held to be the law that "bastards can never inherit but from the mother and from each other," thus the law remains. Wilson v. Wilson, 189 N. C. 85, 88, 126 S. E. 181.

Legitimates May Inherit from Bastards.—Where there are children of the same mother, some born in wedlock and some illegitimate, the former class may inherit from the latter. Flintham v. Holder, 16 N. C. 345. Thus where an illegitimate brother died intestate and without issue, his legitimate brothers and sisters shared in the inheritance. McBryde v. Patterson, 78 N. C. 412.

Law Ignores the Father.—There is no half blood between illegitimates; they are treated as children without a father of any kind. The law takes no notice of him, for they trace only through the mother. Ashe v. Camp Mfg. Co., 154 N. C. 241, 243, 70 S. E. 295.

Must Claim through Brother.—A legitimate, who does not claim directly from a brother or sister, or from the issue or heirs of either, but from an illegitimate first cousin, comes within neither the letter nor the reason of this paragraph. Bettis v. Avery, 140 N. C. 184, 52 S. E. 584.

As between Surviving Brothers and Widow.—Under this rule where an illegitimate son has married, leaving surviving illegitimate brothers and sisters of the same mother, they may collaterally inherit the estate and the inheritance cannot be cast upon his surviving widow, as his heir. Bryant v. Bryant, 190 N. C. 372, 130 S. E. 21.

Rule Applies to Issue of Slaves.—Persons born in slavery, of slave parents, and who were not legitimated by their parents marrying subsequent to the war, have the rights of illegitimates between themselves Hence, when there are two brothers coming under this description, and one dies leaving no issue or mother, the other brother inherits, and is the next in title. (Tucker v. Bellamy, 98 N. C. 31, 4 S. E. 34, and Jones v. Hoggard, 108 N. C. 178, 12 S. E. 906, 907, distinguished.) Tucker v. Tucker, 108 N. C. 235, 13 S. E. 5.

Rule 11, Estate for life of another, not devised, deemed inheritance. Every estate for the life of another, not devised, shall be deemed an inheritance of the deceased owner, within the meaning and operation of this chapter. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 12; C. S. 1654.)

Rule Differs from Older Statutes.—This section was a departure from the English law as settled by 29 Charles II, which enacts (according to the ancient rule of law) that where there is no special occupant in whom the estate may vest, the tenant per autre vie may devise it by will, or it shall go to the executors or administrators, and be assets in their hands for payment of debts; and the other, that of 14 Geo. II, c. 20, which enacts that the surplus of such estate per autre vie, after payment of debts, shall go in a course of distribution like a chattel interest. Brown v. Brown, 168 N. C. 4, 13, 84 S. E. 25.

Rule 12, Seizin defined. Every person, in whom a seizin is required by any of the provisions of this chapter, shall be deemed to have been seized, if he may have had any right, title or interest in the inheritance. (Rev., s. 1556; Code, s. 1281; R. C., c. 38, Rule 13; C. S. 1654.)

Cross References.—See also, rule 1. As to distributees of illegitimates, see § 28-152. As to effects of legitimation, see § 49-11.

Seizin at Common Law.—At the common law, seizin signified the possession or occupation of the soil by a freeholder, one who has at least a life estate in the land. This seizin was of two kinds—seizin in deed or in fact, which was when the person had the actual seizin or possession or occupation of the land with the intent, as is sometimes said, to claim a freehold interest and seizin in law, which was a bare right to possess or occupy the land or freehold, or, as otherwise defined, a right of immediate possession according to the nature of the estate. Early v. Early, 134 N. C. 258, 264, 46 S. E. 503.

Same—Compared with Seizin under Rule.—The seizin, either in law or in deed, of the common law is not the seizin of the statute. The former requires that there shall be either actual possession or the right of immediate possession, while all that is required under the present section to constitute a sufficient seizin for the creation of a new stock of inheritance or stirpes of descent is that the person from whom the descent is claimed should have had, at the time of the descent cast, some right, title or interest in the inheritance, whether vested in possession or not; for the language of the statute is explicit that a person having any such right, title, or interest shall be deemed to have been seized thereof. Early v. Early, 134 N. C. 258, 267, 46 S. E. 503; Severt v. Lyall, 222 N. C. 533, 23 S. E. (2d) 829.

Trust for Wife Descends to Her Heirs.—The resulting trust in favor of the wife in lands the title to which has been acquired by her husband by deed is now descendible to her heirs under this rule, though she may not have been in separate possession thereof during her life. Barrett v. Brewer, 153 N. C. 547, 69 S. E. 614, cited and distinguished. Tyndall v. Tyndall, 186 N. C. 272, 119 S. E. 354.

New Propositus Created by Will.—A devise of land to testator's two daughters for life, and at the death of either or both of them, then said land shall go to the child or children of each, the child or children representing the mother in interest, it was held, upon the marriage of one of them, and having issue born alive, the issue so born takes by purchase under the will, and is a new propositus for the purpose of descent. Allen v. Parker, 187 N. C. 376, 121 S. E. 665.

Issue of Contingent Remainderman Inherit.—Under the provisions of rule 1 and this rule, a devise to the daughter of the testator and her issue, upon the death of the testator's son without issue, is such an interest as is descendible to the issue of the daughter when she has died before the happening of the contingency. Hines v. Reynolds, 181 N. C. 343, 107 S. E. 144.

Upon an estate to W. during his life, and at his death to his eldest son, not then in esse, with residuary clause to the testator's children; upon the happening of the contingency of the birth to W. of a son, it was held that the son takes upon his birth a vested interest, not depending upon his living longer than his father, and upon the falling-in of the life estate it descends, under our present canons of descent, to his next of kin, and does not fall within the residuary clause. Carolina Power Co. v. Haywood, 186 N. C. 313, 119 S. E. 500.

Rule 13, Issue of certain colored persons to inherit. The children of colored parents born at any time before the first day of January, one thousand eight hundred and sixty-eight, of persons living together as man and wife, are declared legitimate children of such parents or either one of them, with all the rights of heirs at law and next of kin, with respect to the estate or estates of any such parents, or either one of them. If such children be dead, their issue shall represent them with all the rights of heirs at law and next of kin provided by this section for their deceased parents or either of them if they had been living; and the provision of this section shall apply to the estates of such children as are now deceased or otherwise. (Rev., s. 1556; Code, s. 1281; 1897, c. 153; 1879, c. 73; C. S. 1654.)

Cross Reference.—As to marriages between slaves validated, see § 51-5 and notes.

Prior to Statute Children Were Illegitimate.—Prior to the passage of this paragraph children born prior to 1868 of colored parents who lived together as man and wife had only the rights of other illegitimates, and could only inherit from their mother, when there was no legitimate child, and from one another. Tucker v. Tucker, 108 N. C. 235, 238, 13 S. E. 5.

Relation to Section 51-5.—There is this marked distinction between this section and section 51-5, which is important in dealing with the competency of the declarations of a parent. Section 51-5 deals with marriage, and it is be-

cause the relationship of husband and wife is established that the children born in wedlock are legitimate, while this rule does not validate the cohabitation, but simply confers the right to inherit, and this right is limited to the estates of the parents. Bettis v. Avery, 140 N. C. 184, 187, 52 S. E. 584; Croom v. Whitehead, 174 N. C. 305, 310, 93 S. E. 854.

All Colored Parents Included.—This rule is a valid law as to descents after its passage, and renders legitimate the children of all colored parents living together as man and wife, born before 1 January, 1868, even the children of a woman of mixed blood, whose mother was a white woman, who lived with a slave as his wife at the time of their birth. Woodward v. Blue, 103 N. C. 109, 9 S. E. 492.

Rule Legitimates Children Only as to Inheritance.—Persons born in slavery, of slave parents, and who were not legitimated by their parents marrying subsequent to the war, are not legitimated by this paragraph, except to the extent of inheriting from their parents. Tucker v. Tucker, 108 N. C. 235, 13 S. E. 5.

Applies to Estate of Parents Only.—This paragraph conveys the right of inheritance upon the children only as to the estate of their parents, not as to collaterals. Tucker v. Bellamy, 98 N. C. 31, 4 S. E. 34; Tucker v. Tucker, 108 N. C. 235, 236, 13 S. E. 5; Bettis v. Avery, 140 N. C. 184, 52 S. E. 584; Croom v. Whitehead, 174 N. C. 305, 93 S. E. 854; Bryant v. Bryant, 190 N. C. 372, 374, 130 S. E. 21.

Operates Only Prospectively.—This rule operates only prospectively and cannot divest any estate theretofore acquired. Tucker v. Bellamy, 98 N. C. 31, 33, 4 S. E. 34; Jones v. Hoggard, 108 N. C. 178, 12 S. E. 906, 907.

No Rights Conferred on Collaterals.—This paragraph legitimates the children of colored parents, who were born before the first day of January, 1868, and merely extends the children's right of inheritance to the estate of the father, which was before that restricted to the estate of the mother, but it does not transmit any title to the plaintiff, who is claiming the land in dispute as heirs of an illegitimate first cousin. Bettis v. Avery, 140 N. C. 184, 52 S. E. 584.

Illegitimates Excluded.—Where a man and woman, both slaves, cohabited as husband and wife for several years, but separated prior to emancipation and children were born while this relation existed and after the separation the woman entered into a similar relation with another slave, which continued until after the end of the war, when the parties duly acknowledged and had recorded the fact of cohabition, the children of the last union were legitimate and inherited the lands of which their father died seized and they also inherited the lands of which their mother died seized, to the exclusion of her children born of the first union. Jones v. Hoggard, 108 N. C. 178, 12 S. E. 906, 907.

Two Conditions Essential.—The two essential conditions necessary to give effect to this paragraph are cohabitation existing at the birth of the child, and the paternity of the party from whom the property claimed is derived. Woodard v. Blue, 103 N. C. 109, 116, 9 S. E. 492; Woodard v. Blue, 107 N. C. 407, 410, 12 S. E. 453; Croom v. Whitehead, 174 N. C. 305, 310, 93 S. E. 854; Spaugh v. Hartman, 150 N. C. 454, 64 S. E. 198.

Cohabitation Is a Presumption Only.—The cohabiting does not alone confer legitimacy, though it furnishes presumptive evidence that the child is the issue of the persons thus living and indicating their relations; but the presumed fact is open to disproof, and to be determined, as other facts, upon the force of the evidence adduced, which may be sufficient to overcome the presumption. Woodward v. Blue, 103 N. C. 109, 116, 9 S. E. 492.

Cohabitation Must Have Been Exclusive.—In order to come within the provision of this paragraph, legitimatizing the children of colored parents living together as man and wife, etc., and thus giving them the rights of inheritance, an exclusive cohabitation must be shown, as signified by the expression, "living together as man and wife," and not casual sexual intercourse. Spaugh v. Hartman, 150 N. C. 454, 54 S. E. 198.

The cohabitation must be exclusive in the sense that it must show a single, not a polygamous, relation. Branch v. Walker, 102 N. C. 34, 40, 8 S. E. 896; Croom v. Whitehead, 174 N. C. 305, 310, 93 S. E. 854.

Same—Effect of Single Act of Infidelity.—It was not intended to require that living together as husband and wife should be "enduring or in strict personal fidelity while it continued," Hall v. Fleming, 174 N. C. 167, 93 S. E. 728; or that a single act of infidelity on the part of the parents should have the effect of destroying the provisions of the statutes, primarily enacted to legitimate the offspring. Croom v. Whitehead, 174 N. C. 305, 310, 93 S. E. 854.

Evidence.—The quasi marriage relation necessary to legitimatize the children of colored parents, under the provision of this paragraph may be shown in evidence by reputation, cohabitation, declarations and conduct, under the same general rule of evidence applicable to establish the fact of marriage. Nelson v. Hunter, 140 N. C. 598, 599, 53 S. E. 439, cited and approved; Spaugh v. Hartman, 150 N. C. 454, 64 S. E. 198.

Same—Rule Less Strict than Where Legal Marriage.—To repeal the inference of paternity, drawn from the mere fact of cohabitation, the same stringent rules do not prevail as in cases of established legal marriage, when, to bastardize the issue, there must be full, affirmative, repelling proof, such as impotency, nonaccess and the like, or the presumption of legitimacy will stand. Woodard v. Blue, 103 N. C. 109, 116, 9 S. E. 492.

Chapter 30. Widows.

Art. 1. Dissent from Will.

§ 30-1. Time and manner of dissent. — Every widow may dissent from her husband's will before the clerk of the superior court of the county in which such will is proved, at any time within six months after the probate. The dissent may be in person, or by attorney authorized in writing, executed by the widow and attested by at least one witness and duly proved. The dissent, whether in person or by attorney, shall be filed as a record of court. If the widow be an infant or insane, she may dissent by her guardian. (Rev., s. 3080; Code, s. 2108; 1868-9, c. 93, s. 37; C. S. 4096.)

Cross Reference.—See annotation to § 30-5.

See 11 N. C. Law Rev., 274, for suggested revision of this and subsequent sections.

Section a "Statute of Limitations."—This section is not a statute conferring a right of dower, but a statute of limitation upon that right, as it existed at common law. In other words its effect is to prescribe a limitation in respect to the time in which the widow may claim or reject the provisions of the will. Hinton v. Hinton, 61 N. C. 410, 412.

Purpose of Six Months' Period.—The object of giving the widow six months within which to make an election to take under the will or against it, under the law, is to enable the widow to fully learn the condition of the estate and the advantages to be derived under the provisions made for her, as compared with those occurring as in case of an intestacy, and thus to intelligently exercise her right to dissent. Yorkly v. Stinson, 97 N. C. 236, 240, 1 S. E. 452; Richardson v. Justice, 125 N. C. 409, 410, 412, 34 S. E. 441. And if the widow is acquainted with the condition of the estate and what is included therein, then her election once made is binding. Horton v. Lee, 99 N. C. 227, 5 S. E. 404.

Other Rights Not Impaired.—The right of the widow to dissent from her husband's will cannot be attended with the deprivation or impairment of other rights because of an unsuccessful opposition to the will. Under this principle the wife may, if the validity of the will is established, claim and accept any benefit given her by the will. Yorkly v. Stinson, 97 N. C. 236, 1 S. E. 452.

Failure to Dissent within Time Allowed.—Where a widow fails to dissent to a will and brings an action after six months from the probate thereof for a year's allowance given her by section 30-15, such action is not maintainable. Perkins v. Brinkley, 133 N. C. 86, 45 S. E. 465.

Same—Where the Estate Is Insolvent.—The failure of a widow to dissent from her husband's will within six months does not prevent her from claiming dower, or its equivalent in lands devised, when it appears that the estate is insolvent. Trust Co. v. Stone, 176 N. C. 270, 97 S. E. 8.

Dissent by Next Friend Where Widow an Infant.—Where the widow is a minor without a guardian, she may be represented by her next friend duly appointed, when dissenting from her deceased husband's will. Hollomon v. Hollomon, 125 N. C. 29, 34 S. E. 99.

When Dissent Made in Person.—Where a widow, being a minor and having no guardian, dissented in person and in open court from her husband's will, her dissent is made erroneously; however if she is assigned her dower by a court of competent jurisdiction her right to it cannot be impeached in an action of ejectment. Cheshire v. McCoy, 52 N. C. 376.

Acts Constituting Election.—The widow will not be precluded from the exercise of the legal right herein provided for by an agreement, even under seal, which she may be induced by the executor to sign, in ignorance of the condition of the estate. Richardson v. Justice, 125 N. C. 409, 410, 34 S. E. 441.

The institution of proceedings by the widow to have her dower allotted in order to protect her estate from creditors was held not to amount to a renunciation of the will. Lee v. Giles, 161 N. C. 541, 77 S. E. 852.

Where the widow entered a caveat to a will and contested its validity, it was held that she was not prevented from accepting any benefit given her by the will, nor was she prevented from entering her dissent thereto within the proper time. Yorkly v. Stinson, 97 N. C. 236, 1 S. E. 452. For other cases of acts amounting to an election thus preventing the widow from entering her dissent, see 12 N. C. Enc. Dig. 677 et seq.

Where a widow is appointed executrix and proves the will and qualifies, she cannot afterwards renounce and dissent, but must carry out the will in all its provisions. Yorkly v. Stinson, 97 N. C. 236, 1 S. E. 452.

Entry of Dissent.—The entry of a dissent to her husband's will by the widow, is an incident to the jurisdiction of the probate, and as this jurisdiction has been conferred upon the clerk of the superior court, the widow's dissent is to be made and entered in his office. Ramsour v. Ramsour, 63 N. C. 231.

Applicability of Doctrine of Estoppel.—Where a widow agrees to adhere to the provisions of a will, and in consequence thereof the executor proceeds to pay legacies and assume obligations which would cause loss to him if the widow were to dissent, she will be estopped by her agreement, and will not be allowed to dissent; but where in such case she offers to put the estate in **statu quo,** and the executor has not acted under her agreement so as to cause him any loss whatever, she is not estopped. Yorkly v. Stinson, 97 N. C. 236, 1 S. E. 452.

Dissent as Bar to Property in Foreign State. — If the widow does not enter her dissent in one state and takes under the will in that state, she cannot then go to a foreign state and enter her dissent and claim her dower. In other words she will not be allowed to take under the will in one state and against it in another. Jones v. Gerock, 59 N. C. 190, 195, citing Mendenhall v. Mendenhall, 53 N. C. 287.

§ 30-2. Effect of dissent.—Upon such dissent, the widow shall have the same rights and estates in the real and personal property of her husband as if he had died intestate. (Rev., s. 3081; Code, s. 2109; R. C., c. 118, s. 12; 1868-9, c. 93, s. 38; C. S. 4097.)

Cross References.—As to distribution in case of intestacy, see § 28-149. As to descent in case of intestacy, see § 29-1, class 8.

Generally.—The "estate" referred to is dower; the "rights" referred to are the year's support and child's support as a distributee, both of which are legal rights, enforcible at law, and not cognizable in a court of equity except when equity may be invoked to enforce her legal rights. Drewry v. Bank, etc., Co., 173 N. C. 664, 92 S. E. 593.

The words "as if he had died intestate" are not limited to the ordinary meaning of the husband dying without making a will, but include the case of his death without effectually disposing of his property. Corporation Commission v. Dunn, 174 N. C. 679, 685, 94 S. E. 481.

Method of Determining Widow's Share.—In ascertaining the distributive share of a widow who dissents from her husband's will, all of his personal estate, whether consisting of advancements heretofore made to children, or legacies to grandchildren or to strangers, is to be brought together, and her share is to be taken out of it pursuant to the statute of distributions. Arrington v. Dorten, 77 N. C. 367.

Dissent Accelerates the Vesting of the Property.—Where property is devised to the widow during her life and then to a university and she dissents thereto, such property vests immediately in the university if the property is not given to the widow in her dower. Trustees v. Borden, 132 N. C. 476, 44 S. E. 47.

Right Subject to Inheritance Tax.—The dower right in lands of the husband taken by the dissenting widow is subject to the inheritance tax. Corporation Commission v. Dunn, 174 N. C. 679, 685, 94 S. E. 481.

Widow as Donee of Power.—Where the widow is the donee of a discretionary power, by dissenting from the will she renounces all gifts whether of estates or powers under it, at least of such powers as imply personal trust and confidence. Hinton v. Hinton, 68 N. C. 100, 104.

§ 30-3. Widow's interest not liable for husband's debts.—The dower or right of dower of a widow, and such lands as may be devised to her by his will, if such lands do not exceed the quantity she would be entitled to by right of dower,

although she has not dissented from such will, shall not be subject to the payment of debts due from the estate of her husband, during the term of her life. (Rev., s. 3082; Code, ss. 2104, 2105; R. C., c. 118, s. 8; 1868-9, c. 93, s. 34; 1791, c. 351, s. 4; C. S. 4098.)

Generally.—This section secures a provision out of the husband's land to the widow in two cases: (1) Where dower has been actually assigned, as in cases of intestacy, and dissent from the husband's will, and (2) where the husband devises lands to the wife, which are presumed to be in lieu of dower. Simonton v. Houston, 78 N. C. 408.

Exempt from Debts and Legacies.—Dower assigned to a widow who dissents from her husband's will is subject to neither debts nor legacies, Bray v. Lamb, 17 N. C. 372, 374, and where the personalty is insufficient to pay the debts the lands of the husband are sold subject to this right of dower. Curry v. Curry, 183 N. C. 83, 110 S. E. 579.

Lands Devised to Wife.—When, for the payment of a deceased husband's debts, it becomes necessary to resort to the lands devised by him to his wife, she is remitted to her right of dower, which, as in other cases, is not subject to those debts during her life. Ex parte Avery, 64 N. C. 113. But her right of dower is not protected against the debt due the vendor for the purchase money of the land. Kirby v. Dalton, 16 N. C. 195.

Where wife joins in mortgage of husband to exclude claim for inchoate dower therein, her relation to the transaction is that of surety, and should she survive him and the land is sold to satisfy the debt she becomes a creditor of the estate in the amount equal to her dower. American Blower Co. v. Mackenzie, 197 N. C. 152, 147 S. E. 829.

Stated in Boyd v. Redd, 118 N. C. 680, 686, 24 S. E. 429; Shackelford v. Miller, 91 N C. 181, 187.

Art. 2. Dower.

§ 30-4. Who entitled to dower.—Widows shall be endowed as at common law as in this chapter defined: Provided, if any married woman shall commit adultery, and shall not be living with her husband at his death, or shall be convicted of the felonious slaying of her husband, or being accessory before the fact to the felonious slaying of her husband, she shall thereby lose all right to dower in the lands and tenements of her husband; and any such adultery or conviction may be pleaded in bar of any action or proceeding for the recovery of dower. (Rev., s. 3083; Code, s. 2102; 1889, c. 499; 1868-9, c. 93, s. 32; 1871-2, c. 193, s. 44; C. S. 4099.)

Cross References.—As to the right to a year's support, see § 30-15 and annotations thereto. As to husband's curtesy, see § 52-16 and annotation under § 52-7. As to acts barring reciprocal property rights of husband and wife, see § 52-19 et seq.

Definition.—Dower is the provision which the law makes for a widow out of the lands or tenements of her husband, for her support and the nurture of her children. Bouvier's Law Dict., Vol. 1, p. 611.

Reconciliation May Prevent Forfeiture.—The forfeiture, by this section, takes effect, not when the wife shall commit adultery, but when she does so and "shall not be living with her husband at his death." In other words, the door stands open until the death of the husband for a reconciliation and return of the wife. Leonard v. Leonard, 107 N. C. 171, 172, 12 S. E. 60.

Single Act of Adultery Sufficient.—If the wife leaves her husband and once commits adultery with the adulterer, even though she does not continually remain in adultery, it is a "continuing" within the meaning of the act. Walters v. Jordan, 35 N. C. 361.

This decision was reached when the section read "if she willingly leave her husband and go away and continue with her adulterer," a requirement no longer found within the provision of this section. While the precise point in this case does not appear to have recently come before the courts, the present wording of the section would seem to furnish all the more reason for the justification of the ruling that a single act of adultery, without a reconciliation with the husband, is sufficient to constitute a bar to the wife's claim for dower.—Ed. Note.

Wrongdoing of Husband No Defense.—The violation of the marriage vows by the husband will not justify the wife in violating her vows, and since the dower right is given for the benefit of the guiltless and not those standing **in pari delicto,** her adultery will bar the widow's right to dower. Phillips v. Wiseman, 131 N. C. 402, 42 S. E. 861.

Stated in Lee v. Thornton, 176 N. C. 208, 97 S. E. 23; Higdon v. Higdon, 206 N. C. 62, 64, 173 S. E. 273.

§ 30-5. In what property widow entitled to dower.—Subject to the provision in § 30-4, every married woman, upon the death of her husband intestate, or in case she shall dissent from his will, shall be entitled to an estate for her life in one-third in value of all the lands, tenements and hereditaments whereof her husband was seized and possessed at any time during the coverture, in which third part shall be included the dwelling-house in which her husband usually resided, together with offices, out-houses, buildings and improvements thereunto belonging or appertaining; she shall in like manner be entitled to such an estate in all legal rights of redemption and equities of redemption or other equitable estates in lands, tenements and hereditaments whereof her husband was seized in fee at any time during the coverture, subject to all valid encumbrances existing before the coverture or made during it with her free consent lawfully appearing thereto. The jury summoned for the purpose of assigning dower to a widow shall not be restricted to assign the same in every separate and distinct tract of land, but may allot her dower in one or more tracts, having a due regard to the interest of the heirs as well as to the right of the widow. This section shall not be construed so as to compel the jury selected to allot dower to allot the dwelling-house in which the husband usually resided, when the widow shall request that the same be allotted in other property. (Rev., s. 3084; Code, s. 2103; R. C., c. 118, s. 3; R. S., c. 121, s. 3; 1827, c. 46; 1869-70, c. 176; 1883, c. 175; 1908, c. 132; C. S. 4100.)

I. General Consideration of Dower.
II. Property Subject to Dower.
  A. In General.
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    1. Nature of Seisin Required.
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Cross Reference.

As to liability for husband's debts, see § 30-3. As to allotment of dower, see § 30-11 et seq.

See 11 N. C. Law Rev., 272, for suggested change in this section.

I. GENERAL CONSIDERATION OF DOWER

Editor's Note.—It is practically impossible in a work of this nature to give a full treatment and discussion of the whole law of this important subject, for any one of the innumerable issues which arise in litigation on this topic could be the basis of a lengthy article. As will be seen from the frontal analysis, the editor has deemed it advisable from the viewpoint of the practitioner, to place hereunder cases which contain construction of this specific section and likewise to deal with those topics which appear to have given the most trouble in the decided cases.

Positive Law Is Basis of Dower.—The contract of marriage does not vest in the wife her right of dower. This right is not regarded as springing from contract, although the contract of marriage is a prerequisite to its existence, but from the positive terms of the common law or statute law. Corporation Commission v. Dunn, 174 N. C. 679, 681 94 S. E. 481; Rose v. Rose, 63 N. C. 391.

Right of Dower Is a Legal Right.—The right of a widow is a legal right and is prior to that of the heir. Campbell v. Murphy, 55 N. C. 357. It does not arise from the estate of the heir but is a continuation of that of her husband Everett v. Newton, 118 N. C. 919, 922, 23 S. E. 961; Williams v. Bennett, 26 N. C. 122.

As to exemption from debts and legacies, see note to

Curry v. Curry, 183 N. C. 83, 110 S. E. 579, under section 30-3.

Law of Situs Governs. — The existence and incidents of the right of dower are determined by the law of the state in which the real estate lies and not by that of the place of the marriage or the domicile of the parties. Corporation Commission v. Dunn, 174 N. C. 679, 681, 94 S. E. 481. The law existing when the estate becomes consummate by the husband's death is the governing law. Id.

Where Dissent of Wife Not Necessary.—It will be noticed that the widow's right to claim dower is subject to the two contingencies, (1) that her husband die intestate, or (2) that she dissent from his will. In other words, this and the foregoing section give the widow the right to elect whether she will take under the provisions of the will or whether she will dissent therefrom and take under the law. There seems to be at least one case wherein the widow is not put to this election. It appears to be this: Where the husband takes a defeasible title to lands and the limitation is defeated at his death because of the non-performance of the condition thereof, then he has no legal title or estate in the lands which he could dispose of by will. Now when the husband dies leaving a will disposing of his other real and personal property, is the widow required to dissent from this will in order to lay claim to dower in the defeasible fee of which the husband was seized and possessed during coverture, but which limitation was terminated at his death? As stated above, it is held that she need not dissent. The reasons given are these: The dissent authorized by this section has reference to property which may be the subject of a devise. The husband in this case has no right to devise the defeasible fee, and his widow therefore is not claiming dower in opposition to the will. See Alexander v. Fleming, 190 N. C. 815, 819, 130 S. E. 867.—Ed. Note.

Not Consummate Until Death of Husband. — A married woman has an inchoate right or estate in one-third in value of all the lands of which her husband is seized and possessed during coverture, but its enjoyment is postponed by law until his death, and is contingent upon her surviving him. Gatewood v. Tomlinson, 113 N. C. 312, 313, 18 S. E. 318. And the wife cannot in the lifetime of her husband have her dower allotted even though his lands are sold under execution. Gatewood v. Tomlinson, 113 N. C. 312, 313, 18 S. E. 318.

Upon the death of a husband, the widow's right of dower becomes consummate, and is a fixed and vested right of property in the nature of a chose in action, which, upon assignment of dower, becomes a life estate in the property assigned, which estate is subject to all the incidents of any other life estate, and is considered a continuation of the husband's estate. Citizens Bank, etc., Co. v. Watkins, 215 N. C. 292, 1 S. E. (2d) 853.

The widow has no right under this section, to select the lands to constitute her dower, the provision providing that the commissioners need not select the dwelling-house if the widow requests otherwise, being merely to afford relief from the otherwise mandatory duty of the commissioners to select the dwelling-house, and not conferring the right of selection on the widow, and the commissioners being further required to equally protect the interests of the heirs and widow. Vannoy v. Green, 206 N. C. 77, 173 S. E. 277.

Valuation of Dower.—In determining the present value of inchoate dower or dower consummate, the full value of the dowerable lands, encumbered as well as unencumbered, and without deducting the mortgage debt, constitutes the proper basis of computation. Virginia Trust Co. v. White, 215 N. C. 565, 2 S. E. (2d) 568.

Nature of the Inchoate Dower.—The sections of the code pertaining to dower seem to recognize the right during the husband's life as a valuable interest that may pass by a conveyance. When she encumbers it by joining in a mortgage to secure his debt she becomes his surety. Gore v. Townsend, 105 N. C. 228, 232, 11 S. E. 160. In Bullard v. Briggs, 7 Pick. (Mass.) 533, cited and approved in Gore v. Townsend, supra, it is said: "It is a right and interest of which she cannot be divested but by her consent or crime, or by her dying before her husband."

An examination of the cases will show that no little difficulty has been encountered in fixing a precise and accurate definition of this inchoate right of dower possessed by the wife during the lifetime of her husband. But whatever contrariety may be found in the various statements made in reference to this right, all the courts adhere to the same established rules in the decision of the cases bearing on the subject, and substantiate the foregoing principles.

In summarizing the nature of this right, it is said in 2 Scriber on Dower 8: "It cannot properly be denominated an estate in lands nor indeed, a vested right therein, however it is a substantial right, possessing in contemplation of law, the attributes of property, and is to be estimated and valued as such." And in Dollin v. Coin, 14 Wall 472, 479, 20 L. Ed. 830, it is said: "A wife having only an inchoate right of dower has no present title to the land, either legal or equitable."—Ed. Note.

Where the husband's lands are sold by a receiver appointed by the court, and the husband and wife join in the receiver's deed to the purchaser, who assumes prior mortgage indebtedness thereon, and the parties agree that the wife's inchoate dower shall attach to the proceeds of the sale, the sale is not a foreclosure of the prior mortgages and the wife's rights of inchoate dower attaches to the proceeds of the sale, and the cash value of the inchoate right is computable and the wife is entitled thereto as against other creditors of the husband. American Blower Co. v. Mackenzie, 197 N. C. 152, 147 S. E. 829, laying down rule for computing present value of right of dower.

Although inchoate dower has a present value, the enjoyment of the estate is expressly postponed by statute until after the husband's death, and is contingent upon the wife surviving her husband. Higdon v. Higdon, 206 N. C. 62, 173 S. E. 273.

Cited in Honeycutt v. Burleson, 198 N. C. 37, 38, 150 S. E. 634.

II. PROPERTY SUBJECT TO DOWER.

A. In General.

Editor's Note.—The courts have followed the clear and unambiguous terms of this section in the determination of just what property is subject to the dower right of the widow. The cases given below will illustrate that the provisions herein contained constitute the formula which the property claimed by the wife must satisfy. The chief issue around which litigation has arisen is in regard to the nature of the seizin which the husband must have and whether or not he has such seizin in the property in question. This topic is thought to be of so great importance as to justify treatment under a separate analysis line.

Last Usual Residence Must Be Included.—In the allotment of the widow's dower, the provision pertaining to last usual residence of the husband has been given a literal interpretation, and it is held that this residence must be embraced therein and if the value thereof is as much as one-third of the realty of which the husband dies seized, then the widow has no interest in the balance of the estate. Howell v. Parker, 136 N. C. 373, 375, 48 S. E. 762. The widow cannot waive the right to the residence. Id. But note the effect of the last sentence of this section.—Ed. Note.

Same—Where Dwelling House Constitutes Entire Estate.—If the deceased had no other property but his dwelling house, then only a third can be set aside as dower. Caudle v. Caudle, 176 N. C. 537, 97 S. E. 472.

Valuation of Property.—A widow is not entitled to have dower of the improved value of her husband's estate, but she must take it according to the value as it was in his lifetime. Campbell v. Murphy, 55 N. C. 357.

Same—Right to Damages.—The widow's claim of dower becomes a vested right upon allotment, continuing from the death of her husband, and from that time she is entitled to damages, measured by the rental value, for the time she has been kept out of possession. In re Gorham, 177 N. C. 271, 98 S. E. 717.

Same—Where Lands Sold to Pay Debts of Deceased.—In case of a sale of the lands to make assets to pay the debts of the deceased, the widow is entitled to interest on her proportionate part from the sale until payment, charging her interest in return, for such sums as she may be indebted to the estate. In re Gorham, 177 N. C. 271, 98 S. E. 717.

Partnership Property.—Real estate belonging to a partnership is subject to dower in favor of a widow of one of the partners only so far as a surplus may be left after paying the partnership debts. Stroud v. Stroud, 61 N. C. 525.

This holding is based upon the reasoning stated in Summey v. Patton, 60 N. C. 601, which is to the effect that where the partnership realty is sold to pay partnership debts, the surplus retains its character as real estate and descends to the heir, so that the heir takes subject to the widow's right of dower.—Ed. Note.

Mortgaged Property.—Under this section where an entire transaction was in effect an indirect mortgage on the property of a father, and his children received no consideration and acquired no beneficial interest in the lands, the sole beneficial interest in the lands was in the father, and upon his death his widow is entitled to her dower rights in the lands. Stack v. Stack, 202 N. C. 461, 163 S. E. 589.

B. Estates and Interests.

1. Nature of Seizin Required.

Seizin of Estate of Inheritance Necessary.—The seizin to

render the estate dowable must be of an estate of inheritance, with the freehold vested in the deceased husband. Barnes v. Roper, 90 N. C. 189, 190.

The widow's right to dower rests upon the theory that during coverture her deceased husband died intestate, seized of an estate which any child she may have borne him might have taken by descent. Alexander v. Fleming, 190 N. C. 815, 130 S. E. 867.

Same—Seizin in Law or in Deed.—A widow is entitled to dower only in an estate of inheritance of which her husband had a seizin in law or in deed at any time during the coverture, Houston v. Smith, 88 N. C. 312; the latter being the actual possession of a freehold estate and the former the right to the immediate possession or enjoyment of a freehold estate. Redding v. Vogt, 140 N. C. 562, 53 S. E. 337.

Possession Alone Will Not Suffice. — Possession cannot supply the seisin of an inheritable estate necessary to support the right of dower. Barnes v. Roper, 90 N. C. 189, 191, Efland v. Efland, 96 N. C. 488, 1 S. E. 858.

The original Act of 1784 read "seized or possessed." The section now reads "seized and possessed," the substitution of the word "and" for the word "or" having been made by the Act of 1836. This substitution, however, does not affect the substantive meaning and intent of the section, and is said in Weir v. Tate, 39 N. C. 264, 278, to be only a clerical error. This being true the section as it now reads is to be given the same construction as it received prior to the exchange of these words. Under this construction it would seem that the word "possessed" is surplusage, and at least one court has said that no member of the profession has ever understood why it was placed in the section. Weir v. Tate, supra. This view seems to be rested on the fact that if the requisite of seizin is satisfied, the possession, so far as is necessary, is likewise satisfied.—Ed. Note.

When Husband Deemed to Be Seized.—The husband is generally deemed to be seized of any land, "when he may have had any right, title or interest in the inheritance." Boyd v. Redd, 118 N. C. 680, 685, 24 S. E. 429.

2. Application.

Editor's Note. — The determination of the question as to whether or not the husband has been seized of the land, within the meaning of the judicial construction placed on the word as used in this section, probably has been the most fruitful source of litigation of the whole subject of dower. The contests which have been waged around this particular requisite have arisen in various forms, and have involved all kinds of estates and interests. However, the conclusions reached by the courts are believed to be placed on reasons which in turn, have as their foundation the basic principles hereinbefore set out. A few of what are believed to be the leading cases are given in the following passages, for it is believed that the constructions of the section on this particular point, handed down by the courts in these cases, are well established in the State of North Carolina.

Seizin of Estate in Remainder.—The widow of a remainderman is not entitled to dower where the life tenant survives the remainderman, because the husband in such case is never seized of such an estate of inheritance in the land as is required. Royster v. Royster, 61 N. C. 226, 229.

Seizin of Purchaser at Judicial Sale.—Where a purchaser at a judicial sale gave his bond for the purchase money and died before the sale was reported to or confirmed by the court, it was held that he was seized of such an equitable estate as would entitle the widow to dower in such lands. Klutts v. Klutts, 58 N. C. 80.

Devise by Will—Rule in Shelley's Case.—Where under his will a testator gave all his lands to his son for life, "and after his death to his lawful heirs, born of his wife," it was held that the son did not take a fee simple, under the rule in Shelley's case, so as to give his widow dower therein. Thompson v. Crump, 138 N. C. 32, 50 S. E. 457.

A testator devised land in trust for the sole benefit of his son and the son's family, specifying that the whole of the property, with all its increase, on the death of the son, was to go on to his lawful heirs, share and share alike; it was held that the son did not take the fee under the rule in Shelley's Case but only a life estate, and therefore his widow was not entitled to dower therein. Gilmore v. Sellars, 145 N. C. 288, 59 S. E. 73.

The general doctrine of the rule in Shelley's Case may well be mentioned at this point. If the rule of this case is applicable to the controversy in question, then the husband takes a fee simple to the lands out of which dower may be had, because the husband will have been seized during coverture of an estate of inheritance within the meaning of the word as used in this section. But if the rule in Shelley's Case is inapplicable, then the husband takes only a life estate out of which dower cannot be had, and this because the husband will not have been "seized" within the meaning of this section for, as we have already seen, seizin as here used means an estate of inheritance. See note of Barnes v. Roper, ante, this note, analysis line II, B, 1. The reason which prevented this doctrine from operating in the Thompson case, just noted, was the fact that the words "born of his wife" were held to qualify and explain "his lawful heirs," thus confining the remainder to the children of his will. For a discussion of the rule in Shelley's Case, see the note to section 41-1.—Ed. Note.

Seizin under Unrecorded Deed.—Where title to land is claimed under a deed it is essential that such deed be registered for otherwise the widow is not entitled to dower out of the premises covered by the unrecorded deed. Thomas v. Thomas, 32 N. C. 123. But see Tyson v. Harrington, 41 N. C. 329 where it is held that the widow of a man, to whom a deed for land had been delivered, but from whom it had been abstracted before registration, has a right to her dower in such land, the husband having an incomplete legal title. The case of Thomas v. Thomas, supra, was cited without disapproval.

Rent.—In a U. S. Supreme Court case, Herbert v. Wren, 7 Cranch 370, 3 L. Ed. 374, it was held that if a wife join her husband in a lease for years, she is still entitled to dower in the rent.

Estate at Will.—At common law a wife had no right of dower in an estate at will. See Duncan v. Navassa Phosphate Co., 137 U. S. 647, 34 L. Ed. 826.

III. PLEADING AND PRACTICE.

Only One Proceeding Necessary.—This section gives the widow dower in **all the lands** of which the husband was seized during coverture, and this provision contemplates that the dower was intended to be sought, and must be sought, in but one special proceeding for the purpose. Askew v. Bynum, 81 N. C. 350, 355. Proceedings for the assignment of dower instituted and determined in the county of the deceased husband's last residence are a bar to subsequent proceedings for the same purpose in another county to affect lands therein located. Id.

Where Petition Filed.—Petition for dower should be filed in the county of the husband's last usual residence, but the jury of allotment may assign the same in one or more tracts situated in one or more counties. Askew v. Bynum, 81 N. C. 350.

The rationale of this section tends to indicate that there should be only one proceeding for the allotment of dower, whether it is a dower proceeding or a proceeding for partition of land, in which widow is entitled to dower, and that proceeding should be in the county where "the dwelling house in which her husband usually resided" is situated. High v. Pearce, 220 N. C. 266, 274, 17 S. E. (2d) 108 (con. op.) and cases cited therein.

See section 30-12 and note thereto.

There is no statute of limitations in regard to the writ of dower; and if her case is not affected by the statute of presumptions the widow is not bound to account for a delay. Campbell v. Murphy, 55 N. C. 357.

Parties.—As to who are necessary parties, see section 30-12 and the note thereto.

§ 30-6. Dower not affected by conveyance of husband; exception.—No alienation of the husband alone, with or without covenant of warranty, shall have any other or further effect than to pass his interest in such estate, subject to the dower right of his wife: Provided, that a mortgage or trust deed by the husband to secure the purchase money, or any part thereof, of land bought by him, shall, without the wife executing the deed, be effectual to pass the whole interest according to the provisions of the said deed. (Rev., s. 3085; Code, s. 2106; 1868-9, c. 93, s. 35; C. S. 4101.)

Cross Reference.—As to private examination of wife, see § 39-7 and annotation thereto.

Editor's Note.—Under this section as it formerly stood no joinder of the wife in a conveyance by the husband was necessary, because as section 30-5 stood under the old law, the wife was given dower only in those lands of which the husband died seized. That section no longer requires seizin at the death of the husband, but only a seizin of inheritance at any time "during coverture." Hence under the prior law the husband had full power to defeat the dower right of the wife by making a conveyance of his lands, for in so doing he would destroy a prerequisite for the attachment of the right of dower. However, this power of the husband was

taken away by the change of the wording of section 30-5, and the wife's right, although, in a sense, a qualified one, attaches to all lands seized by the husband during coverture, assuming of course, the existence of the other essential elements. It necessarily follows, then, that all purchasers, etc., take the property conveyed by the husband, subject to the dower right of the wife, and section 30-6 is merely a statutory protection thereof.

This section is modified by section 30-9 to the extent that the husband of an insane or lunatic wife may alienate his property without her joinder provided the terms of that section are complied with.

Generally.—It is an established principle that every citizen has the right to enjoy the fruits of his own labor, and when his earnings are invested in land, the rule is that he acquires with the title the incidental right of absolute and unrestrained alienation. However there are a few instances where the law has trammeled this right to reach some beneficent end; the provision that the wife must join in a conveyance by her husband constitutes one of these restrictions. But this and the other restrictions must be construed as to carry out the kindly purpose for which they were created, with no more restraint on the power of alienation than is necessary to make them effectual. Hughes v. Hodges, 102 N. C. 236, 9 S. E. 437.

Non Joinder of Wife—Dowable Property Retained.—Where the husband has sold and conveyed portions of his land for valuable consideration without the joinder of the wife, but retained lands, which descend to his heirs, of a kind and quantity which permit that dower be assigned out of the lands descended and according to the provisions of this section, the purchasers have a right to require that dower be allotted out of lands descended, and the lands which they have purchased and paid for be relieved of the widow's claim. Harrington v. Harrington, 142 N. C. 517, 55 S. E. 409.

Wife Not Joining in Execution of Deeds of Trust Acquires No Dower Right.—Where a debt secured by a purchase money deed of trust was divided, and two deeds of trust were substituted for the original deed of trust, which was canceled, and the wife of the grantee did not join in executing any of the deeds of trust, she acquired no dower right in the land, the original debt for the purchase money not having been extinguished. Case v. Fitzsimons, 209 N. C. 783, 184 S. E. 818.

Cited in Boyd v. Brooks, 197 N. C. 644, 645, 150 S. E. 178; Taft v. Covington, 199 N. C. 51, 55, 153 S. E. 597.

§ 30-7. Dower conveyed by wife's joinder in deed.—The right to dower under this chapter shall pass and be effectual against any widow or person claiming under her upon the wife joining with her husband in the deed of conveyance and being privately examined as to her consent thereto in the manner prescribed by law. (Rev., s. 3086; Code, s. 2107; 1868-9, c. 93, s. 36; C. S. 4102.)

Cross Reference.—As to private examination of the wife, see § 39-7 and annotation thereto.

See annotations to § 30-8.

Inchoate Right of Dower as Collateral Security.—The wife by joining in her husband's mortgage given on his lands may convey, as additional security to his debt, her inchoate right of dower. Griffin v. Griffin, 191 N. C. 227, 131 S. E. 585.

Same—Foreclosure.—A deed of trust given by the husband and joined in by the wife unreservedly of her inchoate right of dower, may be enforced under its terms and conditions to pay off the debt it secures, and completely bars the inchoate right of dower. Griffin v. Griffin, 191 N. C. 227, 131 S. E. 585.

Where a wife joins in the execution of a mortgage or deed of trust she conveys her dower interest as security for the debt, and upon foreclosure after her husband's death she may not assert her dower in the land as against the purchaser at the foreclosure sale, although, her position being analogous to that of a surety, she is entitled to assert a claim against her husband's estate to the amount of the value of her dower. Realty Purchase Corp. v. Hall, 216 N. C. 237, 4 S. E. (2d) 514.

Same—Equity Will Not Intervene.—Equity will not interfere in behalf of the wife who has unreservedly joined in a mortgage on her husband's lands, to restrain the sale according to the terms of the instrument, by first ordering a foreclosure sale of the lands outside of the wife's inchoate interest, and if not sufficient, subject her interest to sale for the payment of her husband's debt. Griffin v. Griffin, 191 N. C. 227, 131 S. E. 585.

Joinder Makes Wife a Surety.—When the wife encumbers her inchoate right of dower by joining in a mortgage of his land to secure his debt she becomes his surety, Gore v. Townsend, 105 N. C. 228, 11 S. E. 160, and is entitled to call upon her husband to exonerate her estate from the debt. Id.

Dower Need Not Be Sold When Estate Is Solvent.—The widow may subject her dower to the payment of the debts of her husband's estate by joining in his mortgage deed or conveyance in conformity to the requirements of this section, yet if his estate is solvent the dower need not be sold, and in the event that it is insolvent the estate must be administered according to the established rules. Holt v. Lynch, 201 N. C. 404, 160 S. E. 469.

Cited in Higdon v. Higdon, 206 N. C. 62, 65, 173 S. E. 273.

§ 30-8. Conveyance of home site with wife's assent.—No deed or other conveyance, except to secure purchase money, made by the owner of a home site, which shall include the residence and other buildings together with the particular lot or tract of land upon which the residence is situated, whether actually occupied by said owner or not, shall be valid to pass possession or title during the lifetime of the wife without the voluntary signature and assent of his wife, signified on her private examination according to law: Provided, the wife does not commit adultery, or has not abandoned and does not abandon the husband and live separate and apart from him. Provided further, that all married women under the age of twenty-one shall have the same privilege to renounce their dower rights in and to the home site as is now conferred upon married women twenty-one years and over, and the deed or other conveyances thereof made by the owner of a home site with the voluntary signature and assent of his wife, signified on her private examination according to law, even though the wife be under twenty-one years of age, shall be valid and immediately pass possession and title thereto as though said married women were twenty-one years or over: Provided further, that all conveyances of a home site, as defined in this section, made prior to February 27, 1937, by the owner thereof, with the voluntary signature and assent of his wife, signified on her private examination according to law, shall be valid and pass the title and possession thereto as of the date thereof, even though the wife of said owner was under twenty-one years of age at the time of such signature and assent. (1919, c. 123; 1937, c. 69; C. S. 4103.)

Cross Reference.—As to mortgage of household and kitchen furniture, see § 45-3.

Editor's Note.—Section 30-9 passed by the Public Laws of 1923, is undoubtedly intended to modify this section in that it allows the husband in certain specified cases to alienate the property concerned without the joinder of his wife.

The 1937 amendment directed that the last two provisos be added at the end of this section.

In Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N. C. 41, 178 S. E. 863, it was held that § 30-10 had no application where a minor's wife joined in a mortgage placed by her husband upon his home site, and declared void the mortgage upon its disaffirmance by the wife within three years after she attained her majority. In order to obviate such a result in the future, the amendment was passed to make valid and binding the properly executed renunciation of her dower rights in her husband's home site by a married woman under the age of 21. This amendment is logical and will tend further to stabilize real estate titles. 15 N. C. Law Rev., No. 4, pp. 354, 355.

In General.—In Southern State Bank v. Summer, 188 N. C. 687, 688, 125 S. E. 489, the court said: "The value of the 'home site' is not fixed by the statute. It is not certain as to whether it is intended to be in addition to, or included within, the homestead right. Nothing is said as to whether it is superior to the rights of heirs or the claims of creditors. It has been suggested that the statute may apply, and probably was intended to apply only as against those claiming

under a deed from the husband without his wife's proper joinder. We leave its interpretation for future consideration."

Validity of Section.—This section is valid, and does not fall within the principle that a statute too vaguely worded to express a definite meaning, and which is not susceptible of interpretation by the courts, will be declared void. Boyd v. Brooks, 197 N. C. 644, 150 S. E. 178.

Distinguished from § 45-3.—See note to § 45-3.

Property Constituting a "Home Site."—Where a mortgagor of lands at the time of the execution of the mortgage is in possession of a certain part thereof on which, with the usual outbuildings, he lives with his family as a home, such land is a "home site" within the meaning of this section and held in this case that a 54.75 acres of farm land is not excessive for the purpose. Boyd v. Brooks, 197 N. C. 644, 150 S. E. 178.

Deed to "Home Site" without Wife's Joinder Not Void.—This section limits the effect of the conveyance of a "home site" by a husband's deed or mortgage made without the privy examination of the wife, but does not make the conveyance void, and the effect of the statute is to postpone the title and the right of possession of the "home site" under such deed until the death of the husband, when it then passes to the grantee subject only to the dower right of the wife if she survives him. Boyd v. Brooks, 197 N. C. 644, 150 S. E. 178.

Rights of Parties under Foreclosure of Mortgage on "Home Site" in Which the Wife Did Not Join.—Where the wife does not join in a mortgage made by her husband on the statutory "home site" in his lands, or have her privy examination taken as required by statute, the mortgagee takes subject to the provisions of this section and the purchaser at the foreclosure sale of such mortgage does not acquire under his deed the right to immediate title or possession to the land. Boyd v. Brooks, 197 N. C. 644, 150 S. E. 178.

Homestead Distinguished. — Homestead exemption should not be confused with the wife's interest under this section. The wife's interest in the husband's "home site" exists by this section and a different principle applies as to a conveyance without her valid execution. Johnson v. Leavitt, 188 N. C. 682, 125 S. E. 490.

§ 30-9. Conveyance without joinder of insane wife; certificate of lunacy.—Every man whose wife is a lunatic or insane may bargain, sell, lease, mortgage, transfer and convey any of his real estate by deed, mortgage deed, deed of trust, or lease, without the signature or private examination of his wife: Provided, that the clerk of the superior court of the county in which the wife was adjudged a lunatic or declared insane, or the superintendent of an insane institution of the state, or any other state, shall certify under his hand and seal that she has been adjudged a lunatic or declared insane, and that her sanity has not been declared restored as is provided by law, and this certificate must be attached to the husband's deed, mortgage deed, deed of trust, or lease. Such deed, mortgage deed, deed of trust or lease executed, probated and registered in accordance with law shall convey all the estate and interest as therein intended of the grantor in the land conveyed, free and exempt from the dower rights and all other interests of his wife: Provided, this section shall not apply to the homestead of the husband which has been actually allotted. (1923, c. 65, s. 1; C. S. 4103(a).)

Cross Reference.—See annotations to § 30-8.

Editor's Note.—Attention is called to the fact that section two of the act of 1923, which enacted this section, provided that all sections conflicting with this section are repealed to the extent of this conflict and section 30-8 was specifically mentioned. As to the extent of the repeal of sections 30-6 and 30-8, see the editor's note under those sections.

§ 30-10. Renouncement of dower. — All married persons under the age of twenty-one years shall have the same privilege to renounce their dower rights and rights of curtesy and to give their written assent to conveyances of real property as are now conferred upon married persons twenty-one years old and over. (1923, c. 67, c. 2; 1935, c. 18; C. S. 4103(b).)

Cross Reference.—See also, § 52-13.

See annotations to § 30-8.

Editor's Note.—It was stated in 1 N. C. Law Rev. 271, that while this section does not refer to any section, it should be considered as an amendment to sections 39-7 and 30-7.

The amendment of 1935 made this section applicable to the renunciation of curtesy and assent to conveyances of real property.

See 13 N. C. Law Rev., No. 4, p. 375, for an analysis of this section.

Art. 3. Allotment of Dower.

§ 30-11. By agreement between widow and heir.—If the personal property of a decedent be sufficient to pay his debts and charges of administration, the heir or devisee with the widow may, by deed, agree to an assignment of her dower. (Rev., s. 3087; Code, s. 2110; 1868-9, c. 93, s. 39; C. S. 4104.)

There is nothing in this or the following section to indicate that the widow may select her dower or "endow herself." Vannoy v. Green, 206 N. C. 77, 79, 173 S. E. 277.

§ 30-12. Petition filed in superior court.—If no such agreement be made, the widow may apply for assignment of dower by petition in the superior court, and, if she fail to make such application within three months after the death of her husband, any heir or devisee may file a petition reciting the facts that the widow is entitled to dower on certain lands and has not applied for it, and demand that her dower be assigned to her. In all cases the widow and all heirs and devisees and persons in possession of, or claiming estates in, the lands shall be made parties, and the court shall hear and pass upon the petition in like manner as in other cases of special proceedings. (Rev., s. 3088; Code, ss. 2111, 2112; 1891, c. 133; 1868-9, c. 93, ss. 40, 41; C. S. 4105.)

Cross References.—As to the statute of limitations for allotment of dower upon lands not in actual possession of the widow, see § 1-47, sub-section 5. As to the settlement of dower on partition, see § 46-15 and annotations thereto.

In General.—The remedy by petition, as prescribed by this section, is a substitute for the action of dower at common law. McMillan v. Turner, 52 N. C. 436, 437.

Special Proceeding.—A proceeding for dower is a special proceeding. Tate v. Powe, 64 N. C. 644.

Where Equitable Element Involved.—While the assignment of dower is a special proceeding of which the clerk has jurisdiction, yet if any equitable element is involved, which under the former practice would have been cognizable in a court of equity, the superior court in term has jurisdiction, and the application for dower becomes a civil action. Efland v. Efland, 96 N. C. 488, 1 S. E. 858.

This section, providing a method for the allotment of dower, was not intended to deprive the superior court of its equitable jurisdiction in respect thereto. Citizens Bank, etc., Co. v. Watkins, 215 N. C. 292, 1 S. E. (2d) 853.

Where Question of Title Raised.—In a petition for a partition of land, in a court of law, where the defendant denies the tenancy in common by a plea of sole seizin in himself, the proper course is for the court to try the question of title thus raised, and not to force the plaintiff to resort to an action of ejectment for that purpose. Purvis v. Wilson, 50 N. C. 22.

Summons Returnable to Clerk.—A summons in a proceeding for the allotment of dower is returnable before the clerk of the superior court and not to the court in term. Gatewood v. Tomlinson, 113 N. C. 312, 18 S. E. 318.

Legal Right Personal to Widow.—The right to apply for allotment of dower by special proceeding under this section is a legal right, personal to the widow, and cannot be transferred by assignment. Parton v. Allison, 109 N. C. 674, 14 S. E. 107.

Dissent Essential to Jurisdiction.—The entry of a dissent by the widow is an incident to the jurisdiction of probate, and as this jurisdiction has been conferred upon the clerk

of the superior court, the widow's dissent is to be made and entered in his office. Ramsour v. Ramsour, 63 N. C. 231.

Assignment before Allotment. — Where the right to a dower has been assigned before allotment, the assignee's remedy to enforce it is by civil action in term; the clerk of the superior court has no jurisdiction. Parton v. Allison, 109 N. C. 674, 14 S. E. 107.

Allotment by Heirs.—In McMillan v. Turner, 52 N. C. 436, 437, there is strong intimation that the heirs could assign the widow her dower, and also that twenty years continuous possession by the widow of a certain tract of land claimed as dower, is sufficient to raise a presumption that such assignment had been made. But as to the first point mentioned, i. e., allotment by heirs, see Freeman's Heirs v. Ramsey, 189 N. C. 790, 128 S. E. 404, where it is held that the statutory method of allotment of dower is exclusive.

Administrator as a Party.—If there is no prayer against the administrator he is not a necessary party to a bill for the assignment of dower. Campbell v. Murphy, 55 N. C. 357.

Creditors as Parties.—Creditors are not necessary parties to the proceedings, Ramsour v. Ramsour, 63 N. C. 231; but the court may permit a creditor of a person, who died seized and possessed of lands to be made a party to the proceeding and contest the claim of the widow. Welfare v. Welfare, 108 N. C. 272, 12 S. E. 1025.

Creditors Must Make Exceptions within Allowed Time.—While creditors of an estate may be permitted to contest the widow's allotment of dower in proper instances upon the ground that the allotment is excessive, they must pursue their remedy in apt time by excepting to the report of the jury, and their motion to be made parties in order to contest the allotment of dower, made almost three months after approval by the court of the clerk's confirmation of the jury's report, is too late. Poindexter v. Call, 208 N. C. 62, 179 S. E. 335.

Judgment Conclusive upon All Claimants.—The judgment in a special proceeding for the allotment of dower to a widow is intended by this section to be and is conclusive upon the heirs, devisees or other claimants who may be parties as to the title of the husband and the rights of the widow. Boyd v. Redd, 118 N. C. 680, 685, 24 S. E. 429.

Same—Where Lessee Not Made Party. — The lessee of lands for a term during the continuance of the lease after the death of the deceased owner, is a proper and necessary party to proceedings to lay off the widow's dower wherein the locus in quo had been included, and where he has not been made a party he is not bound by the judgment in his action of ejectment and to recover damages against the widow, administrator and heirs at law. Ingram v. Corbit, 177 N. C. 318, 99 S. E. 18.

Cited in High v. Pearce, 220 N. C. 266, 17 S. E. (2d) 108 (con. op.).

§ 30-13. Assignment of dower.—If dower be adjudged, it shall be assigned by a jury of three persons qualified to act as jurors, unless one of the parties demand a greater number, not exceeding twelve, who shall be summoned by the sheriff to meet on the premises or some part thereof, and being duly sworn by the sheriff or other person authorized to administer oaths, shall proceed to allot and set apart to the widow her dower in said premises according to law and make report of their proceedings under their hands within five days to the clerk of the superior court.

When the husband dies seized and possessed of lands in any other county than that in which dower is to be assigned, the clerk of the superior court of the county in which dower is to be assigned shall, upon application of the widow entitled to dower, issue a commission to the sheriff of such other county requiring him to summons three or more persons, as may be asked in said application, qualified to act as jurors, to go upon the lands of said husband in the county of said sheriff and assess the value of the same after being duly sworn by the sheriff for that purpose, and report their assessment under their hands and seals through the sheriff, who shall countersign the same as their report to the clerk issuing said commission; and said report in the hands of the jury summoned to assign the dower shall be considered by them a true valuation of the lands mentioned in the report, and said last-mentioned jury shall be deemed to have met on the lands thus assessed and shall assign the dower accordingly. But if agreeable to and convenient to the jury summoned or appointed, as the case may be, in the county where the proceeding is pending, for the allotment of dower, said jury may go upon, view and assign and allot the land which lies in any other county or counties; and when so viewed, assessed and allotted, if it or any part of it be allotted as dower, their acts shall be valid and their allotment of dower be as valid, as if all of the land of the deceased husband lay in the county where the proceeding was brought and pending, upon properly certified copy of such allotment being filed and recorded in such other county or counties, other than the county in which the original proceedings were instituted, in which lands acted upon do lie.

If either party to the proceeding shall demand it, the clerk shall appoint three persons qualified to act as jurors, unless one of the parties demands a greater number, and then not exceeding twelve, who shall meet on the premises or some part thereof, and after being duly sworn by the clerk or someone authorized to administer oaths, shall proceed to allot and set apart to the widow her dower in said premises according to law and make report of their proceedings under their hands, or the hands of a majority of them, within five days to the clerk of the Superior Court; and when the jurors are so appointed the sheriff will not countersign the report nor take any part in the proceedings, except that the clerk may cause notice to be served on the jurors so appointed, if he deems or finds it necessary. (Rev., s. 3089; Code, s. 2113; 1893, c. 314; 1868-9, c. 93, s. 42; 1931, c. 393; 1939, c. 339; C. S. 4106.)

Cross References.—As to property subject to dower, see § 30-5 and annotation thereto. As to valuation of property of deceased husband, see annotation to § 30-5. As to conclusiveness of judgment in proceeding, see annotation to § 30-12.

Editor's Note.—The 1931 amendment added the last paragraph to this section.

The 1939 amendment added the second sentence of the second paragraph.

Signature of Sheriff Unnecessary.—It is not required that the sheriff attest the report of the jury by signing the same. Brickhouse v. Sutton, 99 N. C. 103, 5 S. E. 380.

Where Secondary Evidence of Report Admissible.—Where it appeared that the report of the jury fully described the dower of the widow, but had been lost, and the omission of a certain line in the report was made in copying it upon the record, it was held that the report is a part of the record and secondary evidence of its contents is admissible. Wells v. Harrell, 152 N. C. 218, 67 S. E. 584.

Manner of Allotment of Mortgaged Lands.—In a petition for dower, where the lands consisted principally of different parcels mortgaged in several deeds by husband and wife, the allotment should not be in part of the lands as if unencumbered or subject to the same encumberance, but in each parcel separately, and then the widow can work out her relief by asserting her equity against each creditor, as he seeks to enforce his security. Askew v. Askew, 103 N. C. 285, 290, 9 S. E. 646.

The remedy against an excessive assignment of dower is by exceptions to the report of the jury, upon the hearing of which it is competent for the court to hear affidavits, with a view to ascertain the facts. Welfare v. Welfare, 108 N. C. 272, 12 S. E. 1025.

Power of Court.—Ordinarily, the court, before which exceptions to the report of the jury in the allotment of dower is heard, is the sole judge whether a reassignment or successive reassignments shall be made. Poindexter v. Call, 208 N. C. 62, 179 S. E. 335.

Setting Aside the Allotment.—Where the report of the jury allotting dower is returned, and exceptions are taken by one thereby aggrieved, the court will set aside the allotment, and order a new allotment, if sufficient cause be shown. Stiner v. Cawthorn, 20 N. C. 640. But if the report is confirmed, a petition to set aside the allotment will not be heard at a subsequent term. Bowers v. Bowers, 30 N. C. 247.

Order Directing Reallotment of Dower. — The Supreme Court will not disturb an order directing a reallotment of dower, made after hearing the case on argument on both sides and all the papers, including conflicting affidavits concerning value, since the trial court, in the exercise of sound discretion, is the judge of how often, for just cause, it will direct a reallotment. Wilson v. Featherstone, 118 N. C. 840, 24 S. E. 714.

Stated in High v. Pearce, 220 N. C. 266, 17 S. E. (2d) 108 (con. op.).

§ 30-14. Notice to parties of meeting of jury.—The parties to such proceeding, or their attorneys, if within the county, shall be notified of the time and place of meeting of the jury appointed to assign dower, at least five days before the meeting. (Rev., s. 3090; Code, s. 2114; 1868-9, c. 93, s. 43; C. S. 4107.)

Art. 4. Year's Allowance.

Part 1. Nature of Allowance.

§ 30-15. When widow entitled to allowance.—Every widow of an intestate, or of a testator from whose will she has dissented, shall, unless she has forfeited her right thereto as provided by §§ 52-19 and 52-20, be entitled, in addition to her distributive share in her husband's personal estate, to an allowance therefrom of the value of five hundred dollars for her support for one year after his decease. Such allowance shall be exempt from any lien, by judgment or execution, acquired against the property of the husband. (Rev., s. 3091; Code, s. 2116; 1868-9, c. 93, s. 81; 1871-2, c. 193, s. 44; 1880, c. 42; 1889, c. 499, s. 2; C. S. 4108.)

Cross References.—As to property subject to allowance, see § 30-18 and annotations thereto. As to effect of wife's adultery, see § 52-20. As to when children entitled to an allowance, see § 30-17.

Purely a Statutory Right.—The right of a widow to a year's support is purely statutory. Broadnax v. Broadnax, 160 N. C. 432, 76 S. E. 216. See Drewry v. Raleigh Savings Bank and Trust Co., 173 N. C. 664, 92 S. E. 593.

Priority Over Creditors—Rule Stated.—The widow is given her right to her years support against all general creditors, but no better title to the property assigned her than her husband had. Hence, the rule to be deduced would seem to be this: She is entitled to her years allowance in preference to all general creditors, and also in preference to the special lien acquired by an execution bearing teste prior to the husband's death. In regard to other liens and equities, she takes the property in the same manner and plight in which her husband held it. Williams v. Jones, 95 N. C. 504. Her priority extends over the funeral expenses and costs of administration. Denton v. Tyson, 118 N. C. 542, 24 S. E. 116.

Same—Mortgage Registered after Husband's Death. — Where a husband mortgaged a horse, but the mortgage was not registered until after his death, and prior to its registration the horse was assigned to the widow as a part of her year's support, it was held that the widow took the property subject to the mortgage lien. Williams v. Jones, 95 N. C. 504.

Failure to Dissent from Will.—Where a widow fails to dissent from a will, and brings an action after six months from the probate for a year's allowance, such action is not maintainable. Perkins v. Brinkley, 133 N. C. 86, 45 S. E. 465.

Where husband predeceased by wife, see note of In re Stewart, 140 N. C. 28, 30, 52 S. E. 255, under section 30-17.

When Husband Died a Citizen of Foreign State. — The widow of a man who dies a citizen of another state is not entitled to a year's support out of the assets of the decedent in this State, and the fact that she became a citizen of this State after her husband's death is immaterial, since her relations to the estate and her right to share in it are fixed at the intestate's death, and by the laws of his domicil. Simpson v. Cureton, 97 N. C. 113, 2 S. E. 668; Medley v. Dunlap, 90 N. C. 527.

The decision in these cases appears to have been changed in the case of Jones v. Layne, 144 N. C. 600, 57 S. E. 372, in which it is held that a widow, whose husband died domiciled in another state, is entitled to her year's support in this State in which there is a fund due her husband, if the widow is a bona fide resident in the State. The reason given for this ruling is that the fiction of personal property being considered as belonging to the domicil of the owner applies only to the distribution of the assets of the one deceased, and has no application to payment of debts, legacies, costs of administration, etc. See Moye v. May, 43 N. C. 131, also Story Confl. Laws, 354. When it is recalled that the year's support given to the widow is superior to all these claims, then this, coupled with the fact that it seems well settled that the fiction that personal property follows the owner is limited in its operation to the case of distributing the assets of one deceased, would be ample reason for the ruling in the Jones case. Further support may also be found in the very purpose and object of the enactment of the Legislature giving to the widow her year's support. See In re Hayes, 112, N. C. 76, 77, 16 S. E. 904; Kimball v Deming, 27 N. C. 418.—Ed. Note.

Adultery Prior to Enactment of Section, Not a Bar. — A widow is not barred of her right to a year's support under this section by reason of adultery committed prior to the passage of the act. Cook v. Sexton, 79 N. C. 305.

Antenuptial Contract as a Bar.—A widow is barred from recovering a year's support by an antenuptial contract relinquishing all claim to any property of her husband. Perkins v. Brinkley, 133 N. C. 86, 45 S. E. 465.

Award under Will as Estoppel.—Where the widow and the executor by mutual consent selected three men to lay off the widow her year's support, provided for her in the husband's will, which was done, and both parties assented to the report in writing, it was held that the widow in the absence of fraud and undue influence was estopped by the award and cannot maintain a proceeding under this section. Flippin v. Flippin, 117 N. C. 376, 23 S. E. 321.

§ 30-16. Duty of personal representative or justice to assign allowance.—It shall be the duty of every administrator, collector, or executor of a will from which the widow of the testator has dissented, on application in writing, signed by the widow, at any time within one year after the decease of the husband, to assign to her the year's allowance as provided in this chapter, deducting therefrom the value of any articles consumed by her between the death of her husband and the time of the assignment.

If there shall be no administration, or if the personal representative shall fail or refuse to apply to a justice of the peace, as provided in § 30-20, for ten days after the widow has filed the aforesaid request, or if the widow is the personal representative, the widow may make the application to the justice, and it shall be the duty of the justice to proceed in the same manner as though the application had been made by the personal representative.

Where the widow and personal effects of the deceased husband shall have been removed from the township or county where the deceased husband resided before his death, the widow may apply to any justice of the peace of the township or county where such personal property is located, and it shall be the duty of such justice to assign the year's allowance as if the husband had resided and died in that township. (Rev., ss. 3096, 3098; Code, ss. 2120, 2122; 1868-9, c. 93, s. 12; 1870-1, c. 263; 1889, cc. 496, 531; 1891, c. 13; C. S. 4113, 4115.)

Next Friend as Representative of Minor Widow.—In dissenting from her husband's will and applying for a year's allowance, the widow, being a minor without guardian, may be represented by a next friend, duly appointed. Hollomon v. Hollomon, 125 N. C. 29, 34 S. E. 99.

Assignment under Section Not Exclusive.—The assignment of a year's provision under this section does not serve

to preclude her right to an increase thereof under section 30-26 et seq. Mann v. Mann, 173 N. C. 20, 91 S. E. 355.

The reasons for this construction are two-fold. (1) The year's provision is intended for the immediate and pressing needs of the widow and children, and is not given them as a substitute for any or all that they may rightfully claim, (2) the words "further allowance," as used in section 30-26 contemplate the possibility of the right of the widow and children to lay claim to an additional sum, depending on the existence or non-existence of the circumstances mentioned in that section.—Ed. Note.

§ 30-17. When children entitled to an allowance.—Whenever any parent dies leaving any child under the age of fifteen years, including an adopted child, or a child with whom the widow may be pregnant at the death of her husband, or any other person under the age of fifteen years residing with the deceased parent at the time of the death to whom the deceased parent or the surviving parent stood in loco parentis, every such child shall be entitled, besides its distributive share of the personal estate of such deceased parent, to an allowance of one hundred fifty dollars ($150.00) for its support for the year next ensuing the death of such parent, less, however, the value of any articles consumed by said child since the death of said parent. Such allowance shall be exempt from any lien, by judgment or execution against the property of such parent. The personal representative of the deceased parent, within one year after the parent's death, shall assign to every such child the allowance herein provided for; but if there is no personal representative or if he fails or refuses to act within ten days after written request by a guardian or next friend on behalf of such child, the allowance may be assigned by a justice of the peace, upon application of said guardian or next friend.

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

Effect of Section.—The background and effect of this section are summarized in part as follows in 17 N. C. Law Review, 357: Since 1796 statutes have been in force in North Carolina providing for the allotment of a portion of the property of a deceased person for the support of his widow and family for one year after his death. See In re Stewart, 140 N. C. 28, 52 S. E. 255, 256. By these statutes the widow, in addition to her dower and distributive share of her husband's estate, has been given a year's allowance out of his personal property; the year's allowance has included not only a certain sum for her own maintenance, but also additional sum for each child of hers or her husband's under fifteen years of age. The entire amount of this allowance was at one time held to be personal to the widow—her own property to be used at her pleasure. Kimball v. Deming, 27 N. C. 418; Simpson v. Cureton, 97 N. C. 112, 116, 2 S. E. 668, 670. As a consequence, if the husband died leaving no widow, or if the widow died before her year's allowance was assigned to her, no allowance could be set aside for the surviving children as such. Kimball v. Deming, supra. To remedy this situation, a statute was passed in 1889 (c. 496, codified as § 30-17 of the General Statutes of N. C.), which provided that in case there was no widow, or if she died before the allowance had been set aside, an allotment still could be made for the benefit of the members of the family surviving under the age of fifteen years. See In re Stewart, supra. The 1939 amendment amended and rewrote this statute so as to dissociate completly the orphan's year's allowance from the concept of its inclusion in the widow's allotment, and to give him an independent legal status of his own for the purpose of receiving a year's allowance. The statute carefully stipulates that if the sum is paid to the surviving widow, it shall be paid to her for the child's benefit "in lieu of the allowance heretofore made such widow on account of such child."

Editor's Note.—For comment on the 1939 amendatory act, see 17 N. C. Law Rev. 357.

Death of Child before Filing of Application.—Where two children under fifteen years of age resided with the widow at the death of her husband, and one died before the application for the year's provision was filed, it was held that the widow was entitled to an allowance for two children. In re Hayes, 112 N. C. 76, 77, 16 S. E. 904.

This decision was rested on the ground that the chief object of this and the foregoing sections is to provide for the dependent family of the deceased residing with the widow at the death of the husband, and not at the date of her application. As was said in the early case of Kimball v. Deming, 27 N. C. 418, cited and approved in In re Hayes, supra, the purpose "was to make provision for the pressing wants of the widow personally, and to enable her at that mournful juncture to keep her family about her for a short season, and prevent the necessity of scattering her children abroad, until time was allowed for selecting suitable situations for them."—Ed. Note.

Entire Allowance to Widow.—It is proper to make the entire allowance to the widow and none to the minor children, but the existence of such children may be considered, the widow being charged with their care and support. Drewry v. Bank, etc., Co., 173 N. C. 664, 92 S. E. 593.

§ 30-18. From what property assigned.—Such allowance shall be assigned from the crop, stock and provisions or any other personal property of the deceased in his possession at the time of his death, if there be a sufficiency thereof in value; and if there be a deficiency, it shall be made up by the personal representative from the personal estate of the deceased. (Rev., s. 3095; Code, s. 2117; 1868-9, c. 93, s. 9; 1925, c. 92; C. S. 4112.)

Editor's Note.—The words "or any personal property" after the word "provisions" were inserted by the Public Laws of 1925. The insertion of these words takes away all doubt as to whether or not the enumerated classes of property herein contained were meant to exclude all other property. But it is submitted that the addition of these words to this section was not intended to make all the personal property of the deceased subject to the widow's allowance in the first instance. The general words "or any personal property," following the enumeration of specific classes, (crop, stock, and provisions) must, under the maxim ejusdem generis, be restricted to things of the same kind as those specifically mentioned and enumerated. This seems to be the only possible construction to give to the new words since the section in all its other respects is left without any change whatever, and note must be taken of the clause that "if there be a deficiency it shall be made up by the personal representative from the personal estate of the deceased." Unless the newly inserted words are given the limited meaning above referred to, then this last provision would not only be surplusage but would be meaningless. In other words, the door to the personal estate of the deceased has been opened wider but has not been opened to its fullest extent. For example, since the words used in this section seem to contemplate only personal property of a tangible nature, the intangible property would still be outside the scope of the property from which the widow's allowance may be taken, unless it is necessary to make up a deficiency.

"Stock."—In an early case, Van Norden v. Prim, 3 N. C. 149, the word "stock" contained in this section was construed to mean livestock.

Time of Valuation.—The widow's allowance must be made on the basis of the property's value at the time of the allowance, and not at the time of the testator's death. Hunter v. Husted, 45 N. C. 97.

Damages for Wrongful Death.—The right of action for wrongful death is conferred by statute at death, and any recovery therefor never belonged to the deceased and is not assets of the estate, therefore the widow is not entitled to

have her year's support assigned to her therefrom. Broadnax v. Broadnax, 160 N. C. 432, 76 S. E. 216.

Failure to Pay Deficiency.—An administrator is personally liable if he has assets to pay a deficiency and he fails to pay it. Irvin v. Hughes, 82 N. C. 210.

Sale of Land—Retention of Character as Realty.—In case of the sale of lands for assets to pay debts of a decedent, the surplus, after paying the debts and costs, remains real estate and cannot be applied to the payment of a judgment against the administrator in favor of the widow for the balance of her year's allowance. Denton v. Tyson, 118 N. C. 542, 24 S. E. 116.

Part 2. Assigned by Justice of the Peace.

§ 30-19. Value of property ascertained. — The value of stock, crop and provisions or any other personal property assigned to the widow and children, as well as that of the articles consumed, shall be ascertained by a justice of the peace and two persons qualified to act as jurors of the county in which administration was granted or the will proved. (Rev., s. 3097; Code, s. 2121; 1868-9, c. 93, s. 13; C. S. 4114.)

§ 30-20. Procedure for assignment.—Upon the application of the widow, or whenever it shall appear that a child is entitled to an allowance as provided by § 30-17, the personal representative of the deceased shall apply to a justice of the peace of the township in which the deceased resided, or some adjoining township, to summon two persons qualified to act as jurors, who, having been sworn by the justice to act impartially as commissioners shall, with him, ascertain the person or persons entitled to an allowance according to the provisions of this chapter, and examine the crop, stock, and provisions and any other personal property on hand, and assign to the widow and to the children, if any, so much thereof as they shall be entitled to by law. Any deficiencies shall be made up from any of the personal estate of the deceased, and also from any debt or debts known to be due the deceased. Such assignment shall vest in the widow and children such property, and the right to collect the debts thus allotted. (Rev., s. 3098; Code, s. 2122; 1870-1, c. 263; 1891, c. 13; 1899, c. 531; C. S. 4115.)

Cross Reference.—As to recovery of deficiency, see § 30-18 and annotation thereto.

§ 30-21. Report of commissioners. — The commissioners shall make and sign three lists of the articles assigned to each person, stating their quantity and value, and the deficiency to be paid by the personal representative. Where the allowance is to the widow, one of these lists shall be delivered to her. Where the allowance is to a child, one of these lists shall be delivered to the widow or surviving parent with whom the child is living; or to the child's guardian or next friend if the child is not living with said widow or surviving parent; or to the child if said child is not living with the widow or surviving parent and has no guardian or next friend. One list shall be delivered to the personal representative. One list shall be returned by the justice, within twenty days after the assignment, to the Superior Court of the county, and the clerk shall file and record the same and enter judgment against the personal representative, to be paid when assets shall come into his hands, for any residue found in favor of the person entitled to the allowance. (Rev., s. 3099; Code, s. 2123; 1868-9, c. 93, s. 15; C. S. 4116.)

Filing of List of Articles Mandatory. — The filing and recording of the list of articles allotted to the widow, as her year's support, as required by this section, is essential to its validity, and to the vesting in her of the property or debt allotted to the widow. Kiff v. Kiff, 95 N. C. 72.

Reasonable Certainty Required. — The allotment to the widow must be made with such reasonable certainty, in regard to the thing allotted, as to indicate what property was intended by the commissioners, otherwise the allotment will be void. Kiff v. Kiff, 95 N. C. 72. Under this principle the item, "labor for 3½ years, $173," was held void. Id.

§ 30-22. Fees of commissioners. — Any person appointed by any justice of the peace to allot or set apart to any widow and/or child a year's allowance under the statute, and who shall serve, shall be paid the sum of one dollar a day or fraction of a day engaged, and the same shall be taxed as a part of the bill of costs of the proceeding. (1907, c. 223; 1913, c. 18; C. S. 3900.)

§ 30-23. Right of appeal.—The personal representative, or the widow, or child by his guardian or next friend, or any creditor, legatee or distributee of the deceased, may appeal from the finding of the commissioners to the superior court of the county, and, within ten days after the assignment, cite the adverse party to appear before such court on a certain day, not less than five nor exceeding ten days after the service of the citation. (Rev., s. 3100; Code, s. 2124; 1868-9, c. 93, s. 16; 1897, c. 442; C. S. 4117.)

Evidence to Support Findings as Bar to Appeal. — The findings of the judge in the special proceedings for the allotment of the year's support will not be reviewed on appeal where there is evidence to support such findings. Drewry v. Bank, etc., Co., 173 N. C. 664, 92 S. E. 593.

§ 30-24. Hearing on appeal.—At or before the day named, the appellant shall file with the clerk a copy of the assignment and a statement of his exceptions thereto, and the issues thereby raised shall be decided as other issues are directed to be. When the issues shall have been decided, judgment shall be entered accordingly, if it may be without injustice, without remitting the proceedings to the commissioners. (Rev., s. 3101; Code, s. 2125; 1868-9, c. 93, s. 17; C. S. 4118.)

§ 30-25. Personal representative entitled to credit.—Upon the settlement of the accounts of the personal representative, he shall be credited with the articles assigned, and the value of the deficiency assessed as aforesaid, if the same shall have been paid, unless the allowance be impeached for fraud or gross negligence in him. (Rev., s. 3102; Code, s. 2126; 1868-9, c. 93, s. 18; C. S. 4119.)

§ 30-26. When above allowance is in full.—If the estate of a deceased be insolvent, or if his personal estate does not exceed two thousand dollars, the allowances for the year's support of his widow and the children shall not, in any case, exceed the value prescribed above; and the allowances made to them as above prescribed shall preclude them from any further allowances. (Rev., s. 3103; Code, s. 2127; 1868-9, c. 93, s. 19; C. S. 4120.)

Allowance under section 30-20 does not preclude operation of this section, see note of Mann v. Mann, 173 N. C. 20, 91 S. E. 355, under section 30-20.

Part 3. Assigned in Superior Court.

§ 30-27. Widow or child may apply to superior court.—It shall not, however, be obligatory on a widow or child to have the support assigned as above prescribed. Without application to the per-

sonal representative, the widow, or the child through his guardian or next friend, may, at any time within one year after the decedent's death, apply to the superior court of the county in which administration was granted to have a year's support assigned. (Rev., s. 3104; Code, s. 2128; 1868-9, c. 93, s. 20; C. S. 4121.)

§ 30-28. Nature of proceeding; parties. — The application shall be by summons, as is prescribed for special proceedings, in which the personal representative of the deceased, if there be one other than the plaintiff, the largest known creditor, or legatee, or some distributee of the deceased, living in the county, shall be made defendant, and the proceedings shall be as prescribed for special proceedings between parties. (Rev., s. 3105; Code, s. 2129; 1868-9, c. 93, s. 21; C. S. 4122.)

§ 30-29. What complaint must show.—In the complaint the plaintiff shall set forth, besides the facts entitling plaintiff to a year's support and the value of the support claimed, the further facts that the estate of the decedent is not insolvent, and that the personal estate of which he died possessed exceeded two thousand dollars, and also whether or not an allowance has been made to plaintiff and the nature and value thereof; and if no allowance has been made, the quantities and values of the articles consumed by plaintiff since the death of decedent. (Rev., s. 3106; Code, s. 2130; 1868-9, c. 93, s. 22; C. S. 4123.)

§ 30-30. Judgment and order for commissioners. —If the material allegations of the complaint be found true, the judgment shall be that plaintiff is entitled to the relief sought; and the court shall thereupon issue an order to the sheriff or other proper officer of the county, commanding him to summon a justice of the peace and two indifferent persons qualified to act as jurors of the county, to assign to the plaintiff from the crop, stock and provisions, or any other personal property of the decedent on hand, a sufficiency for plaintiff's support for one year from decedent's death; and, if there be a deficiency, to assess such deficiency, to be paid by the personal representative from any other personal assets of the decedent, deducting, nevertheless, in all cases from such allowance the articles, or the value thereof, consumed by plaintiff before such assignment and also any sum previously assigned. (Rev., s. 3107; Code, s. 2131; 1868-9, c. 93, s. 23; C. S. 4124.)

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

Definition of Annual Net Income.—The provision of this section that the allowance shall not exceed "the one-half of the annual net income of the deceased for three years next preceding his death" means the one-half of one year's net income, determined by the average annual income for the three years next preceding the decease, and not one-half of the sum total of the annual net income for the three year period. Holland v. Henson, 189 N. C. 742, 128 S. E. 145.

Allowance Sustained Where Discretion Not Abused.— Where the estate of the deceased husband is large and in good condition, and he received a net annual income for three years prior to his death of over $38,500, an allowance of $12,500 for a year's support to his widow with minor son, less the value of the household furniture, is not an abuse of the superior court's discretion which the supreme court will review. Drewry v. Raleigh Sav. Bank, etc., Co., 173 N. C. 664, 92 S. E. 593.

§ 30-32. Exceptions to the report.—The personal representative, or any creditor, distributee or legatee of the deceased, within twenty days after the return of the report, may file exceptions thereto. The plaintiff shall be notified thereof and cited to appear before the court on a certain day, within twenty and not less than ten days after service of the notice, and answer the same; the case shall thereafter be proceeded in, heard and decided as provided in special proceedings between parties. (Rev., s. 3109; Code, s. 2133; 1868-9, c. 93, s. 25; C. S. 4126.)

§ 30-33. Confirmation of report; execution.—If the report shall be confirmed, the court shall so declare, and execution shall issue to enforce the judgment as in like cases. (Rev., s. 3110; Code, s. 2134; 1868-9, c. 93, s. 26; C. S. 4127.)

Chapter 31. Wills.

Art. 1. Execution of Will.

§ 31-1. Infants incapable.—No person shall be capable of disposing of real or personal estate by will until he shall have attained the age of twenty-one years. (Rev., s. 3111; Code, s. 2137; R. C., c. 119, s. 2; 1811, c. 280; C. S. 4128.)

Under the prior law, see Williams's Legatees v. Heirs at Law, 44 N. C. 271, where it was held that an infant between twenty-one and eighteen could dispose of personal estate by will.

A will executed by a minor's father is not sufficient grounds for a court of equity to refuse the petition of the minor's guardian to be authorized and directed to enter proceedings to attack a consent judgment on grounds of irregularity and that it was not binding on the minor, it appearing that the purported will executed by the minor's father seeking to divest the minor's interest in trust estates was void under this section, the minor's father at the time of executing the instrument being under twenty-one years of age. In re Reynolds, 206 N. C. 276, 173 S. E. 789.

§ 31-2. Married woman capable. — A married woman owning real or personal property may dispose of the same by will. (Rev., s. 3112; Code, s. 2138; R. C., c. 119, s. 3; 1844, c. 88, s. 8; C. S. 4129.)

Curtesy of Husband Defeated.—Since the Constitution of 1868 a married woman may by will deprive her husband of curtesy in her separate estate. Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655; Watts v. Griffin, 137 N. C. 572, 50 S. E. 218.

§ 31-3. Formal execution. — No last will or testament shall be good or sufficient, in law, to convey or give any estate, real or personal, unless such last will shall have been written in the testator's life time, and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest of the estate, except as hereinafter provided; or, unless such last will and testament be found among the valuable papers and effects of any deceased person, or shall have been lodged in the hands of any person for safekeeping, and the same shall be in the handwriting of such deceased person, with his name subscribed thereto or inserted in some part of such will; and if such handwriting shall be proved by three credible witnesses, who verily believe such will and every part thereof is in the handwriting of the person whose will it appears to be, then such will shall be sufficient to give and convey real and personal estate. (Rev., s. 3113; Code, s. 2136; R. C., c. 119, s. 1; 1784, c. 204, s. 11; 1784, c. 225, s. 5; 1840, c. 62; 1846, c. 54; C. S. 4131.)

I. In General.
II. Signing Attestation and Date.
III. Holograph Wills—Deposit with Valuable Papers.

Cross Reference.
As to witnesses to a will, see §§ 31-9 and 31-10.

I. IN GENERAL.

Editor's Note.—The Statute of Frauds in England, in relation to wills, and this section upon the same subject, have in view the same object, namely, the protection of the heirs-at-law, and next of kin of a decedent, from the effect of a forged or false paper as a will. For that purpose, many forms and ceremonies are required to be observed in the execution of such instruments. With regard to attested wills, the requisites of the English statute, and this section, except as to the number of witnesses, are substantially the same. The courts, in both countries, have demanded a strict compliance with these provisions of the law. The same policy must govern the courts of this State when they come to decide whether the requisitions of this section have been complied with in the execution of a paper writing, propounded as a holograph will. See Little v. Lockman, 49 N. C. 495, 496.

Natural Right to Dispose of Property by Will.—The right to dispose of property by will is not a natural right, but one conferred and regulated by statute. Peace v. Edwards, 170 N. C. 64, 86 S. E. 807.

Necessity of Animus Testandi.—The distinguishing feature of all genuine testamentary instruments, whatever their form, is that the paper-writing must appear to be written animus testandi. It is essential that it should appear from the character of the instrument, and the circumstances under which it is made, that the testator intended it should

operate as his will, or as a codicil to it. In re Perry, 193 N. C. 397, 398, 137 S. E. 145.

For a memorandum written and signed by the testator to take effect as his will, it must, among other requisites, show that it was made animus testandi, and where the other formalities have been observed, a "pack" of letters containing a note in his favor, with the indorsement written thereon, and signed by him, a long time prior to his death, "I want S. W. have this pack." will not operate either as a valid holograph will or codicil. Id.

Where the animus testandi appears as doubtful or ambiguous, the question is one for the jury. In re Will of Harrison, 183 N. C. 457, 111 S. E. 867.

Where propounders introduce ample evidence that the paper-writing was in the handwriting of deceased and there is no evidence to the contrary, and the paper-writing is dispositive on its face and unequivocally shows the intention of deceased that it should operate as his will, the animus testandi is conclusively presumed, and it is error for the court to submit the question of such intention to the jury over the objection of propounders. In re Rowland's Will, 206 N. C. 456, 174 S. E. 284.

Nuncupative Wills Not Precluded.—The language of this section does not preclude the validity of nuncupative wills in this State; for section 31-18 par. 3 expressly provides for their probate. The different sections of the code must be construed together. Kennedy v. Douglas, 151 N. C. 336, 66 S. E. 216.

Will Drafted from Dictations after Testator's Death.—A paper writing drafted by an attorney from a stenographer's notes taken from dictation of deceased as to the disposition of her property after death, unsigned and unwitnessed, is not admissible as a last will and testament. Kennedy v. Douglas, 151 N. C. 336, 66 S. E. 216.

Letter as Will.—A letter written by the deceased to his brother, signed by him "Brother Alex," just before the deceased had gone to a hospital for treatment, saying "Brother Richard, take good care of yourself and stay with William at the store. I am going to the hospital on account of not feeling well. I hope God nothing happens, but if it does, everything is yours. Got some money in the bank, but don't know how much we owe on house . . . . . I hope in a few days I will come back," etc., indicates the writer's present intention to dispose of his property, and is provable as his holograph will. Wise v. Short, 181 N. C. 320, 107 S. E. 124.

An agreement to adopt a minor and make her his heir, made between the person desiring to adopt the minor and the minor's parents, as the respective parties to the agreement, indicates that the instrument is not intended as a will. Chambers v. Byers, 214 N. C. 373, 199 S. E. 398.

Reference on Certain Questions.—For an article on the following questions, see 2 N. C. Law Rev. 107 et seq., (1) what is sufficient subscription; (2) what are valuable papers; wherein is considered the relaxation of the doctrine of Little v. Lockman, 49 N. C. 493; (3) what is meant by "Depositing with Someone for Safe Keeping"; (4) animus testandi.

Same—Devisability of Possibility of Reverter before Condition Broken.—See Church v. Young, 130 N. C. 8, 40 S. E. 691.

Applied in In re Will of Roediger, 209 N. C. 470, 184 S. E. 74.

Quoted in Cartwright v. Jones, 215 N. C. 108, 1 S. E. (2d) 359.

Cited in In re Will of Lowrance, 199 N. C. 782, 784, 155 S. E. 876; Grantham v. Grantham, 205 N. C. 363, 366, 171 S. E. 331; Reynolds v. Reynolds, 208 N. C. 578, 182 S. E. 341; In re Williams' Will, 215 N. C. 259, 1 S. E. (2d) 857.

II. SIGNING ATTESTATION AND DATE.

In General.—In order to be a valid written will with witnesses, the same should be signed by the testator or some other person in his presence and by his direction, or the signature should be acknowledged by the testator, and subscribed in his presence by at least two witnesses. Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089.

Codicil must be executed with same formality as the will. Paul v. Davenport, 217 N. C. 154, 7 S. E. (2d) 352.

What Constitutes Signing and Subscribing.—The authorities make a distincton between statutes requiring instruments to be signed and those requiring them to be subscribed, holding with practical unanimity, in reference to the first class, that it is not necessary for the name to appear on any particular part of the instrument, if written with the intent to become bound; and, as to the second class, that the name must be at the end of the instrument. Peace v. Edwards, 170 N. C. 64, 66, 86 S. E. 807.

Name in Body of Will Sufficient Signature.—It is well settled that if the name of the testator appears in his handwriting in the body of the will this is a signing within the meaning of the statute. Hall v. Misenheimer, 137 N. C. 183, 49 S. E. 104, 107 Am. St. Rep. 474; Richards v. Ritter Lbr. Co., 158 N. C. 54, 73 S. E. 485; Boger v. Cedar Cove Lbr. Co., 165 N. C. 557, 81 S. E. 784, Ann. Cas. 1917D, 116; Burriss v. Starr, 165 N. C. 657, 81 S. E. 929, Ann. Cas. 1914D, 71; Peace v. Edwards, 170 N. C 64, 66, 86 S. E. 807.

Under this section a paper-writing in the testator's handwriting, dispositive on its face, with the name of the testator inserted therein in his own handwriting followed by the words "this being my will" is sufficient in form to constitute a holographic will. In re Rowland, 202 N. C. 373, 162 S. E. 897.

Same—For Example.—"I, John Jones, do make and publish this my last will and testament" is good if John Jones wrote the above even though he did nothing further in the way of signing or attesting the instrument concerned. 2 N. C. Law Rev. 107.

Signing in Presence of Witnesses Not Necessary.—This section does not require the testator to manually sign his will in the presence of the subscribing witnesses, and the validity of the written instrument in this respect will be upheld if the testator produces the will itself, and acknowledges and identifies it and his signature thereto, at the time the witnesses subscribe their names as such. Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089; In re Fuller's Will, 189 N. C. 509, 127 S. E. 549, 550.

Witnesses Need Not Sign in Presence of Each Other.—It is not required that the subscribing witnesses sign the will in the presence of each other. Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089; In re Will of Johnson, 182 N. C. 522, 109 S. E. 373.

Signature Made for Testatrix in Her Presence.—An instruction that it was not required that the will should be manually signed by the alleged testatrix if her name was signed thereto by some one in her presence, by her direction, or if such a signature was acknowledged by her as her signature to the instrument presented as her last will was held correct. In re Will of Johnson, 182 N. C. 522, 109 S. E. 373.

Signing Attestation by Both Witnesses in Presence of Testator Essential.—When a witness who had properly signed as such, no other witness signing, had the will copied upon different paper in the absence of the testator, signed the copy, left it at the home of the testator with the original, who afterwards procured the due attestation and signature of the other witness on the copy, both of which were found among the papers of the testator after his death, but the original was destroyed, the copy is not valid as a will, and evidence that the first draft was identical with the copy is incompetent, the first witness having signed before the testator, and not in his presence, there being no physical connection between the original and copy, and not upon the same paper as that of the signature of the testator. In re Baldwin, 146 N. C. 25, 59 S. E. 163.

Evidence tending to show that one of the subscribing witnesses signed the will as such in the presence of testatrix and the other subscribing witness warrants the jury in finding that the witness' subscription met the requirements of this section, notwithstanding that the witness wavered somewhat in her testimony. In re Redding's Will, 216 N. C. 497, 5 S. E. (2d) 544.

Attestation and Signing—Relation in Point of Time.—Some authorities hold that everything required to be done by the testator in the execution of a will shall precede in point of time the subscription by the attesting witness, and that, if the signature of the latter precede the signing by the testator, the will is void. Gardner on Wills, 263. Until the testator has signed, there is no will and nothing to attest. There are eminent authorities, however, which hold that where the signing of the testator and of the witnesses took place at the same time and constituted one transaction, it is immaterial who signed first. Gardner, supra. In re Baldwin, 146 N. C. 25, 29, 59 S. E. 163.

Where a witness subscribes his name to an instrument during the afternoon, and the purported testatrix signs the instrument the following night, but not in the presence of the witness, the signing of the instrument by the parties cannot be construed as one and the same transaction, and the instrument is not validly witnessed and attested by him, and, upon proof that the instrument was properly subscribed by one other witness, a peremptory instruction in favor of caveators is without error for want of proof that the instrument was subscribed by two witnesses. In re McDonald's Will, 219 N. C. 209, 13 S. E. (2d) 239.

Attestation and Subscription on the Same Sheet.—The attestation or subscription by witnesses must be on the same sheet of paper as that which contains the testator's signature, or else upon some paper physically connected with that sheet. In re Baldwin, 146 N. C. 25, 30, 59 S. E. 163.

Attestation Does Not Invalidate a Holographic Will.—The

fact of there being a signature of one subscribing witness to a will of land does not prevent it from being proved as a holograph will; and it is no objection to the probate of a script as a holograph will that it has one subscribing witness, and was intended by the decedent to be proved by subscribing witnesses, which intent was frustrated by the fact that the second attesting witness was incompetent. Hill v. Bell, 61 N. C. 122, 124.

Necessity of Date—Signature Required.—The testator's signature to the will is required though it is not required that the paper-writing be subscribed or dated. Therefore an undated will, when the name of the testator, in his own handwriting, appears in the body thereof, has the same legal effect as those bearing dates and subscribed by the testator. Peace v. Edwards, 170 N. C. 64, 86 S. E. 807.

A paper-writing in the handwriting of testatrix, duly proven by three credible witnesses, signed by testatrix and found among her valuable papers after her death, which paper-writing contains dispositive words sufficient to dispose of the estate, is valid as a holograph will under this section and § 31-18, subsection 2, and it is not necessary that the writing be dated or show the place of execution. In re Parson's Will, 207 N. C. 584, 178 S. E. 78.

Same—Inconsistent Wills, Effect Intestacy.—Where the decedent has left several paper-writings purporting to be his last will, containing the opening declaration, as to each, that the testator made the same as his "last will and testament," but only one of them bears date and his name subscribed thereto, and each of them making a disposition of his property different from the other, the undated and unsubscribed wills have the same legal effect as the one dated and subscribed, though the testator had indorsed under his signature, thereon, the words "last will"; and in the absence of proof as to which of the wills was the last one, the legal effect is intestacy. Peace v. Edwards. 170 N. C. 64, 86 S. E. 807.

Question for Jury.—It is for the jury to determine whether the testatrix impliedly requested the attesting witnesses to attest the will, an implied request being sufficient to submit the question to the jury. In re Kelly's Will, 206 N. C. 551, 174 S. E. 453.

III. HOLOGRAPH WILLS—DEPOSIT WITH VALUABLE PAPERS.

Construction of Statute—Illustration.—The requirements of this section that a paper-writing sufficient to pass as a holograph will must be found after the death of the testator among his valuable papers and effects must be liberally construed, and where it is found among the deceased's papers and effects evidently regarded by him as his most valuable papers, and are in fact valuable, under circumstances showing his intention that that will should take effect as being so found, it is sufficient, and under the facts of this case the paper-writing was adjudged to be effective as his will when found after his death in the pockets of the clothes he was wearing, with large sums of money and other papers of value. In re Will of Groce, 196 N. C. 373, 145 S. E. 689.

When all the words appearing on a paper in the handwriting of the deceased person are sufficient to constitute a last will and testament, the mere fact that other words appear thereon, not in such handwriting, but not essential to the meaning of the words in such handwriting, cannot be held to defeat the intention of the deceased, otherwise clearly expressed, that such paper-writing is and shall be her last will and testament. In re Parson's Will, 207 N. C. 584, 587, 178 S. E. 78.

What Constitutes Proper Depositing under This Section—Example.—A script purporting to be a holograph will was found in a drawer inside of a desk, between a bag of gold coins and a bag of silver coins; and immediately above the drawer, in pigeon-holes, were found notes, bonds and other valuable papers, arranged in files; the drawer and pigeon-holes were secured by the same door and lock: It was held, that the script was properly deposited, under this section defining the requisites of holograph wills. Hughes v. Smith, 64 N. C. 493.

Deposit in Drawer of Bookcase with Deeds, etc.—Where the proof showed that the script propounded as a holograph will was found in a small drawer of a bookcase, in the room which the alleged testator occupied at his death, with his deeds and other papers, it was held to be such a finding "among the valuable papers of the decedent" as will, in connection with the other evidence required by the statute in respect to handwriting, authorizing its probate. Cornelius v. Brawley, 109 N. C. 542, 14 S. E. 78.

Deposit in a Trunk Left with Friend for Safe-keeping.—The placing of a holograph in a trunk, left for safe-keeping with a friend, and having it in the larger part of the valuable papers and money of the deceased, will satisfy the requirements of the statute upon the point of deposit. Hill v. Bell, 61 N. C 122.

Need Not Be Found among Most Valuable Papers.—The phrase, "among the valuable papers and effects of," etc., used in this section does not necessarily and without exception mean among the most valuable papers, etc. Winstead v. Bowman, 68 N. C. 170. So the fact that decedent kept valuable papers in a tin box in a bank which were intrinsically more valuable than papers kept in a trunk where the will was found would not prevent the latter from being a depository within the meaning of the section. Id.

Deposit among Useless Papers and Rubbish.—In the case of Little v. Lockman, 49 N. C. 495, the script propounded was found in the drawer of a bureau, among some useless papers and rubbish, and there were valuable papers and effects kept in another drawer of the same bureau. Under such circumstances the court properly held that the script was not found in such a place of deposit as was contemplated by the statute. Hughes v. Smith, 64 N. C. 493, 495.

It is proper to notice that this section does not say "among valuable papers or effects," or "among any valuable papers or effects," but uses the definite article, the saying "among the valuable papers and effects." Id. This case is criticized by some of the later cases holding that the will need not be deposited among the most valuable papers. But it seems that the holding can be distinguished, without disparaging its authority, by the fact that the will here was deposited with useless papers and rubbish which had little or no value when compared with other papers of the testator deposited elsewhere—Ed. Note.

Jury to Determine Intention in Depositng with Valuables.—It was entirely proper in the judge to leave it to the jury to determine whether, from all the circumstances, they believed that the paper-writing was deposited by the deceased among his valuable papers with the intention that it should be his will. Simms v. Simms, 27 N. C. 684; Hill v. Bell, 61 N. C. 122, 125.

Evidence of Finding among Valuables.—That a holograph script was seen among the valuable papers and effects of the decedent eight months before his death, is no evidence that it was found there at or after his death. Adams v. Clark, 53 N. C. 56.

Sufficiency of Evidence.—Evidence that the will and testament of the deceased, wholly written and signed by her, was found among her valuable papers after her death, in a desk where she kept her business papers and papers she desired to keep for their sentimental value, and that it was transferred after her death, together with the other papers, to her trunk where they were found, is held sufficient, under the circumstances of this case. In re Will of Westfeldt, 188 N. C. 702, 125 S. E. 531.

Found among the Valuable Papers "or" Effects.—The word "and" appearing in the phrase "among the valuable papers and effects" should be taken in its alternative rather than in its conjunctive sense. The change of the conjunction "or" which originally appeared in place of "and" did not affect the construction of the section. This for the reason that if the word "and" is taken in its strict conjunctive sense, the statute would be virtually repealed or its benefits greatly diminished, as only few persons who manage their business with order and system keep their valuable papers and effects mixed up together. Hughes v. Smith, 64 N. C. 493, 495.

What Constitutes Valuable Papers.—Valuable papers consist of such as are regarded by a decedent as worthy of preservation, and therefore in his estimation, of some value; much depends upon the condition and business and habits of the decedent in respect to keeping his valuable papers. Winstead v. Bowman, 68 N. C. 170.

Note Held to Be Codicil.—A note payable to the deceased, found with his holographic will in a box with his other valuable papers after his death, and endorsed thereon in the handwriting of the deceased and over his signature to his wife to take effect after his death, when proved as § 31-18 requires, is to be construed as a codicil to his will, and it is not necessary to such construction that it be physically attached to the holographic will. In re Will of Thompson, 196 N. C. 271, 145 S. E. 393.

What Constitutes Depositing with Someone for Safe Keeping.—In the case of Alston v. Davis, 118 N. C. 202, 24 S. E. 15, a brother in Texas wrote to his sister in North Carolina that if he got sick or died in Texas he wanted her to have his farm. He simply mailed her the letter. Subsequently he died in Texas and his sister undertook to probate the letter as a holographic will in this State. The question arose whether it had been deposited "with someone for safekeeping"; the court held that this constituted depositing with someone for safekeeping and that the will should be probated. In view of the fact that a testamentary disposi-

tion must be accompanied with animus testandi, the decision seems to be clearly unsound, inasmuch as the letter in question discloses no such intention. This conclusion is supported by later decisions of the court which in express terms refuses to follow the doctrine of Alston v. Davis, see Spencer v. Spencer, 163 N. C. 83, 79 S. E. 291. It is believed that if the writer of the letter indicates clearly that by mailing it to the addressee he intends to deposit it as a will, the letter would be admitted to probate as such. See the case of In re Ledford's Will, 176 N. C. 610, 97 S. E. 482; 12 N. C. Law Rev. 199.

§ 31-4. Execution of power of appointment by will.—No appointment, made by will in the exercise of any power, shall be valid unless the same be executed in the manner by law required for the execution of wills; and every will, executed in such manner, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity. (Rev., s. 3114; Code, s. 2139; R. C., c. 119, s. 4; 1844, c. 88, s. 9; C. S. 4132.)

Cross Reference.—See also, § 31-43.

Art. 2. Revocation of Will.

§ 31-5. Revocation by writing or by cancellation or destruction.—No will or testament in writing, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same, by the testator himself, or in his presence and by his direction and consent; but all wills or testaments shall remain and continue in force until the same be burnt, canceled, torn, or obliterated by the testator, or in his presence and by his consent and direction; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, signed by him, or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, all of which shall be in the handwriting of the testator, and his name subscribed thereto or inserted therein, and lodged by him with some person for safe-keeping, or left by him in some secure place, or among his valuable papers and effects, every part of which will or codicil or other writing shall be proved to be in the handwriting of the testator, by three witnesses at least. (Rev., s. 3115; Code, s. 2176; R. C., c. 119, s. 22; 1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2; 1840, c. 62; C. S. 4133.)

Material Alteration Necessary.—In order for there to be a revocation of a will, in whole or in part, under the provisions of this section there must not only exist the intent of the testator to cancel, but there must be the physical act of cancellation; and while it is not required that the words should be entirely effaced where the cancellation is in part, so as to make the same illegible, the portion erased must be of such significance as to effect a material alteration in the meaning of the will or the clause of the will that is challenged on the issue. In re Love's Will, 186 N. C. 714, 120 S. E. 479.

Same—Primary Controlling Clause Unaltered, Effect. — Where the primary or controlling clause of a will remains unaltered by the obliteration by the testator of words therein and the unobliterated words remaining are sufficient to carry the designated property to the devisee, it will not amount to a revocation within the intent and meaning of this section; nor will the obliteration of the name of another beneficiary be sufficient as to him, when it appears that the intent of the revocation by the testator was dependent upon the successful revocation of a principal devise wherein the erasures were insufficient to effectuate a legal cancellation. In re Love's Will, 186 N. C. 714, 120 S. E. 479.

Presumption as to Second Will.—A will may be revoked by a subsequent instrument executed solely for that purpose, or by a subsequent will containing a revoking clause or provisions inconsistent with those of the previous will, or by any of the other methods prescribed by law; but the mere fact that a second will was made, although it purports to be the last, does not create a presumption that it revokes or is inconsistent with one of a prior date. In re Wolfe's Will, 185 N. C. 563, 565, 117 S. E. 804. In this case it was held that where a testator devised a certain part of his lands to L., and by a later will gave his effects to his brothers and sisters, the two wills were not inconsistent and the latter did not revoke the former—Ed. Note.

Presumption of Revocation Where Will Cannot Be Found. —It being shown that a will was once in existence and last heard of in possession of the testator, but could not be found after his death, a presumption arises that it was destroyed by his consent with intent to cancel it. Scoggin v. Turner, 98 N. C. 135, 3 S. E. 719.

Such presumption is not conclusive, but it imposes upon the person asserting the will the burden of proving that it was not so destroyed, or that the testator was not of sound mind at the time of such presumed destruction. Scoggins v. Turner, 98 N. C. 135, 3 S. E. 719.

Revocation of Holographic Will.—It seems clear that a holographic will may be revoked just as an attested will may, i. e., (1) by burning, tearing, canceling or obliterating or (2) by another will, which may be holographic or attested, provided only that the statutory requirements in each case are complied with. No witnesses are necessary on the holographic revocation. See 14 L. R. A. N. S. 968 and 112 Am. St. Rep. 822, 2 N. C. Law Rev. 110.

Revocatory Paper Must Be a Testamentary Paper. — Where the writing offered as operating a revocation of the will of the testator contains none of the elements of a testamentary paper, it cannot be helped by evidence aliunde, and hence has no revocatory effect. Davis v. King, 89 N. C. 441.

Effect of Disposal of Articles Already Bequeathed.—A bequest of personal property in a trunk which contained the holograph will and other valuable papers of the deceased, after removing certain articles specifically bequeathed to others, is not a revocation of her will by the testatrix. In re Foy, 193 N. C. 494, 137 S. E. 427.

Interlineations and Annotations Held Insufficient to Show Revocation.—Where testator, in his own handwriting, makes certain interlineations and annotations upon his will, which had been properly executed, and marks through certain words of the will, and it appears that such alterations are insufficient to constitute a holographic will and were made with the intent of altering the will at some future date in accordance with the notations, but that such alterations were not made with the intent to revoke the will in whole or in part, such interlineations and annotations are insufficient to show a revocation of the will, intent to revoke being essential to revocation by defacement or obliteration of the will by testator under this section. In re Will of Roediger, 209 N. C. 470, 184 S. E. 74.

Revocation by Parol Prior to Section.—See early case of Giles v. Giles, 1 N. C. 377, prior to the enactment of this section, where it is held that a will of real estate in writing may be revoked by parol if the words of revocation denote a present intention to revoke.

Revival by Parol Declaration.—A revocation of a will of real estate carried completely into effect cannot be revived by any subsequent declaration by parol. Giles v. Giles, 1 N. C. 377.

Cited in re Will of Watson, 213 N. C. 309, 195 S. E. 772.

§ 31-6. Revocation by marriage; exception.—All wills shall be revoked by subsequent marriage of the maker except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his heirs, executor or administrator, or the person entitled as his next of kin, under the statute of distributions. (Rev., s. 3116; Code, s. 2177; R. C., c. 119, s. 23; 1844, c. 88, s. 10; C. S. 4134.)

Republication by Parol Not Effective.—Under this section the will of a married woman is revoked by another marriage contracted after the will was made, and her verbal declaration, during the last coverture, that said paperwriting was

her last will and testament without any further execution thereof, in accordance with the statute, does not constitute a reexecution and republication of it. Means v. Ury, 141 N. C. 248, 53 S. E. 850.

Same—How Republished.—A holograph will revoked by the marriage of the testator, can only be revived and republished by a written instrument setting forth his intention, and duly attested by two witnesses, or by a writing by the testator himself, found among his valuable papers, or handed to one for safekeeping. Sawyer v. Sawyer, 52 N. C. 133.

Republication by Codicil.—A will which has been revoked by the marriage of the testator is revived and republished by a codicil properly executed subsequent to the marriage which refers to the prior will and expresses an intention of the testator that the will should be effective except as altered by the codicil. In re Coffield's Will, 216 N. C. 285, 4 S. E. (2d) 870.

Evidence of Undue Influence.—This section revokes any will made before marriage, and evidence that a will had been made prior thereto is not evidence of undue influence in the procurement of a subsequent will made in favor of the wife of the deceased. In re Will of Bradford, 183 N. C. 4, 110 S. E. 586.

Cited in In re Will of Watson, 213 N. C. 309, 195 S. E. 772.

§ 31-7. No revocation by altered circumstances.—No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. (Rev., s. 3117; Code, s. 2178; R. C., c. 119, s. 24; 1844, c. 88, s. 11; C. S. 4135.)

Subsequent Birth or Adoption of Child.—The subsequent birth of a child or the adoption of one under our statute, does not revoke the will of the father under this section as in case of subsequent marriage under section 31-6. Sorrell v. Sorrell, 193 N. C. 439, 137 S. E. 306.

Right of After-born Child Does Not Effect Revocation.—While after-born children not provided for in the will of their deceased parent may claim by inheritance their part of the estate, under section 31-45, it does not amount to revocation of the entire will. Fawcett v. Fawcett, 191 N. C. 679, 132 S. E. 796.

Applied in In re Will of Watson, 213 N. C. 309, 195 S. E. 772.

§ 31-8. No revocation by subsequent conveyance.—No conveyance or other act made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised, except an act by which such will shall be duly revoked, shall prevent the operation of the will with respect to any estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death. (Rev., s. 3118; Code, s. 2179; R. C., c. 119, s. 25; 1844, c. 88, s. 2; C. S. 4136.)

Parol Evidence to Fasten Constructive Trust.—Since the enactment of this section parol evidence is incompetent to fasten upon a devise of land a constructive or implied trust in favor of another. Chappell v. White, 146 N. C. 571, 60 S. E. 635.

This statute was enacted in view of the decision of this court, in 1843, in Cook v. Redman, 37 N. C. 623, in which a trust of this kind was upheld. Chappell v. White. 146 N. C. 571, 573, 60 S. E. 635.

Conveyance, etc., Not to Affect Provisions of Will.—No conveyance or act done after the execution of a will, unless it amounts to a revocation, will affect its provisions. Wood v. Cherry, 73 N. C. 110.

Where Construed, Approved and Cited.—This statute was construed in 1875 by an exceptionally able court, and the opinion delivered by Chief Justice Pearson in a notable case, which has been since repeatedly cited and approved. Wood v. Cherry, 73 N. C. 110, cited and approved in Avery v. Stewart, 136 N. C. 426, 48 S. E. 775; Sykes v. Boone, 132 N. C. 199, 43 S. E. 645; Cobb v. Edwards, 117 N. C. 244, 245, 23 S. E. 241; Herring v. Sutton, 129 N. C. 107, 39 S. E. 772; Pittman v. Pittman, 107 N. C. 159, 12 S. E. 61, and many other adjudications of this court. Chappell v. White, 146 N. C. 571, 573, 60 S. E. 635.

Cited in Wright v. Wright, 198 N. C. 754, 755, 153 S. E. 321.

Art. 3. Witnesses to Will.

§ 31-9. Executor competent witness.—No person, on account of being an executor of a will, shall be incompetent to be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof. (Rev., s. 3119; Code, s. 2146; R. C., c. 119, s. 9; C. S. 4137.)

Purpose of Section.—This section was intended to give the benefit of an executor's testimony to every person who should be interested, either in the establishment, or defeat of a paper writing propounded as a will. Pannell v. Scoggin, 53 N. C. 408, 410.

Executor or Administrator C. T. A. Competent.—An executor or administrator cum testamento annexo, who is also a subscribing witness to a will, is competent to testify to the execution thereof; and the same rule applies to one who was competent at the time of the making of the will, but subsequently acquired an interest therein. Vester v. Collins, 101 N. C. 114, 7 S. E. 687.

Same—Rule Prior to Section.—An executor, before the enactment of this section, could not be a witness in favor of the will, even by renouncing and releasing his interest, and he is still incompetent as to any will that was made before January, 1856. Gunter v. Gunter, 48 N. C. 441.

May Be Examined for Both Parties.—Under this section one named as executor in a receipt, propounded as a will, though named as plaintiff in an issue devisavit vel non, may be examined as a witness for the caveator as well as for the propounder. Pannell v. Scoggin, 53 N. C. 408.

§ 31-10. Beneficiary competent; interest rendered void.—If any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, estate, interest, legacy, or appointment of or affecting any real or personal estate shall be thereby given or made, such devise, estate, interest, legacy, or appointment shall, so far only as concerns such person attesting the execution of such will or the wife or husband of such person, or any person claiming under such person, or wife or husband, be void; and such person so attesting shall be admitted as a witness to prove the execution of such will, or the validity or invalidity thereof. (Rev., s. 3120; Code, s. 2147; R. C., c. 119, s. 10; C. S. 4138.)

In General.—This section avoids only the devise or bequest to the attesting witness and to his and her wife and husband and privies, and leaves the other dispositions made of the testator's property in unimpaired force and operation. Vester v. Collins, 101 N. C. 114, 116, 7 S. E. 687.

Interest of Witness to Holographic Will Not Avoided.—One who is beneficiary under a holograph will may testify to such competent, relevant and material facts as tend to establish it as a valid will without rendering void the benefits he is to receive thereunder. It is otherwise as to an attesting witness of a will that the statute requires to be attested by witness thereto. In re Will of Westfeldt, 188 N. C. 702, 125 S. E. 531.

This section applies only to wills that have attesting witnesses, and to the attesting witness. Hence a devisee under a holographic will is a competent witness to prove the will without losing his interest thereunder. His interest in the results affects only the credit to be given to his testimony. Hampton v. Hardin, 88 N. C. 592.

Interest of One Who Does Not Sign as Witness Not Avoided.—One who signs his name on a will in the place where subscribing witnesses usually sign, is not deprived of benefits conferred upon him by the will, if he, in fact, did not sign as a subscribing witness. Boone v. Lewis, 103 N. C. 40, 9 S. E. 644.

Competency of Witness—Question of Law.—If a witness to a will is interested as a legatee thereunder, he is a competent witness to prove the will, the effect being to deprive him of the legacy and it is error in the Judge to submit the competency of a witness as a question of fact for the jury. The competency of a witness is a question for the court, to be raised when he offers to testify, and to be determined by the court. McLean v. Elliott, 72 N. C. 70.

Object in Avoiding Witnesses' Interest.—It was to remove all improper influences and secure impartiality, in such as are called to attest the execution of the will, that all gifts to them or to their husbands or wives are annulled, and all temptations to swerve from the truth are taken away. Hampton v. Hardin, 88 N, C. 592, 593.

Competency of Widow and Devisee.—The widow and devisee of the testator is a competent witness to prove the fact that the script propounded was found among the valu-

able papers of the deceased. Cornelius v. Brawley, 109 N. C. 542, 14 S. E. 78.

Application of Section 8-51.—Section 8-51 does not apply to wills, which are governed by this section. Cox v. Lumber C., 124 N. C. 78, 82, 32 S. E. 381.

Applied in Barrett v. Williams, 215 N. C. 131, 1 S. E. (2d) 366.

Art. 4. Depository for Wills.

§ 31-11. Depositories in offices of clerks of superior court where living persons may file wills.—The clerk of the superior court in each county of North Carolina shall be required to keep a receptacle or depository in which any person who desires to do so may file his or her will for safe keeping; and the clerk shall make a charge of fifty cents (50c) for the filing of such will, and shall, upon written request of the testator, or the duly authorized agent or attorney for the testator, permit said will or testament to be withdrawn from said depository or receptacle at any time prior to the death of the testator: Provided, that the contents of said will shall not be made public or open to the inspection of any one other than the testator or his duly authorized agent until such time as the said will shall be offered for probate. (1937, c. 435, s. 1.)

Local Modification.—Guilford: 1937, c. 435, s. 2.

Editor's Note.—This section, which makes it possible for a testator during his lifetime to file his will for safekeeping with the probate judge, represents a rather progressive step in the law of wills. If taken advantage of by testators, it may prevent the loss or fraudulent destruction of many validly executed wills, and may tend to prevent the offer of forged wills for probate and contests of wills upon the grounds of fraud, undue influence, and mental incapacity. Similar statutes have been enacted in several states in this country. 15 N. C. Law Rev. 353.

Art. 5. Probate of Will

§ 31-12. Executor may apply for probate; jurisdiction when clerk interested party.—Any executor named in a will may, at any time after the death of the testator, apply to the clerk of the superior court, having jurisdiction, to have the same admitted to probate. Such will shall not be valid or effective to pass real estate or personal property as against innocent purchasers for value and without notice, unless it is probated or offered for probate within two years after the death of the testator or devisor. If such will is fraudulently suppressed, stolen or destroyed, or has been lost, and an action or proceeding shall be commenced within two years from the death of the testator or devisor to obtain said will or establish the same as provided by law, then the limitation herein set out shall only begin to run from the termination of said action or proceeding, but not otherwise. If the clerk of the superior court having jurisdiction to probate any will be a subscribing witness thereto, or a devisee or legatee therein, or if said clerk shall have any pecuniary interest in the property disposed of by said will, then the clerk of the superior court of any adjoining county shall have jurisdiction to probate said will, and upon petition filed before him by any one interested in any way in said will, he shall proceed to have said will produced before him, and the said will shall thereupon be probated, recorded, and filed as provided by this chapter, and a duly certified copy of the said will, together with the probate of the same, and the said petition, under the hand and seal of the said clerk, shall be filed and recorded in the book of wills, in the office of the clerk of the superior court of the county whose clerk was a subscribing witness thereto, or a devisee or legatee therein, or who had a pecuniary interest in the property disposed of by said will and the clerk in said last mentioned county is hereby authorized to issue letters to personal representatives, who may qualify and administer the estate in said will as if originally probated in said county, and the title to all property, both real and personal, conveyed and devised in said will, shall be as good and effectual as if the said will had been originally probated and recorded in said last mentioned county. (Rev., s. 3122; Code, s. 2151; C. C. P., s. 439; 1919, c. 15; 1921, c. 99; 1923, c. 14; C. S. 4139.)

Cross References.—As to jurisdiction of the clerk see §§ 28-1 and 28-2. As to disqualification of clerk, see §§ 2-17 through 2-21. As to conveyances within two years of the death of the decedent where there is no will, see § 28-83. As to rights of innocent purchasers when will withheld from probate, see § 31-39.

Editor's Note.—The provisions of this section, which concern the probating of wills where the clerk of the superior court having jurisdiction to probate it is a subscribing witness thereto, are added by the amendment of 1921, (Public Laws 1921, c. 99), and the similar provisions where such clerk is a devisee or legatee under the will or has a pecuniary interest in the property disposed by the will, are added by the amendment of 1923, (Public Laws 1923, c. 14).

"While the amending statutes expressly refer to this section . . . . . they more particularly affect §§ 1 [28-1] and 2 [28-2], of the code defining the jurisdiction of the clerk in administrations, and §§ 939 [2-17], 940 [2-19] and 941 [2-20], as to disqualifications. By sec. 939 [2-17], the clerk is disqualified to act, if he is a subscribing witness to a will, but this disqualification ceases when the will has been admitted to probate by another clerk; and the same result follows from the amending statute. That the wife of the clerk is a subscribing witness also disqualifies the clerk, but this is not affected by the amendment. This defect may be waived by the parties interested, but the clerk cannot very well take the probate, when he is one of the two subscribing witnesses. Section 940 [2-19]; Trenwith v. Smallwood (1892) 111 N. C. 132, 15 S. E. 1030. The procedure would then be under the amended statute, or by application to the judge, as provided in sec. 941 [2-20]; and in either case, the will, after probate, would be returned to the clerk of the original county to proceed with the administration of the estate. If the clerk has an interest in the estate under the will, he is disqualified by sec. 939 [2-17]; but this may be waived, and he may then proceed as if the defect did not exist. Section 940 [2-19]. If this defect is not waived, what procedure is required? The recent amendment says that the petition may be filed and probate taken before the clerk of any adjoining county and when a certified return is made to the clerk of the original county, he may proceed to appoint the personal representative. Section 941 [2-20] provides that application may be made to the proper judge for an order to remove the proceedings to the clerk of an adjoining county in the same district; or the judge himself may make all necessary orders for the settlement of the estate. There appears to be a conflict between the two statutes in this respect, unless the recent amendment is limited to the mere fact of probate; but if that is all that is meant, the amendment is not necessary, since the same result may be readily obtained under the former statute. The appointment and qualification of the personal representative is as much a judicial act as any other order made in the settlement of the estate; and to allow the clerk who is interested to proceed in the matter without a waiver, would confer upon him the power to sit in judgment in his own cause, contrary to the general policy of the law. Land Co. v. Jennett, (1901), 128 N. C. 3, 37 S. E. 954. The obvious purpose of the two amending statutes was to provide a simple and speedy method of obtaining the probate of a will, when the clerk was disqualified, and this has been done; but how far it was intended to change the former practice, if at all, in case of interest, is not clearly shown." 1 N. C. Law Rev. 314.

In General.—This section and § 31-15, by implication at least, require the probate of a will. Wells v. Odum, 207 N. C. 226, 228, 176 S. E. 563.

No Limitation to Probate a Will—Exception.—In the ab-

sence of some statute to the contrary, there is no limit upon the time after a testator's death within which a will may be proven, and when duly proven it relates back to the death of the testator so as to vest title from that date as between the parties who claim under it. Steadman v. Steadman, 143 N. C. 345, 346, 55 S. E. 784. But this section sets a period of limitation after which a will may not be probated as to bona fide purchasers.—Ed. Note.

Title Descends to Heirs Subject to Be Divested.—The title of the land descends to the heirs of the testator, subject to be divested in favor of the devisee, when the will is duly admitted to probate. Floyd v. Herring, 64 N. C. 409, 411.

Limitation as to Lost Wills Prior to Statute.—See McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971, where it is held that no statute of limitation applies to the probate of a lost will. This case was decided prior to the amendment of 1919, which sets a limitation to the probate of lost wills where the right of bona fide purchasers are involved.

Citation to those in interest is not necessary to the probate of a will in common form, the proceeding being ex parte, and when probated the paper-writing is valid and operative as a will and may not be attacked collaterally. In re Rowland, 202 N. C. 373, 162 S. E. 897.

The probate of a will in common form without citation to those in interest "to see the proceedings," is an ex parte proceeding and not binding on caveators upon the issue of devisavit vel non raised in their direct attack upon the validity of the will, and the admission in evidence in the caveat proceedings of the order of probate constitutes reversible error. Wells v. Odum, 205 N. C. 110, 170 S. E. 145.

Appointment Is Reviewable.—The power, conferred by this section, to appoint administrators is reviewable to the judge of the Superior Court of the county. In re Estate of Wright and Wright v. Ball, 200 N. C. 620, 158 S. E. 192.

§ 31-13. Executor failing, beneficiary may apply.—If no executor apply to have the will proved within sixty days after the death of the testator, any devisee or legatee named in the will, or any other person interested in the estate, may make such application, upon ten days notice thereof to the executor. (Rev., s. 3123; Code, s. 2152; C. C. P., s. 440; C. S. 4140.)

Cross Reference.—As to who may apply for letters of administration in case of intestacy, see § 28-6 et seq.

Notice to Executor in Probating a Codicil.—Before others interested in the probate of a will may apply for its probate ten days previous notice must be given the executor therein named, and where an executor has probated and qualified under the will, it is equally necessary to give the statutory notice before offering for probate a separate paper-writing as a codicil. Spencer v. Spencer, 163 N. C. 83, 79 S. E. 291.

§ 31-14. Clerk to notify legatees and devisees of probate of wills. — The clerks of the superior court of the state are hereby required and directed to notify by mail, all legatees and devisees whose addresses are known, designated in wills filed for probate in their respective counties. All expense incident to such notification shall be deemed a proper charge in the administration of the respective estates. (1933, c. 133.)

While this requirement appears to be mandatory, it does not seem to be prerequisite to the probate of the will itself. Nor does it assume the status and importance of a citation to devisees and legatees as in the case of the probate of a will in solemn form. Apparently the purpose of the statute is to expedite the settlement of the estate of a person who has died testate. 11 N. C. Law Rev. 263.

§ 31-15. Clerk may compel production of will.—Every clerk of the superior court having jurisdiction, on application by affidavit setting forth the facts, shall, by summons, compel any person in the state, having in possession the last will of any decedent, to exhibit the same in his court for probate; and whoever being duly summoned refuses, in contempt of the court, to produce such will, or (the same having been parted with by him) refuses to inform the court on oath where such will is, or in what manner he has disposed of it, shall, by order of the clerk of the superior court, be committed to the jail of the county, there to remain without bail till such will be produced or accounted for, and due submission made for the contempt. (Rev., s. 3124; Code, s. 2154; C. C. P., s. 442; C. S. 4141.)

Cross References.—See annotations to § 31-12. As to larceny, concealment, or destruction of wills, see § 14-77.

In General.—A petition before the clerk of the superior court alleging that the respondents were in possession of a later will than that probated in another county, and that the petitioner was withholding this will for fraudulent purposes, etc., is a proceeding under this section to compel the production of a will. Williams v. Bailey, 177 N. C. 37, 97 S. E. 721.

Failure of Petitioners to Pursue Proceedings—Discharge of Respondents.—Where the respondents in proceedings to compel the production of a will appear before the clerk at the time set for the hearing, and in writing under oath fully deny the charges made, and the petitioners neither file reply, offer evidence, nor request an examination, no issues are raised requiring the matter to be transferred to the trial docket, and the rule against the respondents should be discharged at the petitioner's cost. Williams v. Bailey, 177 N. C. 37, 97 S. E. 721.

Issue of Wrong Venue No Excuse.—Where the clerk of the court of G. county issued a notice to the respondent, who had the will of the deceased in his possession, to exhibit the same for probate, it was the duty of the respondent to obey the summons, and he could have raised in his answer the question of whether the will should be probated in G. or L. county. In re Scarborough Will, 139 N. C. 423, 51 S. E. 931.

Impossibility to Comply with Order as Excuse.—An order of the clerk of the court of G. county which adjudges the respondent guilty of contempt and that he be committed to jail, until such will was produced, was properly reversed on appeal where it appears that the respondent can not comply with the condition upon which he might be discharged, because the clerk of L. county now has custody of the will and has refused to surrender it to the respondent. In re Scarborough Will, 139 N. C. 423, 51 S. E. 931.

Allowance of Reasonable Expenses.—Where the law imposes a duty upon a person, or group of persons, with respect to probating and establishing the validity of a will, in the performance of such duty, in good faith, reasonable expenses thereby incurred should be allowed and paid out of the fund or property which is the subject of the litigation. Wells v. Odum, 207 N. C. 226, 228, 176 S. E. 563.

Attachment for Contempt—Scope of Proceedings.—In a proceeding to attach the respondent for contempt in not producing for probate a will, the question whether the will should be probated in G. or L. county is not presented and can not be passed upon. In re Scarborough Will, 139 N. C. 423, 51 S. E. 931.

Motion to Dismiss Proceedings under This Section.—Where a rule issued under the provisions of this section in proceedings to compel the production of a will, should be discharged, a motion by the respondents to dismiss the proceedings will be treated as a motion to discharge them. Williams v. Bailey, 177 N. C. 37, 97 S. E. 721.

§ 31-16. What shown on application for probate.—On application to the clerk of the superior court, he must ascertain by affidavit of the applicant—

1. That such applicant is the executor, devisee or legatee named in the will, or is some other person interested in the estate, and how so interested.

2. The value and nature of the testator's property, as near as can be ascertained.

3. The names and residences of all parties entitled to the testator's property, if known, or that the same on diligent inquiry cannot be discovered; which of the parties in interest are minors, and whether with or without guardians, and the names and residences of such guardians, if known. Such affidavit shall be recorded with the will and the certificate of probate thereof, if the same is admitted to probate. (Rev., s. 3125; Code, s. 2153; C. C. P., s. 441; C. S. 4142.)

§ 31-17. Proof and examination in writing.—Every clerk of the superior court shall take in writing the proofs and examinations of the wit-

nesses touching the execution of a will, and he shall embody the substance of such proofs and examinations, in case the will is admitted to probate, in his certificate of the probate thereof, which certificate must be recorded with the will. The proofs and examinations as taken must be filed in the office. (Rev., s. 3126; Code, s. 2149; C. C. P., s. 437; C. S. 4143.)

Former Practice.—Formerly the court of pleas and quarter sessions had jurisdiction of the probate of wills, and there was at that time no provision in the statute requring the taking of the proofs in writing or for recording the probate. The practice was to exhibit the will before the court and offer the proofs of execution, and for an entry to be made upon the minutes of the adjudication, and the clerk, acting upon the authority of the court, then recorded the will upon the will book. In most instances he also recorded a memorandum of the proceedings before the court, but this was not done in all cases. Poplin v. Hatley, 170 N. C. 163, 166, 8 S. E. 1028.

Presumption of Valid Recordation.—The requirements of this section did not obtain in the probate of a will in the old practice before the court of pleas and quarter sessions; and where the records show that a will sought to be set aside for improper probate, valid on its face, has been transcribed upon the records of that court, it is presumed to have been duly admitted to probate and properly transcribed upon the record, the burden being upon the caveator to show to the contrary. Poplin v. Hatley, 170 N. C. 163, 86 S. E. 1028.

Same—Vacating Probate in Collateral Proceedings.—Probate of a will by the clerk of the superior court is a judicial act, and his certificate is conclusive evidence of the validity of the will, until vacated on appeal, or declared void by a competent tribunal in a proceeding instituted for that purpose. It cannot be vacated in a collateral manner. Mayo v. Jones, 78 N. C. 402; McClure v. Spivey, 123 N. C. 678, 31 S. E. 857.

Foreign Records Conformant to This Section Sufficient.—Where a non-resident testator devises land in this State, and the record of the foreign court of probate, duly certified, contains the certificate of probate, which refers to the certified examinations of the witnesses, in accordance with the requirements of this section, the whole forming one transaction, the exemplification of which and of the will being duly recorded in the county where the land lies, the will is sufficiently proved and passes the property. Roscoe v. Roper Lumber Co., 124 N. C. 42, 32 S. E. 389.

§ 31-18. Manner of probate.—Wills and testaments must be admitted to probate only in the following manner:

1. In case of a written will, with witnesses, on the oath of at least two of the subscribing witnesses, if living; but when any one or more of the subscribing witnesses to such will are dead, or reside out of the state, or cannot after due diligence be found within the state, or are insane or otherwise incompetent to testify, then such proof may be taken of the handwriting, both of the testator and of the witness or witnesses so dead, absent, insane or incompetent, and also of such other circumstances as will satisfy the clerk of the superior court of the genuineness and the due execution of such will. In all cases where the testator executed the will by making his mark, and where any one or more of the subscribing witnesses are dead or reside out of the state, or are insane or otherwise incompetent to testify, it shall not be necessary to proye the handwriting of the testator, but proof of the handwriting of the subscribing witness or witnesses so dead, absent, insane or incompetent shall be sufficient. The probate of all wills heretofore taken in compliance with the requirements of this section are hereby declared to be valid.

2. In case of a holograph will, on the oath of at least three credible witnesses, who state that they verily believe such will and every part thereof is in the handwriting of the person whose will it purports to be, and whose name must be subscribed thereto, or inserted in some part thereof. It must further appear on the oath of some one of the witnesses, or of some other credible person, that such will was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safe-keeping.

3. In case of a nuncupative will, on the oath of at least two credible witnesses present at the making thereof, who state that they were specially required to bear witness thereto by the testator himself. It must also be proved that such nuncupative will was made in the testator's last sickness, in his own habitation, or where he had been previously resident for at least ten days, unless he died on a journey or from home. No nuncupative will shall be proved by the witnesses after six months from the making thereof, unless it was put in writing within ten days from such making; nor shall it be proved till a citation has been first issued or publication been made for six weeks in some newspaper published in the state, to call in the widow and next of kin to contest such will if they think proper. (Rev., s. 3127; Code, s. 2148; 1893, c. 269; 1901, c. 276; C. C. P., s. 435; C. S. 4144.)

Local Modification.—Burke, Scotland: C. S. 4154; Cleveland, Henderson, Transylvania, Wake: C. S. 4156; 1929, c. 313; 1939, c. 34; Halifax: 1924, c. 10; 1929, c. 313; 1939, c. 34; Haywood: C. S. 4157; Lee: 1929, c. 313; 1939, c. 34.

I. In General—Attested Wills.
II. Holographic Wills.
III. Nuncupative Wills.

Cross Reference.

See annotations to § 31-3.

I. IN GENERAL—ATTESTED WILLS.

Evidence Must Show Subscribing in Presence of Testator.—Under sec. 31-3 and this section regulating the manner in which wills shall be attested and admitted to probate, it is essential, not only that the document shall be subscribed in the presence of the testator by at least two witnesses, but that the evidence upon which the will is admitted to probate must show that fact. In re Thomas, 111 N. C. 409, 411, 16 S. E. 226.

Proof of Handwriting of Testator Where One Witness Alive.—Upon an issue of devisavit vel non, purporting to be signed by testator himself, it is necessary for the propounders to show, in the superior court, the handwriting of the testator and his signature to the will, where only one of the subscribing witnesses to the will is alive, the matter of probate being de novo, and the record of the clerk not being competent evidence in this respect. Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089.

Quoted in Cartwright v. Jones, 215 N. C. 108, 1 S. E. (2d) 359.

Cited in In re Will of Thompson, 196 N. C. 271, 145 S. E. 393; In re Will of Shemwell, 197 N. C. 332, 333, 148 S. E. 469; In re Will of Lowrence, 199 N. C. 782, 784, 155 S. E. 876; In re Will of Stewart, 198 N. C. 577, 152 S. E. 685.

II. HOLOGRAPHIC WILLS.

The phrase, "among the valuable papers and effects of," etc., used in this section, does not necessarily and without exception mean among the most valuable papers, etc., Winstead v. Bowman, 68 N. C. 170.

Testimony of witnesses that the paper writing propounded as the holograph will of deceased was found in his home in a washstand or bureau drawer in which he also kept deeds and receipts, is sufficient to be submitted to the jury on the question of whether the paper writing was found among his valuable papers and effects as required by this section since the requirement of the statute is met if the paper writing is found among papers and effects regarded by decedent as valuable. In re Williams' Will 215 N. C. 259, 1 S. E. (2d) 857.

Effect of Provisions of Section 8-51.—Where the validity of a holograph will depends upon its having been left with the beneficiary for safe keeping, his testimony thereof, after the death of the testator, is a transaction or commu-

nication of which he may not testify under section 8-51. McEwan v. Brown, 176 N. C. 249, 97 S. E. 20, overruling the case of Hampton v. Hardin, 88 N. C. 592.

Handwriting Goes to Jury on Testimony of Three Witnesses.—Testimony of three witnesses that the paper writing propounded as the holograph will of decedent was in his handwriting takes the case to the jury as to this requirement, notwithstanding conflicting testimony of caveator. In re Williams' Will, 215 N. C. 259, 1 S. E. (2d) 857.

Destroyed Will.—In an action to probate a destroyed holographic will, the propounder must show that the instrument in the handwriting of the deceased and signed by him once existed and was destroyed under circumstances that would defeat an inference of revocation. Upon failure of such proof, there is a failure of the proof of the res and a nonsuit is proper. Hewett v. Murray, 218 N. C. 569, 11 S. E. (2d) 867.

III. NUNCUPATIVE WILL.

Similarity with English Statute of Frauds.—The statutory provisions in relation to nuncupative wills have existed in this State since 1784, and they are substantially the same as those in the Statute of Frauds, 29 Car. II., ch. 3, secs. 19, 20; and these provisions have always been strictly construed and enforced by the courts, both in this State and in England. Smith v. Smith, 63 N. C. 637, 639.

Strict Compliance Necessary—Purpose of Requirements.—The requisites of this statutory provision must be strictly complied with and observed, in all material respects, in order to prevent opportunity for fraudulent practices on the part of such persons as would be disposed to obtain undue advantage of persons in their last sickness as to the final disposition of their property; and also to prevent mischiefs that might arise from the ignorance, misapprehension or dishonest purposes of persons called upon to be the witnesses of such wills. The purpose of such requisites is to prevent the fabrication of such wills; they are necessary, and it is essential to observe them strictly. Brown v. Brown, 6 N. C. 350; Rankin v. Rankin, 31 N. C. 156; Webster v. Webster, 50 N. C. 95; Haden v. Bradshaw, 60 N. C. 259; Smith v. Smith, 63 N. C. 637; Bundrick v. Haygood, 106 N. C. 468, 471, 11 S. E. 423; Long v. Foust, 109 N. C. 114, 118, 13 S. E. 889.

Witnesses Must Be Called in to Witness Transaction.—Where a woman in her last illness, without expressing any purpose to make a will said she wanted to give to her sister certain articles of personal property, and called her to her bedside and gave them to her, in the presence of two other persons but did not call them, or either of them, to witness the transaction: It was held that this did not constitute a nuncupative will. Bundrick v. Haygood, 106 N. C. 468, 11 S. E. 423.

It is necessary to the validity of a nuncupative will that the testator state her wishes in the presence of two witnesses and "specially require them to bear witness thereto." Kennedy v. Douglas, 151 N. C. 336, 66 S. E. 216.

Where a person, being in extremis, and conscious of it, sent for a friend with whom he had often talked on the subject of a will and told him what disposition he wanted to make of his property, and then such friend replied that if he wanted to do anything of that kind he had better have some other person in the room, and thereupon the speaker went out and brought in another person, and in the presence of the sick man repeated the proposed disposition of the property, to which the latter assented: It was held, to be a sufficient rogatio testium to satisfy the requirements of a nuncupative will. Smith v. Smith, 63 N. C. 637.

Same—Designation by Name Not Necessary.—It is sufficient that the testator saw the witnesses and charged them to bear witness to his will, and they did so, and it is not a good objection that he failed to designate them particularly by name. That he required them, each, all of them, to bear witness, was what the section requires. The purpose is that the testator shall require two witnesses at least to take notice and bear witness that he makes his will. He must require and direct a competent person, and that person must be able to testify that he was one of the persons—the witnesses—so required, and that he did take notice and bear witness. Long v. Foust, 109 N. C. 114, 119, 13 S. E. 889.

Same—Sufficiency of Showing.—Under this section, it is sufficient to show, on the question of the testator's requesting that the witness "bear witness" to the will, that believing himself to be in extremis, he told the witness during his last illness that he wanted to make a will, who, at his request, called in another and while they were at his bedside, testator gave specific directions for the disposition of his personal property; and though he had therefore expressed his wish to make a written will, and had failed in his effort to do so, the matters sought to be established as the nuncupative will were declared at a time when he was apprehensive that he would become unable to talk, and about four days before his death. In re Garland's Will, 160 N. C. 555, 76 S. E. 486.

No Probate Until Citation—Limitation of Six Months.—After the contents of the will are established within the time and in the manner prescribed by this section it cannot be admitted to probate until the citation or publication, and the probate based thereon shall be completed within six months from the making of the alleged will. The limitation of six months refers only to the proof and establishment of the contents, and that only where it is not reduced to writing within ten days of its making. In re Haygood's Will, 101 N. C. 574, 8 S. E. 222.

Same—May Be Proved before Citation.—It will be observed that it is not required that the will shall not be proved by the witnesses until the citation and notice provided for shall be made, but it shall not be proved—that is, proved in the sense of admitting it to probate at once—until citation shall be made, the purpose being to give the widow and next of kin opportunity to contest the will—the proof thereof by the witnesses thereof—if they shall see fit to do so. In re Haygood's Will, 101 N. C. 574, 577, 8 S. E. 222.

The purpose of the statute is not to prevent the examination of the witnesses of the will, after such lapse of six months, on the trial of the issue devisavit vel non in the course of a contest of it, but it is to require that they shall not be allowed to prove it in the first instance, when it is first presented for probate after that time, unless it shall have been put in writing within ten days next after the making thereof. In re Haygood's Will, 101 N. C. 574, 578, 8 S. E. 222.

If Reduced to Writing May Be Proved after Six Months.—A just interpretation of the provision relative to the proof of a nuncupative will is, that if such will shall be put in writing within ten days next after it was made, it may be proved by the witnesses thereof either before or after the lapse of six months next after the making thereof, because the will being in writing with the sanction of the witnesses, their recollection as to what it was is helped and strengthened thereby, and they could the better be trusted to testify as to the making of the same, and what it was in its detail, at any time within a reasonable period. In re Haygood's Will, 101 N. C. 574, 576, 8 S. E. 222.

Difference in Terminology of This and Section 31-5.—The statute with reference to revocation by holographic will and that with reference to probate of a holographic will are worded somewhat differently. As to revocation it must be "lodged by him with some person for safe-keeping or left by him in some secure place, or among his valuable papers and effects." As to probate it is sufficient if it "was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safe-keeping." 2 N. C. Law Rev. 110.

Writing Postponed Execution as Nuncupative Will.—A paper writing which the deceased had theretofore dictated but postponed executing from time to time and which he finally declared to be his will without reading it, at a time he was in his last sickness not expecting to recover and physically unable to execute it, is invalid as a nuncupative will: (1) his intent that it should be a written will is evidenced by his conduct; (2) the dictation was not in law "during his last sickness." Kennedy v. Douglas, 151 N. C. 336, 66 S. E. 216.

The declaration of a testator made in the presence of two witnesses that a paper writing contained the disposition he desired made of his property and that he desired its provisions carried out, without reading or having the paper read at the time, but relying upon the assertion of a person then present that it contained his wishes as dictated by him several months before, is invalid as a nuncupative will. (1) the dictation was made to one witness alone; (2) there was no sufficient declaration then and there of the testator's wishes in the presence of two witnesses from which they could reduce their recollection to writing within ten days. Kennedy v. Douglas, 151 N. C. 336, 66 S. E. 216.

§ 31-19. Probate conclusive until vacated; substitution of consolidated bank as executor or trustee under will.—Such record and probate is conclusive in evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal. Provided, that whenever in a will so probated or recorded a bank or trust company shall be named executor and/or trustee and shall have at the time of such probate and recording become absorbed by or consolidated with another bank or trust company or shall have sold and

transferred all its assets and liabilities to another bank or trust company doing business in North Carolina, such latter bank or trust company shall be deemed substituted for and shall have all the rights and powers of the former bank or trust company. (Rev., s. 3128; Code, s. 2150; C. C. P., c. 438; 1929, c. 150; 1941, c. 79; C. S. 4145.)

Editor's Note.—The Act of 1929 added the proviso with the exception of the words, "or shall have sold and transferred all its assets and liabilities to another bank or trust company doing business in North Carolina," which were added by the 1941 amendment.

Conclusively Valid Until Declared Void.—A will probated in common form before the clerk of the superior court is conclusively valid until declared void by a competent tribunal, and may be offered in evidence in proceedings to caveat the will. Holt v. Ziglar, 163 N. C. 390, 79 S. E. 805.

Cannot Be Attacked Collaterally.—Where a will has been admitted to probate a party claiming property disposed of by it to another can not, in an action to recover the same, be permitted to attack the will on the ground of the lack of testamentary capacity of the testatrix, and evidence offered for that purpose is properly excluded. Varner v. Johnston, 112 N. C. 570, 17 S. E. 483.

A will probated in common form is not subject to collateral attack, but is binding or conclusive until set aside in a direct proceeding. Mills v. Mills, 195 N. C. 595, 143 S. E. 130; In re Will of Cooper, 196 N. C. 418, 145 S. E. 782.

Until so set aside it is conclusively presumed to be the will of the testator. In re Will of Cooper, 196 N. C. 418, 145 S. E. 782.

A will which has been duly probated in common form may not be collaterally attacked even for fraud. Crowell v. Bradsher, 203 N. C. 492, 166 S. E. 731.

Probate a Judicial Act—Conclusive Presumption of Validity.—Probate of a will by the clerk of the superior court is a judicial act, and his certificate is conclusive evidence of the validity of the will, until vacated on appeal, or declared void by a competent tribunal in a proceeding instituted for that purpose. It cannot be vacated in a collateral manner. Mayo v. Jones, 78 N. C. 402; McClure v. Spivey, 123 N. C. 678, 31 S. E. 857.

An order of the clerk adjudging a will to be fully proved in common form is not "conclusive in evidence of the validity of the will" under this section, on the issue of devisavit vel non, raised by a caveat filed thereto. Wells v. Odum, 205 N. C. 110, 111, 170 S. E. 145.

Rents and profits of lands devised belonged to beneficiaries and their ancestors until the probate was set aside and the will adjudged void. Hinton v. Whitehurst, 214 N. C. 99, 101, 198 S. E. 579.

Effect of Revocation of Probate upon Administration.—The revocation of the probate in common form did not have the effect of annulling the administration properly granted. Floyd v. Herring, 64 N. C. 412.

Title of Innocent Purchasers Not Affected by Judgment Setting Aside Will.—Where the devisees named in a will, which has been duly probated in common form, sell and dispose of part of the lands devised to innocent purchasers for value without notice, and thereafter caveat proceedings are instituted and the will set aside, the heirs at law, by operation of the judgment setting aside the will, become tenants in common in the lands not disposed of, but the title conveyed by the devisees named in the paper writing to purchasers for value without notice, or knowledge of facts from which a purpose to file caveat proceedings could be intimated, is not affected, the probate in common form being conclusive evidence of the validity of the will until it is attacked by caveat proceedings duly instituted. Whitehurst v. Hinton, 209 N. C. 392, 184 S. E. 66.

When Devisees Entitled to Rents and Profits until Probate Set Aside.—Where there is no evidence tending to show that at any time prior to the institution of the caveat proceeding, the defendants, or their ancestors, had any knowledge or intimation that the plaintiffs would attack the validity of the will and there is no evidence tending to show that any of the devisees in said will procured its execution by undue or fraudulent influence, the defendants and their ancestors were entitled to the rents and profits of the lands devised to them until the probate was set aside and the will adjudged void. Whitehurst v. Hinton, 209 N. C. 392, 404, 184 S. E. 66.

§ 31-20. Wills filed in clerk's office.—All original wills shall remain in the clerk's office, among the records of the court where the same shall be proved, and to such wills any person may have access, as to the other records. If said will contains a devise of real estate, outside said county where said will is probated, then a copy of the said will, together with the probate of the same, certified under the hand and seal of the clerk of the superior court of said county may be recorded in the book of wills and filed in the office of the clerk of the superior court of any county in the state in which said land is situated with the same effect as to passing the title to said real estate as if said will had originally been probated and filed in said county and the clerk of the superior court of said last mentioned county had had jurisdiction to probate the same. (Rev., s. 3129; Code, s. 2173; R. C., c. 119, s. 19; 1777, c. 115, s. 59; 1921, c. 108, s. 1; C. S. 4146.)

Cross Reference.—See § 31-39.

Editor's Note.—All but the first sentence of this section was added by the amendment of 1921, Public Laws, ch. 108, § 1.

Will Taken from Record as Evidence of Testator's Handwriting.—An original will taken from the records of the court, is competent without further proof of its execution, as a basis of comparison in determining the genuineness of the handwriting of testator to the instrument in controversy. Croom v. Sugg, 110 N. C. 259, 14 S. E. 748.

§ 31-21. Validation of wills heretofore certified and recorded.—All wills which have prior to March 9, 1921, been certified and recorded in the office of the clerk of the superior court of any county, substantially following the provisions of § 31-20 are hereby validated and approved as to the conveyance and transfer of any title to real estate as contained therein, to the same extent as if said wills had originally been probated and filed in said county, and the clerk of the superior court of said county had had jurisdiction to probate the same, provided the probates and witnesses to the said wills are sufficient and according to law. (1921, c. 108, s. 2; C. S. 4146(a).)

§ 31-22. Certified copy of will proved in another state or country.—When a will, made by a citizen of this state, is proved and allowed in some other state or country, and the original will cannot be removed from its place of legal deposit in such other state or country, for probate in this state, the clerk of the superior court of the county where the testator had his last usual residence or has any property, upon a duly certified copy or exemplification of such will being exhibited to him for probate, shall take every order and proceeding for proving, allowing and recording such copy as by law might be taken upon the production of the original. (Rev., s. 3130; Code, s. 2157; C. C. P., s. 445; R. C., c. 44, s. 9; 1802, c. 623; C. S. 4147.)

Defective Certificate of Clerk.—The certificate of probate of a will executed in another state, disposing of real estate in this State, is defective which does not show affirmatively that the will was executed according to the laws of this State. Raleigh, etc., Ry. Co. v. Mining & Mfg. Co., 113 N. C. 241, 18 S. E. 208.

§ 31-23. Probate of will made out of the state: probate when witnesses out of state.—Whenever it is suggested to the clerk of the superior court, by affidavit or otherwise, that a will has been made without the state, or that a will has been made in the state and the witnesses thereto have moved out of the state, disposing of or charging land or other property within the state, the clerk of the superior court of the county where the property

is situated may issue a commission to such person as he may select, authorizing the commissioner to take the examination of such witnesses as may be produced, touching the execution thereof, and upon return of such commission, with the examination, he may adjudge the will to be duly proved or otherwise, as in cases on the oral examination of witnesses before him, and if duly proved, such will shall be recorded. (Rev., s. 3131; Code, s. 2155; 1899, c. 55; C. C. P., s. 443; C. S. 4148.)

Defective Certificate.—Where a will, proved in another state, bore the certificate of the clerk of the court wherein the probate was had, to the oath of the attesting witnesses, but had no other authentication, it was held inadmissible in evidence, as departing from the requirements of this section. Hunter v. Kelly, 92 N. C. 285.

§ 31-24. Probate when witnesses are nonresident; examination before notary public.—Where one or more of the subscribing witnesses to the will of a testator, resident in this state, reside in another state, or in another county in this state than the one in which the will is being probated, the examination of such witnesses may be had, taken and subscribed in the form of an affidavit, before a notary public residing in the county and state in which the witnesses reside; and the affidavits, so taken and subscribed, shall be transmitted by the notary public, under his hand and official seal, to the clerk of the court before whom the will has been filed for probate. If such affidavits are, upon examination by the clerk, found to establish the facts necessary to be established before the clerk to authorize the probate of the will if the witnesses had appeared before him personally, then it shall be the duty of the clerk to order the will to probate, and record the will with the same effect as if the subscribing witnesses had appeared before him in person and been examined under oath. (1917, c. 183; 1933, c. 114; C. S. 4149.)

Editor's Note.—Public Laws 1933, c. 114, inserted, near the beginning of this section, the words "or in another county in this state than the one in which the will is being probated."

The 1933 amendment will facilitate the probate of wills where difficulty is encountered in securing the personal appearance of witnesses who reside within the state but at a distance from the county of probate. 11 N. C. Law Rev. 262.

§ 31-25. Probate when witnesses in another county.—When a will is offered for probate in one county of this state and the witnesses reside in another county, the clerk of the court before whom such will is offered shall have power and authority to issue a subpoena for the witnesses requiring them to appear before him and prove the will; and the clerk shall likewise have power and authority to issue a commission to take the deposition of such witnesses when they reside more than seventy-five miles from the place where the will is to be probated, such deposition and commission to be returned and the clerk to adjudge the will to be duly proven. Also, when it shall be found as a fact upon affidavit or other proof, by the clerk of any county where a will is to be probated, that any witness to the will resides outside of the county, or inside of the county, and seventy-five miles or less from the place where the will is to be probated, and that the witness is so infirm of body as to be unable to appear in person before the clerk to prove the will, then the clerk shall have the power and authority to issue a commission to take the deposition of the witness, the commission and deposition of the witness to be returned, and the clerk to adjudge the will to be duly proved thereon as if the witness had appeared in person before him. (Rev., s. 3132; 1899, c. 55; 1911, c. 13; 1923, c. 59; C. S. 4150.)

Editor's Note.—Public Laws of 1923, chapter 59 amended this section by adding after the words "resides out of the county" the words "or inside of the county," so that in case of physical disability of the witness, either within or out side of the county, the clerk may order the deposition to be taken. See 1 N. C. Law Rev. 315.

Depositions. — Depositions were taken in proceedings to caveat a will, referring to a paper-writing which was not attached, and it was held competent for the commissioner to identify the paper-writing as a part of the deposition. In re Clodfelter's Will, 171 N. C. 528, 88 S. E. 625.

§ 31-26. Probate of wills of members of the armed forces.—In addition to the methods already provided in existing statutes therefor, the will of a member of the armed forces of the United States, or the merchant marine, executed while in the active service of the United States, shall be admitted to probate (whether there were subscribing witnesses thereto or not, if they, or either of them, is out of the state at the time said will is offered for probate) upon the oath of at least three credible witnesses that the signature to said will is in the handwriting of the person whose will it purports to be. Such will so proven shall be effective to devise real property as well as to bequeath personal estate of all kinds. This section shall not apply to cases pending in courts and at issue on the date of its ratification. (1919, c. 216; Ex. Sess. 1921, c. 39; 1943, c. 218; C. S. 4151.)

Editor's Note.—Prior to the 1943 amendment, which was ratified on February 23, 1943, this section applied only to soldiers and sailors.

§ 31-27. Certified copy of will of nonresident recorded.—Whenever any will made by a citizen or subject of any other state or country is duly proven and allowed in such state or country according to the laws thereof, a copy or exemplification of such will and of the proceedings had in connection with the probate thereof, duly certified, and authenticated by the clerk of the court in which such will has been proved and allowed, if within the United States, or by any ambassador, minister, consul or commercial agent of the United States under his official seal, when produced or exhibited before the clerk of the superior court of any county wherein any property of the testator may be, shall be allowed, filed and recorded in the same manner as if the original and not a copy had been produced, proved and allowed before such clerk. But when any will contains any devise or disposition of real estate in this state, such devise or disposition shall not have any validity or operation unless the will is executed according to the laws of this state, and that fact must appear affirmatively from the testimony of a witness or witnesses to such will, or from findings of fact or recitals in the order of probate, or otherwise, in such certified copy or exemplification of the will and probate proceedings, and if it does not so appear, the clerk before whom the copy is exhibited shall have power to issue a commission for taking proofs touching the execution of the will, as prescribed in § 31-22, and the same may be adjudged duly proved, and shall be recorded as herein provided. (Rev., s. 3133; Code, s. 2156; 1885, c. 393;

C. C. P., s. 444; 1883, c. 144; 1941, c. 381; C. S. 4152.)

Editor's Note.—The 1941 amendment inserted the words "and of the proceedings had in connection with the probate thereof," in the first sentence and made other changes in the section. The amendment, which became effective March 15, 1941, provided that it should not affect pending litigation.

For comment on this amendment, see 19 N. C. Law Rev. 547.

Note that the statement in the first syllabus of Whitton v. Peace, 188 N. C. 298, 124 S. E. 571, stating: "semble, a will properly attested and otherwise sufficient under the laws of another state would operate to pass title to lands situated here" is erroneous, unless it is qualified by saying: provided it also conforms to the requirements of the law of this State. The statute in plain and express terms declares such wills invalid as to realty devised in the State, unless the will is executed according to the laws of this State.

Orderly Arrangement of Pages of Exemplification.—Where the will has been admitted to probate in the court having jurisdiction to admit wills and testaments to probate, even though the pages of the manuscript exemplified copy are not orderly arranged, the will will be admitted to probate and record in this State, under the provisions of this section. Roscoe v. Lumber Co., 124 N. C. 42, 32 S. E. 389; Roper Lumber Co. v. Hudson, 153 N. C. 96, 99, 68 S. E. 1065.

Authentication by Clerk of Court and Not Register of Deeds.—It is necessary to the registration of a copy of a will in this State that the copy or exemplification of the will be duly certified and authenticated by the clerk of the court in which it had been proved or allowed, and if it has been allowed to be registered here under the certificate and seal of the register of deeds in another state it is ineffectual as evidence in a claimant's chain of title. Riley v. Carter, 158 N. C. 484, 74 S. E. 463.

Appearance and Examination of Attesting Witness Not Necessary.—Under the provisions of this section, it is not required that a will executed and admitted to probate in another state be also probated in this State by the appearance and examination of the attesting witnesses in order to pass title to property here when a copy or exemplification thereof duly certified and authenticated by the clerk of the court in which it had been proven and allowed shall be allowed, filed and recorded in the proper county in this State. The doctrine of Hunter v. Kelly, 92 N. C. 285, is no more the law. Vaught v. Williams, 177 N. C. 77, 97 S. E. 737.

Due Record and Certificate of Foreign Probate—Effect.—Where a nonresident testator devises land in this State, and the record of the foreign court of probate, duly certified, contains the certificate of probate, which refers to the certified examinations of the witnesses, in accordance with the requirements of section 31-17, the whole forming one transaction, the exemplification of which and of the will being duly recorded in the county where the land lies, the will is sufficiently proved and passes the property. Roscoe v. Roper Lumber Co., 124 N. C. 42, 32 S. E. 389.

Subscription by Two Witnesses Must Appear from Certificate.—Where a certified copy from another state has been recorded, the fact of subscribing by at least two witnesses must appear affirmatively "in the certificate probate or exemplification of the will." The mere recitation in the attestation clause is not affirmative evidence. Raleigh, etc., Ry. Co. v. Mining & Mfg. Co., 113 N. C. 241, 244, 18 S. E. 208.

§ 31-28. Probates validated where proof taken by commissioner or another clerk.—In all cases of the probate of any will made prior to March 8, 1899 in common form before any clerk of the superior courts of this state, where the testimony of the subscribing witnesses has been taken in the state or out of if by any commissioner appointed by said clerk or taken by any other clerk of the superior court in any other county of this state, and the will admitted to probate upon such testimony, the proceedings are validated. (Rev., s. 3134; 1899, c. 680; C. S. 4153.)

§ 31-29. Probates in another state before 1860 validated. — In all cases where any will devises land in this state, and the original will was duly admitted to probate in some other state prior to the year one thousand eight hundred and sixty, and a certified copy of such will and the probate thereof has been admitted to probate and record in any county in this state, and it in any way appears from such recorded copy that there were two subscribing witnesses to such will, and its execution was proved by the examination of such witnesses when the original was admitted to probate, such will shall be held and considered, and is hereby declared to be, good and valid for the purpose of passing title to the lands devised thereby, situated in this state, as fully and completely as if the original will had been duly executed and admitted to probate and recorded in this state in accordance with the laws of this state. (1913, c. 93, s. 1; C. S. 4155.)

§ 31-30. Validation of wills recorded without probate by subscribing witnesses.—In all cases where wills and testaments were executed prior to the first day of January, one thousand eight hundred and seventy-five (1875), and which appear as recorded in the record of last wills and testaments to have had two (2) or more witnesses thereto, and such last wills and testaments were admitted to probate and recorded in the record of wills in the proper county in this state prior to the first day of January, one thousand eight hundred and eighty-eight (1888), without having been duly proven as provided by law, and such wills were presented to the clerk of the superior court in any county in this state where the makers of said wills owned property, and where the makers of such wills lived and died, and were by such clerks recorded in the record of wills for his county, said wills and testaments or exemplified copies thereof, so recorded, if otherwise sufficient, shall have the effect to pass the title to real or personal property, or both, therein devised and bequeathed, to the same extent and as completely as if the execution thereof had been duly proven by the two (2) subscribing witnesses thereto in the manner provided by law of this state. Nothing herein shall be construed to prevent such wills from being impeached for fraud. (1921, c. 66; C. S. 4157(a).)

§ 31-31. Validation of wills admitted on oath of one subscribing witness.—In all cases where last wills and testaments which appear as recorded in the record of last wills and testaments to have had two witnesses thereto and such last wills and testaments were admitted to probate and recorded in the record of wills in the proper county in this state prior to the first day of January, one thousand eight hundred and ninety (1890) upon the oath and examination of one of the witnesses, such proof being taken in writing and recorded, and the certificate of probate of the Clerk of the Court states that such a will is proven by one of the subscribing witnesses thereto and the handwriting of the other subscribing witness being a non-resident is proven under oath, and such a will and certificate has been recorded in the record of wills of the proper county, such probate is hereby validated as fully as if the proof of the handwriting of the non-resident witness had been taken in regular form in writing and recorded. (1929, c. 41, ss. 1, 2.)

Art. 6. Caveat to Will.

§ 31-32. When and by whom caveat filed.—At the time of application for probate of any will, and the probate thereof in common form, or at

any time within seven years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will: Provided, that if any person entitled to file a caveat be within the age of twenty-one years, or insane, or imprisoned, then such person may file a caveat within three years after the removal of such disability. (Rev., s. 3135; Code, s. 2158; C. C. P., s. 446; 1907, c. 862; 1925, c. 81; C. S. 4158.)

Cross Reference.—As to the widow's right to dissent from the will, see §§ 30-1 and 30-2.

Editor's Note.—Prior to the amendment of 1907 there was no express provision as to period of limitation upon the right to file a caveat. And by judicial construction the period of limitation was fixed at a reasonable time. See In re Hedgepeth, 150 N. C. 245, 63 S. E. 1025. In that case it was further held that the seven years' limitation intended by the amendment would apply to a caveat filed after the amendment to a will probated before the amendment. See also, In re Will Beauchamp, 146 N. C. 254, 59 S. E. 687; Etheridge v. Corprew's Executors, 48 N. C. 14; Gray v. Maer, 20 N. C. 41; In re Dupree, 163 N. C. 256, 259, 79 S. E. 611.

Until the amendment of 1925 married women were extended an additional period of three years after the removal of the disability of coverture. But the amendment of 1925 struck out this provision with the effect that married women were put upon the same place as other persons. But the amendatory act did not apply to caveats filed prior to the first day of January, 1926. See In re Witherington's Will, 186 N. C. 152, 119 S. E. 11, 12.

In General.—By this section, the legislature recognized that it is against the sound public policy to allow probate of wills and settlements of property rights thereunder to be left open to such uncertainties for an indefinite length of time. In re Will of Johnson, 182 N. C. 522, 109 S. E. 373.

The Limitation at Common Law.—While at common law there was no definiteness or uniformity in the adoption of a period of time wherein the right would be presumed to have been forfeited either by acquiescence or unreasonable delay, the period of twenty years was that more generally prevalent, and though this presumption might be rebutted by proper and sufficient evidence, when the facts were admitted, or had been properly established, it became a question for the court to determine whether on such facts the presumption prevailed. In re Dupree, 163 N. C. 256, 79 S. E. 611.

Common Law Limitation Applied After Amendment.—As the caveat in the case of In re Dupree's Will, 163 N. C. 256, 79 S. E. 611 was filed in 1911, the will being admitted to probate in 1887, from 1907 to 1911 the statutory period of seven years had not expired, but from 1887 to 1911 the common law limitation had expired, the court applied the common law limitation and held that the right to caveat the will was barred.

Forty Years of Laches.—An action to probate a will in solemn form will be dismissed when the petitioner had knowledge of the probate of the will in common form and qualification of the executors more than forty years prior to the action, of their removal from the State many years thereafter, of the appointment of an administrator c. t. a., and of his proceedings for final account and settlement, to which she was a party. In re Beauchamp, 146 N. C. 254, 59 S. E. 687.

Twenty-Three Years of Laches.—The devisee, and those who claim under him, having been in possession of the lands devised for twenty-three years, exercising absolute ownership, to the knowledge of the adversary party seeking to caveat the will, who had for that period of time lived only a short distance from the property: It is held, as a matter of law, that the right to caveat the will had, under the circumstances, been forfeited. In re Dupree, 163 N. C. 256, 79 S. E. 611.

Who May Caveat the Will.—The right to interfere in a question of probate belongs to a party in interest, which must mean some person whose rights will be affected by the probate of the instrument to the prejudice of the party. In re Thompson, 178 N. C. 540, 542, 101 S. E. 107; Armstrong v. Baker, 31 N. C. 109, 114.

In this state it takes only one interested person to caveat a will, under this section, and it becomes the duty of the clerk thereupon to bring in interested persons, under § 31-33. When they come in they may align themselves as they will. Bailey v. McLain, 215 N. C. 150, 154, 1 S. E. (2d) 372. For comment on this case, see 18 N. C. Law Rev. 76.

Persons Having Pecuniary Interest May Caveat. — This section, in authorizing a person "who is otherwise interested in sustaining or defeating the will" to appear and, at his election, to support or oppose its probate, means only a person who has a pecuniary interest to protect, either as an individual or in a representative capacity. An interest resting on sentiment or sympathy, or on any basis other than the gain or loss of money or its equivalent, is not sufficient, but any one who would be deprived of property in the broad sense of the word, or who would become entitled to property by the probate of a will, is authorized to appear and be heard upon the subject. In re Thompson, 178 N. C. 540, 542, 101 S. E. 107.

Person Interested May Caveat—Laches.—A person interested is entitled under this section to file a caveat to a will probated in common form and require the propounder to prove the will in solemn form, if the right has not been lost by acquiescence or unreasonable delay; as to whether laches can be imputed without notice of probate in common form, Quaere. In re Hedgepeth, 150 N. C. 245, 63 S. E. 1025.

Creditor of the Heir May Caveat.—It is also held, in Bloor v. Platt, 78 Ohio St., 49, and in 33 Mass. 265, that a creditor of the heir, who has acquired a lien, may caveat the will, the court saying in the Ohio case: "Any person who has such a direct, immediate, and legally ascertained pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will, is 'a person interested.'" In re Thompson, 178 N. C. 540, 543, 101 S. E. 107.

Purchasers from Heirs May File Caveat.—The purchasers of land from the heirs of the deceased owner "are interested in the estate" within the intent and meaning of this section, and thereunder, and under the rule of justice, reason, and authority, are entitled to caveat a will brought forward many years thereafter, and admitted to probate in common form. In re Thompson, 178 N. C. 540, 101 S. E. 107.

Heirs Not Cited under § 31-33.—The heirs at law of a deceased testator whose will is duly probated and who have no knowledge of proceedings to caveat the will, and who were not cited under the provisions of § 31-33, are not estopped to file a second caveat to the paper-writing, nor bound by the former judgment therein sustaining the validity of the paper-writing propounded. Mills v. Mills, 195 N. C. 595, 143 S. E. 130.

Proceedings Transferred to Civil Issue Docket.—Where a caveat to a will is duly filed, with the required bond, etc., at the same time the paper-writing is offered for probate, it is required of the clerk to transfer the proceedings to the civil-issue docket for the trial of the issue of devisavit vel non, and all further steps are stayed in the matter until its final adjudication, except such as may be necessary for the preservation of the estate. In re Little's Will, 187 N. C. 177, 121 S. E. 453.

Nature of Proceedings.—The proceedings in the matter of the probate of a will is summary and in rem, and at first it is ordinarily ex parte, and the contest of it is begun by a caveat under this section. In re Haygood's Will, 101 N. C. 574, 578, 8 S. E. 222.

Caveat a Proceeding in Rem—Nonsuit.—Proceedings to caveat a will are in rem involving the rights of the beneficiaries as named in the will, and those of the opposing heirs at law or next of kin depending upon the answer to the issues of devisavit vel non, and there being no parties, strictly speaking, upon whom a judgment as of nonsuit may be taken, the issue should be tried in the due course and practice of the court, and a motion of nonsuit should be denied. In re Will of Westfeldt, 188 N. C. 702, 125 S. E. 531.

Destroyed Will.—In an action to probate a destroyed holographic will, the propounder must show that the instrument in the handwriting of the deceased and signed by him once existed and was destroyed under circumstances that would defeat an inference of revocation. Upon failure of such proof, there is a failure of the proof of the res and a nonsuit is proper. Hewett v. Murray, 218 N. C. 569, 11 S. E. (2d) 867.

Suspension of Limitation—Application to Caveat Barred.—Chapter 78, Laws 1898, suspending the running of the statute of limitations, has no application to a caveat to a will theretofore barred and for which there was no such statute prior to 1907. In re Beauchamp, 146 N. C. 254, 59 S. E. 687.

Amendments Not Retroactive. — While amendment of 1907, fixes seven years after probate of a will in common form as a limitation, and permits seven years after its ratification as to wills theretofore proven, it will not apply to revive a cause of action theretofore barred. In re Beauchamp, 146 N. C. 254, 59 S. E. 687.

What Propounder Must Prove upon Caveat Being Filed.—Upon the filing of a caveat to a will probated in common form the propounder must prove the will per testes in solemn form, and the burden is upon him to show (1) the formal execution as prescribed by statute; (2) the contents,

if the original was not produced; (3) the loss of the original will or that it had not been destroyed by the testator or with his consent or procurement. In re Hedgepeth, 150 N. C. 245, 63 S. E. 1025.

When an issue of devisavit vel non is raised by caveat, it is tried in the Superior Court in term by a jury. Upon such trial the propounder carries the burden of proof to establish the formal execution of the will. This he must do by proving the will per testes in solemn form. In re Rowland, 202 N. C. 373, 375, 162 S. E. 897.

Application to Clerk within the Time No Excuse, When.—Where parties seeking to caveat a will have forfeited their right to do so by unreasonable delay and acquiescence, the mere fact that they had applied to the clerk several times when their rights would have been allowed, and the clerk declined and refused to entertain the application because the parties failed to give a proper bond as required by law, does not affect the result, for no caveat is properly constituted until the statutory requirements are met; and if it had been so constituted, the absence of notice issued in reasonable time works a discontinuance. In re Dupree, 163 N. C. 256, 79 S. E. 611.

Probate in Common Form Valid Until Set Aside.—The probate of a will in common form is valid until set aside, and the right to require probate in solemn form may be forfeited, either by acquiescence or unreasonable delay, now seven years, under this section. In re Beauchamp, 146 N. C. 254, 59 S. E. 687.

Effect of Infancy, Absence from the State.—Where the common law presumption of forfeiture of the right to caveat a will from unreasonable delay or acquiescence prevails, the matters of infancy, (coverture,) and absence from the State are not necessarily controlling, but they are considered as relevant facts bearing on the question as to whether the presumption will prevail, and more especially is this true in its application to the absence from the State of a party claiming under the will, when he had first remained in possession of the property for more than a year and the cause is one where jurisdiction could be acquired by publication. In re Dupree, 163 N. C. 256, 79 S. E. 611.

Caveat in Spite of Outstanding Life Estate.—One who is authorized by law to caveat a will is not requried to await the falling-in of an outstanding life estate, and such time is not excluded from the computation of period limited in which a caveat to a will may be filed. In re Will of Witherington, 186 N. C. 152, 119 S. E. 11.

Good Faith Claimants Protected until Probate Attacked.—All persons who claim in good faith under a will which has been duly probated in common form as provided by statute are protected by its provisions, until the probate is attacked by a caveat proceeding instituted as provided by this section. Whitehurst v. Hinton, 209 N. C. 392, 403, 184 S. E. 66.

Applied in In re Will of Roediger, 209 N. C. 470, 184 S. E. 74.

§ 31-33. Bond given and cause transferred to trial docket.—Upon any caveator giving bond, with sufficient surety to be approved by the clerk, in the sum of two hundred dollars, payable to the propounder of the will, conditioned to pay all costs which may be adjudged against such caveator in the superior court by reason of his failure to prosecute his suit with effect, or deposit the money or give a mortgage in lieu of such bond, or shall file affidavits and satisfy the clerk of his inability to give such bonds or secure such costs, the clerk shall transfer the cause to the superior court for trial; and he shall also forthwith issue a citation to all devisees, legatees or other parties in interest within the state, and cause publication to be made, for four weeks, in some newspaper printed in the state, for nonresidents to appear at the term of the superior court, to which the proceeding is transferred and to make themselves proper parties to the proceeding, if they choose. At the term of court to which such proceeding is transferred, or as soon thereafter as motion to that effect shall be made by the propounder, and before trial, the judge shall require any of the persons so cited, either those who make themselves parties with the caveators or whose interests appear to him antagonistic to that of the propounders of the will, and who shall appear to him to be able so to do, to file such bond within such time as he shall direct and before trial; and on failure to file such bond the judge shall dismiss the proceeding. (Rev., s. 3136; Code, s. 2159; 1899, c. 13; 1901, c. 748; C. C. P., s. 447; 1909, c. 74; C. S. 4159.)

Bringing in Interested Persons.—In this state it takes only one interested person to caveat a will under § 31-32 and it becomes the duty of the clerk, under this section, to bring in interested persons. When they come in they may align themselves as they will. Bailey v. McLain, 215 N. C. 150, 1 S. E. (2d) 372

Trial by Jury.—The probate of a will in solemn form is a proceeding in rem, and the issue raised by the caveat must be tried by a jury and the propounder and caveator may not waive trial by jury and submit the issue to the court under an agreed statement of facts. In re Will of Roediger, 209 N. C. 470, 184 S. E. 74.

Cited in Mills v. Mills, 195 N. C. 595, 598, 143 S. E. 130.

§ 31-34. Prosecution bond required in actions to contest wills.—When any action is instituted to contest a will the clerk of the superior court will require the prosecution bond required in other civil actions: Provided, however, that provisions for bringing suit in forma pauperis shall also apply to the provisions of this section. (1937, c. 383.)

Editor's Note.—The purpose of this section is not entirely clear. The usual method of contesting a will is to file a caveat, either at the time the will is presented for probate, or within seven years thereafter. This is said to be neither a civil action nor a special proceeding, but is in the nature of a proceeding in rem, in which the propounder has the burden of establishing the formal execution of the will, and the caveators the burden of showing that it is not a valid will. It may be the purpose of the statute to require the propounder to give bond, when a caveat is filed, so as to have the costs secured by both parties. 15 N. C. Law Rev. 352.

§ 31-35. Affidavit of witness as evidence. — Whenever the subscribing witness to any will shall die, or be absent beyond the state, it shall be competent upon any issue of devisavit vel non to give in evidence the affidavits and proofs taken by the clerk upon admitting the will to probate in common form, and such affidavit and proceedings before the clerk shall be prima facie evidence of the due and legal execution of said will. (Rev., s. 3121; 1899, c. 680, s. 2; C. S. 4160.)

§ 31-36. Caveat suspends proceedings under will.—Where a caveat is entered and bond given, the clerk of the superior court shall forthwith issue an order to any personal representative, having the estate in charge, to suspend all further proceedings in relation to the estate, except the preservation of the property and the collection of debts and payment of all taxes and debts that are a lien upon the property of the decedent, as may be allowed by order of the clerk of the superior court, until a decision of the issue is had. (Rev., s. 3137; Code, s. 2160; C. C. P., s. 448; 1927, c. 119; C. S. 4161.)

Editor's Note.—By the amendment of 1927 (Pub. Laws, c. 119), the representative can not be made to stop, upon a caveat filed, the payment of all taxes and debts that are a lien upon the property of the decedent, as may be allowed by order of the clerk of the superior court.

Purpose of Section.—This section is manifestly intended in cases to which it is applicable, to dispense with the necessity of appointing an administrator pendente lite, and confers very similar forms upon the executor, and more especially when he has entered upon the duties of his office before the caveat is entered. Syme v. Broughton, 86 N. C. 153. The prosecution of the action in order to the collection of the debts, is evidently sanctioned by the statute and in furtherance of the purpose of its enactment. Hughes v. Hodges, 94 N. C. 57, 59.

The filing of a caveat suspends further proceedings in the administration of the estate, but does not deprive the executor or executrix of the right to the possession of the assets of the estate. Elledge v. Hawkins, 208 N. C. 757, 182 S. E. 468.

Effect of Caveat upon Rights and Duties of Representative.—The executor is not divested of all his representative powers; nor is the first probate vacated absolutely when the issue touching the will is made up to be tried; nor is there a necessity meanwhile for the appointment of an administrator pendente lite. The function of the executor is suspended only until the controversy is ended, and he is still required to take care of the estate in his hands and may proceed in the collection of debts due the deceased. Randolph v. Hughes, 89 N. C. 428; In re Palmer, 117 N. C. 133, 134, 138, 23 S. E. 104.

In the observance of the mandate to preserve the property the executor may operate and manage the property in the exercise of that degree of care, diligence and honesty which he would exercise in the management of his own property, or he may institute a civil action in which all persons having an interest are made parties and request the court in its equity jurisdiction to authorize such operation, or he may apply to the clerk in his probate jurisdiction for such authorization. Hardy & Co. v. Turnage, 204 N. C. 538, 168 S. E. 823.

Office of Representative Continued.—The proper construction of this section is that after probate is granted in common form and there is an executor who acts or an administrator with the will annexed appointed, his office is intended to be continued during a controversy about the will, and he has all the power and is subjected to all the liabilities of an administrator or an executor, except that his right to dispose of the estate according to the provisions of the will is suspended until the final determination of the suit. In re Palmer, 117 N. C. 133, 134, 137, 23 S. E. 104.

Effect of Absence of Order to Suspend Proceeding.—In the absence of an order to suspend further proceedings upon the filing of a caveat, as provided by this section, the acts of the executor in filing a petition or proceeding with the sale of the land were not void nor were the rights of purchasers affected. Carraway v. Lassiter, 139 N. C. 145, 51 S. E. 968.

May Be Sued, Sell Land, But May Not Pay Legacies.—An executor, or administrator c. t. a., after the will is proved in common form, may be sued, and by leave of court may sell property to pay debts, but cannot pay legacies or exercise other special powers given in the will, where issues upon a caveat are pending; the right to execute the will is suspended until the determination of the suit. Syme v. Broughton, 86 N. C. 153.

§ 31-37. Superior court clerks to enter notice of caveat on will book; final judgment also to be entered.—Wherever a caveat is filed with the clerk of the superior court of any county in the state to any last will and testament which has been admitted to probate in said office, it shall be the duty of such clerk, and he is hereby directed to give notice of the filing of such caveat by making an entry upon the page of the will book where such last will and testament is recorded, evidencing that such caveat has been filed and giving the date of such filing. When such caveat and proceedings resulting therefrom shall have resulted in final judgment with respect to such will, the clerk of the court shall make a further entry upon the page of the will book where such last will and testament is recorded to the effect that final judgment has been entered, either sustaining or setting aside such will. (1929, c. 81.)

Art. 7. Construction of Will.

§ 31-38. Devise presumed to be in fee.—When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity. (Rev., s. 3138; Code, s. 2180; R. C., c. 119, s. 26; 1784, c. 204, s. 12; C. S. 4162.)

Editor's Note.—The trend of judicial decisions for years has been toward relaxing the rigor of the common-law rule, that without words of inheritance no estate of greater dignity than for life could be created by deed. While devises were held, after the statute of wills, to be but a species of alienation, the courts construed them more liberally than deeds; and where, without the use of the word "heirs," as by inserting the word "forever," the testator indicated an intent to pass an estate in fee, it was held, on the ground that testators were generally inops consilii, that the instrument should be so interpreted as to effectuate his purpose. Then followed the liberal principle incorporated in this section to the effect that a devise of real estate to any person should be held to be a devise in fee, unless it plainly appears from some part of the will that the testator intended to convey an estate of less dignity.

The liberal tendency of the age in reference to deeds culminated in the enactment of section 39-1, providing the same rule of construction for deeds as for devises. Vickers v. Leigh, 104 N. C. 248, 257, 10 S. E. 308.

The common-law rule that a devise without words of perpetuity or limitation conveyed a life estate only unless there is a manifest intention to convey the fee has been changed by this section. Henderson v. Western Carolina Power Co., 200 N. C. 443, 157 S. E. 425.

No technical words of conveyance are required in wills. Alston v. Davis, 118 N. C. 202, 24 S. E. 15; Keith v. Scales, 124 N. C. 497, 505, 514, 32 S. E. 809.

Intent of Testator Controls Interpretation.—The intent of the testator as gathered from the entire will controls its interpretation; and this rule applies to the construction of this section when it appears that the testator devised certain lands without the words of inheritance, and that his intent, gathered from a separate item of the will, was to create a defeasible estate in the first taker, contingent upon his dying at any time, whether before or after the death of the testator, leaving issue surviving him. Rees v. Williams, 165 N. C. 201, 81 S. E. 286.

The presumption established by this section that a devise of land shall be construed in fee, etc., gives way to the intent of the testator as gathered from the proper construction of the instrument as a related whole. Roberts v. Saunders, 192 N. C. 191, 134 S. E. 451.

Thus under a devise to the testator's wife of all of his "estate real and personal," and by a later paragraph all of the rest of the testator's property "as above stated" during her widowhood, and should she remarry her dower "according to law": It was held only a life estate, according to the testator's intent, is given to his widow, and her conveyance of a fee-simple title is ineffectual, the statutory presumption of a fee-simple title being inoperative. Roberts v. Saunders, 192 N. C. 191, 134 S. E. 451.

Where the testator, after bequeathing or devising property to a person, expresses a wish or desire as to its use or disposition, such expression will not be construed to create a trust in the legatee or devisee unless it clearly appears from the instrument as a whole that testator so intended, since the devise or bequest will be deemed absolute in the absence of a clearly expressed intention to convey an estate of less dignity, but precatory words will create a trust when it appears from the instrument as a whole that the testator so intended, provided testator has pointed out with sufficient clearness and certainty both the subject matter and objects of the intended trust. Brinn v. Brinn, 213 N. C. 282, 195 S. E. 793.

Unrestricted Devise Passes Fee.—The uniform holding, since the passage of this section has been that an unrestricted devise of real estate passes the fee. Barbee v. Thompson, 194 N. C. 411, 412, 139 S. E. 838.

A testator devised to his daughters, B. and M., all of his real estate after the death of his widow, and also to his daughter T. an equal life interest therein with B. and M., "or so long as the said T. may remain a widow." Upon the death of the testator's widow, B. and M. took in remainder a fee-simple estate, the intent of the testator being to provide for T., who remained unmarried and is now deceased, during her widowhood. Barbee v. Thompson, 194 N. C. 411, 139 S. E. 838.

A devise of lands to the wife of the testator for life, and at her death or remarriage to their two children, by name, for their natural lives for the heirs of their bodies: Held, after the death of the widow, the devise is not a trust created in the children as trustees for the "heirs of their bodies," and the devise not falling within the rule in Shelly's case, and there being no expression in the will to show an intent of the testator to create an estate of less degree than fee, it constitutes an estate tail, converted by our statute into a fee simple. Washburn v. Biggerstaff, 195 N. C. 624, 143 S. E. 210.

A devise of real estate to the testator's son for his own use and benefit with the expressed intent that it should

vest in him absolutely with full right to dispose of it, with limitation over should he die without children surviving, if not disposed of by him during his life, under the provisions of this section, the devise being without clause limiting the estate to one of less dignity, the devisee took a fee-simple title thereto, and could convey a good title to the purchaser. Lineberger v. Phillips, 198 N. C. 661, 153 S. E. 118.

The rule that a general devise will be construed to be in fee, applies only when the language employed by testator fails to show a clear intent to convey an estate of less dignity. Hampton v. West, 212 N. C. 315, 193 S. E. 290.

An unrestricted devise of real estate passes the fee, but a general devise of realty does not pass the fee when it clearly appears from the language of the will that the testator intended to convey an estate of less dignity. Strickland v. Johnson, 213 N. C. 581, 197 S. E. 193.

A devise will be construed to be in fee simple unless an intention to convey an estate of less dignity is apparent from the will, and regard will be had to the natural objects of the testator's bounty, and the testator's intention as gathered from the whole instrument will be given effect unless it is contrary to some rule of law or public policy. Jolley v. Humphries, 204 N. C. 672, 169 S. E. 417.

Under this section the fee generally passes upon a devise of the proceeds of land when an intention to separate the income from the principal is not expressed, or where the devise is general and the devisee is given the power of disposition, or a limitation over is made of such part as may not be disposed of by the first taker. Hambright v. Carroll, 204 N. C. 496, 168 S. E. 817.

In construing wills the courts will endeavor to ascertain the intent of the testator as expressed in the words used, and in cases of doubt resort may be had to the usual canons of interpretation, and a devise will be construed to be in fee unless it appears from the will that the testator intended to convey an estate of less dignity. Bell v. Gillam, 200 N. C. 411, 157 S. E. 60.

A general devise to testator's wife with subsequent items providing that one-half the estate "remaining" at her death should go to his adopted son in fee, and the other half, in the event the wife did not dispose of the residue of the estate by will, to go to the children of L., is held to show an intent to convey an estate of less dignity than a fee simple to testator's wife, rebutting the presumption that the general devise to the wife should be construed to be in fee, the power of disposition of part of the estate, at least, being limited to disposition by will, and the widow does not have the power to convey the entire estate by deed in fee simple. Hampton v. West, 212 N. C. 315, 193 S. E. 290.

Devise for "Use and Benefit without Let or Hinderance."—Where testator left property in trust with power in his wife to demand that trustee turn over property to her "for her own use and benefit without let or hinderance," upon such demand and compliance therewith, the wife takes and can convey a fee simple, notwithstanding a further provision in the will that a third person should take a life estate in property remaining in the hands of trustees at the wife's death. O'Quinn v. Crane, 189 N. C. 97, 126 S. E. 174.

Devise with Power of Full Management and Control, etc.—A devise to the wife of all of the testator's property, real, personal or mixed, with full management and control thereof during her natural life; that she shall enjoy the full benefit thereof with power to sell and dispose of it at her discretion, and that it was the testator's will and desire that she shall devise whatever property she has not thus disposed of during her natural life, or the proceeds thereof, to the person who has been the "kindest to us in aiding and comforting us in our old age," it was held, that under the provisions of this section the wife acquired a fee-simple title. Weaver v. Kirby, 186 N. C. 387, 119 S. E. 564.

Devise with Full Power of Disposal.—A devise to a husband with full power of its disposal, but on certain conditions any part undisposed of by him to go to a nephew, vests a fee simple in the husband. Roane v. Robinson, 189 N. C. 628, 127 S. E. 626; Heefner v. Thornton, 216 N. C. 702, 6 S. E. (2d) 506.

Devise Absolutely as Testator Held Himself.—A devise and bequest to the testator's wife of all of his estate, real or personal, wherever located or however held, including that held at the time of his death, absolutely as he held it himself, declaring that she should not be considered as holding it in trust "technically so called, to be enforced by the judge or decree of any court other than her own conscience, judgment, and affection shall prompt her to so regard it": It was held the devise and bequest to the widow, under the clear terms of the will, was in fee absolute. Fellowes v. Durfey, 163 N. C. 305, 79 S. E. 621.

Fee Simple Defeasible upon a Condition. — An estate "loaned" to testator's daughter R. during her natural life and at her death "I lend all of the" designated land "to the lawful heirs of her body, and to the lawful begotten heirs of their bodies if any," standing alone, would convey the fee simple title, but with the further expression, "in case she should die leaving no lawful issue of her body then I give all the above described land to my son J., and his lawful heirs," the estate is defeasible in the event of the death of R. "leaving no lawful issue of her body." Jarman v. Day, 179 N. C. 318, 102 S. E. 402.

Where a testator devises realty to a grandson, and in the event of death of the latter without children, then the land to descend to other grandchildren, such devises vest a fee simple estate in the first devisee, defeasible only on condition that he dies without leaving heirs of his body. Whitfield v. Garris, 131 N. C. 148, 42 S. E. 568; Whitfield v. Garris, 134 N. C. 24, 45 S. E. 904.

Fee Simple with Power of Appointment.—A devise to A, and to such persons as he shall appoint, vests the absolute property in A, without an appointment. But if it be to him for life and after his death to such person as he shall appoint, he must make an appointment in order to entitle that person to anything. The express life estate to him repels the implication of a fee simple for himself. Levy v. Griffis, 65 N. C. 236, 239.

Same—Trust in Favor of Married Women.—A devise to a trustee in trust for the sole and separate use of a married woman with a power given to her of appointing the estate in fee by deed or will, will vest the trust in her in fee under this section. Levy v. Griffis, 65 N. C. 236.

Vested Remainder to Be Divested upon Condition.—A devise of lands to K. "his lifetime, then to go to" G. and M., "and if they should die without leaving bodily heirs, then to go to the Flow Heirs". It was held, after the falling in of the life estate, G. and M. take the fee in the remainder defeasible upon their dying without leaving "bodily heirs," in which event it would go to the ultimate devisees, upon the principles of a shifting use operating by way of an executory devise. Kirkman v. Smith, 174 N. C. 603, 94 S. E. 423.

Trust in Devised Lands—Precatory Words.—For precatory words used in a will to be regarded as mandatory to create a trust in lands devised, the intention of the testator to that effect must clearly appear by interpretation of the instrument, for otherwise these words must be given the ordinary significance of those of that character, both under our modern decisions and this section providing that a devise of land shall be construed to be in fee, unless the terms of the will clearly shows the testator's intent to pass an estate of less dignity. Springs v. Springs, 182 N. C. 484, 109 S. E. 839.

An unrestricted devise followed by a provision that in the event the devisee died intestate, testator wished such devisee's share to descend to her children, vests the fee in the devisee, the precatory words being repugnant to the estate previously devised and insufficient to limit or divest it. Croom v. Cornelius, 219 N. C. 761, 14 S. E. (2d) 799.

Conflicting Expressions—Which Controls.—Where a testator devises all of his estate to his wife, clearly and unmistakably in fee, a different intent may not be inferred from subsequent expressions used in the will. Fellowes v. Durfey, 163 N. C. 305, 79 S. E. 621.

Conflicting Interest—General Interest Prevails.—The provisions of this section, while laying down a rule of construction, still leave the question of the intention of the testator open for construction, and where there is a particular, and a general paramount interest apparent in the same will, and they clash, the general interest must prevail. Leeper v. Neagle, 94 N. C. 338.

Section Does Not Apply to Devise to Trustee.—Where a devise created no interest in certain lands in favor of testatrix' husband, but devised the lands to him in an active trust for the purpose of carrying out the wishes of her father for the care of his widow, this section has no application to the devise to the husband as trustee in an active trust with direction for the vesting of the lands in her heirs upon the termination of the trust. Stephens v. Clark, 211 N. C. 84, 189 S. E. 191.

Devise Creating a Life Estate.—In Alexander v. Alexander, 210 N. C. 281, 186 S. E. 319, it was held that the devise created an estate limited at most to the life of the widow, and did not convey to the widow a fee simple, notwithstanding the provisions of this section and notwithstanding the rule that a gift of an estate to a person generally or indefinitely with power of disposition ordinarily carries the fee, since it is apparent from the words of the devise that testator did not intend to confer the fee simple.

Void Restraint on Alienation.—Where a restraint on alienation was declared void, the devise was unrestricted and vested the fee in the devisee. Williams v. McPherson, 216 N. C. 565, 5 S. E. (2d) 830.

Applied in Morris v. Waggoner, 209 N. C. 183, 183 S. E. 353.

Stated in Early v. Tayloe, 219 N. C. 363, 13 S. E. (2d) 609; Perry v. Bassenger, 219 N. C. 838, 15 S. E. (2d) 365.

Cited in West v. Murphy, 197 N. C. 488, 149 S. E. 731; Brown v. Lewis, 197 N. C. 704, 150 S. E. 328; Merritt v. Inscoe, 212 N. C. 526, 193 S. E. 714; Shoemaker v. Coats, 218 N. C. 251, 10 S. E. (2d) 810 (con. op.).

§ 31-39. Probate necessary to pass title; recordation in county where land lies; rights of innocent purchasers.—No will shall be effectual to pass real or personal estate unless it shall have been duly proved and allowed in the probate court of the proper county, and a duly certified copy thereof shall be recorded in the office of the superior court clerk of the county wherein the land is situate, and the probate of a will devising real estate shall be conclusive as to the execution thereof, against the heirs and devisees of the testator, whenever the probate thereof, under the like circumstances, would be conclusive against the next of kin and legatees of the testator: Provided, that the probate and registration of any will shall not affect the rights of innocent purchasers for value from the heirs at law of the testator when such purchase is made more than two years after the death of such testator, unless the will has been fraudulently withheld from probate. (Rev., s. 3139; Code, s. 2174; R. C., c. 119, s. 20; 1784, c. 225, s. 6; 1915, c. 219; C. S. 4163.)

Cross Reference.—As to further provisions relative to wills fraudulently withheld from probate, see § 31-12.

Probate an Indispensable Prerequisite.—The probate of a will in the proper court is an indispensable prerequisite to its validity as a conveyance of real or personal estate. Osborne v Leak, 89 N. C. 433; Paul v. Davenport, 217 N. C. 154, 7 S. E. (2d) 352.

No Statute of Limitation to Probate Will.—There is no statute of limitations as to when a will may be admitted to probate and section 47-18 has no application to wills: the probate, when proved, allowed and recorded, as the statute requires, becomes effective and relates back to the death of the devisor, passing the title from that date, avoiding all disposition or conveyances of the property by the heirs contrary to the provisions of the will, unless the claimants are protected by the statute of limitations or some recognized equitable principle. Cooley v. Lee, 170 N. C. 18, 86 S. E. 720.

Section Not Retroactive as to Recordation.—This section requiring copies of wills to be recorded in the county where the devised lands are situate, is prospective and refers only to the wills proved after November, 1, 1883—the time when the Code went into effect. Curles v. Smith, 91 N. C. 172.

Statute of Limitations Where Right of Purchasers Involved.—Under this section prior to the amendment by Laws of 1915, there was no limitation as to the time when a will could be probated and recorded, the ordinary registration acts having no application to wills; they became effective from the death of the testator, ordinarily passing the title to devisees from that date against all dispositions or conveyances from the heirs to the contrary. Barnhardt v. Morrison, 178 N. C. 563, 101 S. E. 218.

Same—Amendment Not Retroactive.—The amendment of this section by the laws of 1915 is prospective in effect, and the right of the devisees, under the section prior to the amendment, to have unlimited time to probate the will will not be affected except from the effective date of the amendment. Barnhardt v. Morrison, 178 N. C. 563, 101 S. E. 218. That is the devisees will have two years after the effective date of the amendment to have their will probated.—Ed. Note.

§ 31-40. What property passes by will.—Any testator, by his will duly executed, may devise, bequeath, or dispose of all real and personal estate which he shall be entitled to at the time of his death, and which, if not so devised, bequeathed, or disposed of, would descend or devolve upon his heirs at law, or upon his executor or administrator; and the power hereby given shall extend to all contingent, executory, or other future interest in any real or personal estate, whether the testator may or may not be the person or one of the persons in whom the same may become vested, or whether he may be entitled thereto under the instrument by which the same was created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will. (Rev., s. 3140; Code, s. 2140; R. C., c. 119, s. 5; 1844, c. 88, s. 1; C. S. 4164.)

After-Acquired Lands—Devisability under English Statute.—As the statutes of devises, 32 and 34 Henry VIII., declares that "a man having lands may devise them," lands acquired subsequent to the devise do not pass by it, although the devisor expressly refers to all the lands he might have at his death; for at the time of the devise he had not the lands. Jiggitts v. Maney, 5 N. C. 258. This case was decided in 1809; under this section the contrary rule is established.—Ed. Note.

A conveyance of "all the property I possess," where there is no apparent motive for making an exception, conveys all property the party owned. Hollowell v. Manly, 179 N. C. 262, 265, 102 S. E. 386.

Right of Entry for Condition Broken.—"And also to all rights of entry for conditions broken," etc., evidently means rights of entry for conditions broken in the lifetime of the testator, and where he had the right of entry while living. Church v. Young, 130 N. C. 8, 12, 40 S. E. 691.

Same—Condition Broken during Lifetime of Testator.—Where a church receives an absolute fee in land, subject to be defeated only by the breach of a condition, and this condition is not broken until after the death of the grantor and a daughter, neither the grantor nor the daughter have any estate in the land (before the breach of the condition, the testator having a mere possibility of reverter) at the time of their death which can be willed or inherited, and upon breach of the condition the estate goes to the heirs at law of the grantor. Church v. Young, 130 N. C. 8, 40 S. E. 691.

Possibility of Reverter Not Devisable.—A mere possibility of reverter cannot be subject of a devise. Church v. Young, 130 N. C. 8, 9, 40 S. E. 691; Hollowell v. Manly, 179 N. C. 262, 265, 102 S. E. 386.

Where a will is susceptible to two reasonable constructions, one disposing of all of the testator's property, and the other leaving part of the property undisposed of, the former construction will be adopted and the latter rejected, there being a presumption against partial intestacy. Holmes v. York, 203 N. C. 709, 166 S. E. 889.

§ 31-41. Will relates to death of testator. — Every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. (Rev., s. 3141; Code, s. 2141; R. C., c. 119, s. 16; 1844, c. 88, s. 3; C. S. 4165.)

The General Rule Expounded.—This general rule seems to be established, that where a testator uses general terms, as "all of my estate" or "all of my lands or real estate," then the devise will speak at the date of the death; but, where he refers to a specific subject of gift, with sufficient particularity in the description of the specific subject of it, showing that an object in existence at the date of his will was intended, referring to the existing state of things at the date of the will and not at his death, then the operation of the general rule is excluded. The death is a prospective event, but the date of the will refers to actual conditions. Hines v. Mercer, 125 N. C. 71, 74, 34 S. E. 106.

Exception to General Rule.—Ordinarily a will will be construed as though executed immediately prior to testator's death, and it is only when the will describes a specific subject of gift with sufficient particularity to show that an object in existence at the date of the execution of the will was intended that the general rule is excluded. Tyer v. Meadows, 215 N. C. 733, 3 S. E. (2d) 264.

Section Relates to Subject Matter, and Not the Objects of

the Will.—This section, making the will speak from the death, relates to the subject matter of disposition only, and does not in any manner interfere with the construction in regard to the objects of the gift. The reason for this is that the objects of the testator's bounty were not found within the mischiefs which were intended to be prevented by the statute. Robbins v. Windley, 56 N. C. 286; Hines v. Mercer, 125 N. C. 71, 74, 34 S. E. 106.

This section has no retroactive effect, and does not apply to wills made prior to its enactment, though the testator dies subsequent to its enactment. Such wills, with reference to the property they devise, speak as of the date of their execution, and not as of the date of testator's death under the rule of construction promulgated by this section. Williamson v. Williamson, 58 N. C. 142.

Devise of "the Whole of My Lands" Passes After-Acquired Property.—A devise of "the whole of my lands" to devisees, includes land acquired by the testator after the publication of his will when no intention to the contrary appears. A subsequent clause in the will, directing "my other property of every kind not before mentioned to be sold," refers to other personal property. Edwards v. Warren, 90 N. C. 604.

Effect of Will Speaking as of Time of Testator's Death.—Inasmuch as a will speaks as of the time of testator's death, a devise by O. of her "undivided interest and property in the estate of the late G. C." passes no such part of the distributive share in such estate as has been collected and received by O., for, immediately upon its payment to O., it became her property and ceased to be a part of the estate of G. C. Aydlett v. Small, 115 N. C. 1, 20 S. E. 163.

Designation of Quantity of Land Does Not Prevent Operation of Rule.—Where a testator devised his lands south of a certain line, "containing by estimation two hundred acres,' and subsequently he purchased other lands south of the line, the reference to the number of acres did not prevent the latter lands being included in the devise. Brown v. Hamil ton, 135 N. C. 10, 47 S. E. 128.

Land under Contract of Purchase after Execution of Will.—In In re Champion, 45 N. C. 246, the devise was to testator's wife: Item 1: "All my real estate, consisting of several lots in Shelby," etc., and in item 2: "All of my personal estate of whatever nature." After the date of the will he contracted to purchase another tract, but had not paid for it at his death: it was held that his rights in the unpaid for land passed to his wife, and it was put on the ground that looking at the whole instrument, the intention to give the whole estate to his wife was manifest. Hines v. Mercer, 125 N. C. 71, 75, 34 S. E. 106.

Cited in Wright v. Wright, 198 N. C. 754, 755, 153 S. E. 321.

§ 31-42. Lapsed and void devises pass under residuary clause.—Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will: Provided, there shall be no lapse of the devise or legacy by reason of the death of the devisee or legatee during the life of the testator, if such devisee or legatee would have been an heir at law or distributee of such testator had he died intestate, and if such devisee or legatee shall leave issue surviving him; and if there is issue surviving, then the said issue shall have the devise or bequest named in the will. (Rev., s. 3142; Code, s. 2142; R. C., c. 119, s. 7; 1844, c. 88, s. 4; 1919, c. 28; C. S. 4166.)

In the Absence of Statute Heirs Prevail over Residuary Devise.—In the absence of statute, upon general principles, the heir at law is favored as much as possible, even to the detriment of a residuary devisee; and, accordingly, a specific devise lapsing by the death of a devisee, devolves upon the "heir" and not the residuary legatee, in fact, whether a devise lapsed or was void ab initio, the residuary devise does not absorb it. Holton v. Jones, 133 N. C. 399, 403, 45 S. E. 765.

Rights of Collateral Heirs.—Where the owner of real and personal property executed a will devising and bequeathing all his property, both real and personal, to his wife, the collateral heirs at law of the testator are entitled to the real property, the devise to the wife having lapsed by reason of her prior death, and the provisions of this section, not applying to prevent such lapse of the devise, since the wife would not have been an heir at law of testator had she survived him, but the children of the wife by a prior marriage are entitled to the personalty, since the wife would have been a distributee of the personal estate of her husband had she survived him, and this section providing that in such case the legacy should not lapse, but should go to the surviving issue of the legatee, the statute clearly recognizing the distinction between real and personal property for the purposes of devolution. Farnell v. Dongan, 207 N. C. 611, 178 S. E. 77.

Section a Prototype of English Statute.—This section enacted in 1844, is a copy of the English statute upon the same subject. It will be observed that it provides for such devises as shall fail or be void: (1) by reason of the death of the devisee during the lifetime of the testator; (2) by reason of such devise being contrary to law; (3) or otherwise incapable of taking effect. Holton v. Jones, 133 N. C. 399, 402, 45 S. E. 765.

This section should not be construed with § 31-44.—Neither section is ambiguous and they are not interrelated. Beach v. Gladstone, 207 N. C. 876, 877, 178 S. E. 546.

Construction of Residuary Clause in General.—In a specific gift, you must look to see whether that particular item is included. The question is whether it is included or not; but in a residuary gift large enough in its language to comprehend residue, the question is, not what is included, but what is excluded; and you must find words sufficiently large, sufficiently definite, sufficiently distinct, to enable you to say that some item is excluded, so that, to use the language of one of the authorities, what hitherto has purported to be the residuary gift is reduced to the level of a specific gift, and ceases to be a residuary gift. Faison v. Middleton, 171 N. C. 170, 173, 88 S. E. 141.

Construction of Residuary Clause to Prevent Intestacy.—A residuary clause in a will should be construed so as to prevent an intestacy as to any part of the testator's estate, unless there is an apparent intent to the contrary, plainly and unequivocally expressed in the writing. Faison v. Middleton, 171 N. C. 170, 88 S. E. 141.

Intestacy Not Favored.—No one supposes that he has failed in his intention to dispose of all of his property by his will, and the courts should endeavor to make out such an intention and to uphold the testamentary plan, so that the testator may not, as to some of his estate, have died intestate. Faison v. Middleton, 171 N. C. 170, 174, 88 S. E. 141.

Whether a clause is a residuary clause is not dependent upon any particular form of expression but upon the intention of the testator, and where a will provides that after the termination of a life estate that the whole estate should be reduced to cash and, after payment of certain specific bequests, distributed among a specific class, where the legacy of one of the class lapses by the death of the legatee prior to the testator's death, the amount of such legacy is thrown into the fund for distribution among the class named, and it does not go to the next of kin of the legatee. Stevenson v. Wachovia Bank, etc., Co., 202 N. C. 92, 161 S. E. 728.

"All of the Residue" Embraces Personalty and Realty.—General words in a residuary clause of a will, "all of the residue," etc., embrace every species of property, whether real or personal, owned by the testator at his death, unless restricted by the context. Faison v. Middleton, 171 N. C. 170, 88 S. E. 141.

Effect of Failure to Name Devisee.—A devise of land "to my . . . . . ." without naming the devisee, followed by a residuary clause of the will, "that all of the residue of my estate be sold, and if there should be any surplus over the payment of debts and expenses, that such surplus be equally divided and paid over" to certain named persons: it was held, the failure to name the devisee brings the devise within the terms of the statute as to void devises, or those incapable of taking effect, and the property devised will go to the residuary legatees, and not to the heirs at law. Faison v. Middleton, 171 N. C. 170, 88 S. E. 141.

Lapsed Devise for Misdescription.—A general residuary bequest carries lapsed and void legacies, and property which is the subject of a devise which fails by reason of a misdescription. 40 Cyc., 1563 to 1570; Gardner on Wills, 418; Faison v. Middleton, 171 N. C. 170, 172, 88 S. E. 141.

Subject-Matter of Void Legacy Is Included in Residuary Legacy.—Under the provisions of this section, the property which is the subject-matter of a void legacy, is included within the residuary legacy provided by the will, and should be delivered by the executor to the residuary legatees.

Wilmington Sav., etc., Co. v. Cowan, 208 N. C. 236, 238, 180 S. E. 87.

Lapse of Shares of Some of the Residuary Legatees.—Where the testator has named several beneficiaries in a residuary clause, and it appears upon the face of the will that several of these names have been run through with a pen, and the intention of the testator to revoke has been established, the beneficiaries whose names have been thus erased taking nothing, and the whole estate, under the residuary clause, goes to the others therein named together with such legacies as may have lapsed. Barfield v. Carr, 169 N. C. 574, 86 S. E. 498.

Rule Applied in Absence of Contrary Intention Only.—A lapsed devise of lands will not fall within the residuary clause of a will, under this section, where a contrary intent appears from the construction of a will itself; and where the testator has specifically devised his lands, making ample provisions for his widow, and gives her, in the residuary clause, "all other property not herein specified," and the use of the word "property," with the expression "not herein specified," shows the testator's intent that a lapsed devise of the realty should not fall within the residuary clause, but will go to the testator's next of kin instead of those of the widow or her devisees under her will. Howell v. Mehegan, 174 N. C. 64, 93 S. E. 438.

Legacy Not Lapsed by Fact That Legatee Predeceased Testator.—In Beach v. Gladstone, 207 N. C. 876, 178 S. E. 546, a judgment that a legacy did not lapse by reason of fact that legatee predeceased testator is affirmed, it appearing that legatee would have been distributee of testator had she survived him.

Cited in Shoemaker v. Coats, 218 N. C. 251, 10 S. E. (2d) 810 (concurring opinion).

§ 31-43. General gift by will an execution of power of appointment.—A general devise of the real estate of the testator, or of his real estate in any place or in the occupation of any person mentioned in the will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper; and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property, described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will. (Rev., s. 3143; Code, s. 2143; R. C., c. 119, s. 8; 1844, c. 88, s. 5; C. S. 4167.)

Cross Reference.—See also, § 31-4.

Power Not Exercised in Express Terms—Construction of Entire Will.—Where the execution by will of a power is not exercised in express terms by reference to the power or the subject, a construction must be given by looking to the whole instrument and giving effect to the intent therein manifested. Johnston v. Knight, 117 N. C. 122, 23 S. E. 92; Walsh v. Friedman, 219 N. C. 151, 13 S. E. (2d) 250.

Residuary Devise Executes Power, Unless Contrary Intention Shown.—Unless there is something to show a contrary intention on the part of a testator, a general residuary devise will operate as an execution of a power to dispose of property by will. Johnston v. Knight, 117 N. C. 122, 23 S. E. 92.

Where the donee of a power to dispose of property by will to certain persons devises the property to such persons by a residuary clause, without referring to the power, the devise will be considered an intentional and not an accidental exercise of the power. Id.

Quoted in Walsh v. Friedman, 219 N. C. 151, 13 S. E. (2d) 250.

§ 31-44. Gifts to children dying before testator pass to their issue.—When any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the death of the testator, such devise or bequest shall not lapse, but shall take effect and vest a title to such estate in the issue surviving, if there be any, in the same manner, proportions and estates as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will. (Rev., s. 3143; Code, s. 2143; R. C., c. 119, s. 8; C. S. 4168.)

Former Law.—Prior to the year 1816, the law was such that if a devise or bequest were made by a testator to his child, and such child died in his lifetime, leaving issue, the devise or legacy would lapse and fall into the residuum, if there were any residuary clause in the will; or, if there were none, would be intestate property, and descend to the heirs-at-law, or be distributed among the next of kin of the testator, according to the nature of the property. Smith v. Smith, 58 N. C. 305, 307.

Section Not Intended for Benefit of Deceased Child's Creditors.—This section giving the legacy intended for a deceased child to his or her children, where such child died in the lifetime of the testator, was held not to be intended for the benefit of the creditors of such deceased child. Smith v. Smith, 58 N. C. 305.

Where Motive of Devise was Dependent upon Devisee's Surviving Testator.—Where it appeared that the sole motive with a testator for leaving the greater part of his estate to a son was that the latter should live with him and help him pay his debts, and also treat his parents with "humanity and kindness," and such son died in the lifetime of the testator, it was held, that the devise lapsed and that the son's interest in the condition was not "real or personal estate" within the meaning of this section, which gives such estate to the issue of a son dying under such circumstances. Lefler v. Rowland, 62 N. C. 143.

Legatee Not in Existence at Time of Bequest—Section Not Applicable.—This section was intended to apply to a lapsed, and not a void, legacy, and where the legacy is void by reason of the fact that the legatee was not in existence at the time the will was made, his (legatee's) children do not take anything under the will. Scales v. Scales, 59 N. C. 163, 166.

Devise to Brother—Right of Brother's Child.—A devise to a brother who dies before the testator does not come within the provisions of this section as to "a child or other issue of the testator" and lapses by reason of his prior death to that of the testator. Howell v. Mehegan, 174 N. C. 64, 93 S. E. 438. To the same effect see Gordon v. Pendleton, 84 N. C. 98. It is believed that this holding would not be true under the amendment of section 31-42 by the laws of 1919, c. 28, if at the time of the testator's death his brother, had he not died, would have been an heir or distributee at law of the testator. In such event the devise to the brother would not lapse, but would go to the brother's issue if such issue survived his parent and the testator.—Ed. Note.

§ 31-45. After-born children share in testator's estate.—Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and proportion of the parent's estate as if he or she had died intestate, and the rights of any such after-born child shall be a lien on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in §§ 28-153 to 28-158. (Rev., s. 3145; Code, s. 2145; 1868-9, c. 113, s. 62; C. S. 4169.)

Editor's Note.—See 12 N. C. Law Rev. 402, for note on "Inheritance by Child Adopted after Execution of Adopting Parent's Will."

Common Law and Civil Law Rules.—At common law, the subsequent birth of a child did not work a revocation of the parent's will; but the civil law adopted and applied a different rule, which apparently was based upon the presumed oversight or inadvertence of the parent in providing for an existing or a contingent situation. It has been suggested that the object of the law is to secure the moral influence of having before the mind of the testator a contingent event so momentous as the birth of a child. Ellis v.

Darden, 11 L. R. A. (Ga.), 51. Christian v. Carter, 193 N. C. 537, 137 S. E. 596.

Section Not Intended to Direct a Parent to Make Provision for Child.—This section is construed as not intending to control a parent as to the provision he should make for his child, but to apply when by inadvertence or mistake the after-born child has not been provided for. Unless the omission was intentional, or provision is made for the child, either under the will or some settlement or provision ultra, the after-born child takes his share, and the statute applies whether there was one or more children. Flanner v. Flanner, 160 N. C. 126, 75 S. E. 936.

"Without Making Any Provision" Construed.—The true meaning of the section has been held in Meares v. Meares, 26 N. C. 192, and King v. Davis, 91 N. C. at pp. 142, 147, to be that "without making any provision" is not intended to be construed to mean that there must be a gift of certain property or thing for the children, for that would be merely adopting the popular misconception of "cutting one off with a shilling," but that "without making any provision" means any arrangement or circumstances tending to show that the testator had these children in mind when the will was made and without any indication that it was his purpose to disinherit them. Thomason v. Julian, 133 N. C. 309, 310, 45 S. E. 636.

Express Exclusion of Children Tantamount to Making Provision.—A will expressly excluding the children of the testator born after the execution thereof "makes a provision for them" within the meaning of this section and such children do not share in the estate as though the testator had died intestate. Thompson v. Julian, 133 N. C. 309, 45 S. E. 636.

Inadequacy of Provision Immaterial.—If any provision is made for an after-born child, the court cannot say that it is inadequate. The statute only applies when no provision at all has been made. King v. Davis, 91 N. C. 142.

Knowledge of Testator as to Child En Ventre Sa Mere Immaterial.—The beneficent provisions of this section are not affected by the presumptive knowledge of the father, from the condition of his wife, that at the time he made the will he must have anticipated the birth, but upon the fact that the child was born thereafter. Christian v. Carter, 193 N. C. 537, 137 S. E. 596.

It is the subsequent birth, not the father's knowledge, which effects the partial revocation. Id.

Under Section 29-1 and This Section Child Will Inherit Land Subjected to Dower.—A child for whom no provision was made will, under the rule of descent, section 29-1, and under this section, inherit the real estate of which his father dies seized, subjected to the dower of the widow, his mother. Nicholson v. Nicholson, 190 N. C. 122, 129 S. E. 148.

Under this section where there is a devise to a wife "to do with as she thinks best for herself and the children," and a child is born two months after the testator's death, such child is not entitled to a share in the estate but is provided for as one of "the children" under the will in view of rule 7, § 29-1. Rowls v. Durham Realty, etc., Co., 189 N. C. 368, 127 S. E. 254.

Not Applicable to Adopted Children—Illegitimate Children.—This section applies only to natural born children of the testator, and does not apply to adopted children. Sorrell v. Sorrell, 193 N. C. 439, 137 S. E. 306. Illegitimate children subsequently adopted, however, fall within the class of natural children. King v. Davis, 91 N. C. 142.

Entire Will is Not Revoked.—While afterborn children not provided for in the will of their deceased parent may claim by inheritance their part of the estate, under this section, it does not amount to revocation of the entire will. Fawcett v. Fawcett, 191 N. C. 679, 132 S. E. 796.

Cited in Trust Co. v. Lenz, 196 N. C. 398, 145 S. E. 776; In re Wall's Will, 216 N. C. 805, 5 S. E. (2d) 837.

Division VII. Fiduciaries.

Chapter 32. Fiduciaries.

§ 32-1. Short title.—This chapter may be cited as the Uniform Fiduciaries Act. (1923, c. 85, s. 14; C. S. 1864(d).)

Editor's Note.—This and the following sections constitute the Uniform Fiduciaries Act which was recommended by the national conference of commissioners on uniform state laws in 1922.

The general purpose is to establish uniform and definite rules in place of divers and indefinite rules now prevailing as to constructive notice or breaches of fiduciary obligations, and to facilitate the performance by fiduciaries of their obligations, rather than to favor any particular class of persons dealing with them. In order to prevent occasional breaches of trusts, the courts have sometimes adopted rules which can nevertheless be evaded by dishonest fiduciaries but at the same time seriously hamper honest fiduciaries in the performance of their obligations. Hence the need for regulations overcoming these difficulties and establishing uniformity.

With this general purpose in mind the law is framed so that its application is restricted to the liabilities of the persons dealing with fiduciaries and does not deal with the liabilities of the fiduciaries themselves. It contemplates only situations where the persons dealing with a fiduciary know him to be such so that questions relating to actual or constructive notice of the existence of the trust or other fiduciary obligations are not within the scope of the act. It was suggested by the commissioners that fear that inadequate protection to beneficiaries will result is partially dissipated by the fact that the English courts have adopted similar rules which work well in practice.

It should be observed that in none of the situations dealt with in this act is the standard of due care or negligence made the test of liability. While the act recognizes that there are instances when the person dealing with the fiduciary should be held liable, it proceeds upon the theory that this is true only when acting with actual knowledge or in bad faith, and in such instances only does the person deal with a fiduciary at his own peril.

Same—Prior Law.—Under the law of this State prior to this statute, the law as to the various classes of fiduciaries has varied just a little but it was held very generally that where one accepted the assets of the estate held in trust by the fiduciary in payment of an individual debt, he was charged with notice and considered a party to the wrong, and thus a dealer at his peril. So it has been held that in equity (in the early cases the rule at law was otherwise) the executor or administrator can make no valid sale or pledge of the assets as a security for or in payment of his own debt on the principle that the transaction itself gives the purchaser or mortgagee notice of the misapplication. Powell v. Jones, 36 N. C. 337, 338; Bradshaw v. Simpson, 41 N. C. 243, 246. Although the purchaser in good faith at a sale was protected. Gray v. Armistead, 41 N. C. 74. But it was the rule with respect to trustees that the purchaser must put himself on the footing of having an equal equity with the cestui que trust, and this he cannot do if he has notice, actual or constructive, of the trust; for, as the trustee has no right to sell, the sale amounts to a breach of duty, in which the purchaser, of necessity, participates, without reference to the application of the fund. Gray v. Armistead, 41 N. C. 74, 78. And where a party unites with a trustee in a breach of trust, or there were circumstances to put him on guard and awaken suspicion, he was required to repay to the trust fund any of its assets which he received in consequence of the breach of trust. Dancy v. Duncan, 96 N. C. 111, 1 S. E. 455.

To make the purchaser of a legal title trustee for the cestui que trust, it was not necessary that he should have notice of the particular trust. It was sufficient if he had notice that the person, from whom he bought, was but a naked trustee. He ought to have inquired and searched out the cestui que trust. Maples v. Medlin, 5 N. C. 220.

So it was, of course, held that where a guardian transferred a note, payable to him as guardian, without indorsement, to one of his creditors as security for his own debt, and became insolvent, the assignee, though he paid a valuable consideration for the note, having had notice of the trust, was, at the suit of the ward, restrained from collecting the note. Lockhart v. Phillips, 36 N. C. 342.

And where a bond was, on its face, payable to a guardian for the benefit of his ward, this was prima facie notice to one, who took an assignment of it, that it was the property of the ward and subject to his equities. More especially was this the case, where the bond was taken in payment of the personal debt of the guardian, and where it was taken at an oppressive discount. Exum v. Bowden, 39 N. C. 281.

It was settled law, therefore, that when a person got from an administrator, or other person acting in a fiduciary capacity, the trust fund or any part of it as payment of the trustee's own debt, that person could not hold the fund from the cestui que trust any more than the original trustee could have done. Gray v. Armistead, 41 N. C. 74; Wilson v. Doster, 42 N. C. 231; Hendrick v. Gidney, 114 N. C. 543, 546, 19 S. E. 598.

The purchasers from fiduciaries who had no right to sell were not protected even though they had no actual or constructive knowledge of the trust, it would seem, because the purchase itself was presumed to make them parties to the wrong and charge them with notice. And even when the fiduciary had a right generally to sell, much less than actual or particular knowledge in detail was sufficient to convert a person, who co-operated with a dishonest trustee in an act amounting to a breach of trust, into a trustee. Constructive notice from the possession of the means of knowledge, had that effect, although the party was actually ignorant, but ignorant merely because he did not investigate. It was well settled, that if anything appeared to a party calculated to attract attention or stimulate inquiry, the person was affected with knowledge of all that the inquiry would have disclosed. Buning v. Ricks, 22 N. C. 130, 134.

From what has been said in this note, it is evident that the law in this State was materially modified, although in the instance of a person dealing with a fiduciary known to be violating his trust or in bad faith the rule is not changed.

§ 32-2. Definition of terms.—1. In this chapter unless the context or subject-matter otherwise requires:

"Bank" includes any person or association of persons, whether incorporated or not, carrying on the business of banking.

"Fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.

"Person" includes a corporation, partnership, or other association, or two or more persons having a joint or common interest.

"Principal" includes any person to whom a fiduciary as such owes an obligation.

2. A thing is done "in good faith" within the meaning of this chapter when it is in fact done

honestly, whether it be done negligently or not. (1923, c. 85, s. 1; C. S. 1864(e).)

Cross Reference.—As to what constitutes the business of banking, see § 53-1.

Origin of Definitions—"Bank."—The definition of "banks" contained in this section was taken from the Uniform Negotiable Instruments Act, section 25-1.

Same—"Persons".—The word "persons" as here defined is a combination of the definitions in the Negotiable Instruments Law, G. S. § 25-1, the Uniform Warehouse Receipt Act, G. S. § 27-2, the Uniform Stock Transfer Act, G. S. § 55-102, the Uniform Partnership Act, G. S. § 59-32, and section 76 of the Uniform Sales Act (which latter act has not been adopted in North Carolina).

Same—"Fiduciary" and "Principal."—The definitions of "fiduciary" and "principal" are both new with this act. However, it is well to observe that two classes of fiduciaries are contemplated: (1) Those holding property in their own name, and (2) those dealing with property which is held in the name of the principal. Different provisions are necessarily made in some of the following sections in regard to these two classes of fiduciaries.

Same—"Good Faith."—The definition of "good faith" is taken verbatim from section 76 of the Uniform Sales Act; the Uniform Warehouse Receipt Act, G. S. § 27-2; section 52 of the Uniform Bills of Lading Act; the Uniform Stock Transfer Act, G. S. § 55-102. "Good Faith" is not defined in the N. I. L. sections 25-1 et seq.

It will probably be of interest to point out that in the tentative draft of this section by the National Commissioners it ended with a definition of "bad faith" in the following language: "And a thing is done in the bad faith when it is in fact done dishonestly." This was omitted by a vote of the National Conference. The N. I. L. contains no definition of "bad faith."

The courts have held that the test of good faith is the subjective test of honesty, and not the objective test of due care. See Brannan's Neg. Inst. Laws, pp. 187 et seq.

§ 32-3. Application of payments made to fiduciaries.—A person who in good faith pays or transfers to a fiduciary any money or other property which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary; and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary. (1923, c. 85, s. 2; C. S. 1864(f).)

Editor's Note.—It was pointed out by the commissioners drafting this act in submitting it to the conference that it applies only when the fiduciaries are authorized to receive the property or money transferred. Under such circumstances it applies to all transfers and not to payments of money only. It also applies to all fiduciaries and not merely trustees.

This section is based upon statutes existing in England, Alabama, Colorado, Delaware, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Jersey, New York, North Dakota, Ohio, Rhode Island, South Dakota, and Wisconsin.

It was stated in 1 N. C. Law Rev. 291 that this section accords with the North Carolina decisions, Tyrrell v. Morris, 21 N. C. 559; Gray v. Armistead, 41 N. C. 74; Kadis v. Weil, 164 N. C. 84, 80 S. E. 229, unless a change results from the elimination by the definition of "fiduciary" in section 32-2 of certain distinctions hitherto recognized between some classes of fiduciaries. Exum v. Bowden, 39 N. C. 281; Gray v. Armistead, supra.

§ 32-4. Registration of transfer of securities held by fiduciaries.—If a fiduciary in whose name are registered any shares of stock, bonds or other securities of any corporation, public or private, or company or other association, or of any trust, transfers the same, such corporation or company or other association, or any of the managers of the trust, or its or their transfer agent, is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or to see to the performance of the fiduciary obligation, and is liable for registering such transfer only when registration of the transfer is made with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or with knowledge of such facts that the action in registering the transfer amounts to bad faith. (1923, c. 85, s. 3; C. S. 1864(g).)

Editor's Note.—This section is based upon a Massachusetts statute which was passed in 1918 and amended in 1926 relating to trustees. See Gen. Laws, ch. 203, section 21, Cum. St. ch. 203, section 21. There are similar statutes in Delaware (R. C. 1915, section 3396); Kentucky (St. 1909, section 4169); Pennsylvania (Purdon's Dig. 13 ed. 4850, section 7), and a very recent statute in Illinois.

This section applies only when the stock or securities are registered in the name of the fiduciary and has no application when it is in the name of the principal; nor where registered in the name of the decedent and the executor or administrator wishes to transfer it to his own name or that of a third person. It does not, therefore, interfere with the provisions of the inheritance tax laws.

In submitting this section, the framers called attention to the various practices with respect to the manner of registering stock on the corporation registers. It was pointed out that in England by statute no notice of the trust is registered upon the books of the corporation, that similar provisions are often made in charters, and in the United States provisions are made especially in instruments creating trusts. The commission also denounced the practice of trustees registering stock held in trust in their own names without disclosing the relation, or registering it in the name of the broker to facilitate the transfer.

In cases where it is desirable to make a transfer of securities more difficult in order to reduce the amount of the fiduciaries' bond, it may be done by giving notice to the corporation that the stock shall be transferable only upon proof of certain facts, or only upon an order of the court. After such notice the corporation would be liable if it should improperly register the transfer.

This section appears to change the rule of Baker v. Railroad, 173 N. C. 365, 92 S. E. 170, which required a corporation before registering a transfer of stock held in the name of a fiduciary as such, to inquire whether the fiduciary was committing a breach of trust in making the transfer. 1 N. C. Law Rev. 291.

§ 32-5. Transfer of negotiable instrument by fiduciary.—If any negotiable instrument payable or indorsed to a fiduciary as such is indorsed by a fiduciary, or if any negotiable instrument payable or indorsed to his principal is indorsed by a fiduciary empowered to indorse such instrument on behalf of his principal, the indorsee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in indorsing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is transferred by the fiduciary in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is transferred in any transaction known by the transferee to be for the personal benefit of the fiduciary, the creditor or other transferee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in transferring the instrument. (1923, c. 85, s. 4; C. S. 1864(h).)

Editor's Note.—This and the two following sections deal with paper drawn or indorsed by fiduciaries.

One of the primary purposes of this section is to bring the rule as to instruments negotiated by or to fiduciaries as to notice of a defect in harmony with the N. I. L., section 25-62. Notwithstanding that section 25-62 provides that, to constitute notice of an infirmity in an instrument or defect in the title of the person negotiating it, the person to whom it is negotiated must have had actual knowledge of the defect or infirmity or knowledge of such facts as to

make the taking amount to bad faith, the courts generally have ignored the N. I. L. and held that where the fiduciary relation is shown on its face, the payee or indorsee is bound to make inquiry. But if there is nothing upon the face of the instrument to indicate the relation one may be holder in due course whether negligent or not unless he acted in bad faith. So courts unconsciously substituted the objective test of negligence for the subjective test of the N. I. L. Thus it may be seen that instead of contradicting the N. I. L., these sections supplement it.

North Carolina has followed the uniform application of the N. I. L. See Smathers v. Toxaway Hotel Co., 162 N. C. 346, 78 S. E. 224; 167 N. C. 469, 83 S. E. 844; Setzer v. Deal, 135 N. C. 428, 47 S. E. 466; Ford v. Brown, 114 Tenn. 467, 88 S. W. 1036. And see 1 N. C. L. Rev. 291.

It is worth noting that these sections cover two situations requiring different rules. (1) Where the instrument is given in a transaction not known by the taker to be for the personal benefit of the fiduciary. Under such circumstances the taker is not bound to inquire but the transaction is presumed to be proper and is rebutted only by proof of actual knowledge that it is improper, or proof of bad faith. Under the last two circumstances the taker is liable in either case. To illustrate, if the taker suspects that the fiduciary's action is improper but refrains from investigating, he acts at his own peril. The test should be that of subjective test of bad faith and not that of objective test of negligence. (2) The next situation is where the taker knows the instrument to be given for the personal benefit of the fiduciary. Distinction is made between (a) cases where the instrument is made payable to the principal, or to the fiduciary in his representative capacity, and as such is indorsed in payment of or as security for a personal debt of the fiduciary [this is the case covered by this section]; (b) where the instrument is made or drawn by the fiduciary as such, payable to the personal creditors of the fiduciary, and delivered to such creditors in payment of or as security for the personal debt of the fiduciary on the one hand [this is the situation covered by section 32-6], and (c) cases where the instrument is drawn by the fiduciary on behalf of the principal payable to the fiduciary personally, or by the fiduciary as such to himself personally, and by the fiduciary indorsed to his personal debtor in payment of his personal debt [this is the situation covered by section 32-7]. In (a) and (b) there is strong presumption of improper action, but in (c) it is plausible that the instrument was given to the fiduciary in payment of a just debt owed by the principal, such as salary, commission, reimbursement for expenses, dividends or the like. Therefore in (c) the person taking the instrument in payment is liable only in case he had actual knowledge of the improper action, but in (a) and (b) he is liable unless the fiduciary in fact acted properly. See the discussion in 34 Harv. Law Rev. 454, note 25.

The language of these sections as to bad faith is made to conform to the similar language of bad faith in the N. I. L.

§ 32-6. Check drawn by fiduciary payable to third person.—If a check or other bill of exchange is drawn by a fiduciary as such, or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in drawing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument. (1923, c. 85, s. 5; C. S. 1864(i).)

Editor's Note.—See note under section 32-5.

Evidence Sufficient for Jury.—Admissions by defendant that it entered into contracts for the sale of certain lands to an individual and that in payment of the sum due upon the execution of the contracts it accepted checks drawn on the funds of a corporation by the individual as president of the corporation, together with evidence that the individual had no authority to so use the corporate funds, that the corporation was not indebted to him, and that the transaction was not made for the corporation, was sufficient to be submitted to the jury in an action by the receiver of the corporation under the provision of this section. LaVecchia v. North Carolina Joint Stock Land Bank, 218 N. C. 35, 9 S. E. (2d) 489.

Judgment on the Pleadings.—Allegations of defendant's acceptance of a corporate check in payment of individual obligation of the president does not entitle the plaintiff to judgment on the pleadings. LaVecchia v. North Carolina Joint Stock Land Bank, 216 N. C. 28, 3 S. E. (2d) 276.

§ 32-7. Check drawn by and payable to fiduciary.—If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, payable to the fiduciary personally, or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary, whether in payment of a personal debt of the fiduciary or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowlege of such breach or with knowlege of such facts that his action in taking the instrument amounts to bad faith. (1923, c. 85, s. 6; C. S. 1864(j).)

Editor's Note.—See note under section 32-5.

§ 32-8. Deposit in name of fiduciary as such.—If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which such deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith.

If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check. (1923, c. 85, s. 7; C. S. 1864(k).)

Cross Reference.—As to deposits made in trust for infants, see § 53-59.

Editor's Note.—This and the three following sections deal with depositories of the funds of fiduciaries.

The purpose of these sections is to lay down uniform rules making banks acting solely as depositories liable only when they have actual knowledge of the fiduciary's breach of duty or when acting in bad faith. Where the bank acts as creditor, however, it is made liable to the same extent as other creditors.

The weight of authority has been to the effect that depositories are not bound to inquire into the fiduciary's authority to make deposits even though made as the fiduciary's personal account. Nor have depositories as a general rule been required to inquire into the purpose for which withdrawals have been made, whether payable to the fiduciary personally or as fiduciary, or to third persons. But a depository has been bound to make inquiry where the fiduciary pays a personal debt out of fiduciary funds deposited in the bank.

This and the two following sections are in accord with the tendency of the North Carolina decisions as indicated in Bank v. Clapp, 76 N. C. 482; Bank v. Insurance Co., 150 N. C. 770, 774, 64 S. E. 902; Miller v. Bank, 176 N. C. 152, 96 S. E. 977. They are also in accord with the general weight of authority. U. S. Fidelity, etc., Co. v. Bank, 77 W. Va. 665, 88 S. E. 109; Duckett v. Natl. Mechanics Bank, 86 Md. 400, 38 Atl. 983. See also 1 N. C. Law Rev. 291.

§ 32-9. Deposit in name of principal. — If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check. (1923, c. 85, s. 8; C. S. 1864(l).)

Editor's Note.—See note under section 32-8.

§ 32-10. Deposit in fiduciary's personal account. —If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary or of checks payable to him as fiduciary or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, or checks payable to his principal and indorsed by him, if he is empowered to indorse such checks, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith. (1923, c. 85, s. 9; C. S. 1864(m).)

Editor's Note.—See note under section 32-8.

§ 32-11. Deposit in names of two or more trustees.—When a deposit is made in a bank in the name of two or more persons as trustees and a check is drawn upon the trust account by any trustee or trustees authorized by the other trustee or trustees to draw checks upon the trust account, neither the payee nor other holder nor the bank is bound to inquire whether it is a breach of trust to authorize such trustee or trustees to draw checks upon the trust account, and is not liable unless the circumstances be such that the action of the payee or other holder or the bank amounts to bad faith. (1923, c. 85, s. 10; C. S. 1864(n).)

Cross Reference.—See note under § 32-8.

Editor's Note.—This section is limited in its application to trustees. It is a general rule that one trustee cannot bind his cotrustee unless authorized by him to do so, and that a trustee can delegate only such of his duties as are ministerial. It is questionable whether or not the drawing of a check is a ministerial duty as a general rule. Probably as to the principal it is, but not as to income. But be that as it may, neither the bank nor payees or other holders are put upon inquiry as to the authority.

This section applies only to trustees and not to other classes of fiduciaries, and its application is limited to checks, according to the opinion of the drafters.

See 1 N. C. L. Rev. 292, to the same effect.

§ 32-12. Cases not provided for in chapter.— In any case not provided for in this chapter the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments and banking, shall continue to apply. (1923, c. 85, s. 12; C. S. 1864(p).)

§ 32-13. Uniformity of interpretation. — This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1923, c. 85, s. 13; C. S. 1864(q).)

Chapter 33. Guardian and Ward.

Art. 1. Creation and Termination of Guardianship.

Art. 2. Guardian's Bond.

Art. 3. Powers and Duties of Guardian.

Art. 1. Creation and Termination of Guardianship.

§ 33-1. Jurisdiction in clerk of superior court.—The clerks of the superior court within their respective counties have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, idiots, lunatics, inebriates, and inmates of the Caswell training school: Provided, that guardians shall be appointed by the clerks of the superior courts in the counties in which the infants, idiots, lunatics, or inebriates reside, unless the guardians be the next of kin of such incompetents or a person designated by such next of kin in writing filed with the clerk, in which case, guardians may be appointed by the clerk of the superior court in any county in which is located a substantial part of the estates belonging to such incompetents. (Rev., s. 1766; Code, s. 1566; R. C., c. 54, s. 2; 1762, c. 69, ss. 5, 7; 1868-9, c. 201, s. 4; 1917, c. 41, s. 1; 1935, c. 467; C. S. 2150.)

Cross Reference.—As to guardianship of insane persons, see § 35-2 et seq.

Editor's Note.—The amendment of 1935 added the proviso at the end of this section.

In General.—The powers which the court of equity formerly had and exercised in regard to orphans and their estates are now conferred upon the clerk of the superior court by this section and section 33-6. Duffy v. Williams, 133 N. C. 195, 197, 45 S. E. 548.

Place of Appointment.—The domicile of an infant is universally held to be the fittest place for the appointment of a guardian of his person and estate, although, for the protection of either, a guardian may be appointed in any state where the person or any property of the infant may be found. Clarke v. Clarke, 178 U. S. 186, 193, 20 S. Ct. 873, 44 L. Ed. 1028.

Under this section the appointment of a guardian in a county other than the one in which the ward's surviving parent resides or the ward's estate is situate is void. Duke v. Johnston, 211 N. C. 171, 189 S. E. 504.

Appointment by Legislature.—An act of the Legislature authorizing a certain person "to act as guardian" of another without giving bond, is constitutional, and is in itself an appointment without intervention of the clerk. Henderson v. Bowd, 116 N. C. 795, 21 S. E. 692.

Matter of Discretion.—The appointment of a guardian is a matter of discretion, the exercise of which cannot be reviewable by the Supreme Court. Battle v. Vick, 15 N. C. 294.

Same—Choice of Infant.—The court in appointing a guardian was not bound by the choice of the minor, but could appoint the person, who, in his discretion, would best perform the duty. Wynne v. Always, 5 N. C. 38; Grant v. Whitaker, 5 N. C. 231.

Person Related to Ward.—Courts are empowered to appoint as guardian such person as they may think proper, without regard to the kinship of the guardian to the ward. Mills v. McAllister, 2 N. C. 303.

Custody of Child.—The jurisdiction of clerks of the superior court in the appointment of guardians of infants, etc., does not extend to a case where the petitioner asks for the custody of a child who had been placed by its mother under the control of another. In re Lewis, 88 N. C. 31.

Removal of Guardian.—A ward may not bring an action in the Superior Court by her next friend to remove her guardian appointed by the clerk under this section. Moses v. Moses, 204 N. C. 657, 169 S. E. 273.

§ 33-2. Appointment by parents; effect; powers and duties of guardian.—Any father, though he be a minor, may, by deed executed in his lifetime and with the written consent and privy examination of the mother, if she be living, or by his last will and testament in writing, if the mother be dead, dispose of the custody and tuition of any of his infant children, being unmarried, and

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

Cross References.—As to habeas corpus for custody of children, see §§ 17-39 and 17-40. As to adoption of children, see § 48-1 et seq.

Editor's Note.—In the second sentence of this section the words "or has willfully abandoned his wife" were added by Public Laws, Ex. Sess. 1920, ch. 21. The 1941 amendment added the proviso.

For comment on the 1941 amendment, see 19 N. C. L. Rev. 480.

Rights of Both Parents Recognized.—In this section and in others, the Legislature has recognized the human as well as the relation between parent and child, the paramount and the subordinate, the present and the inchoate, rights of the father and the mother, and has wisely provided that both the parents shall have adequate opportunity to be heard and, except in rare cases, shall give their consent before the legal relation is severed or the domestic circle is broken. Truelove v. Parker, 191 N. C. 430, 436, 132 S. E. 295.

Persons Entitled to Custody.—The father is, in the first instance, entitled to the custody of his children. In re Lewis, 88 N. C. 31. Newsome v. Bunch, 144 N. C. 15, 56 S. E. 509. See also, In re Turner, 151 N. C. 474, 66 S. E. 431.

And this right is superior to the claims of every one, except those to whom he may have committed their custody and tuition by deed, or unless he is found to be unfitted for their care and custody. Latham v. Ellis, 116 N. C. 30, 20 S. E. 1012.

The parents have, prima facie, the right to the custody and control of their infant children as a natural and substantive right not lightly to be denied or interfered with by action of the courts; but this right is not universal and absolute, and may be modified and disregarded by the court when it is made to appear that the welfare of the children clearly requires it. Brickell v. Hines, 179 N. C. 254, 102 S. E. 309; In re Warren, 178 N. C. 43, 100 S. E. 76; Atkinson v. Downing, 175 N. C. 244, 95 S. E. 487; In re Means, 176 N. C. 307, 97 S. E. 39; State v. Burnett, 179 N. C. 735, 102 S. E. 711.

Father Should Not Be Regarded as Wrongdoer When He Acts in Good Faith with Child's Money.—Since under this section the father is natural guardian for his minor children he should not be regarded as a trespasser or a wrongdoer when he acts in good faith with his child's money and makes purchases for its benefit. Lifsey v. Bullock, 11 F. Supp. 728.

Appointment by Deed or Will.—A father can not appoint a guardian for his children, nor impose on any one the duties and obligations of that office, except, pursuant to this section, "by deed executed in his life time, or by his last will and testament, in writing." Peyton v. Smith, 22 N. C. 325.

No one has a right to the guardianship of an infant, except as testamentary guardian or as appointed by the father by deed or by the court. Long v. Rhymes, 6 N. C. 122.

Same—Interpretation.—Where it can clearly be collected from the will of a father that certain persons are thereby appointed to have the custody of the persons and the estate of his children, until they arrive at age, such an appointment will be held to constitute them guardians, as though the appropriate term had been used. Peyton v. Smith, 22 N. C. 325.

Applies Only to Own Children.—A testator cannot appoint a testamentary guardian except to his own children. Camp v. Pittman, 90 N. C. 615.

Same—Grandchildren.—This section, allowing a father to appoint a guardian by deed or will to his children, does not authorize a grandfather so to appoint a guardian for his grandchildren. Williamson v. Jordan, 45 N. C. 46.

§ 33-3. Mother's guardianship on death of father.—In case of the death of the father of an infant, the mother of such child surviving such father shall immediately become the natural guardian of such child to the same extent and in the same manner, plight and condition as the father would be if living; and the mother in such case shall have all the powers, rights and privileges, and be subject to all the duties and obligations of a natural guardian. But this shall not be construed as abridging the powers of the courts over minors and their estates and over the appointment of guardians. (Rev., s. 1765; Code, s. 1565; 1883, c. 364; C. S. 2152.)

Mother Entitled to Custody.—If a child's mother is a suitable person she is entitled to its custody even though some other person may be more suitable. Ashby v. Page, 106 N. C. 328, 11 S. E. 283, citing Mitchell v. Mitchell, 67 N. C. 307.

Same—Cannot Dispose of Child.—It may be questioned, whether in this State a mother can make a disposition of her child, though a minor, so as to confer upon another the right to have the custody and control thereof. In re Lewis, 88 N. C. 31, 33.

§ 33-4. Appointment on divorce of parents.—When parents are divorced and a child is entitled to any estate, the court granting the divorce must certify that fact to the clerk of the superior court, to the end that he may appoint a fit and proper person to take the care and management of such estate, whose powers and duties shall be the same in all respects as other guardians, except that a guardian so appointed shall not have any authority over the person of such child, unless the guardian be the father or mother. (Rev., s. 1770; Code, s. 1571; R. C., c. 54, s. 4; 1838, c. 16; 1868-9, c. 201, s. 9; C. S. 2153.)

Cross Reference.—As to custody of children generally in case of divorce, see § 50-13.

§ 33-5. Appointment when father living.—The clerk of the superior court may appoint a guardian of the estate of any minor, although the father of such minor be living. And the guardian so appointed shall be governed in all respects by the laws relative to guardians of the estate in other cases, but shall have no authority over the person of such minor. (Rev., s. 1771; Code, s. 1572; R. C., c. 54, ss. 4, 7; 1806, c. 707; 1868-9, c. 201, s. 10; C. S. 2154.)

Cross Reference.—As to appointment of guardian when welfare of child within jurisdiction of juvenile court is thereby promoted, see § 110-37.

§ 33-6. Separate appointment for person and estate; yearly support specified; payments allowed in accounting.—Instead of granting general guardianship to one person, the clerk of the superior court may commit the tuition and custody of the person to one and the charge of his estate to another, whenever at any time during minority, inebriety, idiocy or lunacy, it appears most conducive to the proper care of the orphan's, inebriate's, idiot's, or lunatic's estate, and to his suitable maintenance, nurture and education. In such cases the clerk must order what yearly sums

of money or other provisions shall be allowed for the support and education of the orphan, or for the maintenance of the idiot, lunatic or inebriate, and must prescribe the time and manner of paying the same; but such allowance may, upon application and satisfactory proof made, be reduced or enlarged, or otherwise modified, as the ward's condition in life and the kind and value of his estate may require. All payments made by the guardian of the estate to the tutor of the person, according to any such order, shall be deemed just disbursements and be allowed in the settlement of his accounts; but for the payment thereof by the one and the receipt thereof by the other merely, no commissions shall be allowed to either, though commissions may be allowed to the tutor of the person on his disbursements only. (Rev., ss. 1767, 1768, 1769; Code, ss. 1567, 1568, 1569; R. C., c. 54, s. 3; 1840, c. 31; 1868-9, c. 201, ss. 6, 7; C. S. 2155.)

Cross References.—As to expenses and disbursements credited to guardian, see § 33-42. As to commissions, see § 33-43.

§ 33-7. Proceedings on application for guardianship.—On application to any clerk of the superior court for the custody and guardianship of any infant, idiot, inebriate, lunatic, or inmate of the Caswell training school, it is the duty of such clerk to inform himself of the circumstances of the case on the oath of the applicant, or of any other person, and if none of the relatives of the infant, idiot, inebriate, lunatic, or inmate of the Caswell training school are present at such application, the clerk must assign, or for any other good cause he may assign, a day for the hearing; and he shall thereupon direct notice thereof to be given to such of the relatives and to such other persons, if any, as he may deem it proper to notify. On the hearing he shall ascertain, on oath, the amount of the property, real and personal, of the infant, idiot, inebriate, lunatic, or inmate of the Caswell training school, and the value of the rents and profits of the real estate, and he may grant or refuse the application, or commit the guardianship to some other person, as he may think best for the interest of the infant, idiot, inebriate, lunatic, or inmate of the Caswell training school. (Rev., s. 1772; Code, s 1620; C. C. P., s. 474; 1917, c. 41, s. 2; C. S. 2156.)

In General.—When a guardian is appointed he must assert his right to the custody of his ward by a civil action against the persons in charge of him, while they in turn, if so advised, can take appropriate steps to set aside the guardianship. In re Parker, 144 N. C. 170, 172, 56 S. E. 878.

Habeas Corpus Not Proper.—Except as between parents, under section 17-39, the right of the custody of a child cannot be determined under the writ of habeas corpus, the object of that writ is to remove an illegal restraint. In re Parker, 144 N. C. 170, 56 S. E. 878.

Application Should Be in Writing.—The interests of minors are under the care of the court, and to the end that the same may be protected in suits brought by or against them, the court should see that the next friend or guardian ad litem be appointed upon due consideration of an application in writing, and not upon a simple suggestion. Morris v. Gentry, 89 N. C. 248, 249.

Effect of Failure of Notice.—Failure to notify the relative in custody of the child of proceedings to appoint a guardian is an irregularity, under this section, which does not render the appointment of the guardian void, though it is not conclusive upon such relative. In re Parker, 144 N. C. 170, 56 S. E. 878.

While the failure to notify the relatives of an alleged incompetent of the hearing to determine her competency is an irregularity, such irregularity does not render the appointment of a guardian in the proceedings void, but gives the relatives an opportunity to attack such appointment, and where, upon such attack, the court finds upon supporting evidence that the guardian appointed is a fit and suitable person, the relatives are not entitled to the removal of the guardian. In re Barker, 210 N. C. 617, 188 S. E. 205.

§ 33-8. Letters of guardianship.—The clerk of the superior court must issue to every guardian appointed by him a letter of appointment, which shall be signed by him and sealed with the seal of his office. (Rev., s. 1773; Code, s. 1621; C. C. P., c. 475; C. S. 2157.)

The appointment of a guardian can be shown only by the records in the office of the clerk of the Superior Court by whom the appointment was made, or by letters of appointment issued by the clerk as required by this section, and parol evidence tending to show appointment is incompetent. Buncombe County v. Cain, 210 N. C. 766, 188 S. E. 399.

§ 33-9. Removal by clerk.—The clerks of the superior court have power, on information or complaint made, at all times to remove guardians and appoint successors, to make and establish rules for the better ordering, managing and securing infants' estates, and for the better education and maintenance of wards; and it is their duty to do so in the following cases:

1. Where the guardian wastes or converts the money or estate of the ward to his own use.

2. Where the guardian in any manner mismanages the estate.

3. Where the guardian neglects to educate or maintain the ward in a manner suitable to his or her degree.

4. Where the guardian is legally disqualified to act as a person would be to be appointed administrator.

5. Where the guardian or his sureties are likely to become insolvent or nonresidents of the state. (Rev., s. 1774; Code, s. 1583; R. C., c. 54, ss. 2, 13; 1762, c. 69; 1868-9, c. 201, s. 20; C. C. P., ss. 470, 476; C. S. 2158.)

Cross References.—As to disqualifications to act as administrator, see § 28-8. As to removal of an administrator, see § 28-32. As to criminal liability for embezzlement, see § 14-90. As to guardian removing from state without appointing process agent, see § 28-187.

Discretion of Clerk.—The choosing of a guardian by orphans in court does not necessarily destroy the authority of the first guardian, especially without notice and some evidence of his abusing the trust reposed in him. But the court may at any time remove a guardian, upon proper cause shown, and in the appointment of a successor has entire discretion. Bray v. Brumsey, 5 N. C. 227.

Removal without Cause Error.—An order by a superior court clerk in a cause pending before him for the removal of a testamentary guardian, where none of the provisions of this section are alleged nor found as a fact by the clerk, is improperly made, and will be set aside upon proceedings properly instituted to that end. Sanderson v. Sanderson, 79 N. C. 369.

Personal Use of Ward's Funds.—The use by a guardian of the funds of his ward for his own use is sufficient to warrant his removal. Ury v. Brown, 129 N. C. 270, 40 S. E. 4.

Funds in Jeopardy.—A testamentary guardian ought not to be removed without a showing of such waste, insolvency, or misconduct that the ward will be unable to recover the balance due on the final settlement. Sanderson v. Sanderson, 79 N. C. 369.

A ward may not bring an action in the Superior Court by her next friend to remove her guardian and appoint another, the Superior Court in such instance being without jurisdiction. Moses v. Moses, 204 N. C. 657, 169 S. E. 273.

Removal beyond State.—Where a guardian to an infant, appointed by a county court in this State, removed to another state, taking with him a part of the property of the infant, the court which made the appointment had the right to remove him without notice, and appoint another in his place. Cooke v. Beale, 33 N. C. 36.

§ 33-10. Interlocutory orders on revocation.—In all cases where the letters of a guardian are revoked, the clerk of the superior court may, from time to time, pending any controversy in respect

to such removal, make such interlocutory orders and decrees as will tend to the better securing the estate of the ward, or other party seeking relief by such revocation. (Rev., s. 1775; Code, s. 1607; 1868-9, c. 201, s. 44; C. S. 2159.)

§ 33-11. Resignation; effect; accounting on resignation.—Any guardian wishing to resign his trust may apply in writing to the superior court, setting forth the circumstances of his case. If, at the time of making the application, he also exhibits his final account for settlement, and if the clerk of the superior court is satisfied that the guardian has been faithful and has truly accounted, and if a competent person can be procured to succeed in the guardianship, or the clerk of the superior court may be appointed receiver of the estate of the ward, and if so appointed the clerk of the superior court may accept the resignation of the guardian and discharge him from the trust. But the guardian so discharged and his sureties are still liable in relation to all matters connected with the trust before the resignation. (Rev., s. 1776; Code, s. 1608; 1868-9, c. 201, s. 45; 1921, c. 95; C. S. 2160.)

Cross References.—See also, § 36-9 et seq. As to appeal from the clerk's decision, see §§ 36-13 and 36-14. As to final account by the resigning guardian, see §§ 33-41 and 36-15. As to effective date of resignation, see § 36-16. As to appointment of a successor, see § 36-17.

Editor's Note.—In the second sentence of this section the words "or the clerk of the superior court may be appointed receiver of the estate of the ward and if so appointed" were added by Public Laws, 1921, ch. 95.

Liability Continues.—Where permission is given to a guardian by the judge of probate to file an ex-parte final account and turn over his guardianship to another, he is not thereby discharged from liabilities connected with his trust and arising before such resignation. He is still bound to account with the ward, or the succeeding guardian, when so required. Luton v. Wilcox, 83 N. C. 21.

Art. 2. Guardian's Bond.

§ 33-12. Bond to be given before receiving property.—No guardian appointed for an infant, idiot, lunatic, insane person or inebriate, shall be permitted to receive property of the infant, idiot, lunatic, insane person or inebriate until he shall have given sufficient security, approved by a judge, or the court, to account for and apply the same under the direction of the court. (Rev., s. 1777, Code, s. 1573; C. C. P., s. 355; C. S. 2161.)

Cross References.—As to giving bond in surety company, see § 109-17. As to giving a mortgage in lieu of bond, see § 109-24 et seq. As to terms and conditions of bond, see § 33-31. As to corporation acting as guardian without giving bond, see §§ 58-113 and 58-114.

Presumption of Giving of Bond.—When the fact that a guardian was appointed is admitted, a presumption arises that a guardian bond was given, since such a bond is a prerequisite to the appointment. Kello v. Maget, 18 N. C. 414.

Same—No Denial Permissible.—Where there is evidence that one had been appointed and had acted as guardian, neither he nor his administrators can deny that he was guardian on the ground that he had not given bond. Latham v. Wilcox, 99 N. C. 367, 6 S. E. 711.

Omission by the clerk to take the bond required on the appointment of a guardian does not destroy the efficacy of the appointment. Howerton v. Sexton, 104 N. C. 75, 10 S. E. 148, cited in note in 33 L. R. A., N. S., 762.

Liability. — A guardian and his bondsmen are liable for all moneys due his wards which he has collected or ought to have collected. Loftin v. Cobb, 126 N. C. 58, 35 S. E. 230.

Same—Guardian's Administrator Appointed.—Where the administrator of a former guardian himself becomes guardian, he and his guardian bondsmen become liable for any balance due from the solvent estate of the former guardian. Loftin v. Cobb, 126 N. C. 58, 35 S. E. 230.

Necessary Parties to Action on Bond.—Where an assistant clerk of the Superior Court has been appointed guardian of the estate of a minor by the clerk and has given bond and has defaulted, causing loss to the estate of the minor, upon the minor's coming of age he and the new guardian appointed may sue upon the guardianship bond and where he does so neither the clerk of the Superior Court nor his sureties on his bond is a necessary party, so far as his action is concerned. Phipps v. Royal Indemnity Co., 201 N. C. 561, 161 S. E. 69.

§ 33-13. Terms and conditions of bond; increased on sale of realty. — Every guardian of the estate, before letters of appointment are issued to him, must give a bond payable to the state, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the superior court, and to be jointly and severally bound. Where such bond is executed by personal sureties the penalty in such bond must be double, at least, the value of all personal property and the rents and profits issuing from the real estate of the ward, which value is to be ascertained by the clerk of the superior court by the examination, on oath, of the applicant for guardianship, or any other person, but where such bond shall be executed by a duly authorized surety company, the penalty in such bond may be fixed at not less than one and one-fourth times the value of all personal property and the rents and profits issuing from the real estate of the ward. Provided, however, the clerk of the superior court may accept bond in estates, where the value of all personal property and rents and profits from real estate exceeds the sum of one hundred thousand dollars, in a sum equal to the value of all the personal property and rents and profits from real estate, plus ten per cent of the value of all the personal property and rents and profits from real estate belonging to the estate. The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge touching the guardianship of the estate committed to him. If, on application by the guardian, the court or judge shall decree a sale for any of the causes prescribed by law of the property of such infant, idiot, lunatic or insane person, before such sale be confirmed, the guardian shall be required to file a bond as now required in double the amount of the real property so sold, except where such bond is executed by a duly authorized surety company, in which case the penalty of said bond need not exceed one and one-fourth times the amount of said real property so sold. (Rev., ss. 323, 1778; Code, s. 1574; R. C., c. 54, s. 5; 1762, c. 69, s. 7; 1825, c. 1285, s. 2; 1833, c. 17; 1868-9, c. 201, s. 11; 1874-5, c. 214; 1925, c. 131; 1935, c. 385; C. S. 2162.)

Local Modification.—Craven: 1935, c. 147.

Cross References.—As to statute of limitations on the bond, see §§ 1-50 and 1-52. As to renewal of bond, see § 33-16. As to action on bond, see § 33-14 and notes. As to reduction of guardian's bond upon his delivery of registered securities to the clerk of court, see § 36-4. As to liability of clerk for taking insufficient bond, see § 33-18.

Editor's Note.—The proviso in regard to bonds where the value of all personal property and rents and profits exceeds one hundred thousand dollars was added by Public Laws 1925, c. 131.

Chapter 385 of the Public Laws of 1935 changed the penalty as specified in the second sentence in this section and added the exception appearing at the end of the section relating to cases where bond is executed by surety company.

This section contemplates that the bond shall be signed and acknowledged by the guardian as principal, as well as by the sureties. Cheshire v. Howard, 207 N. C. 566, 571, 178 S. E. 348.

Not Strictly a Record.—A guardian's bond is not strictly

a record of the court, although the fact that it was made and accepted may be. An action may therefore be brought on the bond after its loss or destruction, without any previous application to the court to restore it as a record. Harrell v. Hare, 70 N. C. 658, 660.

Failure to Insert Penalty.—A guardian's bond is not binding on the sureties thereto where it did not state the amount of the penalty at the time it was signed, and they did not afterwards authorize any one to insert the amount. Rollins v. Ebbs, 137 N. C. 355, 49 S. E. 341.

Failure to Collect Money.—Where a guardian ought to receive a certain amount of money and does not, but takes something else, his own bond for instance, in place of the money, he and his sureties are liable. Avent v. Womack, 72 N. C. 397.

Bank Intermingling Trust Funds.—The bank, as guardian, in not investing the funds of its ward, but intermingling it with other funds of its bank, was faithless to the trust reposed in it; and, under the terms of this section, its bondsman must suffer the loss for such faithlessness. Roebuck v. National Surety Co., 200 N. C. 196, 202, 156 S. E. 531.

Responsible for Laches.—A guardian is responsible on his bond for any loss resulting from his laches in failing to sue. Cross v. Craven, 120 N. C. 331, 333, 26 S. E. 940.

Limit of Liability.—The guardian's bond is not responsible in any way for the realty beyond the rents and profits. Cross v. Craven, 120 N. C. 331, 333, 26 S. E. 940.

Same—Sureties Not Responsible.—The sureties on a guardian's bond are not responsible for the nonpayment of a note given by the guardian, and signed by him as guardian, for the board and tuition of his ward. McKinnon v. McKinnon, 81 N. C. 201.

Cited in Pierce v. Pierce, 197 N. C. 348, 349, 148 S. E. 438.

§ 33-14. To be recorded in clerk's office; action on bond.—The bond so taken shall be recorded in the office of the clerk of the superior court appointing the guardian; and any person injured by a breach of the condition thereof may prosecute a suit thereon, as in other actions. (Rev., s. 1779; Code, s. 1575; R. C., c. 54, s. 5; 1868-9, c. 201, s. 12; C. S. 2163.)

Acceptance without Guardian's Signature Is Irregularity.—The acceptance and approval of the bond by the clerk of the Superior Court without the signature of the guardian as principal is an irregularity, but such irregularity does not render the bond void either as to the principal or as to his sureties. Cheshire v. Howard, 207 N. C. 566, 571, 178 S. E. 348.

Jurisdiction.—The clerk has no jurisdiction of a suit on a guardian's bond. Such suit must be brought in the superior court. Rowland v. Thompson, 65 N. C. 110.

In Name of State.—An action on a guardian's bond should be in the name of the State, for the benefit of the plaintiff, and not in the name of the plaintiff. Carmichael v. Moore, 88 N. C. 29; Williams v. McNair, 98 N. C. 332, 4 S. E. 131, 133; Norman v. Walker, 101 N. C. 24, 25, 7 S. E. 468.

Proper Relator.—Under the old system, a trustee appointed by the court of equity was a proper relator in an action on a guardian's bond to recover a trust fund. Jones v. Brown, 67 N. C. 475, distinguishing State v. Lightfoot, 24 N. C. 306; Governor v. Deaver, 25 N. C. 56; Waugh v. Miller, 33 N. C. 235.

The share of an infant in an estate in the hands of his guardian is capable of being assigned; and, when so assigned, the assignee, and not the infant, is the proper relator in an action on the guardian's bond. Petty v. Rousseau, 94 N. C. 355.

A creditor of a guardian is not the proper relator in an action upon the guardian's bond. McKinnon v. McKinnon, 81 N. C. 201.

Condition Set Out.—In an action on a guardian's bond, it is necessary that conditions of the bond which are alleged to have been broken should be set forth in the complaint. McKinnon v. McKinnon, 81 N. C. 201.

Evidence.—Evidence of a balance in the hands of a guardian as shown of his annual account was admissible against a surety under the Laws of 1884. Loftin v. Cobb, 126 N. C. 58, 35 S. E. 230.

Same—Bond Must Be Proved.—A guardian's bond is not a record, and, before it can be read in evidence in any case, it must be proved like all other bonds. Butler v. Durham, 38 N. C. 589.

Defenses.—The same defense which might be made to an action at law or suit in equity, brought in the name of the ward himself against the guardian, is good in an action brought on the guardian's bond. Clark v. Cordon, 30 N. C. 179.

Same—Prior Settlement. — A full settlement of a suit brought by a ward on a guardian's bond, made after the ward becomes of age, in the presence of the ward's mother, and by the advice of her counsel, and a final judgment thereon, is a bar to a subsequent action on the bond. Dean v. Ragsdale, 80 N. C. 215.

Same—Statute of Limitations.—An action by the ward against the sureties on the bond of the guardian is barred after three years from the time the ward becomes twenty-one years old if the guardian makes no final settlement, and within six years if the guardian makes a final settlement. Self v. Shugart, 135 N. C. 185, 47 S. E. 484. See dissenting opinion.

Amount of Recovery.—In an action upon a guardian's bond the recovery against either the principal or the surety can not exceed the penalty thereof, but should be for the penal sum of the bond, and to be discharged on payment of the damages sustained. Anthony v. Estes, 101 N. C. 541, 8 S. E. 347.

Same—Measure of Damages.—The measure of damages in an action upon a guardian's bond for a failure to perform any duty required of him is the amount of the principal received, with compound interest at six per cent until the ward arrives at full age. Topping v. Windley, 99 N. C. 4, 5 S. E. 14.

§ 33-15. Where several wards with estate in common, one bond sufficient. — When the same person is appointed guardian to two or more minors, idiots, lunatics or insane persons possessed of one estate in common, the clerk of the superior court may take one bond only in such case, upon which each of the minors or persons for whose benefit the bond is given, or their heirs or personal representatives, may have a separate action. (Rev., s. 1780; Code, s. 1576; R. C., c. 54, s. 8; 1822, c. 1161; 1868-9, c. 201, s. 13; C. S. 2164.)

§ 33-16. Renewal of bond every three years; enforcing renewal. — Every guardian shall renew his bond before the clerk of the superior court every three years, during the continuance of the guardianship. The clerk of the superior court shall issue a citation against every guardian failing to renew his bond, requiring such guardian to renew his bond within twenty days after service of the citation; and on return of the citation duly served and failure of the guardian to comply therewith, the clerk shall remove him and appoint a successor: Provided, that this section shall not apply to a guardian whose bond is executed by a duly authorized surety company. (Rev., ss. 324, 1781, 1782; Code, ss. 1581, 1582; R. C., c. 54, s. 10; 1762, c. 69, s. 15; 1868-9, c. 201, ss. 18, 19; 1943, c. 167; C. S. 2165.)

Editor's Note.—The 1943 amendment added the proviso.

Same—Clerk's Liability.—The question of the clerk's liability for failure to enforce the renewal of the guardian's bond has caused some conflicting decisions. In Lee v. Watson, 29 N. C. 289, it was decided by a divided court that, "The clerk and his sureties are responsible for neglect in failing to enforce renewal of the bond, and were bound to make compensation to the orphans for any loss they sustained thereby." Later in Jones v. Biggs, 46 N. C. 364, on the same question a divided court decided that the clerk was not liable. That the clerk and his sureties are not liable was again decided in Sullivan v. Lowe, 64 N. C. 500, the opinion being per curiam, and this is the law today.

Where a guardian gives several successive bonds for the faithful discharge of his trust, the sureties on each bond stand in the relation of cosureties to the sureties on every other bond; the only qualification to the rule being that the sureties are bound to contribution only according to the amount of the penalty of the bond in which each class is bound. Thornton v. Barbour, 204 N. C. 583, 585, 169 S. E. 153; Jones v. Hays, 38 N. C. 502.

§ 33-17. Relief of endangered sureties. — Any surety of a guardian, who is in danger of sustaining loss by his suretyship, may file his complaint

before the clerk of the superior court where the guardianship was granted, setting forth the circumstances of his case and demanding relief; and thereupon the guardian shall be required to answer the complaint within twenty days after service of the summons. If, upon the hearing, the clerk of the superior court deem the surety entitled to relief, the same may be granted by compelling the guardian to give a new bond, or to indemnify the surety against apprehended loss, or by the removal of the guardian from his trust; and in case the guardian fail to give a new bond or security to indemnify when required to do so within reasonable time, the clerk of the superior court must enter a peremptory order for his removal, and his authority as guardian shall thereupon cease. (Rev., s. 1783; Code, s. 1606; R. C., c. 54, s. 35; 1762, c. 69, ss. 21, 22; 1868-9, c. 201, s. 43; C. S. 2166.)

Giving New Bond with Other Sureties.—A surety to a guardian's bond is not discharged from his liability by the guardian giving a new bond with other sureties. Jones v. Blanton, 41 N. C. 115.

Liability of New Sureties.—When, under this section, new sureties are ordered to be given, the obligation of the bond given by the new sureties extends to the entire guardianship, retrospective as well as prospective. Such a bond is at least an additional and cumulative security for the ward. Bell v. Jasper, 37 N. C. 597.

Where Counter-Security Given.—Where the sureties of a guardian obtained an order for counter-security, and at that time the guardian owed his ward, and never afterwards returned an account nor made a payment, no presumption of satisfaction at that or any subsequent time arose from the fact that he was then able to pay the sum he owed; and the sureties on the first bond were liable for it, though the order for counter-security expressly released them. Foye v. Bell, 18 N. C. 475.

The clerk is not empowered by any express statute to release sureties, upon bonds approved by him, especially at a time when the principal is in default. This section provides a remedy for dissatisfied sureties upon guardian bonds, but release is not one of the remedies therein contemplated. Thornton v. Barbour, 204 N. C. 583, 587, 169 S. E. 153.

§ 33-18. Liability of clerk for taking insufficient bond.—If any clerk of the superior court shall commit the estate of an infant, idiot, lunatic, insane person or inebriate to the charge or guardianship of any person without taking good and sufficient security for the same as directed by law, such clerk shall be liable, on his official bond, at the suit of the party aggrieved, for all loss and damages sustained for want of security being taken; but if the sureties were good at the time of their being accepted, the clerk of the superior court shall not be liable. (Rev., s. 1784; Code, s. 1614; R. C., c. 54, s. 2; 1762, c. 69, ss. 5, 3; 1868-9, c. 201, s. 51; C. S. 2167.)

In General.—Clerks, and the sureties on their official bonds, are now liable, as the justices were under the old system, for any loss or damages resulting from a failure to take good bonds, and the record of the appointment of the guardian is sufficient evidence of such appointment. Topping v. Windley, 99 N. C. 4, 5 S. E. 14, 17.

Effect of Failure.—The giving of the bonds required of guardians and administrators is not essential to the validity of the appointment itself; the failure to take the bond, however, subjects the officer whose duty it is to see that it is made to the consequences of such omission. Howerton v. Sexton, 104 N. C. 75, 10 S. E. 148.

When Action Lies.—No action can be maintained on the bond given by a clerk conditioned for the faithful performance of his duty, except where there have been such damages sustained as would give the party a right to maintain an action on the case for the neglect of his official duty. Jones v. Briggs, 46 N. C. 364.

§ 33-19. Liability of clerk for other defaults.—If any clerk of the superior court shall willfully or negligently do, or omit to do, any other act prohibited, or other duty imposed on him by law, by which act or omission the estate of any ward suffers damage, he shall be liable therefor as directed in § 33-18. (Rev., s. 1785; Code, s. 1615; 1868-9, c. 201, s. 52; C. S. 2168.)

Editor's Note—Former Provision.—Formerly the clerk was required to make a record of and enter at large on the docket the names of the justices who were present at the granting of a guardianship; and he was also required to make the same entry on the guardian's bond. The purpose of this requirement was to furnish an easy means of proving which of the justices were on the bench in the event that they had been guilty of such negligence in respect to the sureties taken on the bond as to be liable to the action of the infant according to the provisions of the statute. State v. Koonce, 51 N. C. 379, 380.

Art. 3. Powers and Duties of Guardian.

§ 33-20. To take charge of estate. — Every guardian shall take possession, for the use of the ward, of all his estate, and may bring all necessary actions therefor. (Rev., s. 1786; Code, s. 1588; R. C., c. 54, s. 21; 1762, c. 69, s. 3; 1868-9, c. 201, s. 25; C. S. 2169.)

Cross References.—As to power of guardians to lend portions of the estates of their wards, see § 24-4. As to the personal liability of the guardian for stock held for the use of the ward, see §§ 53-40 and 55-65. As to voting as stockholder, see § 55-111. As to income taxes, see §§ 105-139, 105-153, and 105-154. As to payment of taxes, see § 105-412. As to investment and deposit of funds generally, see § 36-1 et seq. As to authority to invest in federal farm loans, see § 53-60; in bonds guaranteed by United States, see § 53-44; in mortgages of federal housing administration, etc., see § 53-45.

In General.—The rule of diligence established by the decided cases is that a guardian in the management of his ward's estate must act in good faith and with that care and judgment that a man of ordinary prudence exercises in his own affairs. Covington v. Leak, 67 N. C. 363; Freeman v. Wilson, 74 N. C. 368, 369; State v. Mebane, 63 N. C. 315; Luton v. Wilcox, 83 N. C. 21, 26.

The rights and powers of guardians are considered as strictly local; and not as entitling them to exercise any authority over the person or personal property of their wards in other states. Lamar v. Micou, 112 U. S. 452, 470, 5 S. Ct. 221, 28 L. E. 751.

Payment of funds to a guardian by Veterans' Bureau under War Risk Insurance Act vests title in the ward and operates to discharge the obligation of the United States. Hence the deposit of the funds in a bank which was duly appointed guardian and which later became insolvent does not entitle the surety on the bank's guardianship bond to a preference for the amount of the deposit, such sums not being an amount due the U. S. Government, the Government having discharged its obligation by payment to the guardian. In re Home Savings Bank, 204 N. C. 454, 168 S. E. 688.

Under this section the guardian can select the forum, as there is no statute to the contrary. Lawson v. Langley, 211 N. C. 526, 530, 191 S. E. 229.

Power to Bind Ward by Contract.—A contract made by a guardian within his authority, will be binding upon his ward upon his attaining full age. United States Mortgage Co. v. Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. Ed. 969.

Recovery of Realty.—A guardian having no title to the land of his ward, it is not his duty to sue for the recovery of realty. Cross v. Craven, 120 N. C. 331, 26 S. E. 940.

Guardian May Exchange Property. — A guardian, having personal surety for a debt due to his ward, may exchange that personal for real security; and, if he does it bona fide, he is not responsible to his ward. Christman v. Wright, 38 N. C. 549.

Compromise of Claim.—A ward is not bound by a compromise of his general guardian of the former's claim for damages for a personal injury, unless made with the sanction of the court to which the guardian should account; and in no event when the compromise is due to the gross negligence of the guardian, or in bad faith, and is manifestly unfair to the ward, and for a grossly inadequate consideration; and when such are found to be the facts, legal fraud will be inferred and the compromise will be set aside without a specific finding of actual fraud. Bunch v. Foreman Blades Lumber Co., 174 N. C. 8, 93 S. E. 374.

Statute of limitations upon discovery of fraud, see John-

son v. Pilot Life Ins. Co., 217 N. C. 139, 7 S. E. (2d) 475, 128 A. L. R. 1375.

§ 33-21. How sales and rentals made. — All sales and rentings by guardians shall be publicly made, between the hours of ten o'clock a. m. and four o'clock p. m., after twenty days notice posted at the courthouse and four other public places in the county. But, upon petition by the guardian, the clerk of the superior court of the county in which the land of the ward is situated, or of the county wherein the guardian has qualified, may make an order, on satisfactory evidence, upon the oath of at least two disinterested freeholders acquainted with the said land, that the best interests of the said ward will be subserved by a private renting of said land, allowing the guardian to rent the land privately. The terms of all such rentings shall be reported to said clerk of the superior court and be approved by him. The proceeds of all sales of personal estate and rentings of real property, except the rentings of lands leased for agricultural purposes, when not for cash, shall be secured by bond and good security. (Rev., s. 1788; Code, s. 1590; 1891, c. 83; 1901, c. 97; R. C., c. 54, s. 26; 1793, c. 391; C. S. 2171.)

Public Renting Required.—This section impliedly declares it to be to the interest of the wards to rent the lands publicly. Duffy v. Williams, 133 N. C. 195, 198, 45 S. E. 548.

Same—Not Discretionary with Guardian.—The provisions of this section that all sales or renting of personal and real property by a guardian shall be made publicly, and, upon the terms therein prescribed, are peremptory and leave no discretion to such guardians. Pate v. Kennedy, 104 N. C. 234, 10 S. E. 188.

Same—Purpose of Provision.—The purpose of these precise and stringent regulations is to give notice to the public of the time, place and terms of such "sales and rentings," and thus encourage and promote competition and obtain better prices and higher rents for the property sold or let, and, also, to prevent the exercise of possible bad judgment, imprudence, lack of caution, collusion and fraud on the part of guardians. Pate v. Kennedy, 104 N. C. 234, 236, 10 S. E. 188.

Same—Effect of Violation.—Where a lease by the guardian of his ward's lands was not publicly made, as required by this section, nor approved by the clerk of the superior court, as required by section 33-22, the lessee may not hold the ward's estate liable for the false representation of the guardian's agent as to the value of the leased property for the lessee's purposes, nor for his false warranty thereof. Coxe v. Whitmire Motor Sales Co., 190 N. C. 833, 130 S. E. 841.

Same—Application.—This section, requiring sales by guardians to be publicly made, does not apply to sales made under directions of the superior court in exercise of its general jurisdiction in equity. Barcello v. Hapgood, 118 N. C. 712, 24 S. E. 124. The section restricts the guardian and not the court. Id.

Court May Order Private Sale.—It is not irregular or erroneous to order the sale of an infant's land to be made privately by the guardian. Barcello v. Hapgood, 118 N. C. 712, 24 S. E. 124.

§ 33-22. When lands may be leased. — The guardian may lease the lands of an infant for a term not exceeding the end of the current year in which the infant shall become of age, or die in nonage. But no guardian, without leave of the clerk of the superior court, shall lease any land of his ward without impeachment of waste, or for a term of more than three years, unless at a rent not less than three per centum on the assessed taxable value of the land. (Rev., s. 1789; Code, s. 1591; R. C., c. 54, s. 25; 1762, c. 69, s. 13; 1794, c. 413, s. 2; C. S. 2172.)

Editor's Note.—See note of Coxe v. Whitmire Motor Sales Co., 190 N. C. 838, 130 S. E. 841, under section 33-21.

Not a Limitation on Power of the Court.—This section is a restriction upon the power of guardians but not a limitation on the power of the court; and guardians may lease the real property of their infant wards for a period extending beyond the guardianship or the minority of the wards with the approval of a court of general equity jurisdiction. Coxe v. Charles Stores Co., 215 N. C. 380, 1 S. E. (2d) 848, 121 A. L. R. 959.

§ 33-23. When guardians to cultivate lands of wards. — Where any parent of a minor child qualifies as guardian of such child, and the ward owns or is entitled to the possession of any real estate used or which may be used for agricultural purposes, such guardian may make application to the clerk of the superior court of the county wherein the land is situate for permission to cultivate it, and the petition shall set forth the nature, extent and location of the same. It shall then be the duty of the clerk to appoint three disinterested resident freeholders, who shall go upon the land and, after being sworn to act impartially, assess the annual rental value thereof. The commissioners shall report their proceedings and findings to the clerk within ten days after the notification of their appointment, and if the clerk shall deem the same to be the interest of the ward he shall make an order allowing the guardian to cultivate the land for a term not exceeding three years at the annual rental value assessed by the commissioners to be paid to the ward by the guardian. The term, however, shall not extend beyond the minority of the minor. The commissioners shall receive as compensation for said services the same fees as are allowed commissioners in partition of real estate. (1909, c. 57; C. S. 2173.)

Cross Reference.—As to compensation of commissioners in partition of real estate, see § 1-408.

§ 33-24. Guardians' powers enlarged to permit cultivation of ward's lands or continuation of ward's business.—In addition to the powers given to guardians under the general laws of the State, all guardians may, upon presentation of satisfactory evidence, with approval of the clerk of superior court, which approval must be concurred in by the resident judge or other regular or special judge holding courts in the district, cause lands to be cultivated and make such contracts with reference thereto as said guardian may deem to the best interest of his ward's estate, and under the direction of the clerk of superior court, with the approval of the resident judge or other regular or special judge holding courts in the district, continue to operate any business or business enterprise of his ward and make such contract, agreements, and settlements with reference thereto as the clerk of superior court, with the approval of said resident judge or other regular or special judge holding courts in the district, may determine necessary or find to be to the best interest of the estate. (1935, c. 24.)

Editor's Note.—Section 1-A of Public Laws of 1935, chapter 24, provides that this section shall not affect litigation pending February 8, 1935.

§ 33-25. Guardians and other fiduciaries authorized to buy real estate foreclosed under mortgages executed to them.—On application of the guardian or other fiduciary of any idiot, inebriate, lunatic, non compos mentis or any person incompetent from want of understanding to manage his own affairs for any cause or reason, or any minor or infant, or any other person for whom such guardian or fiduciary has been appointed, by pe-

tition, verified upon oath, to the superior court, showing that the purchase of real estate is necessary to avoid a loss to the said ward's estate by reason of the inadequacy of the amount bid at foreclosure sale under a mortgage or deed of trust securing the re-payment of funds previously loaned the mortgagor by said guardian or other fiduciary, and that the interest of the ward would be materially promoted by said purchase the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, or by affidavit of three disinterested freeholders over twenty-one years of age who reside in the county in which said land lies, a decree may thereupon be made that said real estate be purchased by such person; but no purchase of real estate shall be made until approved by a judge of the superior court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by a judge, and then only in compliance with the terms and conditions set out in said order and judgment. (1935, c. 156.)

§ 33-26. Plate and jewelry to be kept. — All plate and jewelry shall be preserved and delivered to the ward at age, in kind, according to weight and quantity. (Rev., s. 1791; Code, s. 1597; 1895, c. 74; 1868-9, c. 201, s. 34; C. S. 2175.)

§ 33-27. Personal representative of guardian to pay over to clerk.—In all cases where a guardian of any minor child or of an idiot, lunatic, inebriate or insane person dies, it is competent for the executor or admininistrator of such deceased guardian, at any time after the grant of letters testamentary or of administration, to pay into the office of the clerk of the superior court of the county where such deceased guardian was appointed, any moneys belonging to any such minor child, idiot, lunatic, insane person or inebriate, and any such payment shall have the effect to discharge the estate of said deceased guardian and his sureties upon his guardian bond to the extent of the amount so paid. (Rev., s. 1794; Code, s. 1622; 1881, c. 301, s. 2; C. S. 2176.)

Cross Reference.—As to a mortgage to guardian, see § 45-19.

No Action between Administrators.—The administrator of a deceased ward is not entitled to recover, in an action against the administrator of the deceased guardian, moneys which came into the guardian's hands as proceeds of real estate belonging to the ward sold under a decree of court for partition. Allison v. Robinson, 78 N. C. 222.

§ 33-28. Collection of claims; duty and liability.—Every guardian shall diligently endeavor to collect, by all lawful means, all bonds, notes, obligations or moneys due his ward when any debtor or his sureties are likely to become insolvent, on pain of being liable for the same. (Rev., s. 1795; Code, s. 1593; R. C., c. 54, s. 23; 1762, c. 69, s. 10; 1868-9, c. 201, s. 30; C. S. 2177.)

Cross References.—As to compound interest on obligations due to guardians, see § 24-4. As to criminal liability of guardian for embezzlement of funds, see § 14-90.

General Liability.—A guardian is liable not only for what he does receive, but for what he ought to receive; and if he ought to receive a certain amount of money and does not, but takes something else, his own bond for instance, in the place of money, he and his sureties are liable. Avent v. Womack, 72 N. C. 397.

Same—Diligence and Good Faith.—A guardian is responsible, not only for what he receives, but for all he might have received by the exercise of ordinary diligence and the highest degree of good faith. Armfield v. Brown, 73 N. C. 81.

A guardian, who acted in good faith and was not guilty of culpable negligence, was held not to be responsible for omitting to collect a note during the late war, when it appeared that both of the two obligors were solvent during the war, and were made insolvent by its results. Love v. Logan, 69 N. C. 70.

Need Not Resort to Extraordinary Remedies.—Guardians are not responsible for losses to their wards attributable to their not having resorted to new and extraordinary remedies, the force and effect of which are doubtful. White v. Robinson, 64 N. C. 698.

Accepting Unsecured Note.—A guardian who accepts an unsecured note in payment of a debt due his ward is guilty of laches, and is liable to his ward for the amount of such note. Covington v. Leak, 65 N. C. 594.

Power to Collect and Compromise Debts.—It is held in the U. S. Supreme Court that a guardian, unless restricted by statute, may collect or compromise and release debts due to the ward, subject to the liability to be called to account if he has acted without due regard to the ward's interest. Maclay v. Equitable Life Assurance Society, 152 U. S. 499, 503, 38 L. Ed. 528.

Accepting Smaller Sum.—Where a guardian accepts from an administrator a smaller sum than the wards' share in the estate, the wards may, at their option, sue the guardian or the administrator for the deficiency. Alexander v. Alexander, 120 N. C. 472, 27 S. E. 121.

Failure to Ascertain Amount Due. — Where a guardian carelessly and without deliberation accepts for his wards from an insolvent debtor an amount less than they are entitled to receive from a fund, he is liable to the wards for what he failed to collect. Culp v. Stanford, 112 N. C. 664, 16 S. E. 761, distinguishing Luton v. Wilcox, 83 N. C. 21, and other decisions cited.

Failure to Sue before Insolvency.—Where a guardian fails to sue on note due his ward's estate until the parties thereto are insolvent, he is liable for his negligegnce. Coggins v. Flythe, 113 N. C. 102, 18 S. E. 96.

Failure to Sue Surety Knowing of Obligor's Insolvency.—Where a guardian waited six months after the principal in a note held by him as guardian died insolvent before he sued the surety, who also became insolvent before the suit was brought, the guardian having an opportunity all the time of knowing the true condition of the obligors, it was held that by his laches he made himself responsible for the loss of the debt. Williamson v. Williams, 59 N. C. 62, distinguishing Deberry v. Ivey, 55 N. C. 370; Davis v. Marcum, 57 N. C. 189.

§ 33-29. Liability for lands sold for taxes.—If any guardian suffer his ward's lands to lapse or become forfeited or be sold for nonpayment of taxes or other dues, he shall be liable to answer for the full value thereof to his ward. (Rev., s. 1796; Code, s. 1595; R. C., c. 54, s. 27; 1762, c. 69, s. 14; 1868-9, c. 201, s. 32; C. S. 2178.)

§ 33-30. Liability for costs.—All fees and costs of the superior court for issuing orders, citations, summonses or other process against guardians for their supposed defaults shall be paid by the party found in default. (Rev., s. 1797; Code, s. 1611; 1868-9, c. 201, s. 48; C. S. 2179.)

Cross Reference.—As to owelty to be paid by guardian, see § 46-12.

Art. 4. Sales of Ward's Estate.

§ 33-31. Special proceedings to sell; judge's approval required.—On application of the guardian by petition, verified upon oath, to the superior court, showing that the interest of the ward would be materially promoted by the sale or mortgage of any part of his estate, real or personal, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale or mortgage be had by such person, in such way and on such terms as may be most advantageous to the interest of the ward; but no sale or mortgage shall be made until approved by the judge of the court, nor

shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale or mortgage shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify. The guardian may not mortgage the property of his ward for a term of years in excess of the term fixed by the court in its decree. The word "mortgage" whenever used herein shall be construed to include deeds in trust. (Rev., s. 1798; Code, s. 1602; R. C., c. 54, ss. 32, 33; 1827, c. 33, 1868-9, c. 201, s. 39; 1917, c. 258, s. 1; 1923, c. 67, s. 1; C. S. 2180.)

Cross References.—As to sale of estate of an idiot, inebriate, or lunatic, see §§ 35-10 and 35-11. As to release of land condemned under the powers of eminent domain, see § 40-22.

Editor's Note.—In the next to the last sentence in this section a change was made by Public Laws 1923, ch. 67, section 1. The former provision was that a guardian could not mortgage his ward's property for a term of years "exceeding the minority of the ward." This limitation was stricken out and the term made dependent upon the decree of the court.

Not Applicable to Settlement or Partition.—This section does not apply either to the settlement of estates or to partition. Clark v. Carolina Homes, 189 N. C. 703, 128 S. E. 20, 26.

Presumption That Statutory Requirements Have Been Met.—Although this section must be strictly complied with, where a guardian has applied for permission to mortgage her wards' land, and the clerk has entered an order therefor, which order has been approved by the court, there is a presumption that the statutory requirements have been met. Quick v. Federal Land Bank, 208 N. C. 562, 181 S. E. 746.

Where the guardian's application for a loan stated that the proceeds thereof were to be used to purchase live stock necessary to the proper operation of the farm, to erect buildings on the land, and to provide improvements as defined by the Federal Farm Loan Board, it was held that under the presumption that the provisions of this section were followed, the mortgage is valid and binding upon the wards' estate as to the funds used for permanent improvements on the land, but as to the funds used to purchase live stock the mortgage is void as to the wards, such fund not having been used to materially promote their interest, and the mortgage on the wards' estate in remainder to the extent of the proceeds used to purchase live stock should be set aside upon their petition therefor filed upon their coming of age. Id.

Jurisdiction.—The previous court of equity had authority upon the ex parte petition of the plaintiffs, while they were infants, suing by their mother as next friend, to order and make a valid sale of their land mentioned for partition, and to pass the title thereto through its commissioner appointed for the purpose. Ex parte Dodd, 62 N. C. 97; Rowland v. Thompson, 73 N. C. 504; George v. High, 85 N. C. 113; Ivey v. McKinnon, 84 N. C. 651; Morris v. Gentry, 89 N. C. 248, 252.

Under the prevailing system of judicature in this State, the superior courts have succeeded to and possess the jurisdiction and power of the late courts of equity in respect to infants and their property; and there can be no question that these courts have authority in all proper cases to direct a sale of their property, both real and personal, for their benefit and advantage. Williams v. Harrington, 33 N. C. 616; Ex parte Dodd, 62 N. C. 97; Sutton v. Schonwald, 86 N. C. 198; Morris v. Gentry, 89 N. C. 248; Tate v. Mott, 96 N. C. 19, 22, 2 S. E. 176.

Same—Clerk.—By this section the clerk and court in term have concurrent jurisdiction in the manner of ordering a sale of infants' lands upon petition of their guardian. Barcello v. Hapgood, 118 N. C. 712, 24 S. E. 124.

Same—Contingent Interests.—This section does not confer jurisdiction on the clerks of courts to order the sale of contingent interests in lands, and suits to sell such interests, when the circumstances of the ward require it, should be determined in the superior court, in its equitable jurisdiction, which is required to order an investment of the funds in proper instances in accordance with the terms and conditions imposed by the conveyance, in order that the lawful intent of the donor may not be defeated. Smith v. Witter, 174 N. C. 616, 94 S. E. 402.

And a sale of such interests is void for the lack of jurisdiction, and the deed thereto of the guardian conveys nothing to his grantee. Smith v. Witter, 174 N. C. 616, 94 S. E. 402. As to procedure for the sale of contingent interests, see section 41-11.

Equity Court May Authorize Lease Extending Beyond Period of Minority.—Since the superior courts in proper instances have authority to order a sale of infants' real estate and to order and approve execution of a mortgage on same by the guardian for a period exceeding the minority of the wards, such statutory power, together with the inherent jurisdiction of courts of equity over the estates of infants, give courts of equity plenary jurisdiction to order and empower a guardian to execute a lease on the real estate belonging to his wards for a period exceeding the guardianship or the minority of the wards, upon its finding that such would be to the best interest of the infant wards. Coxe v. Charles Stores Co., 215 N. C. 380, 1 S. E. (2d) 848, 121 A. L. R. 959.

Must Be Represented.—The court may sell the land of minors for better investment, when they are properly represented before the court. Hutchinson v. Hutchinson, 126 N. C. 671, 36 S. E. 149.

Appointed by Court.—The next friend of an infant ought always to be appointed by the court, and really he is an officer of the court, under its supervision and control. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Removal.—The court has power, for good cause shown, to remove the next friend of an infant litigant, and appoint another as often as may be necessary. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Power of Representative.—The power of a guardian to make disposition of his ward's real estate is very carefully regulated and a sale is not allowed except on petition filed, and the order must in all cases have the supervision and approval of the judge. Morton v. Lumber Co., 178 N. C. 163, 166, 100 S. E. 322.

Representative Not a Party.—The guardian or next friend of an infant is not, properly speaking, a party to the action, although his name appears in the record. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Notice to Infant Unnecessary.—It is not essential that the infant should know that an action has been brought in his favor by a next friend, as his incapacity to judge for himself is presumed, but the court may inquire into the propriety of the action and take such steps as may be necessary. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Sale May Be Private.—The sale by order of the court may be either public or private. Barcello v. Hapgood, 118 N. C. 712, 24 S. E. 124. Section 33-21 does not apply when the sale is by order of court. Id.

Guardian Cannot Purchase. — It is well settled that a guardian can not purchase at his own sale, and that all such purchases may be treated as invalid, at the option of the wards, even when no unfairness in the sale and purchase has been shown. But this does not apply to a sale made by a master. Lee v. Howell, 69 N. C. 200, 203; Patton v. Thompson, 55 N. C. 285. As to power of guardians to purchase at foreclosure of mortgages executed to them, see § 33-25.

When Guardian Liable.—Where a guardian obtains a decree of a court of equity for the sale of his ward's land, it must appear, in order to make him liable for any loss in consequence of such sale, that he willfully practiced a deception on the court by false allegations and false evidence, or by industriously concealing material facts. Harrison v. Bradley, 40 N. C. 136.

Where an order confirming a sale of lands for partition does not provide for the disbursement of the funds, and the sum received in cash is properly paid into court and properly disbursed to the parties, the share of the minors therein being less than one hundred dollars and being paid to their mother for their benefit, under § 2-53, the sale was not void. Ex parte Huffstetler, 203 N. C. 796, 167 S. E. 65.

Where Order Violated.—It is proper for the court, before intervening rights have accrued, upon affidavit of one who has been adjudged an idiot in proceedings before the clerk, and guardian appointed, to grant a temporary restraining order, with notice to show cause, and at the hearing thereof to continue the order to the final hearing, when it appears that the guardian has sold the interest in lands of his ward and made title thereto, without having received the purchase price, contrary to the provisions of the order of sale. In re Propst, 144 N. C. 562, 57 S. E. 343.

Proof Required.—This section, contemplates that, in addition to the verified petition of the guardian, the clerk shall require other satisfactory proof of the truth of the matter alleged. The judge, exercising the functions of a chancellor, where sales of this character were made pursuant to proceedings in courts of equity, always referred the petition to the clerk and master, who took evidence and reported their conclusions to the court. It is usual, since these large and important equitable functions are conferred upon

the clerks, to accompany the petition with affidavits showing the necessity for the sale. The practice is to be commended, and should not, without good cause, be departed from. In re Propst, 144 N. C. 562, 567, 57 S. E. 342.

Same—Sale May Be Set Aside.—Where the court, without taking any means to ascertain the necessity for a sale, directed it to be made, and that it should be "first advertised at the court house and three other public places," and no bid be received less than $125, and that the guardian should make conveyance, it was held, that it was not error to set aside the sale and direct another. In re Dickerson, 111 N. C. 108, 15 S. E. 1025.

Judgment.—Where an infant sues by his next friend he is as much bound by the judgment as an adult, and this rule applies to nonresident as much as to resident infants. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Same—When Voidable.—A judgment for or against an infant, when he appears by attorney, but has no guardian or next friend, is not void, but only voidable. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

Confirmation of Sale.—While a formal direction to make title is not always necessary, a confirmation of the sale cannot be dispensed with. In re Dickerson, 111 N. C. 108, 114, 15 S. E. 1025.

An emergency judge has no power to approve and confirm an order of the clerk for the sale or mortgage of lands by a guardian when such emergency judge is not holding court in the county. Ipock v. North Carolina Joint Stock Land Bank, 206 N. C. 791, 175 S. E. 127.

Approval Nunc Pro Tunc.—Where a guardian executed a note and deed of trust under an order made by the clerk without the approval of the judge, and the judge later approved the order nunc pro tunc, the defect was cured so as to come within this section. Powell v. Armour Fertilizer Works, 205 N. C. 311, 170 S. E. 916; Ipcock v. North Carolina Joint Stock Land Bank, 206 N. C. 791, 797, 175 S. E. 127.

A guardian may not be authorized to join with the life tenant in executing a mortgage on lands in which his wards own the remainder in order to refund notes executed by the life tenant representing a part of the moneys expended by the life tenant in making permanent improvements upon the land, since, the remaindermen being in no way liable for the sums expended by the life tenant, the execution of the mortgage could not be to the interest of the remaindermen. Hall v. Hall, 219 N. C. 805, 15 S. E. (2d) 273.

Title Acquired.—Where land of an infant was sold under a decree of the court upon petition of a guardian, the title acquired is not rendered invalid by the reversal of the decree on account of irregularity in the proceeding of which the purchaser had no notice. Sutton v. Schonwald, 86 N. C. 198.

Same—Unauthorized Private Sale.—A guardian, having offered at public sale the land of his wards in accordance with an order of the court, and having failed to sell for want of a bid at a fair price, subsequently sold the land at private sale upon terms approved by the court: it was held that the purchaser at such private sale obtained a good title. Rowland v. Thompson, 73 N. C. 504.

When Foreign Guardian May Sell.—Where a foreign guardian has complied with the provisions of sections 33-48 and 33-49 which authorize him to withdraw the estate of his wards to the place of their residence and to a court of foreign jurisdiction, he may, in the same proceedings, and incident thereto, have the real property of his wards sold and converted into money in conformity with the provisions of this section, when the wards are represented therein by their next friend, and it is made to appear that their interests will be promoted thereby, etc. Cilley v. Geitner, 183 N. C. 528, 11 S. E. 866.

Petition Signed by Person Not a Qualified Guardian Confers No Jurisdiction on Clerk.—A clerk of the Superior Court has jurisdiction to order the sale of a ward's lands only upon petition verified by the duly appointed and qualified guardian of the ward, and where such petition is filed and signed by a person purporting to act as guardian, but who had not been appointed guardian and had not qualified by filing bond, the petition confers no jurisdiction on the clerk. Buncombe County v. Cain, 210 N. C. 766, 188 S. E. 399.

And in Such Case the Purchaser at Sale Acquires No Title Adverse to Infant.—A purchaser of an infant's property at a sale made under an order which is void because the clerk who made the order had no jurisdiction of the proceeding in which the order was made, acquires no right, title, interest, or estate in said property, adverse to the infant. Buncombe County v. Cain, 210 N. C. 766, 775, 188 S. E. 399.

Stated in Ex parte Quick, 206 N. C. 627, 630, 175 S. E. 119.

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

Whenever, in consequence of any sale under § 33-31, the real or personal property of the ward is saved from demands to which in the first instance it may be liable, the final decree shall declare and set apart a portion of the personal or real estate thus saved, of value equal to the real and personal estate sold, as property exchanged for that sold; and in all sales by guardians whereby real is substituted by personal, or personal by real property, the beneficial interest in the property acquired shall be enjoyed, alienated, devised or bequeathed, and shall descend and be distributed, as by law the property sold might and would have been had it not been sold, until it be reconverted from the character thus impressed upon it by some act of the owner and restored to its character proper. (Rev., s. 1799; Code, s. 1603; R. C., c. 54, s. 33; 1827, c. 33, s. 2; 1868-9, c. 201, s. 40; C. S. 2181.)

In General.—Although it is the duty of a court, when the real estate of an infant is sold under its decree, to direct the proceeds to be held as real estate, yet a husband of such infant, who has received the proceeds from his wife's guardian, has no right to complain that such course has not been adopted. Harrison v. Bradley, 40 N. C. 136.

Application.—Where a female infant's land was sold for the benefit of the infant and she married and died before becoming of age, it was held that the money retained the character of real property. Wood v. Reeves, 58 N. C. 271.

§ 33-33. Sale of ward's estate to make assets.—

When a guardian has notice of a debt or demand against the estate of his ward, he may apply by petition, setting forth the facts, to the clerk of the superior court wherein the guardianship was granted, for an order to sell so much of the personal or real estate as may be sufficient to discharge such debt or demand; and the order of the court shall particularly specify what property is to be sold and the terms of sale; but no real estate shall be sold under this section, in any case, without the revision and confirmation of the order therefor by the judge of the superior court. The proceeds of sale under this section shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative; and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases. (Rev., ss. 1800, 1801; Code, ss. 1604, 1605; R. C., c. 54, s. 34; 1789, c. 311, s. 5; 1868-9, c. 201, ss. 41, 42; C. S. 2182.)

Ascertaining That Debts Are Due. — The court should first ascertain that there are debts due from the ward, which render the sale of the property expedient, and they should also select the part or parts of his property which can be disposed of with least injury to the ward. Leary v. Fletcher, 23 N. C. 259.

An order authorizing a guardian, under certain circumstances, to sell the land of his ward, must first show that it was adjudged that there were debts due from the ward, and then specify what particular land is to be sold for their payment. Spruill v. Davenport, 48 N. C. 42.

Same—Amount Need Not Be Shown.—The amount of the debts, or to whom due, need not be set forth in the order. Pendleton v. Trueblood, 48 N. C. 96; Spruill v. Davenport, 48 N. C. 42.

Same—Sale Void Where Debt Not Shown.—A sale of a ward's land on petition of the guardian to pay debts is void, where it is not made to appear that the court passed on and ascertained the fact that there was a debt against the ward's estate. Coffield v. McLean, 49 N. C. 15.

Specifying Land to Be Sold.—An order that the guardian sell the land of his ward, or so much thereof as will be sufficient to discharge his debts, is fatally defective and void, and vests no title in those who bought at the sale.

Ducket v. Skinner, 33 N. C. 431; Leary v. Fletcher, 23 N. C. 259.

Where the order "to sell the land of the ward named in the petition, adjoining the lands of A., B., and others, containing about 110 acres," it not appearing that the ward had other land, this is a sufficient specification of the land under the statute. Pendleton v. Trueblood, 48 N. C. 96.

Mortgagee Not a Party.—In a petition to sell lands for assets to pay debts, a mortgagee of the interest of one of the heirs-at-law was improperly admitted a party defendant. Such claims cannot be set up in this proceeding. Battle v. Duncan, 90 N. C. 546.

Proceeds Subject to Attachment.—Money from the sale of land which belonged to wards is subject to attachment in the hands of the clerk after the confirmation of the sale. Leroy v. Jacobosky, 136 N. C. 443, 48 S. E. 796.

Priority in Payment.—When a guardian of an infant, under an order of court, sells his ward's land for payment of the debts of the ancestor, he is bound to observe the same priority in the payment of the debts as an administrator or executor in applying the personal assets. Merchant v. Sanderlin, 25 N. C. 501.

Sale of Lunatic's Property.—A guardian of a lunatic may, by order of the court, rightfully sell the personal property of his ward for the payment of his debts, provided there be no fraud in the proceeding. Howard v. Thompson, 30 N. C. 367. As to sale or renting of lunatics' estates, see sec. 35-10 et seq.

§ 33-34. To sell perishable goods on order of clerk. — Every guardian shall sell, by order of the clerk of the superior court, all such goods and chattels of his ward as may be liable to perish or be the worse for keeping. Every such order shall be entered in the order record of the superior court and must contain a descriptive list of the property to be sold, with the terms of sale. (Rev., s. 1787; Code, s. 1589; R. C., c. 54, s. 22; 1762, c. 69, s. 10; 1868-9, c. 201, s. 26; C. S. 2170.)

§ 33-35. When timber may be sold.—In case the land cannot be rented for enough to pay the taxes and other dues thereof, and there is not money sufficient for that purpose, the guardian, with the consent of the clerk of the superior court, may annually dispose of or use so much of the lightwood, and box or rent so many pine trees, or sell so much of the timber on the same, as may raise enough to pay the taxes and other duties thereon, and no more. (Rev., s. 1790; Code, s. 1596; R. C., c. 54, s. 27; 1762, c. 69, s. 14; 1868-9, c. 201, s. 33; C. S. 2174.)

Sale without Order of Court.—Where a guardian sold timber on the land of his ward without an order of the court, as required by this section, and took a note for the purchase money, the maker of such note cannot when sued on the same by the guardian and ward (the latter thereby ratifying the contract) set up the failure of the guardian to observe the statutory mandate. Evans v. Williamson, 79 N. C. 86.

Art. 5. Returns and Accounting.

§ 33-36. Return within three months.—Every guardian, within three months after his appointment, shall exhibit an account, upon oath, of the estate of his ward, to the clerk of the superior court; but such time may be extended by the clerk of the superior court, on good cause shown, not exceeding six months. (Rev., s. 1802; Code, s. 1577; R. C., c. 54, s. 11; 1762, c. 69, s. 9; 1868-9, c. 201, s. 14; C. S. 2183.)

In General.—It is the duty of the guardian within three months after his appointment to exhibit an account, upon oath, of the estate of his ward to the clerk of the superior court, and to make an annual return. Norman v. Walker, 101 N. C. 24, 26, 7 S. E. 468.

In the administration of the estate in behalf of the lunatic, the guardian is subject to the orders of the clerk by whom he was appointed and to whom he is required by this and following sections to account. Read v. Turner, 200 N. C. 773, 777, 158 S. E. 475.

§ 33-37. Procedure to compel return.—In cases of default to exhibit the return required by § 33-36, the clerk of the superior court must issue an order requiring the guardian to file such return forthwith, or to show cause why an attachment should not issue against him. If, after due service of the order, the guardian does not, on the return day of the order, file such return, or obtain further time to file the same, the clerk of the superior court shall issue an attachment against him, and commit him to the common jail of the county till he files such return. (Rev., s. 1803; Code, s. 1578; R. C., c. 54, s. 12; 1762, c. 69, s. 15; 1868-9, c. 201, s. 15; C. S. 2184.)

Cross Reference.—As to suits for accounting at term, see § 28-147.

§ 33-38. Additional assets to be returned.—Whenever further property of any kind, not included in any previous return, comes to the hands or knowledge of any guardian, he must cause the same to be returned within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as prescribed in § 33-37. (Rev., s. 1804; Code, s. 1579; 1868-9, c. 201, s. 16; C. S. 2185.)

§ 33-39. Annual accounts.—Every guardian shall, within twelve months from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file in the office of the clerk of the superior court an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk of the superior court may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having carefully revised and audited such account, if he approve the same, he must indorse his approval thereon, which shall be deemed prima facie evidence of correctness. (Rev., s. 1805; Code, s. 1617; R. C., c. 54, ss. 11, 12; 1762, c. 69, ss. 9, 15; 1871-2, c. 46; C. S. 2186.)

Cross References.—As to clerk's power to audit the account of guardian, see § 2-16. As to vouchers being evidence of disbursement, see § 28-119.

Definition of "Account."—An account is defined to be "a statement in writing of debts and credits, or of receipts and payments; a list of items of debts and credits with their respective dates." Black's Dictionary, p. 17. In this section the word is used in this sense, and when not only an account, but payment or settlement is intended, additional words are used to express that idea. State v. Dunn, 134 N. C. 663, 664, 668, 46 S. E. 949.

Good Faith Essential.—There is no trust known to the law which so urgently calls for good faith as that which subsists between the guardian and his ward; and no higher evidence can be offered of that good faith than perfect candor, full information, and minute, detailed accounts. Moore v. Askew, 85 N. C. 199, 202.

What Set Out.—It is the duty of a guardian in making his annual returns to set out the manner in which he has invested the ward's estate, and the nature of the securities which he holds as guardian. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Accounts Prima Facie Correct.—The ex parte settlements made by guardians, executors and administrators with the courts having jurisdiction of such matters, are, when accepted by the court, prima facie correct, and while not conclusive upon creditors or next of kin, and strict proof and specific assignment of errors are not required as in actions to surcharge a stated account, nevertheless the burden is on the party attacking them to establish, by a preponderance

of testimony, their incorrectness. State v. Turner, 104 N. C. 566, 10 S. E. 606.

Ward Can Demand Annual Statement.—A ward is entitled to demand of her guardian an annual statement of the manner and nature of his investments of her estate. Moore v. Askew, 85 N. C. 199.

Account as Evidence.—The annual account of a guardian is competent evidence against him, and presumptive evidence against his sureties. Loftin v. Cobb, 126 N. C. 58, 35 S. E. 230.

§ 33-40. Procedure to compel accounting.—If any guardian omit to account, as directed in § 33-39, or renders an insufficient and unsatisfactory account, the clerk of the superior court shall forthwith order such guardian to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such guardian fail to appear or refuse to exhibit such account, the clerk of the superior court may issue an attachment against him for contempt and commit him till he exhibits such account, and may likewise remove him from office. And in all proceedings hereunder the defaulting guardian will be liable personally for the costs of the said proceeding, including the costs of service of all notices or writs incidental to, or thereby accruing, or the amount of the costs of such proceeding may be deducted from any commissions which may be found due said guardian on settlement of the estate. Where a corporation is guardian, the president, cashier, trust officer or the person or persons having charge of the particular estate for said corporation, or the person to whom the duty of making reports of said estate has been assigned by the officers or directors of said corporation, may be proceeded against and committed to jail as herein provided as if he or they were the guardian or guardians personally: Provided, it is found as a fact that the failure or omission to file such account or to obey the order of the court in reference thereto is willful on the part of the officer charged therewith: Provided further, the corporation itself may also be fined and/or removed as such guardian for such failure or omission. (Rev., s. 1806; Code, s. 1618; C. C. P., s. 479; 1929, c. 9, s. 2; 1933, c. 317; C. S. 2187.)

Editor's Note.—See 11 N. C. Law Rev. 232.

The Act of 1929 added the third sentence to this section. Public Laws 1933, c. 317, inserted the last two sentences of this section relating to compelling corporate guardians to account.

Ground for Removal.—Under this section authorizing the clerk of the superior court to remove a guardian from office upon his failure to account, pursuant to the order of the clerk, a guardian's refusal to account for rents and profits of a ward's land, and his improper claim to the rent adverse to the ward, was ground for his removal. In re Dixon, 156 N. C. 26, 72 S. E. 71.

For this omission to make their quarterly and annual returns, it is the duty of the clerk to require them to be made, and on failure to do so attach and emove the defendants from their office. Sanderson v. Sanderson, 79 N. C. 369, 371.

§ 33-41. Final account.—A guardian may be required to file such account at any time after six months from the ward's coming of full age or the cessation of the guardianship; but such account may be filed voluntarily at any time, and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk of the superior court. (Rev., s. 1807; Code, s. 1619; C. C. P., s. 481; C. S. 2188.)

Cross References.—As to accounting for compound interest in final settlement, see § 24-4. As to necessity for payment of taxes before final accounting, see § 105-240. As to fees for auditing final account, see § 2-35.

In General.—This section is not intended to bestow upon the guardian the ward's moneys and properties for six months after he becomes of age, nor to deprive him of the right to bring an action to recover them during the period, but simply means that the guardian is presumed to have settled with his ward within such six months, and after its lapse the clerk can call on the guardian to file his final account, with the receipts of the ward, in full settlement, to complete the record in his office, for the section states that such return shall be "audited and recorded." Self v. Shugart, 135 N. C. 185, 189, 47 S. E. 484.

"Audit" Explained.—When the section directs that the clerk shall "audit" the account, it implies that he shall pursue the usual course which has been found to be just and convenient in such cases. Rowland v. Thompson, 64 N. C. 714, 717.

Jurisdiction.—The clerk of the superior court has jurisdiction of settlements between guardian and ward, and, of course, between the guardian and ward's personal representative. McLean v. Breece, 113 N. C. 390, 18 S. E. 694; McNeill v. Hodges, 105 N. C. 52, 11 S. E. 265; Rowland v. Thompson, 65 N. C. 110.

The superior court had no original jurisdiction of an action for an account by an existing guardian of infant children against their former guardian; such action should have been brought in the court of probate (now the clerk). Sudderth v. McCombs, 65 N. C. 186.

Same—Appeal.—From the judgment of the clerk an appeal will lie to the judge of the superior court, who having thus obtained jurisdiction of the cause will retain it until it is finally disposed of. Rowland v. Thompson, 65 N. C. 110.

Settlement as Defense. — Where in a suit on a guardian bond it appeared that the account between the guardian and the ward had been settled, and that the guardian gave his own bond to the ward, which was received by the latter in satisfaction of the balance due, and he then gave his guardian a receipt: Held, that this was a sufficient defense to the suit on the guardian bond. State v. Cordon, 30 N. C. 179.

Action Barred in Ten Years.—Ten years after the ward becomes of age bars an action by him against his guardian for settlement. Dunn v. Beaman, 126 N. C. 766, 36 S. E. 172.

When Action Barred as to Sureties.—An action for breach of the guardianship bond based upon this section is barred as to the sureties after three years from the date the guardian should have made payment, and the fact that the guardian continued to pay the ward interest on the amount due the ward for several years after the ward's majority does not affect the running of the statute as to the sureties. State v. Fountain, 205 N. C. 217, 171 S. E. 85. See Copley v. Scarlett, 214 N. C. 31, 197 S. E. 623.

Judgment Is an Estoppel.—The clerk of the superior court, having jurisdiction of proceedings against a guardian for a settlement, a judgment rendered therein is an estoppel to an action in the superior court between the same parties and upon the same question, and can not be attacked collaterally, but can be impeached for fraud only by a direct proceeding for that purpose. Donnelly v. Wilcox, 113 N. C. 408, 18 S. E. 339.

Distributees May Have Accounting.—The express trust existing between the guardian and ward terminates at death of the latter, and the ward's distributees may have letters of administration taken out and call for an accounting. Lowder v. Hathcock, 150 N. C. 438, 439, 64 S. E. 194.

Effect of Wrongful Settlement.—Where a guardian surrendered his office in March to one whom he supposed to be his legal successor and made a settlement with him, though he was not regularly appointed guardian until December following, but in the meantime acted as such in good faith, it was held that the management of the fund from March to December must be treated as an exercise of an agency of the former guardian, whose bond is responsible for any loss resulting therefrom. Jennings v. Copeland, 90 N. C. 572.

§ 33-42. Expenses and disbursements credited to guardian.—Every guardian may charge in his annual account all reasonable disbursements and expenses; and if it appear that he has really and bona fide disbursed more in one year than the profits of the ward's estate, for his education and maintenance, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year; but such disbursements must, in all cases, be suitable to the degree and circumstances of the estate of the ward. (Rev., s. 1808;

Code, s. 1612; R. C., c. 54, s. 28; 1762, c. 69, ss. 18, 19; 1799, c. 536, s. 2; 1868-9, c. 201, s. 49; C. S. 2189.)

Cross References.—As to payments allowed in accounting, see § 33-6. As to expense of bond being lawful expense, see § 109-23.

In General.—A guardian should be charged with what he receives, and credited with what he pays out, when it does not appear that he collected anything prematurely, or kept on hand any unreasonable sum. Freeman v. Wilson, 74 N. C. 368.

Paying Debts Due.—When the guardian in good faith pays debts that ought to be paid, and by so doing the ward's estate suffers no prejudice, he will be allowed credit for disbursements of assets in his hands in such respects. McLean v. Breece, 113 N. C. 390, 392, 18 S. E. 694; Adams v. Thomas, 83 N. C. 521.

Exceeding Income of Estate.—In paying the accounts of a guardian, he cannot, except under rare circumstances, be allowed disbursements beyond the income of his ward. Caffey v. McMichael, 64 N. C. 507; Johnston v. Haynes, 68 N. C. 514.

A guardian will not be permitted to use more than the accruing profits of his ward's estate in the maintenance and education of the ward, except with the sanction of the court, or in extreme cases of urgent necessity. Tharington v. Tharington, 99 N. C. 118, 5 S. E. 414.

Same—Clerk May Allow.—The clerk of the superior court may allow a guardian credit for money necessarily expended in the education of the ward, though the amount exceeded the income and was made without the permission of the clerk of the court. Duffy v. Williams, 133 N. C. 195, 45 S. E. 548.

Same—Lunatic's Debts.—Where, in the settlement of the guardian's account, the lunatic is dead and his only child is of age, and it appears that the guardian, in good faith, paid debts without prejudice to the estate, the disbursement would be allowed. McLean v. Breece, 113 N. C. 390, 18 S. E. 694.

Setting Ward up in Business.—A guardian who advances money for his ward over and above the income of his estate, in order to set him up in business, or for other purposes, without applying to the court for leave, is not entitled to charge the ward with it. Shaw v. Coble, 63 N. C. 377.

Counsel Fees.—A guardian should be allowed reasonable attorney's fees paid in good faith. Burke v. Turner, 85 N. C. 500, citing Whitford v. Foy, 65 N. C. 265.

But fees paid by a guardian to the counsel for services rendered in obtaining an unfair settlement with the ward, and in aiding the guardian to cover up the fraud, cannot be allowed the latter in his settlement. Johnston v. Haynes, 68 N. C. 509.

Father as Guardian.—A father, or his trustee, in settling his accounts as guardian for his children, has no right to charge the children with the amount expended for their education. Walker v. Crowder, 37 N. C. 478.

A father, though he be the guardian of his minor child's estate, is not ordinarily permitted to charge for its maintenance, and, if able, he is himself bound to maintain his child; if not so, he must, before applying any of his ward's income to that end, procure the sanction of the proper court. Burke v. Turner, 85 N. C. 500.

Stepfather as Guardian.—Where a stepfather becomes guardian to his stepchild, he is not entitled to charge for board and other necessaries furnished to his ward antecedently to his appointment as guardian; the infant being incompetent to contract therefor. Barnes v. Ward, 45 N. C. 93.

Payments to Mother for Board of Wards after Majority.—A guardian is not chargeable with moneys paid to the mother of his wards for their board after their arrival at full age, no objection being urged against the propriety or justness of the claim, or of the price paid. McNeill v. Hodges, 83 N. C. 505.

Gift by Ward to Guardian.—In the U. S. Supreme Court it is held that if after the ward comes of age, and into possession of his estate he thinks fit, when sui juris, and at liberty, he may make any reasonable grant by way of award for care and trouble. When done with his eyes open, the court will never set it aside. Ralston v. Turpin, 129 U. S. 663, 672, 9 S. Ct. 420, 32 L. Ed. 747.

Same—Limitation to Rule.—The courts guard against gifts by a ward to his guardian if made at the very time of accounting and delivering up the estate. Ralston v. Turpin, 129 U. S. 663, 673, 9 S. Ct. 420, 32 L. Ed. 747.

§ 33-43. Commissions.—The superior court shall allow commissions to the guardian for his time and trouble in the management of the ward's estate, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors. (Rev., s. 1809; Code, s. 1613; R. C., c. 54, s. 28; 1762, c. 69, ss. 18, 19; 1868-9, c. 201, s. 50; C. S. 2190.)

Cross Reference.—As to commissions of executors and administrators, see § 28-170.

A Compensation to Guardian. — Commissions are only a compensation to the guardian for his time and trouble in managing his ward's estate. Walton v. Erwin, 36 N. C. 136.

The time spent by a guardian in the management of his ward's estate may be considered in fixing his commissions, but cannot be separately charged. Shutt v. Carloss, 36 N. C. 232.

Securities Delivered at Majority.—Commissions should be allowed a guardian on the amount of the notes and other securities for debt delivered to the ward upon the termination of the guardianship. Whitford v. Foy, 65 N. C. 265.

Bank as Administrator and Guardian of Distributee.—Where a bank, acting as administrator and as guardian for one of the distributees, pays over to itself as guardian the distributive share of its ward, such amount is cash received by it as guardian, and it is entitled by law to commissions thereon. Rose v. Bank of Wadesboro, 217 N. C. 600, 9 S. E. (2d) 2.

After Ward's Majority.—A guardian is not entitled to commissions upon any disbursement made after his ward arrives at full age. McNeill v. Hodges, 83 N. C. 505.

Failure to Keep Accounts. — A guardian is entitled to commissions, although he omitted to keep and render regular accounts, where no imputation is cast upon his integrity by reason of the neglect. McNeill v. Hodges, 83 N. C. 505. But where he is grossly negligent, it is otherwise. Topping v. Windley, 99 N. C. 4, 5 S. E. 14.

Using Ward's Money in Own Business.—A guardian will be allowed commissions, although he uses his ward's money in his business, if he makes regular returns, so as to show at all times what amount is due his ward. Carr v. Askew, 94 N. C. 194, distinguishing Burke v. Turner, 85 N. C. 500, 504. See also, Fisher v. Brown, 135 N. C. 198, 47 S. E. 398.

Same—Gross Negligence.—A guardian is not entitled to commissions on money collected and used by him in his own business where he was guilty of gross negligence in not making his returns. Burke v. Turner, 85 N. C. 500.

When Ward Boards with Guardian.—A guardian is entitled to commissions on payments made for his ward for goods bought of a firm of which the guardian was a member, but not on charges for board while the ward lived in his family. Williamson v. Williams, 59 N. C. 62.

Rate of Commissions. — Reasonable commissions will always be allowed to a guardian unless in cases of fraud or very culpable negligence. The rate will depend upon a variety of circumstances, such as the amount of the estate, the trouble in managing it, whether fees have been paid to counsel for assisting him in the management, the last of which will lessen it. Whitford v. Foy, 65 N. C. 265.

Same—Two and One-half Per Cent.—Two and one-half per cent was ample commission to a guardian receiving most of the ward's property, without litigation or difficulty, in the shape of notes payable to himself, which he retained 6 years collecting but little interest, when he voluntarily resigned and delivered the notes to his successor. Walton v. Erwin, 36 N. C. 136.

Same—Five Per Cent.—Five per cent was not an unreasonable allowance to a guardian as commissions on his receipts and disbursements, when these were numerous, and extended over a period of fourteen years. Covington v. Leak, 65 N. C. 594.

Same—Ten Per Cent.—A commission of ten per cent, the highest allowed by the statute, will be allowed to a guardian only in a case of the greatest merit, as where his duties have been troublesome and of long continuance. Walton v. Erwin, 36 N. C. 136.

Referee's Decision Adopted.—The amount of allowance of commissions to a guardian by a referee is usually adopted by the court, unless it is shown to be excessive. Johnston v. Haynes, 68 N. C. 514; Whitford v. Foy, 71 N. C. 527.

An appellate court will not review the finding of a referee as to the commissions allowed a guardian, unless such commissions are shown to be grossly erroneous. Whitford v. Foy, 71 N. C. 527.

Art. 6. Public Guardians.

§ 33-44. Appointment; term; oath.—There may be in every county a public guardian, to be appointed by the clerk of the superior court for a term of eight years. The public guardian shall

take and subscribe an oath (or affirmation) faithfully and honestly to discharge the duties imposed upon him; the oath so taken and subscribed shall be filed in the office of the clerk of the superior court. (Rev., ss. 1758, 1759; Code, ss. 1556, 1560; 1874-5, c. 221, ss. 1, 5; C. S. 2191.)

§ 33-45. Bond of public guardian; increasing bond.—The public guardian shall enter into bond with three or more sureties, approved by the clerk in the penal sum of six thousand dollars, payable to the state of North Carolina, conditioned faithfully to perform the duties of his office and obey all lawful orders of the superior or other courts touching said guardianship of all wards, money or estate that may come into his hands. Whenever the aggregate value of the real and personal estate belonging to his several wards exceeds one-half the bond herein required the clerk of the superior court shall require him to enlarge his bond in amount so as to cover at least double the aggregate amount under his control as guardian. (Rev., ss. 321, 322; Code, ss. 1557, 1558; 1874-5, c. 221, ss. 2, 3; C. S. 2192.)

§ 33-46. Powers, duties, liabilities, compensation.—The powers and duties of said public guardian shall be the same as other guardians, and he shall be subject to the same liabilities as other guardians under the existing laws, and shall receive the same compensation as other guardians. (Rev., s. 1761; Code, s. 1561; 1874-5, c. 221, ss. 6, 7; C. S. 2193.)

Cross Reference.—As to payment of money due minor insurance beneficiary to public guardian, see § 2-52.

§ 33-47. When letters issue to public guardian.—The public guardian shall apply for and obtain letters of guardianship in the following cases:

1. When a period of six months has elapsed from the discovery of any property belonging to any minor, idiot, lunatic, insane person or inebriate, without guardian.

2. When any person entitled to letters of guardianship shall request in writing the clerk of the superior court to issue letters to the public guardian; but it is lawful and the duty of the clerk of the superior court to revoke said letters of guardianship at any time after issuing the same upon application in writing by any person entitled to qualify as guardian, setting forth a sufficient cause for such revocation. (Rev., s. 1760; Code, s. 1561; 1874-5, c. 221, ss. 6, 7; C. S. 2194.)

Art. 7. Foreign Guardians.

§ 33-48. Right to removal of ward's personalty from state.—Where any ward, idiot, lunatic or insane person, residing in another state or territory, or in the District of Columbia, or Canada, or other foreign country, is entitled to any personal estate in this state, or personal property substituted for realty by decree of court, or to any money arising from the sale of real estate, whether the same be in the hands of any guardian residing in this state, or of any executor, administrator or other person holding for the ward, idiot, lunatic or insane person, or if the same (not being adversely held and claimed) be not in the lawful possession or control of any person, the guardian of the ward, idiot, lunatic or insane person, duly appointed at the place where such ward, idiot, lunatic or insane person resides, or in the event no guardian has been appointed the court or officer of the court authorized by the laws of the state or territory or for the District of Columbia or Canada or other foreign country to receive moneys belonging to any infants, idiots, lunatics or insane persons when no guardian has been appointed for such person, may apply to have such estate removed to the residence of the infant, idiot, lunatic or insane person by petition filed before the clerk of the superior court of the county in which the property or some portion thereof is situated; which shall be proceeded with as in other cases of special proceedings. (Rev., s. 1816; Code, ss. 1598, 1601; R. C., c. 54, s. 29; 1820, c. 1044; 1842, c. 38; 1868-9, c. 201, ss. 35, 38; 1874-5, c. 168; 1913, c. 86, s. 1; 1937, c. 307; C. S. 2195.)

Cross Reference.—See also § 36-6 et seq.

Editor's Note.—The 1937 amendment made provision for the event "no guardian has been appointed." It also substituted "infant" for "ward" in a subsequent part of the section.

In General.—Where it appeared that the property in this State of a ward residing in another state consisted of good bonds at interest in the hands of his guardian here, a part of which arose from the sale of land, and the ward was nearly of age, and there was no special necessity made to appear for making a transfer of the property, the court of equity, in the exercise of its discretion, refused to order a transfer of the estate to the hands of a guardian appointed in such other state. Douglas v. Caldwell, 59 N. C. 20.

Local Guardian Not Necessary.—Where a foreign guardian has been duly appointed in the state of his own residence and that of his wards, and has filed a certified copy of his appointment, with a bond sufficient both as to the amount and the financial ability of the sureties to protect the estate of his wards and in conformity with this section and section 33-49, with his petition to the clerk of the court as required by these statutes, it is not necessary that a local guardian be appointed, but the court in this State, before which the matter is properly pending, may order that the foreign guardian be permitted to withdraw the estate of his wards to the place of foreign jurisdiction. Cilley v. Geitner, 183 N. C. 528, 111 S. E. 865.

Foreign Guardian as Next Friend.—A guardian appointed in another state has no authority to represent his wards in suits and proceedings in this State, but when he brings suit for them as guardian it will be treated as if he were their next friend. Tate v. Mott, 96 N. C. 19, 2 S. E. 176.

When Guardian Must Be Resident.—Where the infant grandchildren of the testator take upon a contingency, as directed by the will, properly probated here, it is required that the guardian appointed be a resident of this State, according to our law, unless the funds have been properly removed to another state, under this section and section 33-49; and the law of this State governs the interpretation of the will when the testator died domiciled here. Cilley Geitner, 182 N. C. 714, 110 S. E. 61.

A guardian in another State of nonresident wards may proceed to obtain possession of the property bequeathed to the wards and in the hands of an executor in this State under a will duly probated here under the provisions of this section; § 36-7, relating to property in the hands of a trustee residing in this State, is not applicable. Fidelity Trust Co. v. Walton, 198 N. C. 790, 153 S. E. 401.

§ 33-49. Contents of petition; parties defendant.—The petitioner must show to the court a copy of his appointment as guardian and bond duly authenticated, and must prove to the court that the bond is sufficient, as well in the ability of the sureties as in the sum mentioned therein, to secure all the estate of the ward wherever situated. Any person may be made a party defendant to the proceeding who may be made a party defendant in civil actions under the provisions of the chapter entitled Civil Procedure. (Rev., ss. 1817, 1818; Code, ss. 1599, 1600; R. C., c. 54, s. 30; 1820, c. 1044, s. 2; 1842, c. 38; 1868-9, c. 201, ss. 36, 37; C. S. 2196.)

Cross Reference.—As to who may be defendants, see § 1-69.

Art. 8. Estates without Guardian.

§ 33-50. Duty of grand jury as to orphans and guardians.—The grand jury of every county is charged with and shall present to the superior court the names of all orphan children that have no guardian or are not bound out to some trade or employment. They shall further inquire of all abuses, mismanagement and neglect of all such guardians as are appointed by the clerk of the superior court. The clerk of the superior court shall, at each term of the superior court, lay before the grand jury a list of all the guardians acting in his county or appointed by him. (Rev., s. 1810; Code, s. 1609; R. C., c. 54, s. 18; 1762, c. 69, s. 17; 1868-9, c. 201, s. 46; C. S. 2197.)

§ 33-51. Solicitor to apply for receiver for orphans' estates.—Whenever the name of an orphan, having any estate and for whom no suitable person will become guardian, is presented by a grand jury, the clerk of the superior court must give notice thereof forthwith to the solicitor of the state for the judicial district, who shall apply in behalf of the orphan to the judge of the superior court of the county where such presentment was made, to the end that a receiver be appointed. (Rev., s. 1811; Code, s. 1610; R. C., c. 54, s. 19; 1846, c. 43; 1868-9, c. 201, s. 47; C. S. 2198.)

§ 33-52. Solicitor to prosecute bond of guardian removed without a successor.—Whenever any guardian is removed, and no person is appointed to succeed in the guardianship, the clerk of the superior court shall certify the name of such guardian and his sureties to the solicitor of the judicial district, who shall forthwith institute an action on the bond of the guardian in the superior court, for securing the estate of the ward. (Rev., s. 1812; Code, s. 1584; R. C., c. 54, s. 14; 1844, c. 41; 1868-9, c. 201, s. 21; C. S. 2199.)

Infant Not a Party.—The action required by this section to be taken by the solicitor, in the cases provided for, is properly an action brought by him for the benefit of the ward when the guardian has been removed, and the infant is not a necessary, perhaps not a proper, party to it. Becton v. Becton, 56 N. C. 419; Temple v. Williams, 91 N. C. 82, 89.

Allowance Pendente Lite.—During the pendency of an action under this section against a guardian and the sureties on his bond by his ward for an account and settlement, and while the same is under reference and before the report of the referee is complete and finally acted on, and before any of the ward's estate is in possession of the court, the superior court has no power to order the guardian and his sureties to pay a certain sum into court for the ward's maintenance and support pendente lite, and a further sum for her attorney. State v. Harrison, 75 N. C. 432.

Same—Contempt.—If it is made to appear to the court, pending an action under this section, that a fund belonging to the ward is in possession of the guardian removed, the judge may, by process of contempt, compel its payment into court, where it will be subject to such orders and disposition as the necessities of the ward may require. State v. Harrison, 75 N. C. 432, 434.

§ 33-53. Judge to appoint receiver; his rights and duties.—The judge of the superior court, either residing in or presiding over the courts of the district, before whom such action is brought, shall have power to appoint the clerk of the superior court or some discreet person as a receiver to take possession of the ward's estate, to collect all moneys due to him, to secure, lend, invest or apply the same for the benefit and advantage of the ward, under the direction and subject to such rules and orders in every respect as the said judge may from time to time make in regard thereto; and the accounts of such receiver shall be returned, audited and settled as the judge may direct. The receiver shall be allowed such amounts for his time, trouble and responsibility as seem to the judge reasonable and proper; and such receivership may be continued until a suitable person can be procured to take the guardianship. (Rev., s. 1813; Code, s. 1585; R. C., c. 54, s. 15; 1844, c. 41, s. 2; 1868-9, c. 201, s. 22; C. S. 2200.)

Cross Reference.—As to receivers, see § 1-501 et seq.

When Appointed.—The mere poverty of the executor does not authorize the court, against the will of the testator, to remove him by placing a receiver in his place. There must be, in addition, some maladministration, or some danger of loss from the misconduct or negligence of the executor for which he will not be able to answer by reason of his insolvency. Camp v. Pittman, 90 N. C. 615, 617; Fairbain v. Fisher, 57 N. C. 395.

The appointment of a receiver for an insane person's estate should be made only on the motion of the solicitor, after the wife and one or more adult children, if there are such, or some near relative or friend, have been brought before the judge at chambers or in term. In re Hybart, 119 N. C. 359, 25 S. E. 963.

Clerk Appointed.—Under this section the court has authority to appoint a clerk of the superior court receiver of the infants' estate. Waters v. Melson, 112 N. C. 89, 16 S. E. 918.

Same—The Order.—Where, in an order of court appointing "J. A. M., clerk of the superior court," receiver of the infants' estate, the word "as" was omitted before the words "clerk of the superior court", it was held that the intention of the court to appoint M. as receiver in his official capacity was sufficiently indicated. Waters v. Melson, 112 N. C. 89, 16 S. E. 918.

Does Not Have Guardian's Power.—A receiver appointed to take charge of a ward's estate when the guardian is removed, is not invested with the powers of a guardian, but acts under the control of the court until another guardian is appointed. Temple v. Williams, 91 N. C. 82.

General Liability. — As a general rule, a receiver is responsible for his own neglect only, and is protected when he acts in entire good faith. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Same—Similar to Guardian's.—When a receiver is appointed to take charge of an infant's estate who has no guardian, and is directed to lend out the money and pay the income over to the ward, he will be held to the same accountability as a guardian. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Failure of Bank.—A receiver may keep money in a bank as a safe place of deposit, or may use the bank as a means of transmitting money to distant places, and if he uses reasonable diligence, he will not be held liable if the bank fails. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Where a receiver was appointed to take charge of an infant's estate and invest the same, and report to the court annually, and he deposited a portion of the money in a bank in another state to his credit as receiver, on which deposit he was paid interest by the bank, which afterwards failed, it was held that the receiver was liable for the loss, as he had failed to report to the court the manner in which he had invested the infant's estate, although he had acted in the best faith. State v. Gooch, 97 N. C. 186, 1 S. E. 653.

Official Bond Liable—Former Provisions.—The liability of a clerk as receiver arising under statutory provisions was not formerly embraced by his official bonds, because his office and duties as such clerk did not embrace the receivership and the duties and liabilities incident thereto. The receivership and its incidents were outside of and beyond his official duties as clerk, and hence not embraced by his official bond and its purposes. Kerr v. Brandon, 84 N. C. 128; State v. Odom, 86 N. C. 432; Syme v. Bunting, 91 N. C. 48, 52; State v. Boone, 108 N. C. 78, 83, 12 S. E. 897.

Same—Sureties.—But now when the clerk of the superior court is appointed receiver of a minor's estate under this section, he takes and holds the funds by virture of his office as clerk, and his sureties upon his official bond as such officer are liable for any failure of duty on his part in that respect. State v. Upchurch, 110 N. C. 62, 14 S. E. 642.

The sureties on the clerk's official bond are liable for any breach of his duties as receiver. Waters v. Melson, 112 N. C. 89, 16 S. E. 918.

Action against Receiver.—It is not necessary to obtain

leave of the court before commencing an action for failure of the clerk to fulfill his duty when appointed receiver under this section. State v. Upchurch, 110 N. C. 62, 14 S. E. 642.

Same—Burden of Proof.—The burden is upon a receiver and his sureties to show that he used due diligence in investing the money in his hands. Waters v. Melson, 112 N. C. 89, 16 S. E. 918.

Same—Present Law.—Where the appointment of receiver is conferred upon the clerk under the statute authorizing the court to commit the estate of an infant to "some discreet person," it was held that the same is protected by his bond as clerk. State v. Odom, 86 N. C. 432.

§ 33-54. When receiver to pay over estate.—When another guardian is appointed, he may apply by motion, on notice, to the judge of the superior court for an order upon the receiver to pay over all the money, estate and effects of the ward; and if no such guardian is appointed, then the infant, on coming of age, or in case of his death, his executor, administrator or collector, and the heir or personal representative of the idiot, lunatic or insane person, shall have the like remedy against the receiver. (Rev., s. 1814; Code, s. 1587; R. C., c. 54, s. 17; 1844, c. 41, s. 4; 1868-9, c. 201, s. 24; C. S. 2201.)

Settlement Not Conclusive.—A settlement made with a receiver, even if had under direction of the court, is not conclusive against the ward, but only raises a presumption that the account and settlement are correct. Such presumption may be disproved. Temple v. Williams, 91 N. C. 82.

§ 33-55. Duties of solicitor.—The solicitor shall prosecute the action and take all necessary orders therein. (Rev., s. 1815; Code, s. 1586; 1895, c. 14; R. C., c. 54, s. 16; 1844, c. 41, s. 3; 1868-9, c. 201, s. 23; C. S. 2202.)

Art. 9. Guardians of Estates of Missing Persons.

§ 33-56. Appointment.—When it shall be made to appear to the satisfaction of the clerk of the superior court, or a judge of the superior court having jurisdiction of the appointment of guardians, that any person has disappeared from the community of his residence, and his whereabouts remains unknown in such community for a period of three (3) months, and cannot, after diligent inquiry, be ascertained; and that such person has property in the state and property rights within its jurisdiction which may be affected by his absence, or may need protection and administration; and that such person has made no provision for the management of his affairs; such clerk of the superior court or judge of the superior court may appoint a guardian of the estate and property of such person as may, by law be done in the case of minors and persons non compos mentis, and with the like powers and duties with respect to such estate. (1933, c. 49, s. 1.)

Editor's Note.—See 11 N. C. Law Rev. 231, for discussion and review of this section.

§ 33-57. Jurisdiction.—The clerk of the superior court of the county of the last residence of such absent person shall have prior right to jurisdiction of such appointment, but the appointment may be made by the clerk of the superior court of any county in the state where such person has property, after the expiration of six months from the time of such disappearance, if no prior appointment has been made. (1933, c. 49, s. 2.)

§ 33-58. Powers and duties; bond. — The guardian, so appointed, shall have all the powers and duties with respect to the property and estate of such absent person as are now, or may be hereafter, conferred by law upon guardians generally; and before entering into the discharge of the duties of his guardianship, he shall be required to enter into such bond as is now required by law in such cases, for the faithful performance of his trust and for the accounting of the property, moneys and assets of the estate coming into his hands as guardian. (1933, c. 49, s. 3.)

Cross Reference.—As to bond of guardians generally, see § 33-12 et seq.

§ 33-59. General laws applicable. — The public laws relating to guardianships, and particularly this chapter, as far as by their terms they may be applicable, and as far as they are not modified by this article, shall apply to guardians so appointed. (1933, c. 49, s. 3.)

§ 33-60. Other managerial powers conferred.—In addition to the powers given to guardians under the general laws of the state, such guardians may, by approval of the court, apply funds in his hands to the satisfaction of obligations of such absent person, renew notes and other obligations, pledge property for loans necessary in carrying on or liquidating the affairs of such absent person; cause lands to be cultivated, where such business was previously carried on, and make such contracts with reference thereto as he may deem to the best interest of the estate, and, under the direction of the court and with its approval, continue to operate any business or business enterprise of such person, and make such contracts, agreements and settlements in reference thereto as may be necessary, or to the best interests of the estate. (1933, c. 49, s. 4.)

§ 33-61. Discharge of guardian upon return of missing person.—Upon the return of such absent person, and within six months from the filing of the petition by such person to be restored to his property and to the management of his estate, the clerk of the superior court having jurisdiction of the said guardianship shall require a settlement of the estate by the guardian so appointed, and shall cause to be turned over to such person all of the said estate then in the hands of the said guardian, after the payment of such reasonable costs and commissions as may be authorized by law, and, upon the filing of a financial account by the said guardian, he shall be discharged. (1933, c. 49, s. 5.)

§ 33-62. Guardian not liable except for misconduct.—No action shall be maintained against such guardian, or the sureties on his bond, by reason of his appointment, taking over and managing the property of such absent person, or any of his acts with respect to the said estate, where it appears that they were done under authority of this article, but only for recovery because of the misconduct in office or bad faith of such guardian, or the waste of the assets of the estate through mismanagement, amounting to gross carelessness or in violation of the law. (1933, c. 49, s. 6.)

Chapter 34. Veterans' Guardianship Act.

§ 34-1. Title.—This chapter shall be known as "The Veterans' Guardianship Act." (1929, c. 33, s. 1.)

§ 34-2. Definitions.—In this chapter:

The term "person" includes a partnership, corporation or an association.

The term "Bureau" means the United States Veterans' Bureau or its successor.

The terms "estate" and "income" shall include only moneys received by the guardian from the Bureau and all earnings, interests and profits derived therefrom.

The term "benefits" shall mean all moneys payable by the United States through the Bureau.

The term "Director" means the Director of the United States Veterans' Bureau or his successor.

The term "State Service Officer" means such appointee of the North Carolina Commissioner of Labor as provided by § 95-4.

The term "ward" means a beneficiary of the Bureau.

The term "guardian" as used herein shall mean any person acting as a fiduciary for a ward. (1929, c. 33, s. 2.)

§ 34-3. Appointment of guardian for wards entitled to benefits from United States Veterans' Bureau.—Whenever, pursuant to any law of the United States or regulation of the Bureau, the Director requires, prior to payment of benefits, that a guardian be appointed for a ward, such appointment shall be made in the manner hereinafter provided. (1929, c. 33, s. 3.)

§ 34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, or where wards are members of same family.—Except as hereinafter provided it shall be unlawful for any person to accept appointment as guardian of any ward if such proposed guardian shall at that time be acting as guardian for five wards. If any case, upon presentation of a petition by an attorney of the Bureau under this section alleging that a guardian is acting in a fiduciary capacity for more than five wards and requesting his discharge for that reason, the court, upon proof substantiating the petition, shall require a final accounting forthwith from such guardian and shall discharge such guardian in said case.

The limitations of this section shall not apply where the guardian is a bank or trust company acting for the wards' estates only. An individual may be guardian of more than five wards if they are all members of the same family. (1929, c. 33, s. 4.)

§ 34-5. Petition for appointment of guardian.—A petition for the appointment of a guardian may be filed in any court of competent jurisdiction by or on behalf of any person who under existing law is entitled to priority of appointment. If there be no person so entitled or if the person so entitled shall neglect or refuse to file such a petition within thirty days after mailing of notice by the Bureau to the last known address of such person indicating the necessity for the same a petition for such appointment may be filed in any court of competent jurisdiction by or on behalf of any responsible person residing in this State.

The petition for appointment shall set forth the name, age, place of residence of the ward, the names and places of residence of the nearest relative, if known, and the fact that such ward is entitled to receive moneys payable by or through the Bureau and shall set forth the amount of moneys then due and the amount of probable future payments.

The petition shall also set forth the name and address of the person or institution, if any, having actual custody of the ward.

In the case of a mentally incompetent ward the petition shall show that such ward has been rated incompetent on examination by the Bureau in accordance with the laws and regulations governing the Bureau. (1929, c. 33, s. 5.)

§ 34-6. Certificate of Director prima facie evidence of necessity for appointment.—Where a petition is filed for the appointment of a guardian of a minor ward a certificate of the Director, or his representative, setting forth the age of such minor as shown by the records of the Bureau and the fact that the appointment of a guardian is a condition precedent to the payment of any moneys due the minor by the Bureau, shall be prima facie evidence of the necessity for such appointment. (1929, c. 33, s. 6.)

§ 34-7. Same in regard to guardianship of mentally incompetent wards.—Where a petition is filed for the appointment of a guardian of a

mentally incompetent ward a certificate of the Director, or his representative, setting forth the fact that such person has been rated incompetent by the Bureau on examination in accordance with the laws and regulations governing such Bureau; and that the appointment of a guardian is a condition precedent to the payment of any moneys due such person by the Bureau, shall be prima facie evidence of the necessity for such appointment. (1929, c. 33, s. 7.)

§ 34-8. Notice of filing of petition.—Upon the filing of a petition for the appointment of a guardian, under the provisions of this chapter, the court shall cause such notice to be given as provided by law. (1929, c. 33, s. 8.)

§ 34-9. Qualifications of guardian; surety bond.—Before making an appointment under the provisions of this chapter the court shall be satisfied that the guardian whose appointment is sought is a fit and proper person to be appointed. Upon the appointment being made the guardian shall execute and file a surety bond to be approved by the court in an amount not less than the sum then due and estimated to become payable during the ensuing year. The said bond shall be in the form and be conditioned as required of guardians appointed under the guardianship laws of this state. The court shall have power from time to time to require the guardian to file an additional bond.

No bond shall be required of the banks and trust companies licensed to do trust business in North Carolina. (1929, c. 33, s. 9.)

Cross Reference.—As to bond required of guardians appointed under the guardianship laws of this state, see § 33-12 et seq.

§ 34-10. Guardian's accounts to be filed; hearing on accounts.—Every guardian, who shall receive on account of his ward any moneys from the bureau, shall file with the court annually, on the anniversary date of the appointment, in addition to such other accounts as may be required by the court, a full, true, and accurate account under oath of all moneys so received by him, of all disbursements thereof, and showing the balance thereof in his hands at the date of such account and how invested. A certified copy of each of such accounts filed with the court shall be sent by the guardian to the office of the bureau having jurisdiction over the area in which such court is located.

At the time such account is filed the clerk of superior court shall require the guardian to exhibit to the court all investments and bank statements showing cash balance and the clerk of superior court shall certify on the original account and the certified copy which the guardian sends the bureau that an examination was made of all investments and cash balance and that same are correctly stated in the account. If objections are raised to such an accounting, the court shall fix a time and place for the hearing thereon not less than fifteen days nor more than thirty days from the date of filing such objections, and notice shall be given by the court to the aforesaid bureau office and state service officer by mail not less than fifteen days prior to the date fixed for the hearing. Notice of such hearing shall also be given to the guardian. (1929, c. 33, s. 10; 1933, c. 262, s. 1.)

Editor's Note.—Public Laws of 1933, c. 262, omitted the last two sentences of this section as it formerly read and inserted the last three sentences of the present section in lieu thereof. The next to the last and the last sentence as they now read are practically the same as the omitted provision. The third from the last sentence is new with the amendment.

See 11 N. C. Law Rev. 232, for summary of this section.

§ 34-11. Failure to file account cause for removal.—If any guardian shall fail to file any account of the moneys received by him from the Bureau on account of his ward within thirty days after such account is required by either the court or the Bureau, or shall fail to furnish the Bureau a copy of his accounts as required by this chapter, such failure shall be grounds for removal. (1929, c. 33, s. 11.)

§ 34-12. Compensation at 5 per cent; additional compensation; premiums on bonds.—Compensation payable to guardians shall not exceed 5 per cent of the income of the ward during any year. In the event of extraordinary services rendered by such guardian the court may, upon petition and after hearing thereon, authorize additional compensation therefor, payable from the estate of the ward. Notice of such petition and hearing shall be given the proper office of the Bureau and the State Service Officer in the manner provided in § 34-10. No compensation shall be allowed on the corpus of an estate received from a preceding guardian. The guardian may be allowed from the estate of his ward reasonable premiums paid by him to any corporate surety upon his bond. (1929, c. 33, s. 12.)

Where the clerk entered an order allowing a guardian additional compensation for extraordinary services and the Veterans Administration failed to perfect its appeal from the clerk's order, and thereafter applied to the judge of the Superior Court for a writ of certiorari, the petition for certiorari was denied upon the court's finding of laches and demerit. In re Snelgrove, 208 N. C. 670, 182 S. E. 335.

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

(a) United States government bonds.

(b) State of North Carolina bonds issued since the year one thousand eight hundred seventy-two.

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

It shall be the duty of guardians who shall have funds invested other than as provided for

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

The clerk of the superior court of any county in the state or any guardian who shall violate any of the provisions of this section shall be guilty of a misdemeanor, punishable by fine or imprisonment or both in the discretion of the court. (1929, c. 33, s. 13; 1933, c. 262, s. 2.)

Editor's Note.—Prior to the amendment by Public Laws 1933, c. 262, this section merely provided that the guardian should invest the funds as allowed by the law or approved by the court.

Purchase of home for use of dependent sister, see Patrick v. Branch Bkg., etc., Co., 216 N. C. 525, 5 S. E. (2d) 724.

§ 34-14. Application of ward's estate.—A guardian shall not apply any portion of the estate of his ward for the support and maintenance of any person other than his ward, except upon order of the court after a hearing, notice of which has been given the proper officer of the Bureau and the State Service Officer in the manner provided in § 34-10. (1929, c. 33, s. 14.)

§ 34-15. Certified copy of record required by Bureau to be furnished without charge.—Whenever a copy of any public record is required by the Bureau or State Service Officer to be used in determining the eligibility of any person to participate in benefits made available by such Bureau, the official charged with the custody of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the representative of such Bureau or State Service Officer with a certified copy of such record. (1929, c. 33, s. 15.)

§ 34-16. Commitment to Veterans' Administration, etc., for care or treatment.—(1) Whenever, in any proceeding under the laws of this state for the commitment of a person alleged to be of unsound mind or otherwise in need of confinement in a hospital or other institution for his proper care, it is determined after such adjudication of the status of such person as may be required by law that commitment to a hospital for mental disease or other institution is necessary for safekeeping or treatment and it appears that such person is eligible for care or treatment by the Veterans' Administration or other agency of the United States government, the court, upon receipt of a certificate from the Veterans' Administration or such other agency showing that facilities are available and that such person is eligible for care or treatment therein, may commit such person to said Veterans' Administration or other agency. The person whose commitment is sought shall be personally served with notice of the pending commitment proceeding in the manner as provided by the law of this state; and nothing in this section shall affect his right to appear and be heard in the proceedings. Upon commitment, such person, when admitted to any facility operated by any such agency within or without this state shall be subject to the rules and regulations of the Veterans' Administration or other agency. The chief officer of any facility of the Veterans' Administration or institution operated by any other agency of the United States to which the person is so committed shall, with respect to such person, be vested with the same powers as superintendents of state hospitals for mental diseases within this state with respect to retention of custody, transfer, parole or discharge. Jurisdiction is retained in the committing or other appropriate court of this state at any time to inquire into the mental condition of the person so committed, and to determine the necessity for continuance of his restraint, and all commitments pursuant to this section are so conditioned.

(2) The judgment or order of commitment by a court of competent jurisdiction of another state or of the District of Columbia, committing a person to the Veterans' Administration, or other agency of the United States government for care or treatment shall have the same force and effect as to the committed person while in this state as in the jurisdiction in which is situated the court entering the judgment or making the order; and the courts of the committing state, or of the District of Columbia, shall be deemed to have retained jurisdiction of the person so committed for the purpose of inquiring into the mental condition of such person, and of determining the necessity for continuance of his restraint; as is provided in subsection (1) of this section with respect to persons committed by the courts of this state. Consent is hereby given to the application of the law of the committing state or district in respect to the authority of the chief officer of any facility of the Veterans' Administration, or of any institution operated in this state by any other agency of the United States to retain custody, or transfer, parole or discharge the committed person.

(3) Upon receipt of a certificate of the Veterans' Administration or such other agency of the United States that facilities are available for the care or treatment of any person heretofore committed to any hospital for the insane or other institution for the care or treatment of persons similarly afflicted and that such person is eligible for care or treatment, the superintendent of the institution may cause the transfer of such person to the Veterans' Administration or other agency of the United States for care or treatment. Upon effecting any such transfer, the committing court or proper officer thereof shall be notified thereof by the transferring agency. No person shall be transferred to the Veterans' Administration or other agency of the United States if he be confined pursuant to conviction of any felony or misdemeanor or if he has been acquitted of the charge solely on the ground of insanity, unless prior to transfer the court or other authority originally committing such person shall enter an order for such transfer after appropriate motion and hearing.

Any person transferred as provided in this section shall be deemed to be committed to the Veterans' Administration or other agency of the United States pursuant to the original commitment. (1929, c. 33, s. 16; 1943, c. 424.)

Cross Reference.—As to rules and regulations for state hospitals and powers exercised by the superintendents thereof, see chapter 35.

Editor's Note.—The 1943 amendment rewrote this section.

§ 34-17. Discharge of guardian.—When a minor

ward for whom a guardian has been appointed under the provisions of this chapter or other laws of this state shall have attained his or her majority, and if incompetent shall be declared competent by the Bureau and the court, and when any incompetent ward, not a minor, shall be declared competent by said Bureau and the court, the guardian shall upon making a satisfactory accounting be discharged upon a petition filed for that purpose. (1929, c. 33, s. 17.)

§ 34-18. Construction of chapter.—This chapter shall be construed liberally to secure the beneficial intents and purposes thereof and shall apply only to beneficiaries of the Bureau. (1929, c. 33, s. 18.)

Chapter 35. Insane Persons and Incompetents.

Art. 1. Inebriates.

§ 35-1. Inebriates defined. — Any person who habitually, whether continuously or periodically, indulges in the use of intoxicating liquors, narcotics or drugs to such an extent as to stupify his mind and to render him incompetent to transact ordinary business with safety to his estate, or who renders himself, by reason of the use of intoxicating liquors, narcotics or drugs, dangerous to person or property, or who, by the frequent use of liquor, narcotics or drugs, renders himself cruel and intolerable to his family, or fails from such cause to provide his family with reasonable necessities of life, shall be deemed an inebriate: Provided, the habit of so indulging in such use is at the time of inquisition of at least one year's standing. (Rev., s. 1892; Code, s. 1671; 1891, c. 15, s. 7; 1903, c. 543; 1879, c. 329; C. S. 2284.)

Cited in In re Anderson, 132 N. C. 243, 246, 43 S. E. 649.

Art. 2. Guardianship and Management of Estates of Incompetents.

§ 35-2. Inquisition of lunacy; appointment of guardian.—Any person, in behalf of one who is deemed an idiot, inebriate, or lunatic, or incompetent from want of understanding to manage his own affairs by reason of the excessive use of intoxicating drinks, or other cause, may file a petition before the clerk of the superior court of the county where such supposed idiot, inebriate or lunatic resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the supposed idiot, inebriate or lunatic, to the sheriff of the county, commanding him to summon a jury of twelve men to inquire into the state of such supposed idiot, inebriate or lunatic. Upon the return of the sheriff summoning said jury, the clerk of the superior court shall swear and organize said jury and shall preside over said hearing, and the jury shall make return of their proceedings under their hand to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be an idiot, inebriate, lunatic, or incompetent person by inquisition of a jury, as in cases of orphans.

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

The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be an idiot, inebriate, lunatic or incompetent person by inquisition of a jury, as in cases of orphans. If the person so adjudged incompetent shall be an inebriate within the definition of section 35-1, the clerk shall proceed to commit said inebriate to the department for inebriates at the state hospital in Raleigh for treatment and cure. He shall forward to the superintendent of said state hospital a copy of the record required herein to be made, together with the commitment, and these shall constitute the authority to said superintendent to receive and care for and cure said inebriate. The expenses of the care and cure of said inebriate shall constitute a charge against the estate in the care of his guardian. If, however, such estate is not large enough to pay such expenses, the same shall be a valid charge against the county from which said inebriate is sent. Provided, where the person is found to be incompetent from want of understanding to manage his affairs, by reason of physical and mental weakness on account of old age and/or disease and/or other like infirmities, the clerk may appoint a trustee instead of guardian for said person. The trustee appointed shall be subject to the laws now or which hereafter may be enacted for the control and handling of estates by guardians. The clerks of the superior courts who have heretofore appointed guardians for persons described in this proviso are hereby authorized and empowered to change said appointment from guardian to trustee. The sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. And the juries of the several counties upon whom a process is served under the provisions of this section shall serve and make their returns without demanding their fees in advance. (Rev., s. 1890; Code, s. 1670; C. C. P., s. 473; 1919, c. 54; 1921, c. 156, s. 1; 1929, c. 203, s. 1; 1933, c. 192; C. S. 2285.)

Cross References.—As to the appointment and duties of guardian, see § 33-2 et seq. As to power of guardian of an insane woman to dissent from her husband's will, see § 30-1. As to guardian's power to claim benefits under the Workmen's Compensation Act, see § 97-49. As to bond required of guardian, see § 33-12 et seq. As to commitment of insane person to a state hospital, see § 122-36 et seq. As to proceedings in case of insanity of a citizen of another state, see § 122-63; of an alien, see § 122-64. As to service of summons upon an insane person, see § 1-97.

Editor's Note.—In 1784 (Laws 1784, ch. 228) the county courts were authorized and required to appoint guardians for any idiot or lunatic possessed of property, either real or personal, upon the finding of a jury of idiocy or lunacy; and later other classes of persons than idiots and lunatics were added, for whom guardians may be appointed. Those added classes are "inebriates and those who are incompetent for want of understanding to manage their own affairs by reason of the excessive use of intoxicating drinks or other cause." These additions were made originally in the Code of Civil Procedure, and have been brought forward in subsequent codes.

This section was amended in 1919, Acts 1919, ch. 54, and the right of appeal given to the parties.

In 1921, Acts 1921, ch. 156, sec. 1, this section was again amended and the latter portion, regarding the commitment of inebriates to the State hospital, was added.

The Act of 1929 added the proviso to this section.

Public Laws 1933, c. 192, added the last two sentences abolishing advanced fees of sheriffs and juries.

The effect of this section is to provide that the proceeding may be commenced by the filing of the petition, and that the inquisition may be held upon the notice therein provided being served upon the alleged incompetent, thereby dispensing with the necessity of issuing a summons. The notice to an incompetent to appear at a time and place named to present evidence and show cause, if any, why he should not be declared incompetent serves every function of a summons. In re Barker, 210 N. C. 617, 620, 188 S. E. 205.

General Consideration.—This section clearly makes four classes of persons for whom guardians may be appointed,

namely, idiots, lunatics, inebriates, and those who are incompetent from want of understanding to manage their own affairs by reason of the excessive use of intoxicating drinks or other cause.

(1) An idiot or natural fool is one that has no understanding from his nativity.

(2) A lunatic is one who has possessed reason, but through disease, grief, or other cause has lost it. The term is especially applicable to one who has lucid intervals and may yet in contemplation of the law recover his reason.

(3) An inebriate is defined in sec. 35-1.

(4) The fourth class of persons mentioned in this section must really be embraced under the head of lunatics, that is, their want of understanding in order to render them incompetent to manage their own affairs must be complete. As in lunacy, there must be a total privation of understanding; mere weakness of mind will not be sufficient to place a person in the list of those described in the fourth class mentioned in the statute. In re Anderson, 132 N. C. 243, 246, 43 S. E. 649.

Distribution as to Jurisdiction.—The effect of this action has been to confer upon the clerks original and exclusive jurisdiction to issue writs from time to time, as may be necessary, for the purpose of ascertaining, by the inquisition of a jury, whether a party be an idiot or a lunatic, or, if he had been once found to be a lunatic, whether he had become of sound mind again; and to make all orders that may be necessary upon the return of the inquisition. After an idiot or lunatic has been thus found to be such, and put under guardianship, a court of equity has jurisdiction over his estate, both real and personal, and has power to direct the sale of the same, or any part thereof, and to make all needful orders for the application of the proceeds to the necessities of the idiot or lunatic and his family. Dowell v. Jacks, 58 N. C. 417, 419.

An affidavit filed in accordance with this section, confers jurisdiction upon the clerk, and although the clerk's order of commitment be without warrant of law, the Superior Court obtains jurisdiction upon appeal from the denial of the motion before the clerk to strike out the order, which motion expressly requested that the cause "be reinstated upon the docket." In re Dewey, 206 N. C. 714, 175 S. E. 161.

Presence of Party.—The alleged lunatic has a right to be present at the inquest, and if this right be denied him, it is good cause for setting aside the inquisition. But where an inquisition, taken by order of a court of competent jurisdiction, is returned to and confirmed by the court, it is to be respected like other judgments of a court, until it be reversed or superseded. Bethea v. McLennon, 23 N. C. 523, cited in note in 23 L. R. A. 742.

A finding of the jury that a person, the subject of an inquisition of lunacy, is incompetent from want of understanding to manage his own affairs is such as to require the clerk to appoint a guardian for him, whatever the cause may be. In re Denny, 150 N. C. 423, 64 S. E. 187. And this is true even where the jury finds that the defendant is not a lunatic or idiot. In re Anderson, 132 N. C. 243, 43 S. E. 649, or that defendant was not wholly deprived of reason. In re Denny, 150 N. C. 423, 64 S. E. 187; In re Anderson, 132 N. C. 243, 43 S. E. 649.

Confirmation of Finding.—The report of the jury need not be formally "confirmed" by the clerk as the statute only requires it to be "filed and recorded." Sims v. Sims, 121 N. C. 297, 28 S. E. 407.

Conclusiveness of Adjudication.—An inquisition of lunacy finding a person a lunatic, is only prima facie evidence of the fact, and may be rebutted by proof. Christmas v. Mitchell, 38 N. C. 535.

Erroneous Instruction.—In a proceeding for the appointment of a guardian for respondent on the ground that he was incompetent for "want of understanding to manage his own affairs," respondent held entitled to a new trial for the reason that the court, although giving the respective contentions of the parties upon the issue, failed to define the legal meaning of the term or instruct the jury as to the standard of mental capacity recognized by the law. In re Worsley, 212 N. C. 320, 193 S. E. 666.

Presumed to Lack Capacity to Manage Affairs after Guardian Appointed.—Where a person has been adjudged incompetent for want of understanding to manage his own affairs, under this section, and the court appointed a guardian, and not a trustee, the ward is conclusively presumed to lack mental capacity to manage his own affairs, in so far as parties and privies to the proceeding are concerned; and, while not conclusive as to others, it is presumptive, and the presumption continues unless rebutted in a proper proceeding. Sutton v. Sutton, 222 N. C. 274, 22 S. E. (2d) 553.

Cited in In re Sylivant, 212 N. C. 343, 193 S. E. 422; In re Cook, 218 N. C. 384, 11 S. E. (2d) 142.

§ 35-3. Guardian appointed on certificate from hospital for insane.—If any person is confined in any State, territorial or Governmental asylum or hospital for the insane in this State, or in any other state or territory, or in the District of Columbia, or in any hospital licensed and supervised by the State of North Carolina, the certificate of the superintendent of such hospital declaring such person to be of insane mind and memory, which certificate shall be sworn to and subscribed before the clerk of the Superior Court or any notary public, or the clerk of any court of record in the county, in which such hospital is situated and certified under the seal of court, shall be sufficient evidence to authorize to appoint a guardian for such idiot, lunatic or insane person. Further, the clerks of the different counties of this State are also authorized to appoint guardians for any person entitled to the benefits of the War Risk Insurance Act, as amended, and the World War Veterans' Act of nineteen hundred and twenty-four as amended, where it shall appear from the certificate of the Regional Medical Officer of the United States Veterans' Bureau of North Carolina that such veteran of the World War has been declared by the United States Government as incompetent to receive the funds to be paid to him under said Acts of Congress, and such certificate shall be all the proof required as to the incapacity of said veteran to receive such funds and as to the necessity of a guardian. Guardians for such veterans shall be subject to the same provisions of law as guardians of idiots, inebriates, lunatics, and incompetent persons in this State.

Any guardian or trustee appointed prior to April 3, 1939, under the provisions of this section on certificate issued by the superintendent of any hospital licensed and supervised by the State of North Carolina, and any and all proceedings based thereon are hereby validated. (Rev., ss. 1891, 4609; Code, s. 1673; 1860-1, c. 22; 1907, c. 232; 1927, c. 160, s. 1; 1939, c. 330; C. S. 2286.)

Editor's Note.—The 1927 amendment added the latter part of the first paragraph relating to the appointment of guardians for World War veterans. The 1939 amendment inserted after the word "Columbia" in the fifth line the words "or in any hospital licensed and supervised by the State of North Carolina." It also added the second paragraph.

Certificate Must Be from Superintendent of Government Hospital.—The certificates of the superintendents of hospitals for the insane, which are to be received as sufficient evidence for the clerk to appoint a guardian for an insane person, relate to the superintendents of such hospitals under governmental control, and do not include within the meaning of the statute superintendents of private institutions of this character, and the appointment by the clerk of guardians ad litem on their certificates is void. Groves v. Ware, 182 N. C. 553, 109 S. E. 568.

Cited in Somers v. Board of Commissioners, 123 N. C. 582, 585, 31 S. E. 873.

§ 35-4. Restoration to sanity or sobriety; effect; how determined. — When any insane person or inebriate becomes of sound mind and memory, or becomes competent to manage his property, he is authorized to manage, sell and control all his property in as full and ample a manner as he could do before he became insane or inebriate, and a petition in behalf of such person may be filed before the clerk of the superior court of the county of his residence, or before the clerk of the superior court of the county wherein such person is confined or held; provided, however, that in all cases where a guardian has been appointed the

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

Editor's Note.—The 1937 amendment inserted in this section the words appearing in parenthesis.

The 1941 amendment provided for filing the petition in the county of confinement, except, where a guardian has been appointed, in which case the petition is to be filed in the county where such guardianship is pending.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 486.

Constitutionality of Section.—The constitutional provision preserving the right to a trial by jury applies only to cases in which the prerogative existed at common law or by statute at the time the Constitution was adopted, and this section, requiring that only six freeholders shall be summoned to inquire into the sanity of the person alleged to be insane, is constitutional, not requiring a jury of twelve. Groves v. Ware, 182 N. C. 553, 109 S. E. 568.

Removal of Guardian.—Ex parte proceedings to remove a guardian of an insane person, without notice to such guardian, are void. Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665.

Appeal.—Petitioner, who had been adjudged non compos mentis under section 35-2, filed this petition under this section, to have herself adjudged no longer insane, and prayed for the discharge of her guardian and the possession of her property. Upon the finding of the jury she was adjudged no longer insane and the prayers of her petition granted. Her guardian appealed to the superior court. It was held that the appeal should have been dismissed, since this section does not provide for appeal. Whether the clerk's order could be reviewed by the superior court pursuant to a writ of certiorari, and whether the clerk's order was void ab initio on the ground that the person adjudged insane cannot file a petition under this section, held not presented for decision, but semble, the clerk's order was voidable and not void, and it was error for the superior court to dismiss the proceeding. In re Sylivant, 212 N. C. 343, 193 S. E. 422.

A guardian of an incompetent may not appeal from the finding of the jury or the order of the clerk entered thereon declaring such person sane and competent in proceedings under this section, the guardian having no interest adverse to such declaration and there being no right of appeal given him by statute. In re Dry, 216 N. C. 427, 5 S. E. (2d) 142.

§ 35-5. Legal rights restored upon certificate of sanity by superintendent of hospital. — Any person who has been declared of unsound mind and memory under § 35-3, and for whom a guardian has been appointed, may be fully restored to his rights to manage his or her property by a certificate from the superintendent of the hospital where such person of unsound mind and memory has been confined stating that such insane person has been restored to sound mind and memory. This certificate shall be sworn to and subscribed before the clerk of the superior court or notary public for the county in which the hospital wherein such person had been confined is located, and certified under the seal of said court to the clerk of the superior court of the county wherein said person had his legal residence immediately before being declared of unsound mind and memory. The clerk of such resident county shall record the certificate and immediately issue a notice to the guardian of such person, requiring him to file his final account within sixty days from the date of service of the notice. From the date of docketing the record of such certificate the person formerly of unsound mind and memory shall be restored to all his legal rights. (1909, c. 176; C. S. 2288.)

§ 35-6. Estates without guardian managed by clerk. — When any person is declared to be of nonsane mind or inebriate, and no suitable person will act as his guardian, the clerk shall secure the estate of such person according to the law relating to orphans whose guardians have been removed. (Rev., s. 1894; Code, s. 1676; R. C., c. 57, s. 6; 1846, c. 43, s. 1; C. S. 2289.)

Cross References.—As to the estates of orphans whose guardians have been removed, see § 35-52 et seq. As to defenses deemed pleaded by an insane party in an action, see § 1-16. As to the appointment of a guardian ad litem, see § 1-65.

How Receiver Appointed.—The appointment of a receiver for an insane person's estate should be made only on the motion of the solicitor, after the wife and one or more adult children, if there are such, or some near relative or friend, have been brought before the judge at chambers or in term. In re Hybart, 119 N. C. 359, 25 S. E. 963.

Cited in Smith v. Smith, 106 N. C. 498, 11 S. E. 188.

§ 35-7. Allowance to abandoned insane wife. —When any insane wife is abandoned by her husband, she may, by her guardian, or next friend, in case there be no guardian, apply to the clerk of the superior court for support and maintenance, which the clerk may decree as in cases of alimony, out of any property or estate of her husband. (Rev., s. 1895; Code, s. 1686; 1858-9, c. 52, s. 1; C. S. 2290.)

Cross Reference.—As to alimony, see § 50-16.

§ 35-8. Renewal of obligations by guardians.— In all cases where a guardian has been appointed for a person who has been judicially declared to be an inebriate, lunatic, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicating drink or other causes, and said person is the maker or one of the makers, a surety or one of the sureties, an indorser or one of the indorsers of any note, bond, or other obligation for the payment of money, which is due or past due at the time of the appointment of the guardian, or shall thereafter become due prior to the settlement of the estate of said ward, the guardian of said ward's estate is hereby authorized and empowered to execute, as such guardian, a new note, bond, or other obligation for the payment of money, in the same capacity as the ward was obligated, for the same amount or less, but not greater than the sum due on the original obligation. Such new note shall be in lieu of the original obligation of the ward, whether made payable to the original holder or to

another. Such guardian is authorized and empowered to renew said note, bond, or other obligation for the payment of money from time to time; and said note, bond, or other obligation so executed by such guardian shall be binding upon the estate of said ward to the same extent and in the same manner and with the same effect that the original bond, note, or other obligation executed by the ward was binding upon his estate: Provided, the time for final payment of the note, bond, or other obligation for the payment of money, or any renewal thereof by said guardian shall not extend beyond a period of two years from the qualification of the original guardian as such upon the estate of said ward. (1927, c. 45, s. 1.)

§ 35-9. Guardian not liable.—The execution of any note, bond or other obligation for the payment of money mentioned in § 35-8 by the guardian of the inebriate, lunatic, or incompetent, shall not be held or construed to be binding upon the said guardian personally. (1927, c. 45, s. 2.)

Art. 3. Sales of Estates.

§ 35-10. Clerk may order sale, renting or mortgage.—When it appears to any clerk of the superior court by report of the guardian of any idiot, inebriate or lunatic, that his personal estate has been exhausted, or is insufficient for his support, and that he is likely to become chargeable on the county, the clerk may make an order for the sale, mortgage or renting of his personal or real estate, or any part thereof, in such manner and upon such terms as he may deem advisable. Such order shall specify particularly the property thus to be disposed of, with the terms of renting or sale or mortgage, and shall be entered at length on the records of the court; and all sales and rentings and conveyances by mortgages or deeds in trust made under this section shall be valid to convey the interest and estate directed to be sold or conveyed by mortgage or deed in trust, and the title thereof shall be conveyed by such person as the clerk may appoint on confirming the sale; or the clerk may direct the guardian to file his petition for such purpose. (Rev., s. 1896; Code, s. 1674; R. C., c. 57, s. 4; 1801, c. 589; 1931, c. 184, s. 1; C. S. 2291.)

Cross References.—See annotations under § 35-11. As to manner in which sales and rentals shall be made, see § 33-21 et seq., and § 33-31.

Editor's Note.—The Act of 1931 amended this and § 35-11 to permit the mortgaging, under order of the Clerk of the Superior Court, of the personal or real estate of any idiot, inebriate, or lunatic in order that such incompetent may be adequately supported, his debts paid, or his property disposed of if such disposal be to his best interests. Under the former law his property could only be sold or rented. 9 N. C. Law Rev. 392.

Judicial Character of Sales.—Sales of real property of a lunatic in proceedings before the proper probate judge or clerk of the superior court of North Carolina acting as a probate court are judicial sales. Rexford v. Brunswick-Balke-Collender Co., 181 Fed. 462.

§ 35-11. Purposes for which estate sold or mortgaged; parties; disposition of proceeds. — When it appears to the clerk, upon the petition of the guardian of any idiot, inebriate or lunatic, that a sale or mortgage of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance, or when the clerk is satisfied that the interest of the idiot, inebriate or lunatic would be materially and essentially promoted by the sale or mortgage of any part of such estate; or when any part of his real estate is required for public purposes, the clerk may order a sale thereof to be made by such person, in such way and on such terms as he shall adjudge. The clerk, if it be deemed proper, may direct to be made parties to such petition the next of kin or presumptive heirs of such nonsane person or inebriate. And if on the hearing the clerk orders such sale or mortgage, the same shall be made and the proceeds applied and secured, and shall descend and be distributed in like manner as is provided for the sale of infants' estates decreed in like cases to be sold on application of their guardians, as directed in the chapter entitled Guardian and Ward. The word "mortgage" whenever used herein shall be construed to include deeds in trust. (Rev., s. 1897; Code, s. 1675; R. C., c. 57, s. 5; 1931, c. 184, s. 2; C. S. 2292.)

Cross References.—As to sale of estates of wards generally, see § 33-31 et seq. As to release of lands condemned under the power of eminent domain, see § 40-22.

Jurisdiction of Superior Court as to Prior Debts.—The superior courts have jurisdiction to hear and determine an action instituted by a creditor of a lunatic for the recovery of a debt contracted prior to the lunacy. Blake v. Respass, 77 N. C. 193.

Clerk Has No Power to Pay Prior Debts of Lunatic.—This section confers no power upon the clerk to provide for the payment of the debts of a lunatic contracted prior to the lunacy. Blake v. Respass, 77 N. C. 193.

How Property Sold for Pre-Existing Debt.—Property of a lunatic in the hands of a committee is to be regarded as in custodia legis, and no creditor can reach it for a debt pre-existing the inquisition of lunacy, except through the order of the superior court; and that order is never made until a sufficiency for the support of the lunatic and that of his family, if minors, is first ascertained and set apart. Adams v. Thomas, 81 N. C. 296.

Sale of Lunatic's Contingent Interest.—This section does not confer jurisdiction on the clerks of courts to order the sale of contingent interests of lunatics, in lands; and suits to sell such interests, when the circumstances of the lunatic require it, should be determined in the superior court, in its equitable jurisdiction. Smith v. Witter, 174 N. C. 616, 94 S. E. 402.

Clerk's Jurisdiction Not Affected by Petition for Sale.—The probate court having jurisdiction of a petition for the allotment of a maintenance for a lunatic and his family, to discharge debts unavoidably incurred for that purpose, and to direct sales of real estate to provide a fund therefor, and also to make provision for the care and preservation of the lunatic's estate, it was not ousted of jurisdiction because the guardian's petition also prayed for a sale to provide for the payment of pre-existing debts. Rexford v. Brunswick-Balke-Collender Co., 181 Fed. 462.

Title of Purchaser.—A purchaser of real property at a sale held by a lunatic's commissioner under a probate order is not chargeable with errors or irregularities in the proceedings; it is sufficient, if the court had jurisdiction of the parties and subject-matter, that the commissioner acted under a decree purporting to confer power of sale. Rexford v. Brunswick Balke-Collender Co., 181 Fed. 462.

How Judgment against Lunatic Satisfied.—If the lunatic has property which cannot be reached by execution, the court will ascertain its character and value, and then direct the guardian to apply to the clerk to ascertain and set apart a sufficiency for the support of the lunatic, out of the fund, and, in the meantime, stay further proceedings, and then apply the excess, if any, in satisfaction of the judgment. Blake v. Respass, 77 N. C. 193, 196.

§ 35-12. Sale of land of wife of lunatic upon petition.—Where the wife of a lunatic owns real estate in her own right the sale of which will promote her interest, a sale of the same may be made upon the order of the clerk of the superior court of the county where the land lies, upon the petition of the wife of said lunatic and the guardian of the lunatic husband, and the proceeds of said sale shall be paid to the wife of said lunatic.

(Rev., s. 1898; Code, s. 1687; 1881, c. 361; C. S. 2293.)

Cross References.—See also, § 52-5. As to conveyance of land by the husband of an insane wife, see §§ 39-14, 30-9, and 47-15.

Section Not Mandatory.—The remedies given by this section and sec. 52-5 are in the alternative, and optional by the wife as to which may be pursued. Lancaster v. Lancaster, 178 N. C. 22, 100 S. E. 120.

§ 35-13. Wife of insane person entitled to special proceeding for sale of his property.—Every woman whose husband is a lunatic or insane and is confined in an asylum in this state, and who was living with her husband at the time he was committed to such asylum, if she be in needy circumstances, shall have the right to bring a special proceeding before the clerk of the superior court to sell the property of her insane husband, or so much thereof as is deemed expedient, and have the proceeds applied to her support: Provided, that said proceeding shall be approved by the judge of the superior court holding the courts of the judicial district where the said property is situated. When the deed of the commissioner appointed by the court, conveying the lands belonging to the insane husband is executed, probated, and registered, it conveys a good and indefeasible title to the purchaser. (1911, c. 142, ss. 1, 2; C. S. 2294.)

Art. 4. Mortgage or Sale of Estates Held by the Entireties.

§ 35-14. Where one spouse or both incompetent; special proceeding before clerk.—In all cases where a husband and wife shall be seized of property as an estate by the entireties, and the wife or the husband or both shall be or become mentally incompetent to execute a conveyance of the estate so held, and the interest of said parties shall make it necessary or desirable that such property be mortgaged or sold, it shall be lawful for the mentally competent spouse and/or the guardian of the mentally incompetent spouse, and/or the guardians of both (where both are mentally incompetent) to file a petition with the clerk of the superior court in the county where the lands are located, setting forth all facts relative to the status of the owners, and showing the necessity or desirability of the sale or mortgage of said property, and the clerk, after first finding as a fact that either the husband or wife, or both, are mentally incompetent, shall have power to authorize the interested parties and/or their guardians to execute a mortgage, deed of trust, deed, or other conveyance of such property, provided it shall appear to said clerk's satisfaction that same is necessary or to the best advantage of the parties, and not prejudicial to the interest of the mentally incompetent spouse. (1935, c. 59, s. 1.)

Editor's Note.—For a complete analysis of this article, see 13 N. C. Law Rev. 376.

§ 35-15. General law applicable; approved by judge.—The proceedings herein provided for shall be conducted under and shall be governed by laws pertaining to special proceedings, and it shall be necessary for any sale or mortgage or other conveyance herein authorized to be approved by the resident judge or the judge holding the courts in the judicial district wherein the property is located. (1935, c. 59, s. 2.)

Cross Reference.—As to general law on special proceedings, see § 1-393 et seq.

§ 35-16. Proceeding valid in passing title. — Any mortgage, deed, or deed of trust executed under authority of this article by a regularly conducted special proceeding as provided shall have the force and effect of passing title to said property to the same extent as a deed executed jointly by husband and wife, where both are mentally capable of executing a conveyance. (1935, c. 59, s. 3.)

§ 35-17. Clerk may direct application of funds; purchasers and mortgages protected.—In all cases conducted under this article it shall be competent for the court, in its discretion, to direct the application of funds arising from a sale or mortgage of such property in such manner as may appear necessary or expedient for the protection of the interest of the mentally incompetent spouse: Provided, however, this section shall not be construed as requiring a purchaser or any other party advancing money on the property to see to the proper application of such money, but such purchaser or other party shall acquire title unaffected by the provisions of this section. (1935, c. 59, s. 4.)

§ 35-18. Prior sales and mortgages validated.—Any and all special proceedings under which estates by the entireties have been sold or mortgaged prior to March 5, 1935, under circumstances contemplated in this article are hereby in all respects ratified and confirmed, provided that such proceeding or proceedings are otherwise regular and conformable to law. (1935, c. 59, s. 5.)

Art. 5. Surplus Income and Advancements.

§ 35-19. Income of insane widowed mother used for children's support.—When a father dies leaving him surviving minor children and a widow who is the mother of such children, but leaving no sufficient estate for the support and maintenance and education of such minor children, and the mother is or becomes insane and is so declared according to law, and such insanity continues for twelve months thereafter, and she has an estate which is placed in the hands of a guardian or other person, as provided by law, the estate of such insane mother shall in such cases as are provided for in § 35-20 be made liable for the support, maintenance and education of the class of persons mentioned in said section to the same extent, in the same manner and under the same rules and regulations as applies to estates of fathers thereunder. (Rev., s. 1899; 1905, c. 546; C. S. 2295.)

§ 35-20. Advancement of surplus income to certain relatives.—When any nonsane person, of full age, and not having made a valid will, has children or grandchildren (such grandchildren being the issue of a deceased child), and is possessed of an estate, real or personal, whose annual income is more than sufficient abundantly and amply to support himself, and to support, maintain and educate the members of his family, with all the necessaries and suitable comforts of life, it is lawful for the clerk of the superior court for the county in which such person has his residence to order from time to time, and so often as may be judged expedient, that fit and proper advancements be made, out of the surplus of such income, to any such child, or grandchild, not being a member of his family and entitled to be sup-

ported, educated and maintained out of the estate of such person. Whenever any nonsane person of full age, not being married and not having issue, be possessed, or his guardian be possessed for him, of any estate, real or personal, or of an income which is more than sufficient amply to provide for such person, it shall be lawful for the clerk of the Superior Court for the county in which such person resided prior to insanity to order from time to time, and so often as he may deem expedient, that fit and proper advancements be made, out of the surplus of such estate or income, to his or her parents, brothers and sisters, or grandparents to whose support, prior to his insanity, he contributed in whole or in part. (Rev., s. 1900; Code, s. 1677; R. C., c. 57, s. 9; Ex. Sess. 1924, c. 93; C. S. 2296.)

The evidence tended to show that petitioner is the sister of a World War veteran, that prior to the time he was drafted he gave her what assistance he could for her support, and that he sent her money after he was in the army, that he is unmarried and has no other dependents, that he became incurably insane and was placed in a government hospital where he is being taken care of without charge, that his guardian has on hand $22,046.81, representing payments on his War Risk Insurance, and that petitioner is destitute and without means of support. Held: The clerk of the superior court, with the approval of the resident judge or presiding judge, has the power, upon proper findings from the evidence, to order guardian to purchase a home in the name of the incompetent for the use of petitioner, and to advance petitioner a reasonable sum monthly for her support. Patrick v. Branch Bkg., etc., 216 N. C. 525, 5 S. E. (2d) 724.

Cited in In re Jones, 211 N. C. 704, 191 S. E. 511.

§ 35-21. Advancement to adult child or grandchild.—When such nonsane person is possessed of a real or personal estate in excess of an amount more than sufficient to abundantly and amply support himself with all the necessaries and suitable comforts of life and has no minor children nor immediate family dependent upon him for support, education or maintenance, such advancements may be made out of such excess of the principal of his estate to such child or grandchild of age for the better promotion or advancement in life or in business of such child or grandchild: Provided, that the order for such advancement shall be approved by the resident or presiding judge of the district who shall find the facts in said order of approval. (1925, c. 136, s. 1.)

§ 35-22. For what purpose and to whom advanced. — Such advancements shall be ordered only for the better promotion in life of such as are of age, or married, and for the maintenance, support and education of such as are under the age of twenty-one years and unmarried; and in all cases the sums ordered shall be paid to such persons as, in the opinion of the clerk, will most effectually execute the purpose of the advancement. (Rev., s. 1901; Code, s. 1678; R. C., c. 57, s. 10; C. S. 2297.)

§ 35-23. Distributees to be parties to proceeding for advancement.—In every application for such advancements, the guardian of the nonsane person and all such other persons shall be parties as would at that time be entitled to a distributive share of his estate if he were then dead. (Rev., s 1902; Code, s. 1679; R. C., c. 57, s. 11; C. S. 2298.)

§ 35-24. Advancements to be equal; accounted for on death.—The clerk, in ordering such advancements, shall, as far as practicable, so order the same as that, on the death of the nonsane person, his estate shall be distributed among his distributees in the same equal manner as if the advancements had been made by the person himself; and on his death every sum advanced to a child or grandchild shall be an advancement, and shall bear interest from the time it may be received. (Rev., s. 1903; Code, s. 1680; R. C., c. 57, s. 12; C. S. 2299.)

§ 35-25. Clerk may select those to advance.—When the surplus aforesaid or advancement from the principal estate is not sufficient to make distribution among all the parties, the clerk may select and decree advancement to such of them as may most need the same, and may apportion the sum decreed in such amounts as are expedient and proper. (Rev., s. 1904; Code, s. 1681; R. C., c. 57, s. 13; 1925, c. 136, s. 2; C. S. 2300.)

§ 35-26. Advancements to be secured against waste.—It is the duty of the clerk to withhold advancements from such persons as will probably waste them, or so to secure the same, when they may have families, that it may be applied to their support and comfort; but any sum so advanced shall be regarded as an advancement to such persons. (Rev., s. 1905; Code, s. 1682; R. C., c. 57, s. 14; C. S. 2301.)

§ 35-27. Appeal; removal to superior court.—Any person made a party may appeal from any order of the clerk; or may, when the pleadings are finished, require that all further proceedings shall be had in the superior court. (Rev., s. 1906; Code, s. 1683; R. C., c. 57, s. 15; C. S. 2302.)

Cited in In re Cook, 218 N. C. 384, 11 S. E. (2d) 142.

§ 35-28. Advancements only when insanity permanent. — No such application shall be allowed under this chapter but in cases of such permanent and continued insanity as that the nonsane person shall be judged by the clerk to be incapable, notwithstanding any lucid intervals, to make advancements with prudence and discretion. (Rev., s. 1907; Code, s. 1684; R. C., c. 57, s. 16; C. S. 2303.)

§ 35-29. Decrees suspended upon restoration of sanity.—Upon such insane person being restored to sanity, every order made for advancements shall cease to be further executed, and his estate shall be discharged of the same. (Rev., s. 1908; Code, s. 1685; R. C., c. 57, s. 17; C. S. 2304.)

Art. 6. Detention, Treatment, and Cure of Inebriates.

§ 35-30. "Inebriate" defined.—For the purposes of this article, the word "inebriate" is defined to be a person habitually so addicted to alcoholic drinks or narcotic drugs as to be a proper subject for restraint, care, and treatment. (1921, c. 156, s. 2; C. S. 2304(a).)

§ 35-31. Petition for examination; warrant for hearing; action without petition; evidence.—Upon petition of any two of the following persons, to-wit, the wife, husband, parent, child, committee of the estate of an inebriate, or next friends of such person, or, if there be no such persons, then of two citizens of the county wherein the alleged inebriate resides, the clerk of the superior court of the county in which the said alleged inebriate resides shall issue his warrant requiring the inebriate, on

a day fixed, to be brought into court for a hearing. The petition shall not be considered unless it sets forth that the person named therein is an inebriate within the scope of this article, and unless it be accompanied by the affidavit or affidavits of at least two reputable physicians, stating that they have examined the alleged inebriate, and that he is a proper subject for restraint, care, and treatment, or the clerk may, on his own initiative, where he has information and reasonable grounds to believe that a particular person is an inebriate and is a fit subject for restraint, care, and treatment, cause such person to be brought before him and proceed to hear and try the question of whether or not he is an inebriate within the definition of § 35-30. If two reputable physicians shall certify before him that such person is an inebriate, he may commit such an inebriate as herein provided to the department of the state hospital at Raleigh provided for the care and treatment of such inebriate. (1921, c. 156, s. 3; 1941, c. 226; C. S. 2304(b).)

Editor's Note.—The 1941 amendment rewrote the first sentence of this section so as to permit the petition to be filed by any two citizens in the absence of those specified.

§ 35-32. Commitment for treatment; discharge.—If after such hearing the clerk is satisfied that the alleged inebriate is a proper subject for restraint, care, and treatment, he shall commit the inebriate to the department for inebriates at the state hospital in Raleigh, where he shall be treated, subject to the same rules and regulations as provided for the treatment and cure of curable insane persons, and he shall be discharged therefrom under the same rules and regulations. (1921, c. 156, s. 4; C. S. 2304(c).)

§ 35-33. Inquiry as to estate of inebriate; minors; costs; expenses.—After the clerk shall determine that an inebriate is a fit subject to be committed to the department for inebriates as aforesaid, he shall go further and inquire as to whether said inebriate is indigent or not in such way that he has not in his own right sufficient estate or property to bear the cost and expense of his restraint, care, and treatment while in the institution. If he is so indigent, then he shall inquire further whether or not the petitioning wife or husband has sufficient estate to pay such costs. If the inebriate is a minor he shall determine whether his particular guardian or parent has sufficient estate of the inebriate or his own, if a parent, to pay such costs. In any of these instances, if sufficient estate or property is found to pay such costs, the clerk shall adjudge the payment from such estate, and in all cases, if the petitioning parent has property sufficient to pay, he shall be adjudged to pay costs of the treatment of his minor child. But if in none of these cases sufficient property is found to pay such costs and expenses, the inebriate shall be declared indigent and the actual cost and expense of restraint, care, and treatment of indigent inebriates as herein defined shall be borne and paid by the county from which the inebriate is committed: Provided, that there shall not be included in such cost and expense any charge except for board and clothing. (1921, c. 156, s. 5; C. S. 2304(d).)

§ 35-34. Inebriate submitting himself for treatment.—Any inebriate within the definition of § 35-30 who wishes to submit himself for care and treatment in the department for inebriates at the state hospital in Raleigh, may be received therein as a patient upon his presentation of himself personally at the institution and making arrangements with the superintendent for the actual cost of his detention and treatment. He shall signify his desire in writing, and promise therein to submit himself to the rules and regulations for the government of the institution. When this is done he shall be detained therein and given adequate care and attention. After he has been so detained for thirty days he may secure his release and discharge by ten days notice in writing to the superintendent, or to any one of the assistant physicians in charge of such institution: Provided, said physician or physicians are satisfied that said inebriate has sufficiently recovered to return to his home and not become a menace or charge to society. (1921, c. 156, s. 6; C. S. 2304(e).)

§ 35-35. Department for inebriates. — It shall be the duty of trustees and superintendent of the state hospital at Raleigh to prepare and set apart a department for such inebriates on or before the first day of May, one thousand nine hundred and twenty-two: Provided that, if in the course of care and treatment of said inebriates it developes that they have criminal, mental, or other symptoms indicating they can not be properly taken care of in this department, the superintendent of the hospital is hereby authorized to transfer such patients to any other department under his care, that, in his opinion, the circumstances may justify. (1921, c. 156, s. 7; 1933, c. 341; C. S. 2304(f).)

Editor's Note.—Public Laws of 1933, c. 341, added the proviso relating to inebriates in the state hospital at Raleigh.

Art. 7. Sterilization of Persons Mentally Defective.

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

Editor's Note.—See 11 N. C. Law Rev. 254, for full review of this and following sections.

Constitutionality.—The Act of 1929, c. 34, entitled, "an act to provide for the sterilization of the mentally defective and feeble-minded inmates of charitable and penal institutions of the state of North Carolina," was held unconstitutional, being in violation of the provisions of the Fourteenth Amendment, § 1, of the Constitution of the United States, and of the State Constitution, Art. I, § 17, there being no provision in the statute giving a person ordered to be sterilized notice and a hearing or affording him the right to appeal to the courts. Brewer v. Valk, 204 N. C. 186, 167 S. E. 638. The defect does not exist in the present statute. See § 35-48.

§ 35-37. Operations on mental defectives not in institutions.—It shall be the duty of the board

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

§ 35-38. Restrictions on such operations.—No operation under this article shall be performed by other than a duly qualified and registered North Carolina physician or surgeon, and by him only upon a written order signed after complete compliance with the procedure outlined in this article by the responsible executive head of the institution or board, or the superintendent of public welfare, or other similar official performing in whole or in part the functions of such superintendent, or the next of kin or legal guardian having custody or charge of the feeble-minded, mentally defective or epileptic inmate, patient or non-institutional individual. (1933, c. 224, s. 3.)

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

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

2. When in his opinion it is for the public good that such patient, inmate or non-institutional individual be operated upon.

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

4. When requested to do so in writing by the next of kin or legal guardian of such patient, inmate or non-institutional individual.

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

Cross Reference.—As to necessity of sterilization of one adjudged insane before issuance of marriage license, see § 51-12.

Editor's Note.—The 1935 amendment inserted the third sentence of this section, and the 1937 amendment inserted the second sentence.

§ 35-40. Eugenics board of N. C. created.—There is hereby created the eugenics board of North Carolina. All proceedings under this article shall be begun before the said eugenics board. This board shall consist of five members and shall be composed of: (1) the commissioner of public welfare of North Carolina, (2) the secretary of the state board of health of North Carolina, (3) the chief medical officer of an institution for the feebleminded or insane of the state of North Carolina, not located in Raleigh, (4) the chief medical officer of the state hospital at Raleigh, (5) the attorney general of the state of North Carolina. Any one of these officials may for the purpose of a single hearing delegate his power to act as a member of said board to an assistant: Provided, said delegation is made in writing, to be included as a part of the permanent record in said case. The said board shall from time to time elect a chairman from its own membership and adopt and from time to time modify rules governing the conduct of proceedings before it, and from time to time select the member of the said board designated above as the chief medical officer of an institution for the feebleminded or insane of the state of North Carolina not located in Raleigh. (1933, c. 224, s. 5.)

§ 35-41. Quarterly meetings. — The board of eugenics shall meet at least quarterly in each year in Raleigh for the purpose of hearing all cases that may be brought before it and shall continue in session with appropriate adjournments until all current applications and other pending business have been disposed of. The members shall receive no additional compensation for their services. (1933, c. 224, s. 6.)

§ 35-42. Secretary of board and duties.—The board shall appoint a secretary not a member of the board who shall conduct the business of the board between the times of the regular meetings. Such secretary shall receive all petitions, keep the records, call meetings, and in general act as the executive of said board in such matters as may be delegated to him by said board. (1933, c. 224, s. 7.)

§ 35-43. Proceedings before board. — Proceedings under this article shall be instituted by the petition of said petitioner to the eugenics board. Such petition shall be in writing, signed by the petitioner and duly verfied by his affidavit to the best of his knowledge and belief. It shall set forth the facts of the case and the grounds of his opinion. The petition shall also contain a statement of the mental and physical status of the patient verified by the affidavit of at least one physi-

cian who has had actual knowledge of the case and who in the cases of inmates or patients of institutions described in § 35-36 may be a member of the medical staff of said institution. The eugenics board may require that the petitioner submit additional social and medical history in regard to the inmate, patient or individual resident and his family. The prayer of said petition shall be that an order be entered by said board authorizing the petitioner to perform, or to have performed by some competent physician or surgeon to be designated by him in the petition or by said board in its order upon said inmate, patient or individual resident named in said petition in its discretion that the operation of sterilization or asexualization as specified in § 35-36 which shall be best suited to the interests of the said inmate or patient or to the public good. (1933, c. 224, s. 8; 1935, c. 463, s. 2.)

Editor's Note.—This section was so changed by the 1935 amendment that a comparison is necessary to determine the full extent.

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

A copy of said petition, duly certified to be correct, and the said notice must also be served upon the legal or natural guardian and next of kin of the inmate, patient or individual resident. If no near relative is known, the copy and notice shall be sent to the solicitor of the county in which the inmate, patient or individual resident resides, and it shall be his duty to protect the rights and best interests of the said inmate, patient or individual resident.

If there is no next of kin and no solicitor in said county, or if there is no known guardian of said inmate, patient, or individual resident and the said inmate, patient or individual resident is of such mental condition as not to be competent reasonably to conduct his own affairs, then the said prosecutor shall apply to the superior court of the county in which the inmate, patient or individual resident resides or to the judge thereof in vacation, who shall appoint some suitable person to act as guardian of the said inmate during and for the purposes of proceedings under this article, to defend the rights and interests of the said inmate, patient or individual resident. And such guardian shall be served likewise with a copy of the aforesaid petition and notice, and shall under all circumstances be given at least fifteen days' notice of said hearing. Such guardian may be removed or discharged at any time by the said court or the judge thereof in vacation and a new guardian appointed and substituted in his place.

If the said inmate or patient be under twenty-one years of age and have a living parent or parents whose names and addresses are known or can by reasonable investigation be learned by said prosecutor, they or either of them, as the case may be, shall be served likewise with a copy of said petition and notice and shall be entitled to at least fifteen days' notice of the said hearing: Provided, that the procedure described in this section shall not be necessary in the case of any operation for sterilization or asexualization provided for in this article if the parent, legal or natural guardian, or spouse or next of kin of the inmate, patient or non-institutional individual shall submit to the superintendent of the institution of which the subject is a patient or inmate or to the superintendent of public welfare of the county in which the subject is residing, regardless of whether the subject is a legal resident of such county, a duly witnessed petition requesting that sterilization or asexualization be performed upon said inmate, patient or non-institutional individual, provided the other provisions of this article are complied with. Any operation authorized in accordance with this proviso may be performed immediately upon receipt of the authorization from the eugenics board. (1933, c. 224, s. 9; 1935, c. 463, ss. 3, 6.)

Editor's Note.—Public Laws 1935, chapter 463, section 6 added the proviso at the end of this section. Section 3 of the same act added the last sentence to the first paragraph.

§ 35-45. Consideration of matter by board.—The said board at the time and place named in said notice, with such reasonable continuances from time to time and from place to place as the said board may determine, shall proceed to hear and consider the said petition and evidence offered in support of and against the same: Provided, that the said board shall give opportunity to said inmate, patient or individual resident to attend the said hearings in person if desired by him or if requested by his guardian or next of kin, or the solicitor.

The said board may receive and consider as evidence at the said hearings the commitment papers and other records of the said inmate or patient with or in any of the aforesaid institutions as certified by the superintendent or executive official, together with such other evidence as may be offered by any party to the proceedings.

Any member of the said board shall have power for the purposes of this article to administer oaths to any witnesses at such hearing.

Depositions may be taken, as in other civil cases, by any party after due notice and read in evidence, if otherwise pertinent.

Any party to the said proceedings shall have the right to be represented by counsel at such hearings.

A stenographic transcript of the proceedings at such hearings duly certified by the petitioner and the inmate, patient or individual resident, or his guardian or next of kin, or the solicitor, shall be made and preserved as part of the records of the case. (1933, c. 224, s. 10.)

§ 35-46. Board may deny or approve petition.—The said board may deny the prayer of the said petition or if, in the judgment of the board, the case falls within the intent and meaning of one or more of the circumstances mentioned in § 35-39, and an operation of asexualization or sterilization seems to said board to be

for the best interest of the mental, moral or physical improvement of the said patient, inmate or individual resident or for the public good, it shall be the duty of the board to approve said recommendation in whole or in part or to make such order as under all the circumstances of the case may seem appropriate, within fifteen days after the conclusion of said hearings, and to send to the prosecutor a written order, signed by at least three members of the board, directing him to proceed with the operation as provided in this article. Said order shall contain the name of the specific operation which is to be performed and the date when said operation is to be performed.

If the board disapproves the petition, the case may not be brought up again except on the request of the inmate, patient, or individual resident, or his guardian, or one or more of his next of kin, husband, wife, father, mother, brother, or sister, until one year has elapsed.

Nothing in this article shall be construed to empower or authorize the board to interfere in any manner with the right of the patient, inmate, or individual resident, or his guardian or next of kin to select a competent physician of his own choice for consultation or operation at his own expense. (1933, c. 224, s. 11.)

§ 35-47. Orders may be sent parties by registered mail; consenting to operation.—Any order granting the prayer of the petition, in whole or in part, may be delivered to the petitioner by registered mail, return receipt demanded, to all parties in the case, including the legal guardian, the solicitor and the next of kin of the inmate, patient, or individual resident. It shall be the duty of the said guardian, the solicitor and the next of kin to protect by such measures as may seem to them in their sole discretion sufficient and appropriate the rights and best interests of the said inmate, patient, or individual resident.

If the inmate, patient or individual resident, or the next of kin, legal guardian, solicitor of the county, and guardian appointed as herein provided, after the said hearing but not before, shall consent in writing to the operation as ordered by the board, such operation shall take place at such time as the said prosecutor petitioning shall designate. (1933, c. 224, s. 12.)

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

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

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

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

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

Cross Reference.—See note to § 35-36.

Editor's Note.—The second paragraph of this section was changed by the 1935 amendment. The amendment also inserted in the second sentence of the fourth paragraph the words "unless appealed from."

§ 35-49. Appeal costs.—The cost of appeal, if any, to the superior or higher courts, shall be taxed as in civil cases. If the case is finally determined in favor of the plaintiff, the costs shall be paid by the county. (1933, c. 224, s. 14; 1935, c. 463, s. 5.)

Editor's Note.—The amendment of 1935 omitted the paragraph of this section which provided that the record before the board was conclusive as to facts.

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

The pendency of an appeal in the supreme court shall operate as a stay of proceedings un-

der any orders of the said board and the superior court until the appeal be determined by the said supreme court. (1933, c. 224, s. 15.)

§ 35-51. Civil or criminal liability of parties limited. — Neither the said petitioner nor any other person legally participating in the execution of the provisions of this article shall be liable, either civilly or criminally, on account of such participation, except in case of negligence in the performance of said operation. (1933, c. 224, s. 16.)

§ 35-52. Necessary medical treatment unaffected by article.—Nothing contained in this article shall be construed so as to prevent the medical or surgical treatment for sound therapeutic reasons of any person in this state, by a physician or surgeon licensed in this state, which treatment may incidentally involve the nullification or destruction of the reproductive functions. (1933, c. 224, s. 17.)

§ 35-53. Permanent records of proceedings before board.—Records in all cases arising under this article shall be filed permanently with the secretary of the said eugenics board. Such records shall not be open to public inspection except for such purposes as the court may from time to time approve. (1933, c. 224, s. 18.)

§ 35-54. Construction of terms.—Where the inmates, patients, or non-institutional individuals are referred to in this article as of the masculine or feminine gender, the same shall be construed to include the feminine or masculine gender as well. Wherever the term individual resident appears in this article, it shall be construed to mean non-institutional individual. (1933, c. 224, s. 19.)

§ 35-55. Discharge of patient from institution. —Before any inmate or patient designated in §§ 35-36 and 35-39, shall be released, paroled or discharged, it shall be the duty of the governing body or responsible head of any institution above mentioned to comply with the procedure set out in this article, whenever a written request for the asexualization or sterilization of said inmate or patient is filed with the governing body or responsible head of the institution in which such inmate or patient has been legally confined. This written request may be made by any public official or by the legal guardian or next of kin of any inmate or patient not later than thirty days prior to the date of said parole or discharge. Upon the receipt of the signed approval of the eugenics board as described in this article, it shall be the duty of said governing board or responsible head to issue an order for the performance of the operation upon said inmate or patient, and the operation must be performed before the release, parole or discharge of any such inmate or patient. (1933, c. 224, s. 20.)

§ 35-56. Existing rights of surgeons unaffected. —Nothing in Public Laws 1935, chapter 463 shall, in any way, interfere with any surgeon in the removal of diseased pathological tissue from any patient. (1935, c. 463, s. 7.)

§ 35-57. Temporary admission to state hospitals for sterilization.—Any feeble-minded, epileptic, or mentally diseased person, for whom the eugenics board of North Carolina has authorized sterilization, may be admitted to the appropriate state hospital for the performance of such operation. The order of the eugenics board authorizing a surgeon on the regular or consulting staff of the hospital to perform the operation will be sufficient authority to the superintendent of such hospital to receive, restrain, and control the patient until such time as it is deemed wise to release such patient. All such admissions shall be at the discretion of the superintendent of the state hospital, and in making any agreement with any county or any state institution to perform such operations, the state hospital may collect a fee which shall not be greater than the cost of such operation and the cost of care and maintenance for the duration of the operation and the time required for the patient to recuperate.

The order of the eugenics board and the agreement of the superintendent of the state hospital to admit such patient shall be full and sufficient authority for the prosecutor or the sheriff of the county to deliver such patient to the proper state hospital. (1937, c. 221.)

Cited in Gower v. Clayton, 215 N. C. 82, 1 S. E. (2d) 133.

Art. 8. Temporary Care and Restraint of Inebriates, Drug Addicts and Persons Insane.

§ 35-58. Hospitals and sanatoriums may restrain and treat alcohol and drug addicts.—The superintendent, manager, or owner of any public or private hospital, sanatorium, or institution, upon the written request of two duly licensed physicians, not connected with any hospital, public or private, and the husband, wife, guardian, or in the case of an unmarried person having no guardian, by some one of the next of kin, may receive, care for and restrain in such hospital, sanatorium, or institution, as a patient, for a period not exceeding twenty days, any insane person needing immediate care and treatment; or any person needing immediate care, restraint and treatment because such person has become addicted to the intemperate use of narcotics, hypnotic drugs or alcoholic drinks, to such an extent that he has lost the power of self control. Such request for the admission of such patient shall be in writing and filed at such hospital, sanatorium, or institution, at the time of the reception of such patient, or within twenty-four hours thereafter, and such written request shall be held and considered as a commitment of such patient or person to said hospital, sanatorium, or institution, for a period of not exceeding twenty days. The superintendent, manager, or owner of such hospital, sanatorium, or institution shall not detain or restrain any person received as above provided for more than twenty days and shall not be liable in damages to such person or his personal representative or guardian on account of such restraint: Provided, the same is exercised and administered in a humane manner, without violence or personal injury. (1933, c. 213, s. 1.)

§ 35-59. Use of restraining devices limited. — No restraint in the form of muffs or mitts with lock buckles, or waist straps, wristlets, anklets, or camisoles, head-straps, protection sheets or simple sheets when used for restraint or other device interfering with freedom shall be imposed upon any patient in such hospital, sanatorium, or institution, unless applied in the presence of the superintendent, or of the physician, or of an as-

sistant physician of such hospital, sanatorium, or institution. Such device shall be applied only in cases of extreme violence, active homicidal or suicidal intent, physical exhaustion, infectious disease, or following an operation, or accident which has caused serious bodily injury, or to prevent injury to such patient or others, except that in cases of emergency restraint may be imposed without the presence of the superintendent, physician or assistant physician; every such emergency case, after the imposition of such restraint, shall immediately be reported to the superintendent, or manager, physician, or assistant physician of such hospital, sanatorium or institution, who shall immediately investigate the case and approve or disapprove the restraint imposed. (1933, c. 213, s. 2.)

§ 35-60. Civil liability for corrupt admissions. —Nothing contained in this article shall be held or construed to relieve from liability in any suit or action, instituted in the courts of this state, any husband, wife, guardian, physician, or assistant physician, to such person or patient on account of collusion of such husband, wife, guardian, physician or assistant physician to unlawfully, wrongfully and corruptly commit any such person or patient to such hospital, sanatorium, or institution, under the provisions of this article. (1933, c. 213, s. 3.)

Chapter 36. Trusts and Trustees.

Art. 1. Investment and Deposit of Trust Funds.

Art. 2. Removal of Trust Funds from State.

Art. 3. Resignation of Trustee.

Art. 4. Charitable Trusts.

Art. 5. Uniform Trusts Act.

Art. 6. Uniform Common Trust Fund Act.

Art. 1. Investment and Deposit of Trust Funds.

§ 36-1. Certain investments deemed cash. — Guardians, executors, administrators, and others acting in a fiduciary capacity, having surplus funds of their wards, estates and cestuis que trustent to loan, may invest in United States bonds, or any securities for which the United States are responsible, farm loan bonds issued by Federal land banks, or in bonds of the state of North Carolina issued since the year one thousand eight hundred and seventy-two; or in drainage bonds duly issued under the provisions of article 8 of chapter entitled Drainage; and in settlements by guardians, executors, administrators, trustees, and others acting in a fiduciary capac-

ity, such bonds or other securities of the United States, and such bonds of the state of North Carolina, and such drainage bonds, shall be deemed cash to the amount actually paid for same, including the premium, if any, paid for such bonds or other securities, and may be paid as such by the transfer thereof to the persons entitled. (Rev., s. 1792; Code, s. 1594; 1870-1, c. 197; 1885, c. 389; 1917, c. 6, s. 9; 1917, c. 67, s. 1; 1917, c. 152, s. 7; 1917, c. 191, s. 1; 1917, c. 269, s. 5; C. S. 4018.)

Cross References.—As to authority to invest in federal farm bonds, see § 53-60. As to further provisions as to investment by guardians and interest thereon, see § 24-4. As to authority of guardians and other fiduciaries to buy real estate foreclosed under mortgages executed by them, see § 33-25. As to investment in bonds guaranteed by United States, see § 53-44. As to loans on mortgages, etc., issued under federal housing act, see § 53-45.

Cited in Hood v. North Carolina Bank, etc., Co., 209 N. C. 367, 184 S. E. 51.

§ 36-2. Investment of trust funds in county, city, town, or school district bonds.—Guardians, executors, administrators, trustees, and others acting in a fiduciary capacity, are authorized to invest funds in their hands as such fiduciaries in bonds issued by any county, city, town or school district, of the state of North Carolina subsequent to January first, one thousand nine hundred and fifteen, provided that the net debt of such county, city, town or school district does not exceed ten (10%) per cent of the assessed valuation of the property therein subject to taxation for the payment of such bonds, in the same manner, to the same extent and with the same legal consequence as fiduciaries are now authorized to invest such funds in bonds of the state of North Carolina under the provisions of § 36-1. (Ex. Sess. 1921, c. 63; 1931, c. 257; C. S. 4018(a).)

Editor's Note.—The Act of 1931 made this section applicable to city, town and school district bonds.

Cited, in dissenting opinion, in Hood v. North Carolina Bank, etc., Co., 209 N. C. 367, 184 S. E. 51.

§ 36-3. Investment in building and loan and federal savings and loan associations.—Guardians, executors, administrators, clerks of the superior court and others acting in a fiduciary capacity may invest funds in their hands as such fiduciaries in stock of any building and loan association organized and licensed under the laws of this state: Provided, that no such funds may be so invested unless and until authorized by the insurance commissioner. Provided further, that such funds may be invested in stock of any federal savings and loan association organized under the laws of the United States, upon approval of an officer of the Home Loan Bank at Winston-Salem, or such other governmental agency as may hereafter have supervision of such associations. (1933, c. 549, s. 1; 1937, c. 14.)

Editor's Note.—The 1937 amendment added the second proviso.

§ 36-4. Investment in registered securities.—Any guardian having in hand surplus funds belonging to a minor ward may, if he so elects, invest the same in registered securities within the classes designated by §§ 36-1 and 36-2, the registration of said securities as to principal only to be in the name of said minor ward.

Upon delivery of such registered securities to the clerk of the superior court of the county in which the estate of said minor ward is being administered, said clerk of the superior court shall give said guardian a receipt for the same and said clerk of the superior court shall thereafter hold said securities for said ward, subject only to final disposition thereof to be approved by the resident judge or presiding judge of the superior court: Provided, however, all income accruing therefrom shall be paid to said guardian in the same manner and for the same purposes as any other income of said estate derived from other sources.

Whenever any guardian shall have delivered to the clerk of the superior court registered securities as hereinbefore provided, he shall be entitled to credit in his account as guardian for the amount actually expended for such securities, and his bond as such guardian shall thereupon be reduced in an amount equal in proportion to the total amount of the bond as the funds expended for the securities are to the total amount of the estate covered by such bond. (1935, c. 449; 1943, c. 96.)

Local Modification.—Craven: 1935, c. 449.

Editor's Note.—Prior to the 1943 amendment the latter part of the third paragraph read as follows: "in an amount equal to twice the amount of the funds actually invested in said securities."

As to effect of section, see 13 N. C. Law Rev. 386.

§ 36-4.1. Investment in life, endowment or annuity contracts of legal reserve life insurance companies.—(1) Executors, administrators c. t. a., trustees and guardians legally holding funds or assets belonging to, or for the benefit of, minors or others may, upon petition filed with the clerk of the superior court of the county in which said fiduciary has qualified, be authorized by an order of such clerk of superior court and approved by either the resident judge or a judge of the superior court at term time, to invest such funds or assets, or part thereof, in single premium life, endowment or annuity contracts; any such fiduciaries may be authorized by order of the clerk of the superior court, upon approval by the judge as above provided, to invest the earnings, or part thereof, of such trust funds or assets, without encroaching upon the principal, in any annual premium life, endowment or annuity contracts of legal reserve life insurance companies duly licensed and qualified to transact business within the state: Provided, that where any such annual premium contract has been purchased as herein authorized any such fiduciary may, upon authorization of the clerk of the superior court and approval of the judge as above specified, encroach upon and use the principal of such trust funds or assets in order to pay subsequent premiums and thereby prevent a lapsation or forfeiture of any such insurance contract purchased pursuant to the provisions of this section.

(2) Such contracts may be issued on the life, or lives, of a ward, or wards, and beneficiary, or beneficiaries of a trust fund, or upon the life of any person in whose life the said ward or beneficiary has an insurable interest, and shall be so drawn by the insuring company, that the proceeds or avails thereof shall be the sole property of the person, or persons whose funds are invested therein. Such contracts may not be purchased from any such company for which such executor, administrator c. t. a., guardian or trustee is acting as agent, or receives any commission, or part of any commission, directly or indirectly

paid by such company to its agent soliciting and/or selling such contract.

(3) Notwithstanding anything contained in this section no insurance contracts as specified in subsection (1) may be purchased by any executor, administrator c. t. a., trustee, or guardian if the trust agreement or other instrument, if any, under which such fiduciary has qualified and is acting provides otherwise. (1943, c. 473, ss. 1-3.)

§ 36-5. Trust funds deposited at trustee's risk.—No provision in any charter or certificate of organization of any corporation permitting deposits therein by any guardian, executor or other trustee or fiduciary, or by any county, bonded or other officer, shall operate or be construed to relieve or discharge them, or either of them, from official responsibility, or to relieve them, or either of them, or their sureties, from liability on their official bonds. (Rev., s. 1793; 1889, c. 470; C. S. 4019.)

Cross Reference.—As to deposit of trust funds, see §§ 32-8 to 32-11.

Art. 2. Removal of Trust Funds from State.

§ 36-6. Proceeding to remove trust funds of nonresidents.—When any personal estate in this state is vested in a trustee resident therein, and those having the beneficial interest in the said estate are nonresidents of this state, the clerk of the superior court of the county in which the said trustee resides may, on a petition filed for that purpose, order him or his personal representative to pay, transfer, and deliver the said estate, or any part of it, to a nonresident trustee appointed by some court of record in the state in which the said beneficiary or beneficiaries reside. No such order of any clerk shall be valid and in force until approved by the resident judge of said judicial district, or the judge holding court in such district. (1911, c. 161, s. 1; C. S. 4020.)

Cross Reference.—As to guardian's right to remove ward's personalty from the state, see § 33-48.

Cited in Fidelity Trust Co. v. Walton, 198 N. C. 790, 793, 153 S. E. 401.

§ 36-7. Removal ordered on notice; bond of nonresident trustee.—No such order shall be made, in the case of a petition, until notice of the application shall have been given to all persons interested in such trust estate, as now required by law in other special proceedings, nor until the court shall be satisfied by authentic documentary evidence that the nonresident trustee, appointed as aforesaid, has given bond, with sufficient surety, for the faithful execution of the trust, nor until it is satisfied that the payment and removal of such estate out of the state will not prejudice the right of any person interested or to become interested therein. (1911, c. 161, s. 2; C. S. 4021.)

Cross References.—As to bond in surety company, see § 109-16 et seq. As to mortgage in lieu of bond, see § 109-24 et seq. As to cash deposit in lieu of bond, see § 109-32.

§ 36-8. Order of removal discharges resident trustee.—When any guardian or committee, trustee or other person in this state, shall pay over, transfer, or deliver any estate in his hands or vested in him, under any order or decree made in pursuance of this article, he shall be discharged from all responsibility therefor. (1911, c. 161, s. 3; C. S. 4022.)

Art. 3. Resignation of Trustee.

§ 36-9. Clerk's power to accept resignations.—The clerks of the superior courts of this state have power and jurisdiction to accept the resignation of executors, administrators, guardians, trustees, and other fiduciaries and to appoint their successors in the manner provided by this article. (1911, c. 39, s. 1; C. S. 4023.)

Cross Reference.—As to resignation of guardian, see also § 33-11.

Appointment by Clerk.—Where a charitable trust is created by a written instrument the court may appoint a trustee, in the exercise of its equitable jurisdiction, to execute the trust when the instrument fails to designate one, or the one designated fails or refuses to act, or one may be appointed under the provisions of this section. Ladies Benevolent Society v. Orrell, 195 N. C. 405, 142 S. E. 493.

Where the trustee appointed by will to administer an active trust dies, the clerk of the Superior Court is without authority to appoint a successor, since the clerk has no authority to administer an equity unless empowered to do so by statute, and this section authorizes the clerk to appoint a successor trustee only when the former trustee resigns. Cheshire v. First Presbyterian Church, 221 N. C. 205, 19 S. E. (2d) 855.

Section Not Extended to Give Jurisdiction. — The equitable jurisdiction of the Superior Courts does not extend to the clerks of court unless expressly given by statute, and this and following sections giving clerks of court a limited power to appoint trustees in certain instances will not be extended to give them jurisdiction of any proceeding unless clearly within the provisions of the statutes. In re Smith, 200 N. C. 272, 156 S. E. 494.

Cited in Cheshire v. Presbyterian Church, 222 N. C. 280, 22 S. E. (2d) 566.

§ 36-10. Petition; contents and verification. — When any executor, administrator, guardian, trustee, or other fiduciary desires to resign his trust, he shall file his petition in the office of the clerk of the superior court of the county in which he qualified or in which the instrument under which he claims is registered. The petition shall set forth all the facts in connection with the appointment and qualification of the applicant as such fiduciary, with a copy of the instrument under which he acts; shall state the names, ages, and residences of all the cestuis que trustent and other parties interested in the trust estate; shall contain a full and complete statement of all debts or liabilities due by the estate, and a full and complete statement of all assets belonging to said estate, and a full and complete statement of all moneys, securities, or assets in the hands of the fiduciary and due the estate, together with a full statement of the reasons why the applicant should be permitted to resign his trust. The petition shall be verified by the oath of the applicant. (1911, c. 39, s. 2; C. S. 4024.)

§ 36-11. Parties; hearing; successor appointed.—Upon the filing of the petition, the clerk shall docket the cause as a special proceeding, with the fiduciary as plaintiff and the cestuis que trustent as defendants, and shall issue summons for the defendants, and the procedure shall be the same as in other special proceedings. If any of the defendants be nonresidents, summons may be served by publication; and if any be infants, a guardian ad litem must be appointed by the court to represent their interests in the manner now provided by law. The cestuis que trustent, creditors, or any other person interested in the trust estate, have the right to answer said petition or traverse the same and to offer evidence why the prayer of the petition should not be

granted. The clerk shall then proceed to hear and determine the matter, and if it appears to the court that the best interests of the creditors and the cestuis que trustent demand that the resignation of the fiduciary be accepted, or if it appears to the court that sufficient reasons exist for allowing the resignation, and that the resignation can be allowed without prejudice to the rights of creditors or the cestuis que trustent, the clerk may, in the exercise of his discretion, allow the applicant to resign; and in such case the clerk shall proceed to appoint the successor of the petitioner in the manner provided in this article. (1911, c. 39, s. 3; C. S. 4025.)

§ 36-12. Resignation allowed; costs; judge's approval.—In making an order allowing the fiduciary to resign the clerk shall make such order concerning the costs of the proceedings and commissions to the fiduciary as may be just. If there is no appeal from the decision and order of the clerk within the time prescribed by law, the proceedings shall be submitted to the judge of the superior court and approved by him before the same become effective. (1911, c. 39, s. 3; C. S. 4026.)

§ 36-13. Appeal; stay effected by appeal.—Any party in interest may appeal from the decision of the clerk to the judge at chambers, and in such event the procedure shall be the same as in other special proceedings as now provided by law. If the clerk allows the resignation, and an appeal is taken from his decision, such appeal shall have the effect to stay the judgment and order of the clerk until the cause is heard and determined by the judge upon the appeal taken. (1911, c. 39, s. 4; C. S. 4027.)

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

§ 36-15. Final accounting before resignation.—No executor, administrator, guardian, trustee, or other fiduciary shall be allowed or permitted to resign his trust until he shall first file with the court his final account of the trust estate, and until the court shall be satisfied that the said account is true and correct. (1911, c. 39, s. 6; C. S. 4029.)

Cross References.—As to vouchers being presumptive evidence, see § 28-119. As to fee for auditing final accounts, see § 2-35.

§ 36-16. Resignation effective on settlement with successor.—In case the resignation of the fiduciary is accepted by the court, the same shall not go into effect, or release or discharge the fiduciary from liability, until he shall have accounted to his successor in full for all moneys, securities, property or other assets or things of value in his possession or under his control or which should be in his possession or under his control belonging to the trust estate. (1911, c. 39, s. 6; C. S. 4030.)

§ 36-17. Court to appoint successor; bond required.—If the court shall allow any executor, administrator, guardian, trustee, or other fiduciary to resign his trust upon compliance with the provisions of this article, it shall be the duty of the court to proceed to appoint some fit and suitable person as the successor of such executor, administrator, guardian, trustee or other fiduciary; and the court shall require the person so appointed to give bond with sufficient surety, approved by the court, in a sum double the value of the property to come into his hands, conditioned upon the faithful performance of his duties as such fiduciary and for the payment to the persons entitled to receive the same of all moneys, assets, or other things of value which may come into his hands. All bonds executed under the provisions of this article shall be filed with the clerk, and shall be recorded in his office in a book kept for that purpose. (1911, c. 39, s. 7; C. S. 4031.)

Cross References.—As to bond in surety company, see § 109-16 et seq. As to mortgage in lieu of bond, see § 109-24 et seq. As to cash deposit in lieu of bond, see § 109-32.

§ 36-18. Rights and duties devolve on successor.—Upon the acceptance by the court of the resignation of any executor, administrator, guardian, trustee, or other fiduciary, and upon the appointment by court of his successor in the manner provided by this article, the substituted trustee shall succeed to all the rights, powers, and privileges, and shall be subject to all the duties, liabilities, and responsibilities that were imposed upon the original trustee. (1911, c. 39, s. 8; C. S. 4032.)

Art. 4. Charitable Trusts.

§ 36-19. Trustees to file accounts.—When real or personal property has been granted by deed, will, or otherwise, for such charitable purposes as are allowed by law, it shall be the duty of those to whom are confided the management of the property and the execution of the trust, to deliver in writing a full and particular account thereof to the clerk of the superior court of the county where the charity is to take effect, on the first Monday in February in each year, to be filed among the records of the court, and spread upon the record of accounts. (Rev., s. 3922; Code, s. 2342; R. C., c. 18, s. 1; 1832, c. 14, s. 1; 43 Eliz., c. 4; C. S. 4033.)

Cited in Woodcock v. Wachovia Bank, etc., Co., 214 N. C. 224, 199 S. E. 20; Humphrey v. Board of Trustees, 203 N. C. 201, 165 S. E. 547.

§ 36-20. Action for account; court to enforce trust.—If § 36-19 be not complied with, or there is reason to believe that the property has been mismanaged through negligence or fraud, it shall be the duty of the clerk of the superior court to give notice thereof to the attorney-general or solicitor who represents the state in the superior court for that county; and it shall be his duty to bring an action in the name of the state against the grantees, executors, or trustees of the charitable fund, calling on them to render a full and minute account of their proceedings in relation to the administration of the fund and the execution of the trust. The attorney-general or solicitor may also, at the suggestion of two reputable citizens, commence an action as aforesaid; and, in either case, the court may make such order and decree as shall seem best calculated to enforce the performance of the trust. (Rev., s. 3923; Code, ss. 2343, 2344;

R. C., c. 18, ss. 2, 3; 1832, c. 14, ss. 2, 3; C. S. 4034.)

Trust Estate Is Not Forfeited.—The trustees of a charitable trust who violate the provisions of the trust are subject to the procedure prescribed by this section, and where the trust is created by will the trust estate is not forfeited in favor of a residuary legatee solely upon the ground that the moneys derived have been diverted to other uses than the testator intended. Humphrey v. Board of Trustees, 203 N. C. 201, 165 S. E. 547.

§ 36-21. Not void for indefiniteness; title in trustee; vacancies.—No gift, grant, bequest or devise, whether in trust or otherwise, to religious, educational, charitable or benevolent uses or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, shall be invalid by reason of any indefiniteness or uncertainty of the objects or beneficiaries of such trust, or because said instrument confers upon the trustee or trustees discretionary powers in the selection and designation of the objects or beneficiaries of such trust or in carrying out the purpose thereof, or by reason of the same in contravening any statute or rule against perpetuities. If a trustee or trustees are named in the instrument creating such a gift, grant, bequest or devise, the legal title to the property given, granted, bequeathed or devised for such purpose shall vest in such trustee or trustees and its or their successor or successors duly appointed in accordance with the terms of such instrument. If no trustee or trustees be named in said instrument, or if a vacancy or vacancies shall occur in the trusteeship, and no method is provided in such instrument for filling such vacancy or vacancies, then the Superior Court of the proper county shall appoint a trustee or trustees, pursuant to § 36-9, to execute said trust in accordance with the true intent and meaning of the instrument creating the same. Such trustee or trustees when so appointed shall be vested with all the power and authority, discretionary or otherwise, conferred by such instrument. (1925, c. 264, s. 1.)

Editor's Note.—See 16 N. C. L. Rev. 22.

Charitable trusts are not subject to the rule against perpetuities, this section being merely declaratory of the existing law, and limitations over from one charity to another may be made to take effect after the period prescribed by the rule against perpetuities. Williams v. Williams, 215 N. C. 739, 3 S. E. (2d) 334.

Charitable trusts are not subject to the rule against perpetuities. Penick v. Bank of Wadesboro, 218 N. C. 686, 12 S. E. (2d) 253.

Appointment of Trustee upon Occurrence of Vacancy.—Where land is conveyed to trustees and their successors for specified charitable purposes, the court may appoint trustees upon failure of the successors to the original trustees, since equity will not permit a trust to fail for want of a trustee, but said trustees should be appointed by the court upon proper application. Lassiter v. Jones, 215 N. C. 298, 1 S. E. (2d) 845.

Trusts Held Valid.—A devise to "the authorities in control of the Deaf, Dumb and Blind Asylum of the State of North Carolina for the use and benefit of the indigent children therein, born blind, of the Caucasian race," constitutes a valid charitable trust. Hass v. Hass, 195 N. C. 734, 143 S. E. 541.

A devise of all the income and profits of lands in trust for a charitable organization of a certain church "to be used by the stewards of the church in defraying the expenses of the institution" is a sufficient designation of the stewards of that church as trustees for the execution of the trust contemplated by the instrument, and to vest in them the title and right of possession for its purposes. Ladies Benevolent Society v. Orrel, 195 N. C. 405, 142 S. E. 493.

The will in question established a trust with provisions that the income from the property should be used for the advancement of a religious denomination and defined the purposes which should be considered as embraced within that term as being the teaching of the gospel according to the church convention, building and repairing churches and parsonages, making donations to educational institutions of that faith and helping young men or women who expressed a desire to enter the church university to obtain the preparatory education therefor. The will further provided, by a proper construction of the instrument, for a contingent limitation over of the corpus of the estate in accordance with the provisions governing the uses of the income. Held: The contingent limitation over of the corpus of the estate is not void for uncertainty as to the purposes and beneficiaries intended, such purposes being sufficiently defined to be effective under this section. Williams v. Williams, 215 N. C. 739, 3 S. E. (2d) 334.

A gift to the trustees of a named church in trust for the home and foreign missions and benevolent causes of that church, was held valid under this section and good as against the contention that no cause was named capable of enforcing a lawful claim, as each benevolent cause supported by that church had an interest in the devise. King v. Richardson, 46 F. Supp. 510.

Trust Held Invalid.—Testator bequeathed a certain sum to his executors to be held in trust, and paid out in twenty years "to such corporations or associations of individuals as will in their judgment best promote the cause of preventing cruelty to animals in the vicinity of Asheville." It was held that although this section provides that a bequest for charitable purposes shall not be held void for indefiniteness of the beneficiary or because discretionary power is conferred upon the trustee to select and designate the beneficiary, in the present case not only is the purpose of the trust indefinite and the beneficiaries unnamed, but the sum is left to the uncontrolled discretion, not of the trustees, but of the beneficiaries to be selected by the trustees, and therefore goes one step beyond the curative provisions of the statute, and the bequest must be held void for uncertainty. Woodcock v. Wachovia Bank, etc., Co., 214 N. C. 224, 199 S. E. 20.

Details of Administration May Be Left to Trustee.—A charity in its legal sense is a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, and it is the policy of this State, as indicated by our statutes, not to declare such gift void because created for the benefit of an indefinite class, and if the founder describes the general nature of the charitable trust he may leave details of its administration to duly appointed trustees. Whitsett v. Clapp, 200 N. C. 647, 158 S. E. 183.

Cited in Johnson v. Wagner, 219 N. C. 235, 13 S. E. (2d) 419.

§ 36-22. Trusts created in other states valid.—Every such religious, educational or charitable trust created by any person domiciled in another state, which shall be valid under the laws of the state of the domicile of such creator or donor, shall be deemed and held in all respects valid under the laws of this State, even though one or more of the trustees named in the instrument creating said trust shall be domiciled in another state or one or more of the beneficiaries named in said trust shall reside or be located in a foreign state. (1925, c. 264, s. 2.)

§ 36-23. Application of section 36-22.—Section 36-22 shall apply to all trusts heretofore or hereafter created in which one or more of the beneficiaries or objects of such trust shall reside or be located in this State. (1925, c. 264, s. 3.)

Art. 5. Uniform Trusts Act.

§ 36-24. Definitions. — As used in this article unless the context or subject matter otherwise requires:

1. "Person" means an individual, a corporation, a partnership, an association, a joint stock company, a business trust, an unincorporated organization, or two or more persons having a joint or common interest.

2. "Trustee" includes trustees, a corporate as well as a natural person and a successor or substitute trustee.

3. "Relative" means a spouse, ancestor, descendant, brother or sister.

4. "Affiliate" means any person directly or indirectly controlling or controlled by another person, as hereinabove defined, or any person under direct or indirect common control with another person. It includes any person with whom a trustee has an express or implied agreement regarding the purchase of trust investments by each from the other, directly or indirectly, except a broker or stock exchange.

5. "Trust" means an express trust only. (1939, c. 197, s. 1.)

Editor's Note.—For comment on this uniform act, see 17 N. C. Law Rev. 396.

§ 36-25. Bank account to pay special debts.—1. Whenever a bank account shall, by entries made on the books of the depositor and the bank at the time of the deposit, be created exclusively for the purpose of paying dividends, interest or interest coupons, salaries, wages, or pensions or other benefits to employees, and the depositor at the time of opening such account does not expressly otherwise declare, the depositor shall be deemed a trustee of such account for the creditors to be paid therefrom, subject to such power of revocation as the depositor may have reserved by agreement with the bank.

2. If any beneficiary for whom such a trust is created does not present his claim to the bank for payment within one year after it is due, the depositor who created such trust may revoke it as to such creditor. (1939, c. 197, s. 2.)

§ 36-26. Loan of trust funds.—Except as provided in § 36-27, no corporate trustee shall lend trust funds to itself or an affiliate, or to any director, officer, or employee of itself or of an affiliate; nor shall any noncorporate trustee lend trust funds to himself, or to his relative, employer, employee, partner, or other business associate. (1939, c. 197, s. 3.)

§ 36-27. Funds held by bank for investment or distribution.—Funds received or held by a bank as fiduciary awaiting investment or distribution shall be promptly invested, distributed or deposited to the credit of the trust department as a demand deposit in the commercial department of the bank or another bank: Provided, that the bank or the commercial department shall first deliver to the trust department, as collateral security, securities eligible for the investment of the sinking funds of the state of North Carolina equal in market value to such deposited funds, or readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five per cent (125%) of the funds so deposited; and such collateral security shall be held by the trust department in trust and for the special benefit of the estate or fund for which the deposit was made, or, in case the deposit consists of uninvested or undistributed funds belonging to several estates or trust funds, then in trust for the special benefit of said estates or funds in proportion to their respective interest in such deposits. The said securities shall at all times be kept separate and apart from the other assets of the trust department and proper records shall be kept by the proper officer in connection therewith. If such funds are deposited in a bank insured under the provisions of the Federal Deposit Insurance Corporation, the above collateral security will be required only for that portion of uninvested balances of each trust which are not fully insured under the provisions of that corporation. "Investment" and/or "invested" shall not be construed to include savings accounts or certificates or deposits in any bank. (1939, c. 197, s. 4.)

§ 36-28. Trustee buying from or selling to self.—No trustee shall directly or indirectly buy or sell any property for the trust from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee or of an affiliate; or from or to a relative, employer, partner, or other business associate. (1939, c. 197, s. 5.)

§ 36-29. Trustee selling from one trust to another trust.—No trustee shall as trustee of one trust sell property to itself as trustee of another trust. (1939, c. 197, s. 6.)

§ 36-30. Corporate trustee buying its own stock.—No corporate trustee shall purchase for a trust shares of its own stock, or its bonds or other securities, or the stock, bonds or other securities of an affiliate. (1939, c. 197, s. 7.)

§ 36-31. Voting stock.—A trustee owning corporate stock may vote it by proxy, but shall be liable for any loss resulting to the beneficiaries from a failure to use reasonable care in deciding how to vote the stock and in voting it. (1939, c. 197, s. 8.)

Cross References.—As to trustee's power to vote stock, see also § 55-111. As to liability as stockholder, see § 60-17.

§ 36-32. Banks holding stock in name of nominee.—A bank holding stock as fiduciary may hold it in the name of a nominee, without mention of the trust in the stock certificate or stock registration book: Provided, that (1) the trust records and all reports or accounts rendered by the fiduciary clearly show the ownership of the stock by the fiduciary and the facts regarding its holdings; (2) the nominee shall not have possession of the stock certificate or access thereto except under the immediate supervision of the fiduciary. The fiduciary shall personally be liable for any loss to the trust resulting from any act of such nominee in connection with such stock so held. (1939, c. 197, s. 9.)

§ 36-33. Powers attached to office.—Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, all powers of a trustee shall be attached to the office and shall not be personal. (1939, c. 197, s. 10.)

§ 36-34. Powers exercisable by majority.—1. Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, any power vested in three or more trustees may be exercised by a majority of such trustees; but no trustee who has not joined in exercising a power shall be liable to the beneficiaries or to others for the consequences of such exercise, nor shall a dissenting trustee be liable for the consequences of an act in which he joins at the direction of the majority trustees, if he expressed his dissent in writing to any of his cotrustees at or before the time of such joinder.

2. Nothing in this section shall excuse a cotrustee from liability for inactivity in the administra-

tion of the trust nor for failure to attempt to prevent a breach of trust. (1939, c. 197, s. 11.)

Cross Reference.—As to right of trustee where only a naked trust is created, see § 41-3.

§ 36-35. Contracts of trustee. — 1. Whenever a trustee shall make a contract which is within his powers as trustee, or a predecessor trustee shall have made such a contract, and a cause of action shall arise thereon, the party in whose favor the cause of action has accrued may sue the trustee in his representative capacity, and any judgment rendered in such action in favor of the plaintiff shall be collectible (by execution) out of the trust property. In such an action the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

2. No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within thirty days after the beginning of such action, or within such other time as the court may fix, and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest, or in the case of a charitable trust the attorney general and any corporation which is a beneficiary or agency in the performance of such charitable trust, of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to the parties to be notified at their last known addresses. The trustee shall furnish the plaintiff a list of the parties to be notified, and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary, or in the case of charitable trusts the attorney general and any corporation which is a beneficiary or agency in the performance of such charitable trust, may intervene in such action and contest the right of the plaintiff to recover.

3. The plaintiff may also hold the trustee who made the contract personally liable on such contract, if the contract does not exclude such personal liability. The addition of the word "trustee" or the words "as trustee" after the signature of a trustee to a contract shall be deemed prima facie evidence of an intent to exclude the trustee from personal liability. (1939, c. 197, s. 12.)

Cross References.—As to endorsement of a negotiable instrument by trustee, see § 25-50. As to costs when trustee is a party to an action, see § 6-31.

§ 36-36. Exoneration or reimbursement for torts. —1. A trustee who has incurred personal liability for a tort committed in the administration of the trust is entitled to exoneration therefor from the trust property if he has not discharged the claim, or to be reimbursed therefor out of trust funds if he has paid the claim, if (1) the tort was a common incident of the kind of business activity in which the trustee was properly engaged for the trust or, (2) although the tort was not a common incident of such activity if neither the trustee nor any officer or employee of the trustee was guilty of personal fault in incurring the liability.

2. If a trustee commits a tort which increases the value of the trust property, he shall be entitled to exoneration or reimbursement with respect thereto to the extent of such increase in value, even though he would not otherwise be entitled to exoneration or reimbursement.

3. Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees. (1939, c. 197, s. 13.)

§ 36-37. Tort liability of trust estate.—1. Where a trustee of his predecessor has incurred personal liability for a tort committed in the course of his administration, the trustee in his representative capacity may be sued and collection had from the trust property, if the court shall determine in such action that (1) the tort was a common incident of the kind of business activity in which the trustee or his predecessor was properly engaged for the trust; or (2) that, although the tort was not a common incident of such activity, neither the trustee nor his predecessor, nor any officer or employee of the trustee or his predecessor, was guilty of personal fault in incurring the liability; or (3) that, although the tort did not fall within classes (1) or (2) above, it increased the value of the trust property. If the tort is within classes (1) or (2) above, collection may be had of the full amount of damage proved; and if the tort is within class (3) above, collection may be had only to the extent of the increase in the value of the trust property.

2. In an action against the trustee in his representative capacity under this section the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

3. No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within thirty days after the beginning of the action, or within such other period as the court may fix and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustees who then had a present interest of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to such beneficiaries at their last known addresses. The trustees shall furnish the plaintiff a list of such beneficiaries and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary may intervene in such action and contest the right of the plaintiff to recover.

4. The trustee may also be held personally liable for any tort committed by him, or by his agents or employees in the course of their employments, subject to the rights of exoneration or reimbursement provided in § 36-36.

5. Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees. (1939, c. 197, s. 14.)

§ 36-38. Withdrawals from mingled trust funds. —Where a person who is a trustee of two or more trusts has mingled the funds of two or more trusts in the same aggregate of cash, or in the same bank or brokerage account or other investment, and a withdrawal is made therefrom by the trustee for his own benefit, or for the benefit of a third person not a beneficiary or

creditor of one or more of the trusts, or for an unknown purpose, such a withdrawal shall be charged first to the amount of cash, credit, or other property of the trustee in the mingled fund, if any, and after the exhaustion of the trustee's cash, credit, or other property, then to the several trusts in proportion to their several interests in the cash, credit, or other property at the time of the withdrawal. (1939, c. 197, s. 15.)

§ 36-39. Unenforceable oral trust created by deed.—1. When an interest in real property is conveyed by deed to a person on a trust which is unenforceable on account of the statute of frauds and the intended trustee or his successor in interest still holds title but refuses to carry out the trust on account of the statute of frauds, the intended trustee or his successor in interest, except to the extent that the successor in interest is a bona fide purchaser of a legal interest in the real property in question, shall be under a duty to convey the interest in real property to the settlor or his successor in interest. A court having jurisdiction may prescribe the conditions upon which the interest shall be conveyed to the settlor or his successor in interest.

2. Where the intended trustee has transferred part or all of his interest and it has come into the hands of a bona fide purchaser, the intended trustee shall be liable to the settlor or his successor in interest for the value of the interest thus transferred at the time of its transfer, less such offsets as the court may deem equitable. (1939, c. 197, s. 16.)

§ 36-40. Power of settlor.—The settlor of any trust affected by this article may, by provision in the instrument creating the trust if the trust was created by a writing, or by oral statement to the trustee at the time of the creation of the trust if the trust was created orally, or by an amendment of the trust if the settlor reserved the power to amend the trust, relieve his trustee from any or all of the duties, restrictions, and liabilities which would otherwise be imposed upon him by this article; or alter or deny to his trustee any or all of the privileges and powers conferred upon the trustee by this article; or add duties, restrictions, liabilities, privileges, or powers, to those imposed or granted by this article; but no act of the settlor shall relieve a trustee from the duties, restrictions, and liabilities imposed upon him by §§ 36-26, 36-27 and 36-28. (1939, c. 197, s. 17.)

§ 36-41. Power of beneficiary.—Any beneficiary of a trust affected by this article may, if of full legal capacity and acting upon full information, by written instrument delivered to the trustee relieve the trustee as to such beneficiary from any or all of the duties, restrictions, and liabilities which would otherwise be imposed on the trustee by this article, except as to the duties, restrictions, and liabilities imposed by §§ 36-26, 36-27 and 36-28. Any such beneficiary may release the trustee from liability to such beneficiary for past violations of any of the provisions of this article. (1939, c. 197, s. 18.)

§ 36-42. Power of the court.—A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the duties and restrictions which would otherwise be placed upon him by this article, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for violations of the provisions of this article. (1939, c. 197, s. 19.)

§ 36-43. Liabilities for violations of article.—If a trustee violates any of the provisions of this article, he may be removed and denied compensation in whole or in part; and any beneficiary, co-trustee, or successor trustee may treat the violation as a breach of trust. (1939, c. 197, s. 20.)

§ 36-44. Uniformity of interpretation. — This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1939, c. 197, s. 21.)

§ 36-45. Short title.—This article may be cited as the Uniform Trusts Act. (1939, c. 197, s. 22.)

§ 36-46. Time of taking effect. — This article shall take effect the first day of July, one thousand nine hundred and thirty-nine and shall apply in the construction of and operation under (a) all agreements containing trust provisions entered into subsequent to March 15, 1941; (b) all wills made by testators who shall die subsequent to March 15, 1941; and (c) all other wills and trust agreements and trust relations in so far as such terms do not impair the obligation of contract or deprive persons of property without due process of law under the Constitution of the State of North Carolina or of the United States of America. (1939, c. 197, s. 25; 1941, c. 269.)

Editor's Note.—The 1941 amendment struck out a part of the original section and substituted therefor that part of this section beginning with the words "in the construction." For comment on this amendment, see 19 N. C. Law Rev. 544.

Art. 6. Uniform Common Trust Fund Act.

§ 36-47. Establishment of common trust funds.—Any bank or trust company qualified to act as fiduciary in this state may establish one or more common trust funds for the purpose of furnishing investments to itself as fiduciary, or to itself and another or others, as co-fiduciaries; and may, as such fiduciary or co-fiduciary, invest funds which it lawfully holds for investment in interests in such common trust fund or funds, if such investment is not prohibited by the instrument, judgment, decree, or order creating such fiduciary relationship or by an amendment thereof, and if, in the case of co-fiduciaries, the bank or trust company procures the consent of its co-fiduciary or co-fiduciaries to such investment. (1939, c. 200, s. 1.)

Editor's Note.—For comment on this enactment, see 17 N. C. Law Rev. 394.

§ 36-48. Court accountings. — Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust fund or funds shall not be required to render a court accounting with regard to such fund or funds; but it may, by application to the superior court, secure approval of such an accounting on such conditions as the court may establish. This section shall not affect the duties of the trustees of the participating trusts under the common trust fund to render accounts of their several trusts. (1939, c. 200, s. 2.)

§ 36-49. Supervision of state banking commis-

sion.—All common trust funds established under the provisions of this article shall be subject to the rules and regulations of the state banking commission. (1939, c. 200, s. 3.)

§ 36-50. Uniformity of interpretation. — This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1939, c. 200, s. 4.)

§ 36-51. Short title.—This article may be cited as the Uniform Common Trust Fund Act. (1939, c. 200, s. 5.)

§ 36-52. Time of taking effect. — This article shall be in full force and effect on and after July first, one thousand nine hundred thirty-nine and shall apply to fiduciary relationships then in existence or thereafter established. (1939, c. 200, s. 8.)

Chapter 37. Uniform Principal and Income Act.

§ 37-1. Definition of terms.—"Principal" as used in this chapter means any realty or personalty which has been so set aside or limited by the owner thereof or a person thereto legally empowered that it and any substitutions for it are eventually to be conveyed, delivered or paid to a person, while the return therefrom or use thereof or any part of such return or use is in the meantime to be taken or received by or held for accumulation for the same or another person;

"Income" as used in this chapter means the return derived from principal;

"Tenant" as used in this chapter means the person to whom income is presently or currently payable, or for whom it is accumulated or who is entitled to the beneficial use of the principal presently and for a time prior to its distribution;

"Remainderman" as used in this chapter means the person ultimately entitled to the principal, whether named or designated by the terms of the transaction by which the principal was established or determined by operation of law;

"Trustee" as used in this chapter includes the original trustee of any trust to which the principal may be subject and also any succeeding or added trustee. (1937, c. 190, s. 1.)

§ 37-2. Application of the chapter; powers of settlor.—This chapter shall govern the ascertainment of income and principal, and the apportionment of receipts and expenses between tenants and remaindermen, in all cases where a principal has been established with, or, unless otherwise stated hereinafter, without the interposition of a trust; except that in the establishment of the principal provision may be made touching all matters covered by this chapter, and the person establishing the principal may himself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so, and such provision and direction, where not otherwise contrary to law, shall control notwithstanding this chapter. (1937, c. 190, s. 2.)

§ 37-3. Income and principal; disposition. — (1) All receipts of money or other property paid or delivered as rent of realty or hire of personalty or dividends on corporate shares payable other than in shares of the corporation itself, or interest on money loaned, or interest on or the rental or use value of property wrongfully withheld or tortiously damaged, or otherwise in return for the use of principal, shall be deemed income unless otherwise expressly provided in this chapter.

(2) All receipts of money or other property paid or delivered as the consideration for the sale or other transfer, not a leasing or letting, or property forming a part of the principal, or as a repayment of loans, or in liquidation of the assets of a corporation, or as the proceeds of property taken on eminent domain proceedings where separate awards to tenant and remainderman are not made, or as proceeds of insurance upon property forming a part of the principal except where such insurance has been issued for the benefit of either tenant or remainderman alone, or otherwise as a refund or replacement or change in form of principal, shall be deemed principal unless otherwise expressly provided in this chapter. Any profit or loss resulting upon any change in form of principal shall inure to or fall upon principal.

(3) All income after payment of expenses properly chargeable to it shall be paid and delivered to the tenant or retained by him if already in his possession or held for accumulation where legally so directed by the terms of the transaction by which the principal was established, while the principal shall be held for ultimate distribution as determined by the terms of the transaction by which it was established or by law. (1937, c. 190, s. 3.)

§ 37-4. Apportionment of income. — Whenever a tenant shall have the right to income from periodic payments, which shall include rent, interest on loans and annuities, but shall not include dividends on corporate shares, and such right shall cease and determine by death or in any other manner at a time other than the date when such periodic payments should be paid, he or his per-

sonal representative shall be entitled to that portion of any such income next payable which amounts to the same percentage thereof as the time elapsed from the last due date of such periodic payments to and including the day of the determination of his right is of the total period during which such income would normally accrue. The remaining income shall be paid to the person next entitled to income by the terms of the transaction by which the principal was established. But no action shall be brought by the trustee or tenant to recover such apportioned income or any portion thereof until after the day on which it would have become due to the tenant but for the determination of the right of the tenant entitled thereto. The provisions of this section shall apply whether an ultimate remainderman is specifically named or not. Likewise when the right of the first tenant accrues at a time other than the payment dates of such periodic payments, he shall only receive that portion of such income which amounts to the same percentage thereof as the time during which he has been so entitled is of the total period during which such income would normally accrue; the balance shall be a part of the principal. (1937, c. 190, s. 4.)

Cross Reference.—As to apportionment in the case of renting real estate, see § 42-5 et seq.

§ 37-5. Corporate dividends and share rights.—(1) All dividends on shares of a corporation forming a part of the principal which are payable in the shares of the corporation shall be deemed principal. Subject to the provisions of this section, all dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations, other than the declaring corporation, shall be deemed income. Where the trustee shall have the option of receiving a dividend, either in cash or in the shares of the declaring corporation, it shall be considered as a cash dividend and deemed income, irrespective of the choice made by the trustee.

(2) All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in such corporation, and the proceeds of any sale of such rights, shall be deemed principal. All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in another corporation, and the proceeds of any sale of such rights, shall be deemed income.

(3) Where the assets of a corporation are liquidated, amounts paid upon corporate shares as cash dividends declared before such liquidation occurred or as arrears of preferred or guaranteed dividends shall be deemed income; all other amounts paid upon corporate shares on disbursements of the corporate assets to the stockholders shall be deemed principal. All disbursements of corporate assets to the stockholders, whenever made, which are designated by the corporation as a return of capital or division of corporate property shall be deemed principal.

(4) Where a corporation succeeds another by merger, consolidation or reorganization or otherwise acquires its assets, and the corporate shares of the succeeding corporation are issued to the shareholders of the original corporation in like proportion to, or in substitution for, their shares of the original corporation, the two corporations shall be considered a single corporation in applying the provisions of this section. But two corporations shall not be considered a single corporation under this section merely because one owns corporate shares of or otherwise controls or directs the other.

(5) In applying this section the date when a dividend accrues to the person who is entitled to it shall be held to be the date specified by the corporation as the one on which the stockholders entitled thereto are determined, or in default thereof the date of declaration of the dividend. (1937, c. 190, s. 5.)

§ 37-6. Premium and discount bonds.—Where any part of the principal consists of bonds or other obligations for the payment of money, they shall be deemed principal at their inventory value or in default thereof at their market value at the time the principal was established, or at their cost where purchased later, regardless of their par or maturity value; and upon their respective maturities or upon their sale any loss or gain realized thereon shall fall upon or inure to the principal. (1937, c. 190, s. 6.)

§ 37-7. Principal used in business.—(1) Whenever a trustee or a tenant is authorized by the terms of the transaction by which the principal was established, or by law, to use any part of the principal in the continuance of a business which the original owner of the property comprising the principal had been carrying on, the net profits of such business attributable to such principal shall be deemed income.

(2) Where such business consists of buying and selling property, the net profits for any period shall be ascertained by deducting from the gross returns during and the inventory value of the property at the end of such period, the expenses during and the inventory value of the property at the beginning of such period.

(3) Where such business does not consist of buying and selling property, the net income shall be computed in accordance with the customary practice of such business, but not in such way as to decrease the principal.

(4) Any increase in the value of the principal used in such business shall be deemed principal, and all losses in any one calendar year, after the income from such business for that year has been exhausted, shall fall upon principal. (1937, c. 190, s. 7.)

§ 37-8. Principal comprising animals. — Where any part of the principal consists of animals employed in business, the provisions of § 37-7 shall apply; and in other cases where the animals are held as a part of the principal, partly or wholly because of the offspring or increase which they are expected to produce, all offspring or increase shall be deemed principal to the extent necessary to maintain the original number of such animals and the remainder shall be deemed income; and in all other cases such offspring or increase shall be deemed income. (1937, c. 190, s. 8.)

§ 37-9. Disposition of natural resources.—Where

any part of the principal consists of property in lands from which may be taken timber, minerals, oils, gas or other natural resources, and the trustee or tenant is authorized by law or by the terms of the transaction by which the principal was established to sell, lease or otherwise develop such natural resources, and no provision is made for the disposition of the net proceeds thereof after the payment of expenses and carrying charges on such property, such proceeds, if received as rent on a lease, shall be deemed income, but if received as consideration, whether as royalties or otherwise, for the permanent severance of such natural resources from the lands, shall be deemed principal to be invested to produce income. Nothing in this section shall be construed to abrogate or extend any right which may otherwise have accrued by law to a tenant to develop or work such natural resources for his own benefit. (1937, c. 190, s. 9.)

§ 37-10. Principal subject to depletion.—Where any part of the principal consists of property subject to depletion, such as leaseholds, patents, copyrights and royalty rights, and the trustee or tenant in possession is not under a duty to change the form of the investment of the principal, the full amount of rents, royalties or return from the property shall be income to the tenant; but where the trustee or tenant is under a duty, arising either by law or by the terms of the transaction by which the principal was established, to change the form of the investment, either at once or as soon as it may be done without loss, then the return from such property not in excess of five per centum per annum of its fair inventory value, or in default thereof its market value at the time the principal was established, or at its cost where purchased later, shall be deemed income and the remainder principal. (1937, c. 190, s. 10.)

§ 37-11. Unproductive estate.—(1) Where any part of a principal in the possession of a trustee consists of realty or personalty which for more than a year, and until disposed of as hereinafter stated, has not produced an average net income of at least one per centum per annum of its fair inventory value, or in default thereof its market value at the time the principal was established, or of its cost where purchased later, and the trustee is under a duty to change the form of the investment as soon as it may be done without sacrifice of value and such change is delayed, but is made before the principal is finally distributed, then the tenant, or in case of his death his personal representative, shall be entitled to share in the net proceeds received from the property as delayed income to the extent hereinafter stated.

(2) Such income shall be the difference between the net proceeds received from the property and the amount which, had it been placed at simple interest at the rate of five per centum per annum for the period during which the change was delayed, would have produced the net proceeds at the time of change, but in no event shall such income be more than the amount by which the net proceeds exceed the fair inventory value of the property or in default thereof its market value at the time the principal was established or its cost where purchased later. The net proceeds shall consist of the gross proceeds received from the property, less any expenses incurred in disposing of it and less all carrying charges which have been paid out of principal during the period while it has been unproductive.

(3) The change shall be taken to have been delayed from the time when the duty to make it first arose, which shall be presumed, in the absence of evidence to the contrary, to be one year after the trustee first received the property if then unproductive, otherwise one year after it became unproductive.

(4) If the tenant has received any income from the property or has had any beneficial use thereof during the period while the change has been delayed, his share of the delayed income shall be reduced by the amount of such income received or the value of the use had.

(5) In the case of successive tenants the delayed income shall be divided among them or their representatives according to the length of the period for which each was entitled to income. (1937, c. 190, s. 11.)

§ 37-12. Expenses; trust estates.—(1) All ordinary expenses incurred in connection with the trust estate or with its administration and management, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the estates of both tenant and remainderman, interest on mortgages on the principal, ordinary repairs, trustees' compensation except commissions computed on principal, compensation of assistants, and court costs and attorneys' and other fees on regular accountings, shall be paid out of income. But such expenses where incurred in disposing of, or as carrying charges on, unproductive estate as defined in § 37-11, shall be paid out of principal, subject to the provisions of sub-section two of § 37-11.

(2) All other expenses, including trustee's commissions computed upon principal, cost of investing or reinvesting principal, attorneys' fees and other costs incurred in maintaining or defending any action to protect the trust or the property or assure the title thereof, unless due to the fault or cause of the tenant, and cost of, or assessments for, improvements to property forming part of the principal, shall be paid out of principal. Any tax levied by any authority, federal, state or foreign, upon profit or gain defined as principal under the terms of sub-section two of § 37-3 shall be paid out of principal, notwithstanding said tax may be denominated a tax upon income by the taxing authority.

(3) Expenses paid out of income according to sub-section one which represent regularly recurring charges shall be considered to have accrued from day to day, and shall be apportioned on that basis whenever the right of the tenant begins or ends at some date other than the payment date of the expenses. Where the expenses to be paid out of income are of unusual amount, the trustee may distribute them throughout an entire year or part thereof, or throughout a series of years. After such distribution, where the right of the tenant ends during the period, the expenses shall be apportioned between tenant and remainderman on the basis of such distribution.

(4) Where the costs of, or special taxes or assessments for, an improvement representing an addition of value to property held by the trustee as

part of principal are paid out of principal, as provided in sub-section two, the trustee shall reserve out of income and add to the principal each year a sum equal to the cost of the improvement divided by the number of years of the reasonably expected duration of the improvement. (1937, c. 190, s. 12.)

§ 37-13. Expenses; non-trust estates.—(1) The provisions of § 37-12, so far as applicable and excepting those dealing with costs of, or special taxes, or assessments for, improvements to property, shall govern the apportionment of expenses between tenants and remaindermen where no trust has been created, subject, however, to any legal agreement of the parties or any specific direction of the taxing or other statutes; but where either tenant or remainderman has incurred an expense for the benefit of his own estate, and without the consent or agreement of the other, he shall pay such expense in full.

(2) Subject to the exceptions stated in sub-section one the cost of, or special taxes or assessments for, an improvement representing an addition of value to property forming part of the principal shall be paid by the tenant, where such improvement cannot reasonably be expected to outlast the estate of the tenant. In all other cases a portion thereof only shall be paid by the tenant, while the remainder shall be paid by the remainderman. Such portion shall be ascertained by taking that percentage of the total which is found by dividing the present value of the tenant's estate by the present value of an estate of the same form as that of the tenant, except that it is limited for a period corresponding to the reasonably expected duration of the improvement. The computation of present values of the estates shall be made on the expectancy basis set forth in the "American Experience Tables of Mortality," and no other evidence of duration or expectancy shall be considered. (1937, c. 190, s. 13.)

§ 37-14. Uniformity of interpretation. — This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1937, c. 190, s. 14.)

§ 37-15. Short title.—This chapter may be cited as the Uniform Principal and Income Act. (1937, c. 190, s. 15.)

Division VIII. Real and Personal Property.

Chapter 38. Boundaries.

§ 38-1. Special proceeding to establish. — The owner of land, any of whose boundary lines are in dispute, may establish any of such lines by special proceedings in the superior court of the county in which the land or any part thereof is situated. (Rev., s. 325; 1893, c. 22; C. S. 361.)

Cross Reference.—As to special proceeding generally, see § 1-393 et seq.

Origin of the Doctrine of the Section. — This section grew out of and is in some respects similar to the common law "writ of perambulation," although the procedure hereunder tends greatly to simplify the procedure obtaining under the former law. Until the passage of this section the consent of both adjoining land owners was necessary in order to have the dispute as to the bounds of their respective estates judicially determined. Under the present law either of the adjoining proprietors as a matter of right is entitled to have the land processioned, without the other's consent, and, where there has been an appeal, to have all the controverted matters settled by the jury under the guidance of the court. Green v. Williams, 144 N. C. 60, 63, 58 S. E. 549.

Purpose of Processioning. — The primary object of this section and the following sections of this article is to faciliate the speedy determination of disputed boundaries between adjoining land owners who do not contest the other's title to their respective tracts. Parker v. Taylor, 133 N. C. 103, 45 S. E. 473. Title to the land is not in issue unless so made by the pleadings, Cole v. Seawell, 152 N. C. 349, 67 S. E. 753; but when placed in issue by the defendant's denial of the plaintiff's ownership then, by sec. 1-399, the pending special proceedings are converted into a civil action to quiet title and the court will try all the issues in controversy connected therewith. Woody v. Fountain, 143 N. C. 67, 55 S. E. 425.

Relief under the Section—Injunctions.—To warrant the granting of an injunction in the cases of special proceedings, the relief sought must be subsidiary to the relief asked in the special proceedings, Hunt v. Sneed, 64 N. C. 176; and since this section gives no substantive relief —settles no rights, or titles to property, but only locates the dividing lines between the parties, the plaintiff was denied an injunction to restrain the defendant from commissions of trespasses when such order was asked for in the special proceedings instituted to determine the boundary line between the adjoining estates. Wilson v. Alleghany Company, 124 N. C. 7, 32 S. E. 326.

Dispute as to Boundary Necessary.—To sustain an action to establish the true dividing line between adjoining owners of land, a dispute as to the location of the line must be shown or the case on appeal will be dismissed in the Supreme Court. Wood v. Hughes, 195 N. C. 185, 141 S. E. 569.

Effect of Binding Agreement.—Where, in proceedings to establish the disputed boundaries between adjoining lands, a binding executed agreement between the parties has been established by uncontradicted evidence, the plaintiff is estopped from proceeding under this section, and there is no error in the court's holding that the completed agreement of arbitration operated as an estoppel as a matter of law. Lowder v. Smith, 201 N. C. 642, 643, 161 S. E. 223.

Procedure.—As the procedure for the application of this section is that prescribed in § 38-3, subsec. 4, it is competent for the defendant under §§ 1-70 and 1-399 to plead the equitable relief of mutual mistake, having the cause transferred to the civil issue docket, and having the common grantor of the plaintiff and defendant made a party defendant. Smith v. Johnson, 209 N. C. 729, 184 S. E. 486.

§ 38-2. Occupation sufficient ownership. — The occupation of land constitutes sufficient ownership for the purposes of this chapter. (Rev., s. 326; 1893, c. 22; 1903, c. 21; C. S. 362.)

Sufficiency of Ownership—When Title Not in Dispute.— The courts have construed the term "occupation", as used in this section, to mean possession, and uniformly hold that one in (a) possession of the land, and (or) (b) whose title thereto is not disputed so that no issue is raised save only that of the location of the boundary, has sufficient ownership to avail himself of the special proceedings herein provided for. Williams v. Hughes, 124 N. C. 3, 32 S. E. 325; Parker v. Taylor, 133 N. C. 103, 45 S. E. 473.

Where it is admitted that plaintiff's title was not in dispute, and that defendant's title was not in dispute except as to the true boundary line, the refusal of the court to submit an issue as to plaintiff's title, in addition to the issue as to the true boundary line, will not be held error. Clark v. Dill, 208 N. C. 421, 181 S. E. 281.

Same—When Title is in Dispute. — Where, however, the defendant puts the title to the land in issue, and the case has taken the form of a civil action, then the plaintiff can no longer rest his case by merely proving his occupation of the land as evidencing the boundary, but must go further and prove his title to the land. Woody v. Fountain, 143 N. C. 67, 55 S. E. 425. See also Williams v. Hughes, 124 N. C. 3, 32 S. E. 325.

§ 38-3. Procedure. — 1. Petition; Summons; Hearing.—The owner shall file his petition under oath stating therein facts sufficient to constitute the location of such line as claimed by him and making defendants all adjoining owners whose interest may be affected by the location of said line. The clerk shall thereupon issue summons to the defendants as in other cases of special proceedings. If the defendants fail to answer, judgment shall be given establishing the line according to petition. If the answer deny the location set out in the petition, the clerk shall issue an order to the county surveyor or, if cause shown, to any competent surveyor to survey said line or lines according to the contention of both parties, and make report of the same with a map at a time to be fixed by the clerk, not more than thirty days from date of order; to which time the cause shall be continued. The cause shall then be heard by the clerk upon the location of said line or lines and judgment given determining the location thereof.

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

Compliance with the Procedural Steps Mandatory.—This section must be strictly followed in all material respects and any flagrant or negligent departure therefrom will be fatal to the proceedings. Forney v. Williamson, 98 N. C. 329, 4 S. E. 483. But the Court will look to the substance and not to the form of the pleadings, and where an affidavit contains a full and explicit denial of the line set out in the plaintiff's petition it will be treated as an answer since it contains all that is required by the section. Scott v. Kellum, 117 N. C. 664, 23 S. E. 180.

Effect of Misjoinder of Parties.—A proceeding under the provisions of this section to establish the true dividing line between adjoining owners of land, will be dismissed upon demurrer for misjoinder of parties and causes of action that involve the title or interests of others not related to the matter in dispute, and which are entirely independent thereof. Rogers v. Rogers, 192 N. C. 50, 133 S. E. 184.

Burden of Proof.—Upon the institution of the proceedings to ascertain the true dividing line between the lands the burden is on the plaintiff to establish such line, Woody v. Fountain, 143 N. C. 67, 55 S. E. 425; Hill v. Dalton, 140 N. C. 9, 52 S. E. 273, and this burden does not shift to the defendant merely because, in addition to denying the line to be as claimed by the plaintiff, he alleges another to be the dividing line. Garris v. Harrington, 167 N. C. 86, 83 S. E. 253.

The plaintiff is the actor and has the burden of establishing the true location of the dividing line. McCanless v. Ballard, 222 N. C. 701, 24 S. E. (2d) 525.

Applicability of Doctrine of Res Judicata—Title to Land Not in Issue.—Where the only fact in issue is the establishment and location of the boundary line, then the judgment of

the clerk is, to this extent, binding on the parties and they may not again litigate on this precise point. Whitaker v. Garren, 167 N. C. 658, 83 S. E. 769. But his judgment may not estop the parties from asserting in a separate action title in the land, Nash v. Shute, 182 N. C. 528, 109 S. E. 353.

Same—Title in Issue.—Where, however, the parties join issue upon the title and the case is transferred to the regular term of the court a judgment therein estops the parties both as to the title and the location of the line. Whitaker v. Garren, 167 N. C. 658, 83 S. E. 759. See also, Nash v. Shute, 182 N. C. 528, 109 S. E. 353, the court in this case, saying: ". . . The law confers on the clerk no jurisdiction to settle questions of title. He can only authoritatively determine the location of a disputed line . . . The parties are therefore not concluded by his judgment in respect to [questions of title]."

When Title Is Put in Issue—Injunctive Relief.—When defendant in a processioning proceeding puts title in issue, the cause should be transferred to the civil issue docket for trial, but when he does not do so the proceeding does not involve title or right to possession, but solely the location of the true dividing line, and therefore injunctive relief will not lie at the instance of one party to enjoin the other from retaining possession of the disputed strip, pending the final determinaiton of the proceeding, even in the superior court on appeal, since the restraint sought is not germane to the subject of the action. Jackson v. Jackson, 216 N. C. 401, 5 S. E. (2d) 143.

Evidence — Generally. — The general rules for ascertaining boundaries apply equally well when recourse is had through special proceedings. Power Co. v. Savage, 170 N. C. 625, 87 S. E. 629. See also, Woodard v. Harrell, 191 N. C. 194, 132 S. E. 12, containing dicta to the effect that parol evidence of location of boundary line may be properly admitted, if the parties were merely locating the true boundary line, but not to show verbal agreement to change the true dividing line.

Same—The Surveyor's Report.—The surveyor, when acting under this section, is not in any sense a referee and his report to the court should not contain conclusions of law, but should only set forth a detailed account of the facts of the case and when it does this, it is entitled to great evidential weight although it is not conclusive as to the results contained therein. Norwood v. Crawford, 114 N. C. 513, 19 S. E. 349. See also Green v. Williams, 144 N. C. 60, 56 S. E. 549.

What Report of Processioners must Contain.—A report of a processioner is radically defective when it does not state, with precision, the claims of the respective parties, so as to show what lines were disputed or how far they were disputed, and no undue laxity in the proceedings in this respect will be tolerated by the court. Hoyle v. Wilson, 29 N. C. 466. So also where one of the parties objects to the processioner's proceeding, the processioner must, in his return to the court, state "all the circumstances of the case," as for instance, the nature of the objection, the line or lines claimed by each party, etc., Carpenter v. Whitworth, 25 N. C. 204.

When Transfer to Regular Term Required.—The jurisdiction of the clerk in these special proceedings is limited in its scope. It extends only to those cases in which the only fact in issue is the location of the boundary line between the lands. Where the title to the land is put in issue the clerk has no authority to pass on any question involved but must transfer the whole proceedings to the regular term of the court. Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302; Smith v. Johnson, 137 N. C. 43, 49 S. E. 62; Parker v. Taylor, 133 N. C. 103, 45 S. E. 473.

2. Appeal to Term.—Either party may within ten days after such determination by the clerk serve notice of appeal from the ruling of the clerk determining the said location. When notice of appeal is served it shall be the duty of the clerk to transmit the issues raised before him to the next term of the superior court of the county for trial by a jury, when the question shall be heard de novo.

Parties on Appeal.—Under the provision contained in this section for the appeal by either party to the regular term of the court, other parties having an interest in the locus in quo may, upon motion, be permitted to come in. Batts v. Pridgen, 147 N. C. 133, 60 S. E. 897.

3. Survey After Judgment.—When final judgment is given in the proceeding the court shall issue an order to the surveyor to run and mark the line or lines as determined in the judgment. The surveyor shall make report including a map of the line as determined, which shall be filed with the judgment roll in the cause and entered with the judgment on the special proceedings docket.

4. Procedure as in Special Proceedings.—The procedure under this chapter, the jurisdiction of the court, and the right of appeal shall, in all respects, be the same as in special proceedings except as herein modified. (Rev., s. 326; 1893, c. 22; 1903, c. 21; C. S. 363.)

§ 38-4. Surveys in disputed boundaries.—When in any suit pending in the superior court the boundaries of lands are drawn in question, the court may, if deemed necessary, order a survey of the lands in dispute, agreeable to the boundaries and lines expressed in each party's titles, and such other surveys as shall be deemed useful; which surveys shall be made by two surveyors appointed by the court, one to be named by each of the parties, or by one surveyor, if the parties agree; and the surveyors shall attend according to the order of the court, and make the surveys, and shall make as many accurate plans thereof as shall be ordered by the court; and for such surveys the court shall make a proper allowance, to be taxed as among the costs of the suit. (Rev., s. 1504; Code, s. 939; R. C., c. 31, s. 119; 1779, c. 157; 1786, c. 252; C. S. 364.)

Allowance for Costs of Survey.—The word "court", as used in the last provision of this section, refers to the judge, and not to the clerk, and where the trial judge has failed to make an order allowing compensation to the surveyor, the clerk has no power to make the allowance; but on appeal from the clerk's refusal, such order will be made by the judge of the Superior Court, Cannon v. Briggs, 174 N. C. 740, 94 S. E. 519; LaRoque v. Kennedy, 156 N. C. 360, 72 S. E. 454.

Discretion of Court.—This section vests in the court a sound discretion within the limits defined. Vance v. Pritchard, 218 N. C. 273, 10 S. E. (2d) 725.

Chapter 39. Conveyances.

Art. 1. Construction and Sufficiency.

Art. 2. Conveyances by Husband and Wife.

Art. 1. Construction and Sufficiency.

§ 39-1. Fee presumed, though word "heirs" omitted.—When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word "heir" is used or not, unless such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity. (Rev., s. 946; Code, s. 1280; 1879, c. 148; C. S. 991.)

Cross Reference.—As to presumption of conveyance in fee simple when deed and registry of conveyance destroyed, see § 8-21.

Editor's Note.—This section changes the common-law rule that in order to convey a fee simple the word "heirs" should appear either in the premises or the habendum of the deed. Carolina Real Estate Co. v. Bland, 152 N. C. 225, 67 S. E. 483. Even prior to the enactment of the section the courts of this State commenced to draw away from the strictness of the common-law rule in this respect, and a perusal of a large number of cases bearing upon and controlling the subject show a marked tendency to mitigate the harshness of the law. So an exception as to devises and equitable estate had already been made. (See Whichard v. Whitehurst, 181 N. C. 79, 106 S. E. 463; Hollowell v. Manly, 179 N. C. 262, 102 S. E. 386, relating to a conveyance in trust). And a series of cases established the proposition that the word "heirs," when used as indicative of the estate to be granted, no matter where the word appeared in the instrument, would be transposed and inserted so as to cause the instrument to operate as a fee simple. See Smith v. Proctor, 139 N. C. 314, 319, 51 S. E. 889. But perhaps the most radical departure from the early rule is found in the case of Vickers v. Leigh, 104 N. C. 248, 10 S. E. 308, where it was decided that if it appeared that the word "heirs" was omitted from the instrument because of ignorance, because of inadvertence or because of a mistake, the word would be supplied so as to pass title in fee in accordance with the intention of the grantor.

These early cases may be of importance as this section is not retroactive, and the construction of instruments enacted prior to its passage will be governed by the rules herein set out.

Same Rule as for Construction of Devises.—This section provides the same rule of construction of deeds as is contained in section 31-38 for construction of devises. Vickers v. Leigh, 104 N. C. 248, 10 S. E. 308.

Construction of Word Heir.—The word "heirs" is always a word of limitation and vests the absolute property in chattels as well as land. Cutlar v. Cutlar, 3 N. C. 154.

Word "Heirs" Unnecessary to Create Equitable Estate.—An equitable estate in fee may be declared without the use of the word "heirs," if an intention to pass such estate can be gathered from the instrument. Holmes v. Holmes, 86 N. C. 205; Smith v. Proctor, 139 N. C. 314, 51 S. E. 889.

Interpreted in Accord with Intent.—Where it is the manifest purpose of a deed to pass a fee, the court will effectuate this purpose, if it can do so by any reasonable interpretation. Ricks v. Pulliam, 94 N. C. 225.

The presumption of fee raised by this section is rebutted by the fact that the deed in this case intended to convey only a life estate which is manifest from the many restraining expressions contained therein. Boomer v. Grantham, 203 N. C. 230, 231, 165 S. E. 698.

Same—Fee Simple Presumed Unless Clear Intent Otherwise.—All conveyances of land executed since the passage of the act are to be taken to be in fee simple, unless the intent of the grantor is plainly manifest in some part of the instrument to convey an estate of less dignity. It is the legislative will that the intention of the grantor and not the technical words of the common law shall govern. Triplett v. Williams, 149 N. C. 394, 398, 63 S. E. 79.

And by this section, a deed though not using the word "heirs", is a conveyance in fee, unless the contrary intention appears. Holloway v. Green, 167 N. C. 91, 83 S. E. 243.

The section was applied where the intent of the donor, appearing by proper construction of a deed, was to give a fee simple estate to his grandchild upon the birth of her child by marriage. Sharpe v. Brown, 177 N. C. 294, 98 S. E. 825.

The granting clause of a deed was to one of the grantor's sons, his heirs and assigns, and following the description "this deed is conveyed to the said grantee to him his lifetime and then to his boy children" with habendum to the said son "and his heirs and not to assign only to his brothers their only use and behoof for ever" with warranty to the said son "and his heirs and assigns." It was held that the portion of the habendum restraining assignment except to the brothers of the grantee is equally consistent with an assignment of a life estate as with an assignment of the fee, and to hold that the grant to the "son and his heirs" conveyed the fee simple would require that other portions

of the instrument expressive of the intent of the grantor be disregarded, and in accordance with the intention of the grantor as gathered from the entire instrument the deed conveys a life estate to the son with remainder to the son's male children, the intent of the grantor to convey an estate of less dignity than a fee being apparent. Jefferson v. Jefferson, 219 N. C. 333, 13 S. E. (2d) 745.

Section as Curing Repugnancy.—The premises of a deed to land read, among other things, "unto said M. G., her heirs and assigns;" and the habendum, "to herself, the said M. G. during her lifetime, and at her death said land is to be equally divided between" her children. It was held that since under this section, the same estate would have passed if the word "heirs," an established formula, had been omitted in the granting clause, there is no repugnance in this deed between the granting clause and habendum. Triplett v. Williams, 149 N. C. 394, 63 S. E. 79.

The limitation of the estate in the habendum, and the creation of an estate in remainder therein, were conclusive proof that there was no intention of the grantor to create an estate in fee, but an estate for life to M. G. with a remainder over to her children. Triplett v. Williams, 149 N. C. 394, 63 S. E. 79.

Deeds Executed Prior to Effective Force of Section.—Although a deed to lands executed and delivered prior to the effective force of this section would not pass an estate in fee simple if the deed entirely omitted the word "heirs" or other appropriate words of inheritance, a deed executed before such date to a school committee "and their successors in office in fee simple" is sufficient to pass a fee simple title to the lands conveyed therein. Tucker v. Smith, 199 N. C. 502, 154 S. E. 826.

Deed to Husband and Wife and Heirs of Wife.—A deed to a husband and wife, and only to the heirs of the latter, does not pass the fee to the former by virtue of this section, for as to him it is plainly intended that the grantor meant to convey an estate of less dignity. Sprinkle v. Spainhour, 149 N. C. 223, 62 S. E. 910.

Restraint of Alienation.—Where a conveyance is construed under this section to be in fee, any attempt of restraint upon alienation is void, but where relevant, the words therein used may be construed to ascertain whether the intent of the grantor was to convey a fee or an estate of less dignity. Holloway v. Green, 167 N. C. 91, 83 S. E. 243.

Correction of Instrument.—The court, in its equitable jurisdiction, may correct an instrument so as to pass a fee in land when the intent so appears in the submission of a case agreed. Whichard v. Whitehurst, 181 N. C. 79, 106 S. E. 463.

Purpose of Conveyance.—A habendum, "To have and to hold the aforesaid lands and premises to the party of the second part and their successors in office forever, for the only proper use and behalf of said Claremont Female College as aforesaid," does not have the effect of appropriating the specific property to school purposes under condition subsequent, but, unless there is imperative and express provision to the contrary, shall be held to express only the purpose of the grantor in making the deed, and as to third persons the power of the trustee or other corporate authority to convey the property is not impaired. Claremont College v. Riddle, 165 N. C. 211, 81 S. E. 283.

Reservation of Easement.—In Ruffin v. Seaboard Air Line Railway, 151 N. C. 330, 66 S. E. 317, this section was applied in holding that a reservation of an easement was a reservation in fee, as no contravening intent appeared from the conveyance.

Retention of Mineral Rights.—Under this section where a deed conveys land "with the exception of one half of all the mineral found upon the premises, which is hereby expressly reserved," the grantor retains the fee in one half the mineral rights. Central Bank, etc., Co. v. Wyatt, 189 N. C. 107, 126 S. E. 93.

Section does not change common law conveyance of inheritance to a conveyance of less effectiveness, i. e., to one conveying only a life estate. Whitley v. Arenson, 219 N. C. 121, 12 S. E. (2d) 906.

Applied in New York Life Ins. Co. v. Lassiter, 209 N. C. 156, 160, 183 S. E. 616.

Cited in Krites v. Plott, 222 N. C. 679, 683, 24 S. E. (2d) 531.

§ 39-2. Vagueness of description not to invalidate.—No deed or other writing purporting to convey land or an interest in land shall be declared void for vagueness in the description of the thing intended to be granted by reason of the use of the word "adjoining" instead of the words "bounded by," or for the reason that the boundaries given do not go entirely around the land described: Provided, it can be made to appear to the satisfaction of the jury that the grantor owned at the time of the execution of such deed or paper-writing no other land which at all corresponded to the description contained in such deed or paper-writing. (Rev., s. 948; 1891, c. 465, s. 2; C. S. 992.)

Cross Reference.—As to vagueness of description in paper-writing offered as evidence, see § 8-39.

Editor's Note.—In Blow v. Vaughan, 105 N. C. 198, 10 S. E. 891, it was held that a deed describing land "as adjoining lands of A, B, and others and containing 25 acres, more or less," etc., was too vague and indefinite to be aided by parol proof. A similar holding appears on p. 411 of the same volume of the reports where the case of Wilson v. Johnson is set out. These two cases, published in 1890, were received by the bar and the state with manifest disapproval and were the cause of much concern as to the validity of titles. Hence, the Legislature in 1891 enacted the salutary provisions of this section. The section does not operate retrospectively. Hemphill v. Annis, 119 N. C. 514, 519, 26 S. E. 152.

Description.—The word "description" imports such a description as is susceptible of being aided by parol proof. Hemphill v. Annis, 119 N. C. 514, 26 S. E. 152.

And a deed which fails to describe any land is as void now as it was prior to the passage of this section. Moore v. Fowle, 139 N. C. 51, 51 S. E. 776.

Application.—In Harris v. Woodard, 130 N. C. 580, 581, 41 S. E. 790, it was said: "The statute (§ 39-2), applies only where there is a description which can be aided, but not when, as in this case, there is no description." Quoted in Bryson v. McCoy, 194 N. C. 91, 95, 138 S. E. 420.

A deed which fails to describe with certainty the property sought to be conveyed, does not fix a beginning point or any of the boundaries, and contains no reference to anything extrinsic by reference to which the description could be made certain, is too vague and indefinite to admit of parol evidence of identification, and it being impossible to identify the land sought to be conveyed, the deed is inoperative, this section not applying to such cases. Katz v. Daughtrey, 198 N. C. 393, 151 S. E. 879.

Capable of Being Reduced to Certainty.—A description contained in a deed or contract to convey lands is sufficiently definite to admit of parol evidence of identification when it is capable of being reduced to certainty by reference to something extrinsic to which the instrument refers. Patton v. Sluder, 167 N. C. 500, 83 S. E. 818.

Application.—A description in a mortgage to a life estate in lands as being in a certain county and township, containing twenty acres more or less, a part of a certain estate, and giving the names of two parties whose lands join it, is sufficient to admit parol evidence to fit the locus in quo to the description in the instrument, and is not void for vagueness of description under this section. Bissette v. Strickland, 191 N. C. 260, 131 S. E. 655.

A description of land in a deed, which designates all that tract of land in two certain counties, lying on "both sides of old road between" designated points, and bounded by lands of named owners, "and others," being parts of certain state grants, conveyed by the patentee or enterer to certain grantees, etc., is sufficient under this section to admit of parol evidence in aid of the identification of the lands as those intended to be conveyed. Buckhorn Land, etc., Co. v. Yarbrough, 179 N. C. 335, 102 S. E. 630.

Same—Sufficiency of Description in Will.—Where a will leaves to the widow of the testator for life, "at least 75 acres of land * * * * * * * * to include the dwelling house and to be located as she may want it to be, and as near four-square as is consistent," it is sufficient under this section to be located by parol evidence. Heirs at Law of Freeman v. Ramsey, 189 N. C. 790, 128 S. E. 404.

§ 39-3. Conveyances to slaves.—When it is made to appear that any gift or conveyance has been made to any person, while a slave, of any lands or tenements, whether the same was conveyed by deed or parol, and the bargainee or donee has been placed in actual possession of the same, such gift or conveyance shall have the force and effect of transferring the legal title to the lands and tenements to such bargainee or donee: Provided, such possession shall have continued for the term of ten years prior to the ninth day of March,

one thousand eight hundred and seventy: Provided, further, that any absence from the premises from the first day of May, one thousand eight hundred and sixty-one, to the first day of January, one thousand eight hundred and sixty-six, shall not be held as an abandonment or discontinuance of the possession: Provided, also, that this section shall not affect the interest of a bona fide purchaser for value from the grantor or bargainor of the lands or tenements in dispute. (Rev., s. 949; Code, s. 1278; 1869-70, c. 77; C. S. 993.)

Affects Remedy Only.—The statute affects the remedy only and does not interfere with vested rights. Buie v Carver, 75 N. C. 559, 563.

Former Laws Do Not Defeat Purpose of Section.—Whenever it shall judicially appear that a slave purchased and paid for any property, real or personal, and that conveyance thereof was made to him, or to any one for his use, such purchaser, or those lawfully representing him, shall be entitled to such property, anything in the former laws of this State forbidding slaves to acquire and hold property, to the contrary notwithstanding. Caldwell v. Watson, 74 N. C. 296.

Where Not Applicable to Will.—Where a man made a will in 1860 and dies in 1861, leaving certain property to his wife during her life and then to his slaves, naming them, and the widow died in 1899, the slaves cannot take under the will. Jervis v. Lewellyn, 130 N. C. 616, 41 S. E. 873.

Conveyor Must Have Had Title.—The section does not apply to a case where one having himself no title made a parol conveyance of land to a slave and put the slave in possession more than ten years before the passage of the act, but extends only to cases where the alleged donor or vendor had title himself. Buie v. Carver, 75 N. C. 559.

§ 39-4. Conveyances by infant trustees.—When an infant is seized or possessed of any estate in trust, whether by way of mortgage or otherwise, for another person who may be entitled in law to have a conveyance of such estate, or may be declared to be seized or possessed, in the course of any proceeding in the superior court, the court may decree that the infant shall convey and assure such estate, in such manner as it may direct, to such other person; and every conveyance and assurance made in pursuance of such decree shall be as effectual in law as if made by a person of full age. (Rev., s. 1036; Code, s. 1265; R. C., c. 37, s. 27; 1821, c. 1116, ss. 1, 2; C. S. 994.)

Editor's Note.—The general rule is that the contracts of an infant are voidable at the option of the infant, and when avoided, the contract is null and void ab initio. Pippen v. Mutual Ben. Life Ins. Co., 130 N. C. 23, 40 S. E. 822. To this general rule, there is one exception as old as the rule itself: "An infant may bind himself for necessaries." Jordan v. Coffield, 70 N. C. 110; Turner v. Gaither, 83 N. C. 357, 35 Am. Rep. 574. It would seem that this section added a second exception to the general rule in this State. It expressly creates a class of contracts which an infant is authorized to make, and which are as binding "as if made by a person of full age." See 3 N. C. Law Rev. 110.

Section Indicates Proceeding in Equity.—The language of this section that "the court may decree" is indicative of a proceeding in equity. Riddick v. Davis, 220 N. C. 120, 16 S. E. (2d) 662.

Exclusiveness of Remedy.—The remedy prescribed by this section, relating to the foreclosure of a deed of trust, must be, under our form of civil procedure, an action in the nature of an equitable proceeding to foreclose a mortgage. No other remedy is given by statute. Hence, it is exclusive and must be resorted to, and in the manner prescribed. Riddick v. Davis, 220 N. C. 120, 16 S. E. (2d) 662.

Trustors are necessary parties to action by purchaser at foreclosure sale to obtain authority for infant trustee to execute the deed. Riddick v. Davis, 220 N. C. 120, 16 S. E. (2d) 662.

Cited in Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N. C. 41, 44, 178 S. E. 863.

§ 39-5. Official deed, when official selling or empowered to sell is not in office.—When a sheriff, coroner, constable or tax collector, in virtue of his office, sells any real or personal property and goes out of office before executing a proper deed therefor, he may execute the same after his term of office has expired; and when he dies or removes from the state before executing the deed, his successor in office shall execute it. When a sheriff or tax collector dies having a tax list in his hands for collection, and his personal representative or surety, in collecting the taxes, makes sale according to law, his successor in office shall execute the conveyance for the property to the person entitled. (Rev., ss. 950, 951; Code, s. 1267; R. C., c. 37, s. 30; 1891, c. 242; C. S. 995.)

Cross References.—As to authority of sheriff to execute deed to land sold under execution, see § 1-309. As to sheriff's deed for trust estate, see § 1-316. As to sheriff's deed on sale of equity of redemption, see § 1-317. As to duty of sheriff or other officers to execute deed for property sold under execution, see § 1-339.

A tax deed executed by an "ex-sheriff" may be authorized under this section. Manufacturing Co. v. Rosey, 144 N. C. 370, 57 S. E. 2; McNair v. Boyd, 163 N. C. 478, 79 S. E. 966.

When Executed by Successor.—A deed made by a succeeding sheriff (or coroner) operates by virtue of the section to pass the title to what was sold. Edwards v. Tipton, 77 N. C. 222; Isler v. Andrews, 66 N. C. 553.

Same—May Demand Clear Evidence.—Before a successor in office can be required to make a conveyance sought under this section he is entitled to demand clear and conclusive evidence that a sale was made by his predecessor, and also that the purchase price was paid. Isler v. Andrews, 66 N. C. 553; Harris v. Irwin, 29 N. C. 432.

Deeds as Evidence. — A sheriff's deed made pursuant to this section after he has gone out of office is still subject to the rule that such deeds are prima facie evidence of sale and execution. Curlee v. Smith, 91 N. C. 172. But the recitals in a deed made by a successor of the sheriff are only hearsay, as they constitute his opinion based on information and not from his own knowledge. Id. See also Edwards v. Tipton, 77 N. C. 222; McPherson v. Hussey, 17 N. C. 323.

Power of Court to Correct Deeds. — A sheriff's deed is under control of the court, and the court can compel a sheriff to correct his deed; if the sheriff who executes the deed dies, the court can compel his successor to correct the deed, pursuant to this section, hence, the court may on motion during the trial of the suit correct such a deed. Millsaps v. McCormick, 71 N. C. 531, 533.

Does Not Extend to Clerks.—This section does not extend to clerks, and they cannot exercise the power herein conferred after going out of office. Shew v. Call, 119 N. C. 450, 453, 26 S. E. 33.

§ 39-6. Revocation of deeds of future interest made to persons not in esse.—The grantor in any voluntary conveyance in which some future interest in real estate is conveyed or limited to a person not in esse may, at any time before he comes into being, revoke by deed such interest so conveyed or limited. This deed of revocation shall be registered as other deeds; and the grantor of like interest for a valuable consideration may, with the joinder of the person from whom the consideration moved, revoke said interest in like manner. The grantor, maker or trustor who has heretofore created or may hereafter create a voluntary trust estate in real or personal property for the use and benefit of himself or of any other person or persons in esse with a future contingent interest to some person or persons not in esse or not determined until the happening of a future event may at any time, prior to the happening of the contingency vesting the future estates, revoke the grant of the interest to such person or persons not in esse or not determined by a proper instrument to that effect; and the grantor of like interest for a valuable consideration may, with the joinder of the person from whom the consideration moved, revoke said interest in like manner: Provided that

in the event the instrument creating such estate has been recorded, then the deed of revocation of such estate shall be likewise recorded before it becomes effective: Provided, further, that this section shall not apply to any instrument hereafter executed creating such a future contingent interest when said instrument shall expressly state in effect that the grantor, maker, or trustor may not revoke such interest: Provided, further, that this section shall not apply to any instrument heretofore executed whether or not such instrument contains express provision that it is irrevocable unless the grantor, maker, or trustor shall within six months after the effective date of this proviso either revoke such future interest, or file with the trustee an instrument stating or declaring that it is his intention to retain the power to revoke under this section: Provided, further, that in the event the instrument creating such estate has been recorded, then the revocation or declaration shall likewise be recorded before it becomes effective. (Rev., s. 1045; 1893, c. 498; 1929, c. 305; 1941, c. 264; 1943, c. 437; C. S. 996.)

Cross Reference.—As to registration of deeds, see §§ 47-17, 47-18 et seq.

Editor's Note.—The Act of 1929 added the last sentence to this section down to the second proviso. Formerly the section applied only to voluntary conveyances; as amended, it includes the creation of voluntary trusts in real or personal property, not only for the benefit of the grantor, maker, or trustor, and of persons not in esse, but for the benefit of persons determinable upon the happening of a future event. Furthermore, as amended, it applies to trusts heretofore created as well as to such as may be created hereafter. Stanback v. Citizens' Nat. Bank, 197 N. C. 292, 148 S. E. 313.

The 1941 amendment inserted before the first proviso the words beginning with "and the grantor." The amendment became effective March 15, 1941, and did not affect pending litigation. For comment on this enactment, see 19 N. C. Law Rev. 507.

The 1943 amendment added the last three provisos at the end of the section.

For article commenting on this section, see 20 N. C. Law Rev. 278.

Section Not Retroactive.—This section does not apply to deeds executed prior to its enactment. Roe v. Journegan, 175 N. C. 261, 95 S. E. 495; Roe v. Journigan, 181 N. C. 180, 106 S. E. 680.

Though vested rights may not be affected by retroactive laws, contingent interests may be affected thereby, and where there is a voluntary trust with the limitation over upon a contingency determinable at some future time as to the persons who take thereunder, the power of revocation of a trust given by this section is not within the constitutional inhibition. Stanback v. Citizen's Nat. Bank, 197 N. C. 292, 148 S. E. 313.

Constitutionality was upheld in Stanback v. Citizen's Nat. Bank, 197 N. C. 292, 148 S. E. 313. Mere expectancies of future contingent interests provided for persons not in esse do not constitute vested rights such as would deprive the legislature of the power to enact this section authorizing revocation of a voluntary grant. MacMillan v. Branch Banking, etc., Co., 221 N. C. 352, 355, 20 S. E. (2d) 276.

Voluntary Trusts.—A trust estate in personalty created by the donor in consideration of one dollar and natural love and affection is a voluntary trust revocable by the donor under this section. Stanback v. Citizens Nat. Bank, 197 N. C. 292, 148 S. E. 313.

Where a voluntary trust is created in bank stock for the life of the donor or until he reach the age of fifty years, and at the termination to his issue or in the absence of issue to his next of kin, those who take in remainder take upon a contingency, the vesting of which depends upon the uncertain happening of a future event, and the trust may be revoked by the donor. Stanback v. Citizens Nat. Bank, 197 N. C. 292, 148 S. E. 313.

Where a woman receives property without restriction from her father's estate and executes a deed in marriage settlement in trust without consideration, the deed is a voluntary trust in contemplation of this section. MacRae v. Commerce Union Trust Co., 199 N. C. 714, 715, 155 S. E. 614.

Revocation of Trust Settlement.—Where a woman executes a trust deed of settlement upon her marriage for the benefit of her children who may be born of the marriage, depending upon their reaching a certain age, the trust interest subject to be changed by her during her life, after the birth of children, their interests do not ipso facto become vested, and she may revoke the trust upon giving a sufficient deed to that effect and in compliance with the statute. MacRae v. Commerce Union Trust Co., 199 N. C. 714, 715, 155 S. E. 614.

Plaintiff executed a voluntary trust in personalty with direction that the income therefrom be paid to her for life and upon her death the trust estate be distributed to her surviving children, and in the event plaintiff should die without issue, the trust estate should be paid to a named beneficiary if living and if he were not then living then to plaintiff's heirs generally. Plaintiff has no children and executed an instrument in writing revoking the trust upon the payment of a specified sum to the only beneficiary of the remainder in esse, who consented to the revocation of the trust upon the payment to him of the amount agreed. It was held that under the provisions of this section plaintiff was entitled to the revocation of the trust. MacMillan v. Branch Banking, etc., Co., 221 N. C. 352, 20 S. E. (2d) 276.

Law Governing Power of Revocation of Trust Settlement.—Where the daughter of a British subject takes property absolutely from the trustees under his will upon her marriage, and marries in North Carolina, executing in this State a deed of settlement in trust, without consideration, for beneficiaries of this State, upon certain contingencies, the lex loci contractu governing the marriage settlement is that of North Carolina and controlled by the provisions of our statutes as to its revocation. MacRae v. Commerce Union Trust Co., 199 N. C. 714, 155 S. E. 614.

The waiver of the right of revocation by the trustor of a voluntary trust is without consideration and does not preclude trustor from exercising her right to revoke under this section. MacMillan v. Branch Banking, etc., Co., 221 N. C. 352, 20 S. E. (2d) 276.

Applied in Cutter v. American Trust Co., 213 N. C. 686, 197 S. E. 542.

Art. 2. Conveyances by Husband and Wife.

§ 39-7. Instruments affecting married woman's title; husband to execute; privy examination. — Every conveyance, power of attorney or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments must be executed by such married woman and her husband, and due proof or acknowledgment thereof must be made as to the husband and due acknowledgment thereof must be made by the wife, and her private examination, touching her voluntary assent to such instrument, shall be taken separate and apart from her husband, and such acknowledgment or proof as to the execution by the husband and such acknowledgment by the wife and her private examination shall be taken and certified as provided by law. Any conveyance, power of attorney, contract to convey, mortgage, deed of trust or other instrument executed by any married woman in the manner by this chapter provided, and executed by her husband also, shall be valid in law to pass, bind or charge the estate, right, title and interest of such married woman in and to all such lands, tenements and hereditaments or other estate, real or personal, as shall constitute the subject-matter or be embraced within the terms and conditions of such instrument or purport to be passed, bound, charged or conveyed thereby. (Rev., s. 952; Code, s. 1256; 1899, c. 235, s. 9; C. C. P., s. 429, subsec. 6; 1868-9, c. 277, s. 15; C. S. 997.)

I. General Considerations.
II. Executed by Both Husband and Wife.
  A. In General.
  B. The Husband's Acknowledgment and Proof Thereof.
  C. Acknowledgment and Privy Examination of Feme Covert.
III. Effect of Feme Covert's Deed.

Cross References.

As to private examination of wife, see § 47-39. As to husband's acknowledgment and wife's private examination before the same officer, see § 47-40. As to married women generally, the Martin Act of 1911, see § 52-2 et seq. As to officers authorized to take examination, see § 39-10. As to dower, see § 30-4 et seq.

I. GENERAL CONSIDERATIONS.

Editor's Note.—In arriving at the legislative intent and a sound construction of this section, it must be considered in connection with Article X, section 6 of the Constitution of North Carolina, and Chapter 52 of the General Statutes. The Constitution secures to a feme covert her property, real and personal, acquired before or after marriage, as her sole and separate estate and property. However, it requires the written consent of the husband before she can make a valid conveyance thereof.

The very year of the adoption of the Constitution the Legislature, in the endeavor to carry out and give effect to this provision, passed an act requiring that for the validity of a conveyance or other instrument, affecting the "estate, right or title of any married woman in lands, tenements or hereditaments," her privy examination must be taken by the proper officer. Code, Civil Procedure, sec. 429, sub-sec. 6. Re-enacted, with some slight modifications, Laws 1868, 69, ch. 277, sec. 15. This enactment continued, in substance, through the various codes and laws on the subject, appearing in Revisal 1905 as sec. 952. Council v. Pridgen, 153 N. C. 443, 445, 69 S. E. 404. The section was brought forward in a substantial manner as this section. Section 2113 of the Revisal, now § 52-23 of the General Statutes, conferred upon a free trader the "power to contract and deal as if she were a feme sole." In Council v. Pridgen, 153 N. C. 443, 69 S. E. 404, it was held that this referred to the ordinary contracts made in some business in which the feme might engage, and did not change her status as to conveyance, or contracts to convey her real estate. The Legislature of 1911, ch. 109, enacted the Martin Act, which is sec. 52-2 of the General Statutes.

Since this enactment it is held that contracts wrongfully broken by married women will subject them to liability for damages, even though they cannot be compelled to convey unless they have been privily examined according to forms of law. In other words they may be liable for damages, although specific performance cannot be required. Warren v. Dail, 170 N. C. 406, 87 S. E. 126; Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820; Royal v. Southerland, 168 N. C. 405, 84 S. E. 708; Pomeroy Contracts (2 Ed.), p. 11; Anson Contracts, pp. 384, 385.

See 12 N. C. Law Rev., 68, for comment in reference to this section.

Constitutionality.—This section is constitutional. Jackson v. Beard, 162 N. C. 105, 78 S. E. 6; Council v. Pridgen, 153 N. C. 443, 69 S. E. 404; Graves v. Johnson, 172 N. C. 176, 90 S. E. 113.

It is not in conflict with the constitutional provision which secures to the wife her entire estate, notwithstanding her coverture. Southerland v. Hunter, 93 N. C. 310.

This section is distinct from § 30-8, Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N. C. 41, 44, 178 S. E. 863.

Strict Compliance Necessary.—Unless the formalities of this section are complied with, the deed is absolutely void. Jackson v. Beard, 162 N. C. 105, 107, 78 S. E. 6, and cases cited.

Same—Creation of Trust.—A woman under coverture cannot create a trust in land by parol or in any other manner except by embodying it in a written instrument executed in accordance with this section. Ricks v. Wilson, 154 N. C. 282, 287, 70 S. E. 476.

Registration of Power of Attorney Unnecessary.—A power of attorney given by a married woman to dismiss an action concerning her land need not be registered to give it validity. Hollingsworth v. Harman, 83 N. C. 153, 154.

No Distinction between Legal and Equitable Interests.—The section admits no distinction between legal and equitable interests and embraces every "estate, right and title," which the married woman may possess in land, and such is the construction put upon it by the court. Clayton v. Rose, 87 N. C. 106, 109.

Cited in Owens v. Blackwood Lbr. Co., 212 N. C. 133, 193 S. E. 219.

II. EXECUTED BY BOTH HUSBAND AND WIFE.

A. In General.

It is necessary that a wife's deed be signed by the husband and acknowledged by both husband and wife. Joiner v. Firemen's Ins. Co., 6 F. Supp. 103, 104.

Reason for Joinder of Husband.—The purpose of the section in making these requirements as to the deeds of feme covert is stated by Chief Justice Smith in Ferguson v. Kinsland, 93 N. C. 337, as follows: "The requirement that the husband should execute the same deed with the wife was to afford her his protection against the wiles and insidious arts of others, while her separate and private examination was to secure her against coercion and undue influence from him." And Connor, J., in Ball v. Paquin, 140 N. C. 83, 52 S. E. 410, says: "For the purpose of throwing around her the protection of her husband's counsel and advice, the Legislature declared that with certain exceptions she could not contract without the written consent of her husband." Jackson v. Beard, 162 N. C. 105, 108, 78 S. E. 6.

It is true that the husband, under our Constitution, Art. X, sec. 6, has no interest as husband in his wife's property, real or personal. The provision that he must give his written assent to conveyances by her of realty is the sole survival in our Constitution of the ancient idea that a wife must be under the guardianship and control of her husband and is incompetent to transact business. This requirement in our Constitution is omitted in nearly all the other State constitutions. It is not based upon his having any interest in his wife's land, nor on his having a vested interest therein at her death, for she has full authority to devise the same without his consent and deprive him of any interest as tenant by the curtesy. Accordingly, it is held that while his assent must be in writing, it need not be by deed, for he has nothing to convey; that his joining with her in the instrument is sufficient. Jones v. Craigmiles, 114 N. C. 613, 19 S. E. 638, and cases there cited, and that his signing the instrument merely as a witness is a sufficient "written assent." Jennings v. Hinton, 126 N. C. 48, 35 S. E. 187; or a letter written by him is sufficient. Prinkley v. Ballance, 126 N. C. 393, 35 S. E. 631. Stallings v. Walker, 176 N. C. 321, 323, 97 S. E. 25.

Execute Same Instrument.—This section clearly contemplates that the same instrument of writing shall be executed by both husband and wife. Slocomb v. Ray, 123 N. C. 571, 31 S. E. 829; Green v. Bennett, 120 N. C. 394, 27 S. E. 142.

Order of Procedure.—It is contemplated and required by the statute that the deed shall be first acknowledged by the husband and wife, and that her privy examination shall be taken afterwards; or if, for any of the causes specified in the statute, this cannot be done, then, first, the husband must acknowledge the execution of the deed, or it must be proved as to him by witnesses before a judge or the county court, and then, upon suggestion to the judge or county court, as directed by the statute, the commission may go out to take the acknowledgment and privy examination of the wife. Graves v. Johnson, 172 N. C. 176, 178, 90 S. E. 113.

Binding Dower Interest by Mortgage.—To bind the dower interest by mortgage the husband and wife must join in the execution of the deed, separate conveyances will not comply with the requirement of this section. Slocomb v. Ray, 123 N. C. 571, 31 S. E. 829.

B. Husband's Acknowledgment and Proof Thereof.

Time of Acknowledgment.—While the husband and wife must both be parties to the same deed, there is manifestly no requirement in the language of the section that the act of acknowledgment by both should be contemporaneous. Lineberger v. Tidwell, 104 N. C. 506, 512, 10 S. E. 758.

Same—Husband Executes First.—The deed is none the less effectual to pass the title of the wife because the husband not only executes it before she does, but after execution sends the officer to take her acknowledgment and privy examination at a point several miles distant, provided that she does then voluntarily assent and her acknowledgment and privy examination is taken and certified in form substantially the same as that prescribed by statute by a competent officer. Lineberger v. Tidwell, 104 N. C. 506, 511, 10 S. E. 758.

Must be Proved as to Husband.—The statute has been changed to permit the acknowledgment of the husband to be taken after that of the wife and before a different officer (§ 39-8), but this section still requires the acknowledgment of the husband or proof of his execution of the deed to pass the title or interest of the wife; and the principle announced, that the General Assembly has power to prescribe the form in which the assent of the husband to the execution of a deed by the wife shall be evidenced, is unimpaired, and was fully recognized in Warren v. Dail, 170 N. C. 406, 87 S. E. 126. Graves v. Johnson, 172 N. C. 176, 179, 90 S. E. 113.

The case of Southerland v. Hunter, 93 N. C. 310, which has been approved on this point in Lineberger v. Tidwell, 104 N. C. 506, 511, 10 S. E. 758, and in Slocomb v. Ray, 123 N. C. 571, 574, 31 S. E. 829, construes section 1256 of the Code (1883), Revisal, sec. 952, Consolidated Statutes, § 992, which is this section; and it is there held that a deed signed by

the husband, but not proved as to him, was ineffectual to pass the title of the wife, although her acknowledgment and private examination were taken. The fact that the General Assembly saw fit to change the statute requiring proof as to the husband and wife to be taken before the same officer, and that proof as to the husband should precede proof as to the wife, after the decisions of McGlennery v. Miller 90 N. C. 215, 218, and Ferguson v. Kinsland, 93 N. C. 337, 339, and left the statute unchanged as to the requirements that the deed must be proved as to the husband to pass the title or interest of the wife, after the decision in Southerland v. Hunter, furnishes the strongest possible evidence that the General Assembly thought the latter a safeguard which ought to be retained. Graves v. Johnson, 172 N. C. 176, 179, 90 S. E. 113.

Acknowledgment after Wife's Death.—A deed to lands is only complete upon delivery, and a married woman's deed to her lands requires the written consent of her husband under the form provided for by this section requiring that such conveyance be signed by both the husband and wife; and a deed made and signed in due form by the wife, in which thereafter the husband writes in his name as a grantor, and after her death, acknowledges its execution before the clerk, is invalid to pass title. Hensley v. Blankinship, 174 N. C. 759, 94 S. E. 519.

Consent Proved and Recorded after Wife's Death.—No title is conveyed by a married woman's deed of her separate property where her husband's consent thereto was not proved and recorded until after the death of the wife. Green v. Bennett, 120 N. C. 394, 27 S. E. 142.

Evidence of Husband's Consent. — Where an instrument executed by a husband and wife specifically charges the latter's land with the payment of a debt, the consent of the husband need not be specifically set out in the deed, since his joining in the conveyance is sufficient evidence of his consent. Bank v. Ireland, 122 N. C. 571, 29 S. E. 835.

Effect of Husband's Minority.—The part of this section requiring execution by the husband when his wife's lands are conveyed, is contractual in its nature; and hence when the husband is a minor the conveyance is subject to the usual rules applying to infant's contracts, and he may avoid or ratify it upon reaching his majority. Jackson v. Beard, 162 N. C. 105, 78 S. E. 6.

Veto Power of Husband.—While the husband has no interest in the wife's property, he has a "veto" power over the alienation of her realty by withholding his written assent, without which her conveyances of realty are invalid. Stallings v. Walker, 176 N. C. 321, 324, 97 S. E. 25.

C. Acknowledgment and Privy Examinations of Feme Covert.

Origin of Privy Examination.—A provision for the privy examination is found for the first time in 18 Edw. I. It was first enacted in this State in 1715. Paul v. Carpenter, 70 N. C. 502, 504.

Deed Void without Privy Examination.—A deed of a feme covert, until she is privily examined by the proper authorities, is mere blank paper, so utterly void that even if it contains a stipulation in her own behalf, she cannot have the benefit thereof. Smith v. Ingram, 130 N. C. 100, 105, 40 S. E. 984; Askew v. Daniel, 40 N. C. 321, cited, quoted and approved in Scott v. Battle, 85 N. C. 185, 39 Am. Rep. 694, which in effect overrules Daniel v. Crumpler, 75 N. C. 184.

Where a conveyance of land is made under a power of attorney sufficient in form by the heirs at law of a deceased owner of land, as tenants in common, but one of them, a feme covert, at the time, had not had her privy examination taken under the provisions of this section, both the power of attorney and the deed predicated and dependent upon it are ineffective to convey her interest, and she holds as a tenant in common with the purchaser, or those who may have acquired title under his deed. Adderholt v. Lowman, 179 N. C. 547, 103 S. E. 1.

Where the private examination of a married woman is not taken to a deed of trust executed by her it is void. Boyett v. First Nat. Bank, 204 N. C. 639, 169 S. E. 231.

Same—When Executed in Antoher State.—A deed executed by a married woman in another state, according to the laws of such state, for realty in this state, without privy examination of the wife, as required by this section is void. Smith v. Ingram, 130 N. C. 100, 40 S. E. 984.

When Only Interest Is Dower.—Where the only interest of a married woman in land is her dower, her failure to sign the deed and to be privily examined does not preclude the grantee from recovering possession during her husband's life. Upon the husband's death however, her right of dower would arise. Deans v. Pate, 114 N. C. 194, 19 S. E. 146.

Time of Privy Examination.—Proof of acknowledgment of execution by one or both (husband and wife) must precede the examination in reference to the volition and freedom of the wife. Southerland v. Hunter, 93 N. C. 310, 312; Barrett v. Barrett, 120 N. C. 127, 26 S. E. 691. See the Curative Act, section 47-67 of this Code, which was held in the Barrett case not to apply so as to impair or divest the rights of intervening third persons. But the decision in these cases is now changed by § 39-8.

III. EFFECT OF FEME COVERT'S DEED.

How Lands of Feme Covert Bound.—In Green v. Branton, 16 N. C. 500, 504, the court says that a feme covert can be bound as to her land in only two ways: first, by her deed executed jointly with her husband with her privy examination thereto, and, secondly, by the judgment of a competent court. Smith v. Ingram, 130 N. C. 100, 105, 40 S. E. 984.

Delivery of Deed Not Presumed. — The delivery of a deed will not be presumed from the acknowledgment of the husband and the acknowledgment and privy examination of the wife. Tarlton v. Griggs, 131 N. C. 216, 42 S. E. 591.

When Deed Is Inoperative. — In Scott v. Battle, 85 N. C. 185, it is held that a feme covert's deed, not executed in the prescribed mode, is wholly inoperative. Clayton v. Rose, 87 N. C. 106, 110.

Same—Formalities Not Observed. — A purchase-money deed given by a feme covert, living with her husband, in which the husband does not join and which does not contain any privy examination of the wife, is void because not complying with this section and Art. X, sec. 6 of the Constitution. Hardy v. Abdallah, 192 N. C. 45, 133 S. E. 195.

Estoppel.—A married woman is not estopped by a deed not executed in the mode prescribed by the statute. Smith v. Ingram, 130 N. C. 100, 107, 40 S. E. 984, citing 11 A. & E. Enc. (2d) 393; Towles v. Fisher, 77 N. C. 437.

When Not Subject to Collateral Attack.—Where an infant feme covert acknowledged the execution of a deed, and her privy examination was taken before a judge of the superior court, the deed was then a conveyance of record and could not be collaterally impeached in an action of ejectment. Wright v. Player, 72 N. C. 94.

§ 39-8. Acknowledgment at different times and places; before different officers; order immaterial. —In all cases of deeds or other instruments executed by husband and wife and requiring registration, the probate of such instruments as to the husband and acknowledgment and private examination of the wife may be taken before different officers authorized by law to take probate of deeds, and at different times and places, whether both of said officials reside in this state or only one in this state and the other in another state or country. And in taking the probate of such instruments executed by husband and wife, including the private examination of the wife, it is immaterial whether the execution of the instrument was proven as to or acknowledged by the husband before or after the acknowledgment and private examination of the wife. (Rev., s. 953; 1899, c. 235, s. 9; 1895, c. 136; C. S. 998.)

Editor's Note. — Prior to the enactment of this section a deed made by husband and wife, conveying the wife's land, was required to be first acknowledged by the husband and wife, and then her privy examination taken. This order was regarded as material, and of the substance of the execution of such a deed. Unless this order of acknowledgment and probate was observed, the deed was ineffectual to pass any title or interest whatsoever. McGlennery v. Miller, 90 N. C. 215. And in Barrett v. Barrett, 120 N. C. 127, 129, 130, 26 S. E. 691, it was said that the only defect in the privy examination in question was that it was taken a few minutes or hours before the husband's acknowledgment on the same day of the execution of the deed by him.

Obviously such stringent and technical requirements could hardly be said to be in line with the spirit of a statute whose leading purpose was to facilitate alienation by married women, or as said in Barfield v. Combs, 15 N. C. 514, its object is to protect, not to hamper, married women. It is hard to see where any additional protection is afforded married women, while the evils and inconveniences resulting therefrom are only too apparent. This section offers a solution to the difficulty by removing the technicalities while in no wise decreasing the protection provided for married women. Burgess v. Wilson, 13 N. C. 306; Pierce

v. Wanett, 32 N. C. 446; Malloy v. Bruden, 88 N. C. 305; Barrett v. Barrett, 120 N. C. 127, 26 S. E. 691, citing Cooley Const. Lim. (6 Ed.), 463, 464; Graves v. Johnson, 172 N. C. 176, 90 S. E. 113.

Need Not Be at Same Time or before Officer.—It is not necessary that the husband should actually sign at the same time as the wife, or in her presence; nor is it necessary that the proof or acknowledgment of the execution should be at the same time or before the same officer. Lineberger v. Tidwell, 104 N. C. 506, 10 S. E. 758.

Cannot Be Taken over Telephone. — This section, providing the proper mode of conveyance of real property by husband and wife of his lands, tenements and hereditaments, contemplates that the acknowledgment and privy examination of the wife provided for shall be made in the presence of the officer, which is emphasized by sections 47-38 and 47-39, as to acknowledgments of grantors and married women; and acknowledgment and private examination taken of the wife over a telephone does not meet the statutory requirements, and renders the conveyance invalid as to her. Southern State Bank v. Sumner, 187 N. C. 762, 122 S. E. 848.

Acknowledgment of Husband Required. — The acknowledgment of the husband or proof of his execution of the deed is still required to pass the title or interest of the wife. Graves v. Johnson, 172 N. C. 176, 179, 90 S. E. 113.

§ 39-9. Absence of wife's examination does not affect deed as to husband.—When an instrument purports to be signed by a husband and wife the instrument may be ordered registered, if the acknowledgment of the husband is duly taken, whether the private examination of the wife is properly taken or not, but no such instrument shall be the act or deed of the wife unless her private examination is taken according to law. (Rev., s. 954; 1899, c. 235, s. 8; 1901, c. 637; C. S. 999.)

Cross Reference.—As to provision that clerk of the superior court pass on certificate of acknowledgment and order registration, see § 47-14.

When Assent of Wife Not Needed. — An unembarrassed owner of land, no matter when the land was acquired, can convey the same, absolutely, or by way of trust or mortgage, free of all homestead rights, without the assent of his wife, subject only to her right of dower, except in the following cases: (1) Where the land in question has been allotted to him as a homestead, either on his own petition or by an officer, in accordance with law; (2) where no homestead has been allotted, but there are judgments against him which constitute a lien on the land, and upon which execution might issue and make it necessary to have his homestead allotted; (3) where no homestead has been allotted, but he has made a mortgage, reserving an undefined homestead, which mortgage constitutes a lien on the land that could not be foreclosed without allotting a homestead; (4) where the conveyance is fraudulent as to creditors, and no homestead has been allotted in other lands. Hughes v. Hodges, 102 N. C. 236, 9 S. E. 437.

Constitutional Requirement as to Homestead. — By the eighth section of the tenth Article of the Constitution, a deed made by the owner of a homestead without the voluntary signature and assent of his wife is void. Wittkowsky v. Gidney, 124 N. C. 437, 441, 32 S. E. 731.

When Probate Does Not Authorize Registration.—Where probate deed recites the acknowledgment and privy examination of the wife of the grantor only, it is insufficient and does not authorize registration. Hatcher v. Hatcher, 127 N. C. 200, 37 S. E. 207.

§ 39-10. Officers authorized to take privy examination.—The officials authorized by law to take proofs and acknowledgments of the execution of any instrument are empowered to take the private examination of any married woman, when her private examination is necessary, touching her free and voluntary assent to the execution of any instrument to which her assent is or may be necessary, and to certify the fact of such private examination. (Rev., s. 955; 1899, c. 235, s. 6; C. S. 1000.)

Cross Reference.—As to officials authorized by law to take acknowledgments, see §§ 2-16, paragraph 13, 47-1, 47-2, 47-3, 10-5.

When Husband and Wife out of State. — When the husband and wife reside in a foreign country her acknowledgment, etc., may be taken by an ambassador, etc., of the United States, or by the mayor or other chief officer of any city or town. Paul v. Carpenter, 70 N. C. 502, 508.

Acknowledgment before Military Officer. — An acknowledgment and private examination taken by the provost marshal of the city of New Bern while that place was in possession of the United States military authorities, in the absence of fraud and the like, is good, having a similar effect as foreign judgments. Paul v. Carpenter, 70 N. C. 502.

When Officer Employee of Grantee. — The privy examination of a married woman as to her execution of a deed is not invalid because taken by a notary public who was a clerk in the office of the grantee, but had no interest in the transaction. Bank v. Ireland, 122 N. C. 571, 575, 29 S. E. 835.

When Officer Related to Parties. — Probate and private examinations taken before an officer are not invalid simply because he is related to the parties. McAllister v. Purcell, 124 N. C. 262, 32 S. E. 715.

Omission of Seal by Justice of the Peace. — The omission by a justice of the peace to attach his seal to a certificate of the proof of execution of a deed and privy examination of the wife will not invalidate his action, which is otherwise regular. Lineberger v. Tidwell, 104 N. C. 506, 10 S. E. 758.

Corrections after Expiration of Office. — A justice of the peace cannot correct his certificate made to a deed after his term of office has expired, such authority not having been given by statute. Cook v. Pittman, 144 N. C. 530, 57 S. E. 219.

§ 39-11. Certain conveyances not affected by fraud if privy examination regular. — No deed conveying lands nor any instrument required or allowed by law to be registered, executed by husband and wife since the eleventh of March, one thousand eight hundred and eighty-nine, if the private examination of the wife is thereto certified as prescribed by law, shall be invalid because its execution or acknowledgment was procured by fraud, duress or undue influence, unless it is shown that the grantee or person to whom the instrument was made participated in the fraud, duress or undue influence, or had notice thereof before the delivery of the instrument. Where such participation or notice is shown, an innocent purchaser for value under the grantee or person to whom the instrument was made shall not be affected by such fraud, duress or undue influence. (Rev., s. 956; 1889, c. 389; 1899, c. 235, s. 10; C. S. 1001.)

Cross Reference.—As to sufficiency of probate and registration without livery, see § 47-17 and annotations.

See 12 N. C. Law Rev., 71.

Presence and Undue Influence of Husband.—The presence and undue influence of the husband at the ceremony of the privy examination would not vitiate a certificate to a deed in all respects regular as against the grantee, unless the grantee had notice of it, and the burden would be upon the plaintiff attacking the validity of the deed for that reason. Brite v. Penny, 157 N. C. 110, 72 S. E. 964, citing Butner v. Blevins, 125 N. C. 585, 34 S. E. 629; Davis v. Davis, 146 N. C. 163, 59 S. E. 659.

When Fraud of Probate Office Alleged. — Where a married woman has signed a mortgage or deed of trust to secure borrowed money, she may not have it set aside upon allegation of fraud of a probate officer in taking her separate examination, when she admits that the examination was taken in substance of the requirement of the statute and she had signed the conveyance, and there is no evidence that the mortgagee participated in the fraud. Whitaker v. Sikes Co., 187 N. C. 613, 122 S. E. 468.

In Whitaker v. Sikes Co., 187 N. C. 613, 615, 122 S. E. 468, the court said: "Even if the justice practiced a fraud upon her, since she does not allege that the Sikes Company, the party to whom the instrument was made, had any knowledge thereof, or participated in any way in the alleged fraud, she is precluded now from having it adjudged invalid and set aside."

When Privy Examination Not Taken. — In an action to invalidate a deed to lands because, in fact, the privy examination of the feme covert, the owner and plaintiff, had not

been taken, though expressed to have been taken, as required in the certificate of the justice of the peace, the plaintiff, may by clear, cogent, and convincing proof show that her examination had not been taken at all, and when, under a proper charge thereon from the judge, the jury has found that such examination was not taken, the verdict will stand, though the grantee may not have been fixed with notice. Davis v. Davis, 146 N. C. 163, 59 S. E. 659.

Same—Or Was Irregular. — Where the privy examination of a wife is not taken, or is taken in a manner insufficient to fulfill the requirements of the law, though the grantee has had no knowledge thereof, the matter is open to judicial investigation. Benedict v. Jones, 129 N. C. 470, 40 S. E. 221.

Must Allege Guilt of Grantee. — A defense by a married woman that her privy examination as to her execution of a deed was procured by fraud and imposition is unavailing unless supported by an allegation that the grantee had notice of or participated in the same. Bank v. Ireland, 122 N. C. 571, 29 S. E. 835.

Innocent Purchaser from Guilty Grantee. — The section also protects the title of an innocent purchaser for value from a grantee, who did have notice of such fraud, duress or undue influence. Butner v. Blevins, 125 N. C. 585, 34 S. E. 629.

Note Procured by Duress.—Upon the principle embodied in this section, a note given by a husband and wife, where the husband procures her execution by duress, is voidable only, and is good in the hands of a bona fide holder. L. A. Randolph Co. v. Lewis, 196 N. C. 51, 144 S. E. 545.

§ 39-12. Power of attorney of married woman.— All conveyances which may be made by any person under a power of attorney from any feme covert, freely executed by her with her husband, shall be valid to all intents and purposes to pass the estate, right and title which said feme covert may have in such lands, tenements and hereditaments as are mentioned or included in such power of attorney. (Rev., s. 957; Code, s. 1257; R. C., c. 37, s. 11; 1798, c. 510; C. S. 1002.)

Cross Reference.—As to registration of power of attorney, see § 47-28.

§ 39-13. Wife need not join in purchase-money mortgage. — The purchaser of real estate who does not pay the whole of the purchase money at the time when he takes a deed for title may make a mortgage or deed of trust for securing the payment of such purchase money, or such part thereof as may remain unpaid, which shall be good and effectual against his wife as well as himself, without requiring her to join in the execution of such mortgage or deed of trust. (Rev., s. 958, Code, s. 1272; 1868-9, c. 204; 1907, c. 12; C. S. 1003.)

Cross References.—As to dower generally, see § 30-4 et seq. As to property in which widow is entitled to dower, see § 30-5. As to deed of husband alone, purchase money mortgages as exception, see § 30-6.

Dower Right Subject to Defeat. — The dower right of a feme covert may be defeated by a mortgage of the husband alone, when for part of the purchase money. Corporation Comm. v. Dunn, 174 N. C. 679, 683, 94 S. E. 481.

Where Wife of Grantee Acquires No Dower Right.—Where two deeds of trust are executed and substituted for the original purchase money deed of trust, which is canceled, the wife of the grantee acquires no dower right in the land, the original debt for the purchase money not having been extinguished. Case v. Fitzsimons, 209 N. C. 783, 184 S. E. 818.

§ 39-14: Repealed by Session Laws 1943, c. 543.

Editor's Note.—Chapter 65 of the Public Laws of 1923, now codified as section 30-9, was a re-enactment of this section. However, that act contained no specific repeal of this section. The 1943 act accomplished the repeal in specific terms.

Art. 3. Fraudulent Conveyances.

§ 39-15. Conveyance with intent to defraud creditors void.—For avoiding and abolishing feigned, covinous and fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures, by such covinous or fraudulent devices and practices aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed or defrauded) to be utterly void and of no effect; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding; and in all actions by creditors to set aside gifts, grants, alienations and conveyances of lands and tenements and judgments purporting to be liens on the same on the ground that such gifts, grants, alienations, conveyances and judgments are feigned, covinous and fraudulent hereunder, it shall be no defense to the action to allege and prove that the lands and tenements alleged to be so conveyed or encumbered do not exceed in value the homestead allowed by law as an exemption: Provided, that nothing in this section shall be construed to authorize the sale under execution or other final process, obtained on any debt during the continuance of the homestead, of any interest in such land as may be exempt as a homestead. (Rev., s. 960; Code, s. 1545; 1893, c. 78; R. C., c. 50, s. 1; 50 Edw. III, c. 6; 13 Eliz., c. 5, s. 2; 1715, c. 7, s. 4; C. S. 1005.)

I. General Considerations.
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As to registration of conveyances, contracts to convey, and leases of land, see § 47-18. As to assignments for benefit of creditors, no preferences allowed in deeds of trust or deeds of assignment therefor, see § 23-1. As to arrest and bail in action for fraud on creditors, see § 1-410, paragraph 5. As to attachment in action for fraud, see § 1-440.

I. GENERAL CONSIDERATIONS.

Editor's Note. — This section is a substantial re-enactment of the statute 13 Eliz., C. 5, sec. 2. Bank v. Adrian, 116 N. C. 537, 547, 21 S. E. 792. Prior to its enactment it was necessary to invoke the aid of a court of equity to have a deed declared void for fraud, and where, under a statutory provision, deeds were pronounced void as against creditors in order to secure a formal declaration of their invalidity, the moving party must have asked for relief that would have been formerly administered solely in a court of equity. Farthing v. Carrington, 116 N. C. 315, 328, 22 S. E. 9. At an early period in the judicial history of this state, it was held that courts of law might hear evidence and pass even incidentally upon the question whether a deed was fraudulent under 13 Eliz. Logan v. Simmons, 18 N. C. 13, 16; Lee v. Flannagan, 29 N. C. 471; Hardy & Bro. v. Skinner, 31 N. C. 191; Helms v. Green, 105 N. C. 251, 259, 11 S. E. 470; Wharton on Evidence, sec. 131. 13 Eliz., is declaratory of the common law so far as regards existing creditors. The remedy given to subsequent creditors rests entirely upon the enactment of the statute. In this sense the statute is sometimes spoken of as being in affirmance

of the common law. Long v. Wright, 48 N. C. 290, 293, citing Co. Lit. 290 b 3 Ba. Ab. Titl. "Fraud," p. 307.

The object of the English statute was to prevent debtors from dealing with their property in any way to the prejudice of their creditors. See Central Bank v. Hume, 128 U. S. 195, 203, 9 S. Ct. 41, 32 L. Ed. 370.

Scope of Section. — The statute dealing with fraudulent conveyances applies to the state as well as to individuals, and the state cannot rely on its prerogative. Hoke v. Henderson, 14 N. C. 12.

It applies to voluntary conveyances of personalty, as well as realty, as against creditors. Garrison v. Brice, 48 N. C. 85.

Prevents Passage of Any Estate. — The section makes fraudulent conveyances absolutely void, and in that way prevents the passing of any estate whatever, as against creditors of the grantor. Flynn v. Williams, 29 N. C. 32.

Same—Conveyance Made by Debtor. — The section operating, as it does, to wholly avoid the conveyances coming within its purview, can be applied only to conveyances made by the debtor himself. Gowing v. Rich, 23 N. C. 553.

Mortgagor Considered as Owner.—In expounding the statute against fraudulent conveyances, the mortgagor is considered the owner of the estate, and the mortgagee but an encumbrancer. Wall v. White, 14 N. C. 105, 107.

Cited in Askew v. Interstate Hotel Co., 195 N. C. 456, 142 S. E. 590; Vollers Co. v. Todd, 212 N. C. 677, 194 S. E. 84.

II. WHAT CONSTITUTES FRAUD.

A. In General.

Rule Stated. — In Aman v. Walker, 165 N. C. 224, 227, 81 S. E. 162, it was held that the principles to be deduced from the authorities as to fraudulent conveyances, are: (1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid. (2) If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally. (3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and vailable to pay existing debts is retained. (4) If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee and of which intent he had no notice, it is valid. (5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee or of which he has notice, it is void. Black v. Sanders, 46 N. C. 67; Warren v. Makely, 85 N. C. 12, 14; Credle v. Carrawan, 64 N. C. 422, 424; Worthy v. Brady, 91 N. C. 265, 268; Savage v. Knight, 92 N. C. 493, 498; Clement v. Cozart, 112 N. C. 412, 420, 17 S. E. 486; Hobbs v. Cashwell, 152 N. C. 183, 188, 67 S. E. 495; Powell Bros. v. McMullan Lumber Co., 153 N. C. 52, 58, 68 S. E. 926.

Employing an attorney who resides at some distance, and in another county, to draw the deed of assignment, and making a provision therein authorizing public or private sale for cash, are not circumstances of fraud. Barber v. Buffaloe, 111 N. C. 206, 16 S. E. 386.

Fraud a Compound Question of Law and Fact. — In Crow v. Holland, 12 N. C. 481, 482, it was said: "Fraud is a compound question of law and fact. The facts going to establish it are decided by a jury. Whether, when proved, they will amount to such a fraud as will vacate a grant is a question of law for the court to decide."

B. Intent.

Intent as Poisonous Element. — In Moore v. Hinnant, 89 N. C. 455, 459, Chief Justice Smith, speaking for the court said: "The intent is the essential and poisonous element in the transaction, and not merely the effect; since in every conveyance and appropriation of property, the property conveyed is placed beyond the creditor's reach, and he is so far obstructed in the pursuit of his remedy against the debtor's estate. But the inquiry is, was this the purpose of the assignment; and if so, and it was participated in by the assignee or party to take benefit under it, the assignment is invalid, though the debt or liability professed to be the object to be secured be bona fide due, and itself tinged with no vicious ingredient."

Sufficiency of Intent. — It is not necessary that there should have been an intent to hinder, delay, and defraud. An intent either to hinder and delay, or an intent to defraud, is sufficient. Peeler v. Peeler, 109 N. C. 628, 14 S. E. 59.

Same—Actual Delay Need Not Result. — In the language of Lord Ellenborough in Mieux v. Howell, 4 East., 1-13: "The Act of Parliament (and ours conforms to it) was meant to prevent deeds, etc., fraudulent in their concoction, and not merely such as in their effect might delay or hinder other creditors." Quoted in Moore v. Hinnant, 89 N. C. 455, 459.

"It is clear, however, from the language of the statute of 13 Elizabeth," remarks a recent author after a full discussion of the subject, and as his conclusion from a review of adjudged cases, "that its provisions were directed exclusively against conveyances made with an actual intent on the part of the debtors to hinder, delay or defraud creditors, as distinguished from the mere effect or operation of such conveyances. The expressions in the preamble, 'devised and contrived,' 'to the end,' 'purpose and intent,' etc., leave no room for doubt on this point. Hence it has been sometimes very expressively designated, as the statute against fraudulent intents in alienation." Moore v. Hinnant, 89 N. C. 455, 460, quoting Burrill Assign., sec. 332.

Intent as Objective Element. — The intention of a conveyance is to accomplish the objects that moved the maker to execute it, and if any of these latter be covinous, the intent is necessarily so. Stone v. Marshall, 52 N. C. 300, 302.

Acts fraudulent in view of the law, because of their necessary tendency to delay or obstruct the creditor in pursuit of his legal remedy, do not cease to be such because the fraud as an independent fact was not then in mind. If a person does and intends to do that which from its conveyances the law pronounces fraudulent, he is held to have intended the fraud inseparable from the act. Cheatham v. Hawkins, 80 N. C. 161, 163, cited in note in 23 L. R. A., N. S., 386.

Mutuality of Fraudulent Intent.—In Horback v. Hill, 112 U. S. 144, 148, 5 S. Ct. 81, 28 L. Ed. 670, it was said that the fraud which will vitiate a sale must be mutual, that is, must be intended by both parties, or by one with knowledge of the other's purpose, and thus acquiesced in and furthered, and actual notice or knowledge, of such intent of the grantor, or reasonable cause to suspect the existence of such intent, is sufficient. Shaver v. Alterton, 151 U. S. 607, 621, 14 S. Ct. 442, 38 L. Ed. 286.

Evidence of Intent.—The rule laid down by Mr. Justice Boyden in Reiger v. Davis, 67 N. C. 185, 189, was that when a debtor, much embarrassed, conveys property of much value to a near relative, and the transaction is secret and no one is present to witness the trade but these near relatives, it is regarded as fraudulent, but when these relatives are made witnesses in the cause, and dispose to the fairness and bona fides of the transaction, and that, in fact, there was no purpose of secrecy, it then becomes a question for the jury to determine the intent which influenced the parties, and to find it fraudulent, or otherwise, as the evidence may satisfy them. Helms v. Green, 105 N. C. 251, 263, 11 S. E. 470.

Same—Reservation of Exemptions. — The reservation of exemptions allowed by law in a deed of assignment is no evidence of a fraudulent intent. Barber v. Buffaloe, 111 N. C. 206, 16 S. E. 386.

Same—Conveyance Fraudulent on Face.—A conveyance sometimes contains provisions which in themselves justify the inference of a fraudulent intent. Peters v. Bain, 133 U. S. 670, 686, 10 S. Ct. 354, 33 L. Ed. 696.

Intent Not Clear—Badges of Fraud.—It is true that courts and juries cannot see and know the intent of an assignor except from his words and acts. Where he expresses his intent—his purpose to be—to defraud his creditors, we need not look further. This will avoid the assignment. But if he had not so declared his purpose, then we have to look to his acts to ascertain the intention with which the assignment was made—to what are called the "badges of fraud." Royster v. Stallings, 124 N. C. 55, 64, 32 S. E. 384. These "badges of fraud" constitute the subject of the next succeeding analysis line of this note.

C. Badges of Fraud.

Badges of Fraud Defined.—As stated in the last paragraph under the preceding analysis line of this note it frequently becomes necessary, in order to ascertain the debtor's intentions, to look for what are designated as "badges of fraud." These badges of fraud are suspicious circumstances that

overhang a transaction, and where the parties to it withhold testimony that it is exclusively within their power to produce, and that would remove all uncertainty, if believed, as to its character, the law puts the interpretation upon such conduct most unfavorable to the suppressing party as it does in all cases where a party purposely or negligently fails to furnish evidence under his control and not accessible to his adversary. Helms v. Green, 105 N. C. 251, 11 S. E. 470.

The usual badges of fraud are continuation of possession, or a secret trust, or some provision for the ease and comfort or benefit of the assignor, or the insertion of some feigned debt not due by the assignor. Royster v. Stallings, 124 N. C. 55, 65, 32 S. E. 384.

Same—Possession Not Fraudulent Per Se.—Possession retained by the vendor of chattels does not, per se, make the sale fraudulent in law. It is but presumptive evidence of fraud, proper to be left to a jury. To repel this presumption the vendee may show that consideration passed, though none be stated in the bill of sale. Howell v. Elliott, 12 N. C. 76.

Same—Permitting Mortgagor to Remain in Possession of and Sell Stock of Merchandise. — Where mortgagees expressly agree to permit mortgagor to remain in possession of the stock of merchandise and sell the same in the usual course of trade, but do not require him to account for the proceeds of same, which the mortgagor does, until he is adjudged bankrupt, the mortgage is presumptively fraudulent in law and the burden is upon the mortgagor to rebut that presumption by proof that there were no pre-existing debts at the time the mortgage was executed, or that the mortgagor had assets sufficient and available to pay the existing debts exclusive of the property embraced in the mortgage. In re Joseph, 43 F. (2d) 252. See also Morris Plan Bank v. Cook, 55 F. (2d) 176, 179.

Same—Secrecy.—It is a mark of fraud if the transaction be secret; and it is meant by secrecy, if it be done in the presence only of near relatives, being such persons as may be relied on not to disclose what they know to the neighborhood; or if it be done at such distance from the neighborhood, that it is unlikely that the affair will become known to them. Vick v. Kegs, 3 N. C. 126.

That the only parties present at a conveyance of all the vendor's land in satisfaction of old debts were the vendor and vendee, who were brothers-in-law, and subscribing witness, also a brother-in-law of the vendee, is a fact calculated to throw suspicion upon the transaction, i. e., is a badge of fraud. Peebles v. Horton, 64 N. C. 374.

Same—Kinship.—The U. S. Supreme Court held in Gottlieb v. Thatcher, 151 U. S. 271, 279, 14 S. Ct. 319, 38 L. Ed. 157, that the relationship of brothers does not, of and in itself, cast suspicion upon a transfer from one to the other of property, or create such a prima facie presumption against its validity as would require the court to hold it to be invalid without proof that there was fraud on the part of the grantor participated in by the grantee.

Conveyance of Exempt Property. — The U. S. Supreme Court held in Rio Grande R. Co. v. Vinet, 132 U. S. 565, 571, 10 S. Ct. 168, 33 L. Ed. 438, that where a member of a firm covered his homestead with a mortgage, which was used to raise money by the firm to pay its debts, it was not a transaction that should be branded as a fraud by other creditors.

Wife's Separate Property.—In Schreyer v. Scott, 134 U. S. 405, 415, 10 S. Ct. 579, 33 L. Ed. 955, it was held that the transfer by a husband to his wife of the legal title to property of which she was prior thereto, the equitable owner, or in which she had at least a large equitable interest, is not voluntary.

III. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

Bona Fide Purchaser without Notice.—A purchaser for a valuable consideration, and without notice, from a fraudulent grantee, acquires a good title against the creditors of the fraudulent grantor. Saunders v. Lee, 101 N. C. 3, 7 S. E. 590. And in Young v. Lathrop, 67 N. C. 63, 69, Chief Justice Pearson said: "Whatever may be said about fairness or unfairness towards creditors, the legislative will gives preference to a bona fide purchaser, for valuable consideration at full price and without notice of the fraud and covin."

Bona Fide Purchaser Prevails.—A bona fide purchaser of personal property, without notice, acquires a good title, though his vendor may have made a prior fraudulent conveyance to a third person. Plummer v. Worley, 35 N. C. 423.

Purchaser with Notice.—Since the passage of the Act of 1840 a purchaser of land with notice at the time of a former fraudulent conveyance is not protected in his purchase, although he paid value therefor. Triplett v. Witherspoon, 70 N. C. 589; Hiatt v. Wade, 30 N. C. 340.

Same—Constructive Notice.—A purchaser from a trustee, under a conveyance containing upon its face evidence of a fraudulent purpose to defeat creditors, takes with notice of such evidence. Eigenbrun v. Smith, 98 N. C. 207, 4 S. E. 122.

Repairs and Improvements.—In a U. S. Supreme Court case, Railroad Co. v. Soutter, 13 Wall. 517, 523, 20 L. Ed. 543, it was held that a fraudulent purchaser of property when deprived of its possession by attacking creditors, cannot recover of them for repairs or improvements, or for incumbrances lifted by him whilst in possession.

Valid against Maker.—A conveyance made with an intent to defraud creditors, is nevertheless valid against the maker and all others except creditors and those who purchase under a sale made for their benefit. Saunders v. Lee, 101 N. C. 3, 7 S. E. 590.

When Parties in Pari Delicto.—In York v. Merritt, 77 N. C. 213, the action was by the grantee against the grantor for possession of the land conveyed to defraud creditors. The court held that when the parties have united in a transaction to defraud another or others, or the public, or the due administration of justice, or which is against the public policy or contra bonos mores, the courts will not enforce it against either party. Bank v. Adrian, 116 N. C. 537, 540, 21 S. E. 792.

Although a purchaser may pay a full price for the property, yet if he purchased with the intent to aid his vendor to defeat the latter's creditors his purchase will be void. Eigenbrun v. Smith, 98 N. C. 207, 4 S. E. 122.

A bond given as a pretext to enable one person to set up a claim to the property of another, so as to defraud the creditors of that other, is void even as between the parties to the same. Powell & Co. v. Inman, 53 N. C. 436.

When Conveyance to Trustee Void.—A conveyance to a trustee for the use of creditors, if made with intent to defraud any one of the vendor's creditors, is void, though the trustee be ignorant of such intent, and his conduct is bona fide. Eigenbrun v. Smith, 98 N. C. 207, 4 S. E. 122.

Personal Liability of Wife.—It was held in Trust Co. v. Sedgwick, 97 U. S. 304, 24 L. Ed. 954, that where property is conveyed to a wife in fraud of her husband's creditors, a judgment in personam for its value cannot be taken against her, nor, in case of her death, against her executors.

Burden of Proof.—Where a conveyance from an insolvent husband to his wife is attacked for fraud, the onus is upon the wife to show that a consideration, in the shape of money paid, the discharge of a debt due from him to her, or something of value, actually passed. Peeler v. Peeler, 109 N. C. 628, 14 S. E. 59.

The burden is on the purchaser of property conveyed to defraud creditors to show that he bought for a valuable consideration and without notice. Cox v. Wall, 132 N. C. 730, 44 S. E. 635.

IV. RIGHTS AND REMEDIES OF CREDITORS.

Editor's Note.—It would seem that this Article dealing with fraudulent conveyances is the controlling law until the debtor makes an assignment for the benefit of creditors, whereupon sections 23-1 to 23-12, inclusive, govern. Under section 23-1 when a debtor executes a deed of trust, or deed of assignment, all of the debts of the said debtor shall become due and payable at once. The said deed shall not contain any preference whatsoever of one creditor over another, except as provided in Article 1, Chapter 23.

Section 23-3 makes it the duty of the trustee to recover any property which was conveyed by the debtor for the purpose of defrauding his creditors, or of giving a preference. In defining a preference, the section goes on to say that it shall be deemed to have been given when the conveyance is within four months of the registration of the deed of trust or deed of assignment. This definition is quite similar to section 60(a) of the Federal Bankruptcy Act.

Minor children are not creditors of their father for their past support furnished them by another, and for which their personal estate was not invaded, and a conveyance executed by him prior to the institution of their action may not be set aside by them under this section. Bryant v. Bryant, 212 N. C. 6, 192 S. E. 864.

Preference of Creditors.—It is stated in emphatic terms by Gaston, J., speaking for the court in Hafner v. Irwin, 23 N. C. 490, 496, thus: "Every conveyance of property by an insolvent or embarrassed man, to the exclusive satisfaction of the claims of some of his creditors, has necessarily a tendency to defeat or hinder his other creditors in the collection of their demands. But if the sole purpose of such a conveyance be the discharge of an honest debt, it does not fall under operation of the statute against fraudulent conveyances."

It is entirely well settled, both in England and America, that at common law a debtor, insolvent or in failing circumstances, has a right to prefer certain creditors to whom he is under special obligations, where done in good faith and without fraud, though by such preference the fund for the payment of other creditors be lessened or absorbed. See Huntley v. Kingman, 152 U. S. 527, 532, 14 S. Ct. 688, 38 L. Ed. 540.

But an agreement by which a conveyance, made for the purpose of preferring a creditor, is to be kept secret until the debtor has an opportunity to get beyond the reach of process issued by his other creditors, renders the conveyance fraudulent towards other creditors, as intended to hinder, delay, or defeat them. Hafner v. Irwin, 23 N. C. 490.

Conveyance to Defeat Claims for Torts.—A secret conveyance of a mill made to defeat, hinder or delay a party injured by the erection thereof in the recovery of his damages, is fraudulent and void as to such party, and the former owner of the mill, notwithstanding such conveyance, continues liable for the damage. Purcell v. McCallum, 18 N. C. 221.

Where a deed was executed to evade the payment of any judgment that might be recovered against the grantor in an action for slander pending at the time of its execution, it is fraudulent, under the section, as to his creditors. Helms v. Green, 105 N. C. 251, 11 S. E. 470.

Secret Trusts.—In Clement v. Cozart, 109 N. C. 173, 179, 13 S. E. 862, it was said that if a deed be made, showing upon its face a full valuable consideration, but upon the secret trust that the vendee shall not pay anything therefor, but shall hold the same in contemplation of insolvency for the benefit of the vendor, so as to protect and shield the property against any debts that he may owe at the time, or any liabilities that he may subsequently incur, such a deed would be void as to all persons whose claims are, shall or might be defrauded thereby. As to pre-existing debts such a deed would be ipso facto fraudulent and void. Morgan v. McLelland, 14 N. C. 82.

Same—Evidence.—In Barber v. Buffaloe, 122 N. C. 128, 129, 29 S. E. 336, it was held that there was sufficient evidence of fraud to take the case to the jury. There the party preferred, a relative of the assignor, went 16 miles on Sunday night with the attorney who drew the deed or assignment, brought in the property with the debt secured, and allowed the assignor to remain in possession free of rent; this was evidence of a secret trust and benefit to the assignor, and the turning point in the case. Royster v. Stallings, 124 N. C. 55, 65, 32 S. E. 384.

Absolute Transfers Intended as Security.—A deed absolute but executed upon a parol agreement for redemption, is, in law, fraudulent and void against the creditors of the vendor. Gregory v. Perkins, 15 N. C. 50.

A deed absolute on its face, which is mere security for a debt, is void as against creditors of the grantor. Bernhardt v. Brown, 122 N. C. 587, 29 S. E. 884.

Absolute Transfer Intended as Mortgage.—A deed absolute on its face, but intended as a mortgage only, is fraudulent and void against creditors and purchasers, and against subsequent as well as prior creditors. Halcombe v. Ray, 23 N. C. 340.

When Insolvent Debtor Improves Wife's Estate. — An insolvent debtor cannot withdraw money from his own estate and give it to his wife to be invested by her in the purchase or improvement of her property, and to that extent, when it is done, creditors may subject the property so purchased or improved to the payment of their claims. Michael v. Moore, 157 N. C. 462, 73 S. E. 104.

Prior and Subsequent Creditors. — Indebtedness, at the time of making a voluntary conveyance of part only of the grantor's property, is, in respect to subsequent creditors seeking satisfaction out of the property conveyed, merely evidence of fraud, the consideration of which belongs to the jury; but in respect to prior creditors where debts cannot be otherwise satisfied, it constitutes fraud in law to be declared by the court. O'Daniel v. Crawford, 15 N. C. 197.

Same—Surety on Bond.—The liability of a principal to indemnify a surety on a bond is an existing liability at the time the bond is executed, within the rule that conveyance with intent to defraud creditors is void as to existing obligations. Graeber v. Sides, 151 N. C. 596, 66 S. E. 600.

Void in Part Void in Toto.—If only a part of the consideration of a deed is fraudulent against creditors, the whole deed is void. Hafner v. Irwin, 23 N. C. 490.

Same—Fraud in Law.—As respects fraud in law as distinguished from fraud in fact where that which is valid can be separated from that which is invalid, without defeating the general intent, the maxim, "void in part, void in toto," does not necessarily apply, and the instrument may be sustained notwithstanding the invalidity of a particular provision. Peters v. Bain, 133 U. S. 670, 688, 10 S. Ct. 354, 33 L. Ed. 696.

When Deed of Trust Fraudulent.—A deed of trust executed by a corporation, or an individual for the purpose of gaining time at the expense of creditors, in order to dispose of property to advantage, and prevent a sacrifice by a sale for cash, when the company or individual has the means and resources from which enough might be realized to pay all the debts, is fraudulent and void as against creditors. London v. Parsley, 52 N. C. 313.

It is no ground for a court to pronounce a deed of trust fraudulent per se, as against other creditors, that the property conveyed was to be sold at a private sale. Burgin v. Burgin, 23 N. C. 453.

When Wife Participates in Husband's Bank Deposits. — Where the wife participates in her husband's depositing his money in her name at a bank for the purpose of defrauding his creditors, the attempted appropriation is void under this section which was enacted to prevent fraudulent gifts, and in an appropriate action the deposit will be considered and dealt with as if it stood in the name of the husband. Moore v. Greenville Banking, etc., Co., 173 N. C. 180, 91 S. E. 793.

When Trustee in Bankruptcy May Have Conveyance Set Aside.—A trustee in bankrutcy is entitled to have a fraudulent conveyance set aside and to recover the property transferred, provided any creditor of the bankrupt would be entitled to the same. Cox v. Wall, 132 N. C. 730, 44 S. E. 635.

Fraudulent Conveyance of Life Insurance Policy.—A life insurance policy issued to one for the benefit of himself is an integral part of his estate, and a voluntary assignment thereof to his children, made when he is insolvent, is fraudulent and void. Burton v. Farinholt, 86 N. C. 261.

Feigned and Covinous Judgment.—A feigned and covinous judgment is made utterly void as against the person who is in anywise hindered, delayed, or defrauded of his debts. Powell v. Howell, 63 N. C. 283, 285.

§ 39-16. Conveyance with intent to defraud purchasers void.—Every conveyance, charge, lease or encumbrance of any lands or hereditaments, goods and chattels, if the same be made with the actual intent in fact to defraud such person who has purchased or shall purchase in fee simple or for lives or years the same lands or hereditaments, goods and chattels, or to defraud such as shall purchase any rent or profit out of the same, shall be deemed utterly void against such person and others claiming under him who shall purchase for the full value thereof the same lands or hereditaments, goods and chattels, or rents or profits out of the same, without notice before and at the time of his purchase of the conveyance, charge, lease or encumbrance, by him alleged to have been made with intent to defraud; and possession taken or held by or for the person claiming under such alleged fraudulent conveyance, charge, lease or encumbrance shall be always deemed and taken as notice in law of the same. (Rev., s. 961; Code, s. 1546; R. C., c. 50, s. 2; 27 Eliz., c. 4, s. 2; 1840, c. 28, ss. 1, 2; C. S. 1006.)

Cross Reference.—As to registration, the Connor Act, see §§ 47-17, 47-18, 47-19, and 47-20.

Editor's Note.—The section is substantially the same as 27 Eliz. c. 4, sec. 2, with the exception of two important changes. The Act of 1860 amended it so as to limit its operation to the purchaser, both for full value and without notice, and gave to creditors of bargainors or mortgagors, and to such purchasers of their interests, but not to the bargainors or mortgagors themselves, the right to impeach conveyances on the ground that they were executed to hinder, delay or defeat, or defraud creditors or such purchasers. Bank v. Adrian, 116 N. C. 537, 547, 21 S. E. 792.

In Cadagan v. Kennett, Comp. 434, Lord Mansfield, in his sweeping manner, commences his opinion with this broad proposition, i. e., "The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 and 2 Eliz." This proposition has never received the sanction of any adjudication, and is treated by writers as dictum. In Long v. Wright, 48 N. C. 290, 293, Pearson, J., speaks of it as "a striking illustration of his Lordship's

proneness to break through the distinction between law and equity."

In Plummer v. Worley, 35 N. C. 423, Ruffin, C. J., uses this language "It is true that the statute of 27 Eliz. is in its terms confined to lands, but it has been often said that it is but in affirmance of the common law." It is apparent that reference is here made to the dictum of Lord Mansfield, and the inference is indistinctly suggested that the principle of 27 Eliz. might be extended to "things personal"; but the idea is not followed out in the decision. So it came to be a settled and unbroken holding in this State that the section applied only to land. However, the need for an extension of its provisions to "things personal" was keenly felt. So, while the rule was too well established for the courts to break away, the statute brought relief by extending the section to "goods and chattels," the change appearing for the first time in section 1546 of the Code of 1883.

Section Construed with Registration Act.—This section and the Registration Act (Sections 47-17 to 47-20) were both intended to prevent fraud, and must be construed together with that view. Austin v. Staten, 126 N. C. 783, 36 S. E. 338.

First Bona Fide Purchaser Protected.—27 Elizabeth being intended for the benefit of purchasers, the first bona fide purchaser, whether from the fraudulent vendor or vendee, is within its operation. Hoke v. Henderson, 14 N. C. 12.

"Purchaser" Defined. — The term "purchaser" is not used in the statute in its technical sense, for one who comes to an estate by his own act. It is to be received in its popular meaning as denoting one who buys for money, and, as we think, buys fairly and of course at a fair price. Fullenwider v. Roberts, 20 N. C. 420, 425, citing Upton v. Basset, Cro. Eliz. 445.

The Legislature thought proper in 1840 to declare that no person shall be deemed a purchaser unless he purchased the land for the full value thereof, without notice, at the time of his purchase, of the conveyance by him alleged to be fraudulent. Hiatt v. Wade, 30 N. C. 340, 342.

Second Purchaser Must Be Bona Fide.—The second purchaser must now, as before the Act of 1885, still be a bona fide purchaser, and for full value. We do not mean to say that he should have paid every dollar the land was worth, but he should have paid a reasonable fair price, such as would indicate fair dealing and not be suggestive of fraud. Austin v. Staten, 126 N. C. 783, 788, 36 S. E. 338.

Same—Equity Will Not Deprive of Legal Advantage.—No one has superior claims to the consideration of a court of equity than a purchaser without notice; and there is no case in which the court has interfered to deprive such a purchaser of a legal advantage. Crump v. Black, 41 N. C. 321, 324.

Curing Invalidity. — It is a settled principle that a deed voluntary or even fraudulent in its creation, and voidable by a purchaser, may become good by matter ex post facto. See Sumner v. Hicks, 2 Black 532, 535, 17 L. Ed. 355.

Consideration.—To constitute a good purchase, good faith and a fair price are requisite. Fullenwider v. Roberts, 20 N. C. 420, 428.

Same—A "Petty" Sum. — When the consideration is pecuniary, a "petty" sum, when compared with the value of the land, would not help a second over the head of a first conveyance. Fullenwider v. Roberts, 20 N. C. 420, 426.

Same—One-half or Two-thirds Value. — Under the section a man cannot be held to be a purchaser for a valuable consideration who gives for the land not more than one-half or two-thirds of the value. Harris v. DeGraffenreid, 33 N. C. 89.

Possession by Third Person Legal Notice. — Where one purchases land which he knows to be in the possession of a person other than the vendor, he is affected with legal notice and must inquire into the title of the possessor. Bost v. Setzer, 87 N. C. 187.

Burden of Proof. — Where both parties claim by deed from a common grantor, the deed of the plaintiff being the younger, but registered first—he makes out a prima facie case, and the burden of proof is shifted upon the defendant to attack the bona fides of the plaintiff's deed, and to defeat it, if he can, by establishing fraud. Austin v. Staten, 126 N. C. 783, 36 S. E. 338.

Same—Mortgages. — A mortgage to secure a present loan constitutes the mortgagee a purchaser for value within the meaning of the section. Fowle v. McLean, 168 N. C. 537, 541, 84 S. E. 852.

And the same principle obtains in reference to mortgages and deeds of trust to secure a part indebtedness, except as to an estate or interest existent in the property conveyed. Fowle v. McLean, 168 N. C. 537, 541, 84 S. E. 852; Brem v. Lockhart, 93 N. C. 191; Potts v. Blackwell, 57 N. C. 59.

Same—Deed in Trust. — A deed in trust to sell property and pay certain creditors is supported by a valuable consideration, and is valid against a prior deed of gift as being a subsequent sale to a purchaser for a valuable consideration under this section. Ward v. Wooten, 75 N. C. 413, 416.

Same—Assignee of Fraudulent Vendee. — An assignee of a fraudulent vendee for the benefit of creditors, incurring no new liability on the faith of his title, is not protected. Wallace v. Cohen, 111 N. C. 103, 105, 15 S. E. 892, which cites: Farley v. Lincoln, 51 N. H. 577; Harris v. Horner, 1 Dev. & Bat. Eq. 455, 30 Am. Dec. 182; Stevens v. Brennan, 79 N. Y. 254; Montgomery v. Bucyrus Mach. Works, 92 U. S. 257, 23 L. Ed. 656; Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993.

But such an assignee takes title subject to any equity, or other right, that attaches to the property in the hands of the debtor. Carpenter v. Duke, 144 N. C. 291, 293, 56 S. E. 938.

Possession. — It is clear that the possession here spoken of is not a possession continued by the fraudulent donor, but is that of the donee himself or his tenant, taken under the conveyance, and that such possession of the donee or for him amounts to notice in respect only of those tracts or parcels to which that possession extends, and cannot affect a person who buys a parcel which is not, at the time of his purchase, in the possession of the fraudulent donee. Wade v. Hiatt, 32 N. C. 302, 303.

§ 39-17. Voluntary conveyance evidence of fraud as to existing creditors.—No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper. (Rev., s. 962; Code, s. 1547; R. C., c. 50, s. 3; 1840, c. 28, ss. 3, 4; C. S. 1007.)

Gifts of Visible Estate and Retention of Choses in Action. —Gifts of visible estates cannot be defeated, where the debtor has resources in stocks or other securities of value to meet his liabilities. Worthy v. Brady, 91 N. C. 265.

When Donor Is Unable to Pay Debts. — It is a well settled rule of law in this state, that no voluntary deed can be upheld as against creditors, when the bargainor is unable to pay his debts at the time of the execution of the deed. Hobbs v. Cashwell, 152 N. C. 183, 188, 67 S. E. 495; McCanless v. Flinchum, 89 N. C. 373.

When Conveyance Avoided Only as between Parties to Action. — When the court, in an action under this section has declared a voluntary conveyance void as to the plaintiff, and decreed that it be "set aside, revoked, rescinded, and annulled," it is avoided only as between the parties to the action. Sturges v. Portis Min. Co., 206 Fed. 534, 538; Allred v. Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924.

Legatee Must Suffer Loss. — The assent of an executor to a legacy, before he has paid all of the debts of his testator, is void as to the creditors; for it is a fraud, an act done in violation of the maxim, "A man must be just before he is generous." So long as the executor is solvent, no debt can be left unpaid, for he is liable to the creditors de bonis propriis, by reason of the devastavit. If the executor be insolvent, the loss must fall upon the legatee rather than upon a creditor. Barnawell v. Threadgill, 40 N. C. 86; Barnawell v. Threadgill, 56 N. C. 50, 62; Pullen v. Hutchins, 67 N. C. 428, 433.

A qualification is made in cases where the donor, at the time of the gift "retained property, fully sufficient and available for the satisfaction of all of his then creditors." This modification of the maxim "A man must be just before he in generous," is confined to gifts inter vivos. In respect to legacies, or gifts by will, there has been no modification of the maxim; on the contrary, the legislation upon the subject tends to enforce a strict adherence to it. Pullen v. Hutchins, 67 N. C. 428, 432.

Conveyance to Son. — Where a deed to the grantor's son is impeached as a voluntary gift upon the ground that he did not retain property "fully sufficient and available for the satisfaction of his then creditors," as required by the section, it was held that such a conveyance is valid if not made with a fraudulent intent and enough property is retained for all his creditors. Worthy v. Brady, 91 N. C. 265.

But where such a deed provides that the grantee shall support his invalid brothers (naming them) and comply with the conditions imposed, it is not voluntary within the meaning of the section, but rests upon a valuable consideration. Worthy v. Brady, 91 N. C. 265.

A voluntary conveyance to a son is not avoided by the fact that the grantor was indebted at the time, if he afterwards paid the debt. Smith v. Reavis, 29 N. C. 341.

A contract made in consideration of support by the son of his father and mother for life for one hundred dollars and certain shares of stock of the father, of the value of seven thousand dollars, and the father has not retained sufficient property out of which to pay his then existing creditors, and the son has acted in good faith without notice or knowledge, the transfer of the stock to the son is not valid as against his father's creditors beyond the amount he has expended for the support for which he was liable under the terms of the contract. Peoples Bank, etc., Co. v. Mackorell, 195 N. C. 741, 143 S. E. 518.

Same—When Void Per Se.—A voluntary deed of land or other property made to a son by a father unable to pay his debts is void per se as to creditors; indeed, such a deed to any person is void, and such a deed appearing, the court declares it void in law. Hobbs v. Cashwell, 152 N. C. 183, 188, 67 S. E. 495; McCanless v. Flinchum, 89 N. C. 373.

Conveyances to Wife. — A conveyance of lands to husband and wife by entireties which was paid for by the husband will not be considered as fraudulent with respect to his creditors, when he retained property amply sufficient to pay them at the time of the deed. Finch v. Cecil, 170 N. C. 114, 86 S. E. 991.

Where a husband makes a gift of land to his wife, without any valuable consideration, but it is admitted he had no fraudulent intent, and he retains property sufficient to pay his debts in existence at the time of the gift, it is not fraudulent as to creditors. Taylor v. Eatman, 92 N. C. 601, 602.

Same—Evidence. — When a deed from a husband to his wife is sought to be set aside by his creditors for fraud, evidence tending to show that she had a resulting trust by reason of her having conveyed the same land to her husband without consideration moving to her is inadmissible under the principle that a grantor in a deed to lands may not engratt a resulting trust upon his conveyance of the fee simple title with full covenants and warranty of title. Kelly Springfield Tire Co. v. Lester, 192 N. C. 642, 135 S. E. 778.

In an action to set aside a husband's deed to his wife for fraud as to his creditors, the presumption formerly arising from a voluntary conveyance is removed and the indebtedness of the husband is evidence only from which the intent may be inferred, and a requested instruction is properly refused which requires the defendant to satisfy the jury by the greater weight of the evidence that he retained property fully sufficient and available. Shuford v. Cook, 169 N. C. 52, 85 S. E. 142, citing Hobbs v. Cashwell, 152 N. C. 183, 67 S. E. 495.

Partition between Husband and Wife.—Where a bankrupt is allotted an undivided interest in certain lands as his homestead and the remainder in the undivided interest in such lands is sold to make assets, and at the sale it is bought by the wife of the bankrupt, and the land is partitioned by order of court, and in the partition proceeding the husband acknowledges the interest in remainder of his wife, the judgment in the partition proceeding estops the husband from denying the interest of his wife, and operates as a gift to her within the meaning of this section. Wallace v. Phillips, 195 N. C. 665, 143 S. E. 244.

Necessary Allegations to Set Aside Gift.—In order for a creditor of a husband to set aside a gift to his wife as fraudulent against creditors, his complaint must allege that at the time of the alleged gift the donor had not retained property fully sufficient and available to pay his then existing creditors, and in the absence of such allegation a demurrer thereto is good. Wallace v. Phillips, 195 N. C. 665, 143 S. E. 244.

Presumption and Burden of Proof. — The law presumes that the sale was made in good faith and with honest intentions; in the absence of proof to the contrary, the validity of the sale could not be questioned. See Shauer v. Alterton, 151 U. S. 607, 625, 14 S. Ct. 442, 38 L. Ed. 286.

The burden is on plaintiff in an action to set aside a deed as being fraudulent as to creditors to prove that the grantor failed to retain property sufficient and available to pay his then existing creditors. Hood v. Cobb, 207 N. C. 128, 176 S. E. 288.

Same—When Presumed Fraudulent.—If there is an existing debt, and the debtor makes a voluntary conveyance, and afterwards becomes insolvent, so that the creditor must lose his money, unless the property conveyed can be reached, such voluntary conveyance is presumed as a matter of law to be fraudulent. Black v. Sanders, 46 N. C. 67.

Deed Made for Benefit of Debtor's Family. — Where a deed, made without consideration by a debtor, expresses on its face that it is made for the benefit of the debtor and his family, the court can itself pronounce it fraudulent and void as against a then existing creditor. Sturdivant v. Davis, 31 N. C. 365.

Sufficiency of Property Retained. — A deed of gift may be fraudulent, though the donor, at the time of the gift, honestly believed that she had property sufficient to satisfy all her debts then existing, when in fact she was mistaken. Black v. Sanders, 46 N. C. 67.

In an action to set aside a deed, evidence that the grantor retained $11,625 to pay debts to the amount of $11,500 is not sufficient to show that the grantor retained property sufficient to pay his debts. Williams v. Hughes, 136 N. C. 58, 48 S. E. 518.

In an action to set aside a deed as being fraudulent as to creditors, under this section, evidence of the tax valuation of the other lands of the debtor at the time of the conveyance is competent on the issue of intent to hinder, delay and defraud creditors as tending to show the debtor had reason to believe he was retaining property sufficient and available to pay his then existing creditors. Hood v. Cobb, 207 N. C. 128, 176 S. E. 288.

Same—Question for Jury. — It is a question of fact for the determination of the jury whether the donor had retained property amply sufficient to pay his creditors at the time of his making a gift, within the intent and meaning of the section, which determines the validity of the transaction, and the question of his intent to defraud has no significance. Garland v. Arrowood, 177 N. C. 371, 99 S. E. 100.

When Value Determined.—A commissioner's deed of sale of part of the lands of the debtor, executed three years after the execution of the deed sought to be set aside as being fraudulent as to creditors, is held incompetent as evidence under this section, the issue being the value of all the debtor's lands at the itme of the voluntary deed attacked in the action. Hood v. Cobb, 207 N. C. 128, 176 S. E. 288.

Prior and Subsequent Creditors. — The controlling principle is stated in Aman v. Walker, 165 N. C. 224, 227, 81 S. E. 162, as follows: "If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally." Sutton v. Wells, 177 N. C. 524, 527, 99 S. E. 365.

A voluntary conveyance is necessarily and in law fraudulent when opposed to the claim of a prior creditor; as against subsequent creditors, whether fraudulent or not, depends upon the bona fides of the transaction, and the question is one of intent to be passed upon by the jury. O'Daniel v. Crawford, 15 N. C. 197, in which the subject of fraudulent conveyances is elaborately discussed in concurring opinions by Ruffin, C. J., and Gaston, Daniel, JJ. Clement v. Cozart, 109 N. C. 173, 180, 13 S. E. 862.

When Question of Fraud for Jury. — The section only requires the question of fraud to be submitted to a jury, in cases where property fully sufficient and available to pay all creditors is retained by the donor. Black v. Sanders, 46 N. C. 67.

§ 39-18. Marriage settlements void as to existing creditors.—Every contract and settlement of property made by any man and woman in consideration of a marriage between them, for the benefit of such man or woman, or of their issue, whether the same be made before or after marriage, shall be void as against creditors of the parties making the same respectively, existing at the time of such marriage if the same is antenuptial, or at the time of making such contract or settlement if the same is postnuptial. (Rev., s. 963;

Code, ss. 1270, 1820; 1871-2, c. 193, s. 11; R. C., c. 37, s. 25; 1785, c. 238, s. 2; C. S. 1008.)

Cross References.—As to contracts between husband and wife, see § 52-13. As to antenuptial contracts of wife, see § 52-14. As to statutes concerning married women generally, see § 52-1 et seq.

Gifts between Husband and Wife Good Inter Se. — All gifts from a husband to his wife are good inter se, and against all persons claiming under them; and good against all persons, if he is not in debt at the time; but such gifts are voidable as to existing creditors, if their rights are not secured, and as to subsequent purchasers without notice, and creditors, if made with intent to delay or defraud them. Kelly Mar. Women, Chapter 6, sec. 9, at page 137, quoted in Walton v. Parish, 95 N. C. 259, 263.

May Surrender Curtesy Initiate. — Since the Act of 1848, a husband has the right to surrender his estate as tenant by the curtesy initiate and let it merge in the reversion of his wife, who, with the assent of her husband, may sell the same and receive the whole of the purchase money. Teague v. Downs, 69 N. C. 280.

Same—Proceeds to Separate Use of Wife. — And an agreement, that the wife shall receive such a price in personal property and hold the same to her separate use to enable her to lay it out in the purchase of another tract of land, is valid, such price not vesting in the husband jure mariti, so as to subject the same to the claims of his creditors. Teague v. Downs, 69 N. C. 280.

Application.—Where, in 1862, a husband about to enter military service made a deed to his wife of certain land for her support, but retained sufficient property to pay all of his existing debts, it was held, that the consideration was a meritorious one. Walton v. Parish, 95 N. C. 259.

§ 39-19. Purchasers for value and without notice protected.—Nothing contained in the preceding sections shall be construed to impeach or make void any conveyance, interest, limitation of use or uses, of or in any lands or tenements, goods or chattels, bona fide made, upon and for good consideration, to any person not having notice of such fraud. (Rev., s. 964; Code, s. 1548; R. C., c. 50, s. 4; 13 Eliz., c. 5, s. 6; 1785, c. 7, s. 6; C. S. 1009.)

See note under § 39-15.

Editor's Note. — In Reiger v. Davis, 67 N. C. 185; Lassiter v. Davis, 64 N. C. 498, and the class of cases of which they are the leading representatives, the question as to the burden of proof was not involved. The court decides in those cases merely that the fraudulent conveyance is void unless it appears that the vendee was not a party to the fraud, or purchased without any notice of the fraudulent intent. See Devries & Co. v. Phillips, 63 N. C. 53; Cox v. Wall, 132 N. C. 730, 741, 44 S. E. 635.

Intended as Proviso.—The purpose of the Legislature in enacting this section was to constitute an independent provision, operating as a proviso to the other sections on fraudulent conveyances. Cox v. Wall, 132 N. C. 730, 44 S. E. 635.

Scope and Effect.—In Young v. Lathrop, 67 N. C. 63, 72, 12 Am. Rep. 603, the court held that the section was a proviso to the preceding sections of the chapter, and Pearson, C. J., in referring to it, uses this language: "The proviso can only be made operative by giving to it the scope and effect of purging the original conveyance of the fraud with which it was tainted, by allowing the bona fides and the full valuable consideration of the second conveyance to supply the want of these qualities to the first, so as to perfect the title to the bona fide purchaser, by carrying it back to the donor and claiming the title from him, and thus prevent the title of the first purchaser from being impeached and made void." Cox v. Wall, 132 N. C. 730, 735, 44 S. E. 635.

Bona Fide Purchaser before Execution Sale. — Where a fraudulent grantee of land conveyed it to a bona fide purchaser for value without notice of the fraud, after a creditor of the fraudulent grantor had obtained a judgment against him, but before the land was sold under an execution issued on such judgment and teste of the terms where it was obtained, it was held that by force of the proviso obtained in this section (4th section of the 50th ch. of the Rev. Code, 13th Eliz., ch. 5, sec. 6), the title of the bona fide purchaser from the fraudulent grantee was to be preferred to that of the purchaser under the execution of the creditor of the fraudulent grantor. Young v. Lathrop, 67 N. C. 63.

Bona Fide Purchaser Gets Good Title.—Under this section a purchaser for value and without notice of any fraud gets good title by conveyance or transfer from fraudulent vendor. Peoples Bank, etc., Co. v. Mackorell, 195 N. C. 741, 745, 143 S. E. 518.

Trustees and Mortgagees Subject to Equities.—It is a settled principle, acted upon every day, that the trustee or mortgagee is a purchaser for a valuable consideration within the provisions of 13 and 27 Elizabeth; but it would seem they take subject to any equity that attached to the property in the hands of the debtor, and cannot discharge themselves from it on the ground of being purchasers without notice. Potts v. Blackwell, 56 N. C. 449, 453.

Good Consideration.—"Good consideration" means valuable consideration, or a fair price. Young v. Lathrop, 67 N. C. 63, 72; Arrington v. Arrington, 114 N. C. 151, 167, 19 S. E. 351, citing 2 Bigelow Frauds 443.

Onus Probandi.—When a grantor executes a deed with intent to defraud his creditors, the grantee can only protect his title by showing that he is a purchaser for a valuable consideration, and without notice of a fraudulent intent on the part of his grantor. Saunders v. Lee, 101 N. C. 3, 7 S. E. 590; Morgan v. Bostic, 132 N. C. 743, 44 S. E. 639; Cansler v. Cobb, 77 N. C. 30, 32.

In Bamberger v. Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. Ed. 374, what is said by the court with reference to the burden of proof does not relate to the notice of the fraud, but to the fraud itself, and of course the burden to establish the latter was placed upon the contesting creditor. Cox v. Wall, 132 N. C. 730, 741, 44 S. E. 635.

When Wife Takes with Notice of Fraud.—Where a husband's conveyance to his wife is executed with a fraudulent intent, and the wife, with a knowledge of his purpose, accepts the benefit of the act and claims under it, she puts herself beyond the pale of the protection offered to innocent purchasers by the section. Peeler v. Peeler, 109 N. C. 628, 633, 14 S. E. 59.

Conveyance to Daughter in Consideration of Services. — Where A made a deed to his daughter, in consideration of services rendered and to be rendered in the future for attending upon him in his old age, with intent to defraud his creditors, the deed is void, even though the daughter had no knowledge of such fraudulent intent. Cansler v. Cobb, 77 N. C. 30.

Cited in Threlkeld v. Malcragson Land Co., 198 N. C. 186, 151 S. E. 99; Massachusetts Bonding, etc., Co. v. Knox, 220 N. C. 725, 735, 18 S. E. (2d) 436, 138 A. L. R. 1438 (dis. op.).

§ 39-20. Bona fide purchaser of mortgaged property not affected by illegal consideration of note secured.—No conveyance or mortgage, made to secure the payment of any debt or the performance of any contract or agreement, shall be deemed void as against any purchaser for valuable or other good consideration of the estate or property conveyed, sold, mortgaged or assigned, by reason that the consideration of such debt, contract or agreement is forbidden by law, if such purchaser, at the time of his purchase, did not have notice of the unlawful consideration of such debt, contract or agreement. (Rev., s. 965; Code, s. 1549; R. C., c. 50, s. 5; 1842, c. 70; C. S. 1010.)

Cross Reference.—As to registration of conveyances affecting validity thereof, see § 47-18.

When Part of Debts Secured are Fictitious.—A purchaser for value without notice, under a deed in trust in which some of the debts secured are fictitious, gets a good title, even against the creditors of the fraudulent trustor. McCorkle v. Earnhardt, 61 N. C. 300.

Mortgage Note Tainted with Usury.—This section does not purport to protect the innocent holder of a mortgage note which is tainted with usury, but the "purchaser of the estate or property" at the sale under the mortgage, who buys without notice of the usurious taint in the debt secured. The only case in our reports that seems to mitigate against the otherwise uniform tenor of the decisions on this subject is Coor v. Spicer, 65 N. C. 401, which held that a mortgage given to secure a usurious bond might be enforced in the hands of an innocent purchaser for value. The case recognizes the general rule, but takes mortgages out of it upon the supposed wording of the section. Aside from the fact that this is held expressly otherwise in the latter case of Moore v. Woodward, 83 N. C. 531, an examination of the section will show that Coor v. Spicer was a palpable inadvertence. Ward v. Sugg, 113 N. C. 489, 493, 18 S. E. 717.

Where a deed of trust is made to secure certain specified debts one of which is tainted with usury, and a purchaser buys at the trustee's sale for a valuable consideration with-

out notice of the illegality of the consideration of the said debt his title is not affected thereby. McNeill v. Riddle, 66 N. C. 290.

§ 39-21. Bona fide purchaser of fraudulently conveyed property treated as creditor.—Purchasers of estates previously conveyed in fraud of creditors or purchasers shall have like remedy and relief as creditors might have had before the sale and purchase. (Rev., s. 966; Code, s. 1550; R. C., c. 50, s. 6; C. S. 1011.)

§ 39-22. Persons aiding debtor to remove to defraud creditors liable for debts.—If any person removes or aids and assists in removing any debtor out of any county in which he has resided for the space of six months, or more, with the intent, by such removing, aiding or assisting, to delay, hinder or defraud the creditors, or any of them, of such debtor, the person so removing, aiding or assisting therein, and his executors or administrators, shall be liable to pay all the debts which the debtor removed may justly owe in the county from which he was so removed; and the same may be recovered by the creditors, their executors or administrators, by a civil action. (Rev., s. 1939; Code, s. 1551; R. C., c. 50, s. 14; 1820, c. 1063; C. S. 1012.)

What Constitutes Aid and Assistance.—Aid or assistance is the doing of some act whereby the party is enabled, or it is made easier for him to do the principal act, or effect some primary purpose. Wiley & Co. v. McRee, 47 N. C. 349, 351.

Where a party persuades a debtor, who is temporarily absent from the county of his residence, not to go back into that county, but to go to distant parts, and promises, if he will do so, to send his property from his residence to him, and does afterwards send such property to him, and aids him with money to abscond from where he then is, and goes part of the way with him, for the purpose of defrauding his creditors, he is liable under the section. Moore v. Rogers, 48 N. C. 91.

Where a party, having the money of his principal in his hands for a fair and honest purpose, paid it to his son fraudulently to assist him in absconding, the mere fact that, in a settlement of accounts between the principal and the agent, the former allowed the latter's bill for money thus applied does not amount to such a ratification as to subject the principal. Moore v. Rogers, 51 N. C. 297.

Same—Carrying Debtor to Railway Station.—Where a party, with his horse and buggy, carried a debtor to a railroad station, and there procured the money to enable him to leave the State, with the intent to assist him in the purpose of avoiding his creditors, it was held to be a fraudulent removal within the statute. Moffit v. Burgess, 53 N. C. 342.

Same—Property Not Carried Entirely Out of County. — Where a debtor removes out of a county with intent to defraud his creditors, a person who, knowing of such intent, helps him by carrying him or his property a part of the way in order to assist him in getting him out of the county, becomes bound for his debts, although he did not convey the debtor or his goods entirely out of the one county into another. Godsey v. Bason, 30 N. C. 260.

Same—Aid without Acts.—There is no distinction between frauds consisting mainly in acts, and those which consist mainly in words, the criterion of the plaintiff's right of action and the defendant's liability being, that the one should have been damaged in consequence of the fraud of the other. March v. Wilson, 44 N. C. 143.

Same—Mere Advice Insufficient. — Simply advising a debtor to run away, though the advice be given to delay, etc., is not equivalent to aiding and assisting, and will not sustain an action under the statute against the fraudulent removing of debtors. Wiley & Co. v. McRee, 47 N. C. 349.

Knowledge of Particular Debt Unnecessary. — Where a person who has removed a debtor out of a county is sued by a creditor it is not necessary to show that this person had a knowledge of any particular debt due from the debtor, but is sufficient if the circumstances of the case induce the jury to believe that the removal was made with a view to defraud creditors. Godsey v. Bason, 30 N. C. 260.

One Arrested under Writ of Capias Ad Respondendum. — The bail of a person arrested under a writ of capias ad respondendum may maintain an action on the case at common law against one for fraudulently aiding and assisting the principal to remove from the county, in consequence whereof he had to pay the debt sued on. March v. Wilson, 44 N. C. 143.

Surety on Constable's Bond Not Creditor.—A surety on a constable's bond, upon which there has been a breach, but no judgment nor payment by him, is not a creditor, so as to entitle him to recover against one for fraudulently removing his principal. Booe v. Wilson, 46 N. C. 182.

Measure of Damages.—In an action under this section the measure of damages is the amount of the debt due by the debtor to the plaintiff. Godsey v. Bason, 30 N. C. 260.

Same—Jury in Suit by Different Creditors.—An action on the case, brought by A. against B., for fraudulently removing a debtor, is tried, and a verdict found for defendant. The same jury are tendered in a case of C. against B. for the same act of removing, and are challenged by the plaintiff. They are under a legal bias by reason of having decided the case of A. against B., and the challenge ought to be allowed, and this although additional evidence is to be adduced in the second trial. Baker v. Harris, 60 N. C. 271.

Intent of Escaped Debtor Immaterial.—The declaration of a debtor fraudulently removed, that "he intended to get the defendant into a scrape," was held to be immaterial. Moffitt v. Burgess, 53 N. C. 342.

§ 39-23. Sales in bulk presumed fraudulent.—The sale in bulk of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in regular and usual prosecution of the seller's business, shall be prima facie evidence of fraud, and void as against the creditors of the seller, unless the seller, at least seven days before the sale, makes an inventory showing the quantity and, so far as possible, the cost price to the seller of such articles included in the sale, and shall seven days before the proposed sale notify the creditors of the proposed sale, and the price, terms and conditions thereof. If the owner of said stock of goods shall at any time before the sale execute a good and sufficient bond, to a trustee therein named, in an amount equal to the actual cash value of the stock of goods, and conditioned that the seller will apply the proceeds of the sale, subject to the right of the owner or owners to retain therefrom the personal property exemption or exemptions as are allowed by law, so far as they will go in payment of debts actually owing by the owner or owners, then the provisions of this section shall not apply. Such sale of merchandise in bulk shall not be presumed to be a fraud as against any creditor or creditors who shall not present his or their claim or make demand upon the purchaser in good faith of such stock of goods and merchandise, or to the trustee named in any bond given as provided herein, within twelve months from the date of maturity of his claim, and any creditor who does not present his claim or make demand either upon the purchaser in good faith or on the trustee named in a bond within twelve months from the date of its maturity shall be barred from recovering on his claim on such bond, or as against the purchaser, in good faith, of such stock of goods in bulk. Nothing in this section shall prevent voluntary assignments or deeds of trust for the benefit of creditors as now allowed by law, or apply to sales by executors, administrators, receivers or assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or by any public officers under judicial process. (1907, c. 623; 1913, c. 30, s. 1; Ex. Sess. 1913, c. 66, s. 1; 1933, c. 190; C. S. 1013.)

Cross References.—As to power of corporation to sell, transfer and convey property in course of business, see § 55-26, cl. 9. As to assignments for benefit of creditors, see § 23-1, et seq.

Editor's Note.—The words "seven days before the proposed sale," near the end of the first sentence, were substituted by Public Laws 1933, c. 190, for the words "within said time."

Constitutionality.—This section is not unconstitutional or void as an unwarranted limitation of the right to sell and dispose of property. Pender v. Speight, 159 N. C. 612, 75 S. E. 851.

Same—Valid Exercise of Police Power.—This section regulating the sale of merchandise in bulk, with certain requirements as to notice to creditors, inventories, etc., making such sales, contrary to the provisions of the statute, prima facie evidence of fraud and void as against creditors of the seller, is a valid exercise of the police powers of government, and such sale is to be regarded as prima facie fraudulent in the trial of an issue, as to its validity. Raleigh Tire, etc., Co. v. Morris, 181 N. C. 184, 106 S. E. 562; Whitmire-Ligon Co. v. Hyatt, 175 N. C. 117, 119, 95 S. E. 38; Gallup & Co. v. Rozier, 172 N. C. 283, 90 S. E. 209; Pennell v. Robinson, 164 N. C. 257, 80 S. E. 417.

Construed Strictly.—The statute making void as against creditors a sale of a large part or the whole of a stock of merchandise in bulk, unless the requirements of the act are complied with, is in derogation of the common law, and must be strictly construed. Swift & Co. v. Tempelos, 178 N. C. 487, 101 S. E. 8.

A sale in bulk of a large part or the whole of a stock of merchandise under the conditions set forth in the statute, without an inventory and proper notice to creditors or without an adequate and proper bond to account for the proceeds, is absolutely void as to creditors and may be made available for their debts and claims. Gallup & Co. v. Rozier, 172 N. C. 283, 90 S. E. 209; Pennel v. Robinson, 164 N. C. 257, 80 S. E. 417; Whitmore-Ligon Co. v. Hyatt, 175 N. C. 117, 119, 95 S. E. 38.

Merchandise Defined.—Within the intent and meaning of the section the word "merchandise" is limited to things ordinarily bought and sold in the way of merchandise, the subject of commerce and traffic, and does not include a stock of provisions or supplies kept in a restaurant to be prepared and served to its customers for meals, or to the furniture and fixtures used therein in connection with conducting the business of a restaurant. Swift & Co. v. Tempelos, 178 N. C. 487, 101 S. E. 8.

"Sale" within Statute.—Where a bankrupt transfers a large part of his stock of goods to a corporation, which does not assume any of the debts, but merely issues its capital stock in payment, the sale is void as against creditors, in view of this section, the word "sale" in the statute meaning the transfer of property from one person to another for consideration of value, regardless of the mode of payment of consideration. First Nat. Bank v. Raleigh Sav. Bank & Trust Co., 37 F. (2d) 301.

Subsequent Creditors Not Included.—This section applies only as to creditors of the seller at the time of the sale and not to a subsequent creditor. Farmer's Bank, etc., Co. v. Murphy, 189 N. C. 479, 127 S. E. 527.

Vendor's Right to Personal Property Exemption.—A vendor of merchandise in bulk which is void under our statute is not deprived of his right to his personal property exemption under execution of his judgment creditor. Whitmore-Ligon Co. v. Hyatt, 175 N. C. 117, 95 S. E. 38.

When Question for Jury.—In an action to set aside the sale of a stock of merchandise in bulk as void against creditors, it is for the jury to determine the fact as to whether the seller had complied with the statutory requirement as to invoice, notice to creditors, etc., upon his evidence that he had done so, under proper instructions from the court; and a charge in effect that if he had failed in this respect the transaction was prima facie fraudulent, and not that it was void, is reversible error. Gallup & Co. v. Rozier, 172 N. C. 283, 90 S. E. 209.

Liability of Purchaser. — Where a dealer in automobile supplies has sold his stock of merchandise in bulk to those whose business it is to use such material in making repairs for their customers, the latter may not avoid liability to the creditors of the vendor on the ground that they were not dealers in such wares under the doctrine announced in Swift & Co. v. Tempelos, 178 N. C. 487, 101 S. E. 8, for the sale of the original creditor is itself void for noncompliance with this section. Raleigh Tire, etc., Co. v. Morris, 181 N. C. 184, 106 S. E. 562.

Purchaser Not Liable.—Under the provisions of this section a creditor, at most, would be entitled to have the transfer set aside, but not to hold the purchaser personally liable. Goldman & Co. v. Chank, 200 N. C. 384, 156 S. E. 919, discussing but not deciding whether sale was contrary to section.

Cited in Begnell v. Safety Coach Lines, 198 N. C. 688, 153 S. E. 264.

Art. 4. Voluntary Organizations and Associations.

§ 39-24. Authority to acquire and hold real estate.—Voluntary organizations and associations of individuals organized for charitable, fraternal, religious, or patriotic purposes, when organized for the purposes which are not prohibited by law, are hereby authorized and empowered to acquire real estate and to hold the same in their common or corporate names: Provided, that voluntary organizations and associations of individuals, within the meaning of this article, shall not include associations, partnerships or copartnerships which are organized to engage in any business, trade, or profession. (1939, c. 133, s. 1.)

Cross References. — As to unlawfulness of associations, etc., maintaining places for receiving, keeping, etc., liquors, see § 18-15. As to secret political and military organizations forbidden, see § 14-10.

§ 39-25. Title vested; conveyance; probate. — Where real estate has been or may be hereafter conveyed to such organizations or associations in their common or corporate name the said title shall vest in said organizations, and may be conveyed by said organization in its common name, when such conveyance is authorized by resolution of the body duly constituted and held, by a deed signed by its chairman or president, and its secretary or treasurer, or such officer as is the custodian of its common seal with its official seal affixed, the said conveyance to be proven and probated in the same manner as provided by law for deeds by corporations, and conveyances thus made by such organizations, and associations shall convey good and fee simple title to said land. (1939, c. 133, s. 2.)

Cross References.—As to power of corporation to convey, see § 55-40. As to probate and registration for corporate conveyances, see §§ 47-41, 47-16.

§ 39-26. Effect as to conveyances by trustees. —Nothing in this article shall be deemed in any manner to change the law with reference to the holding and conveyance of land by the trustees of churches or other voluntary organizations where such land is conveyed to and held by such trustees. (1939, c. 133, s. 3.)

Cross Reference.—As to power of trustees of a religious body to convey property, see § 61-4.

§ 39-27. Prior deeds validated.—All deeds heretofore executed in conformity with this article are declared to be sufficient to pass title to real estate held by such organizations. (1939, c. 133, s. 4.)

Art. 5. Sale of Building Lots in North Carolina.

§ 39-28. Application for permit to sell.—After March 9, 1927, before a building lot or lots in a new sub-division of real estate is offered for sale or sold in North Carolina wherein it is represented or agreed that streets, sidewalks, water, sewer, lights or other improvements are to be made for the benefit of the purchaser or purchasers, the person, firm or corporation desiring to offer the same for sale shall first apply to the Clerk of the Superior Court of the county wherein the building lot or lots are situated for a permit to so sell said lots. (1927, c. 210, s. 1.)

§ 39-29. Contents of application.—The application for a permit to sell must state the loca-

tion of the lots or lot with an estimate of the cost of the improvement proposed to be made on each lot as a whole; the estimate of cost so made shall be certified as approximately correct by a civil engineer or county surveyor licensed to practice in the State of North Carolina. (1927, c. 210, s. 2.)

§ 39-30. Investigation by clerk; bond. — Upon the filing of said application and the certificate of the cost of the improvement, the clerk of the court shall satisfy himself that the land or lots are located in his county and he shall also satisfy himself of the genuineness of the application and certificate of the engineer or county surveyor, and shall, if so satisfied, require a good and sufficient bond, in a sum equal to the amount certified by the engineer or county surveyor as the approximate cost of the improvement or improvements, with a corporation licensed to do business in the State of North Carolina as surety thereon, conditioned to save the purchaser or purchasers of each lot or lots harmless to the amount of the estimated and certified cost of the proposed improvement on each lot or lots so purchased. (1927, c. 210, s. 3.)

§ 39-31. Application, certificate, bond and order filed as permanent record.—The clerk of the Superior Court shall preserve the application, certificate and bond and his orders thereon as a permanent record for the benefit of any party whose rights are affected thereby and shall, when the provisions of this article have been fully complied with, and when a filing fee of one dollar has been paid, issue a permit to the applicant to sell said lot or lots. (1927, c. 210, s. 4.)

§ 39-32. Penalty for violation. — Any person, firm or corporation selling or offering for sale any building lot or lots in violation of the provisions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1927, c. 210, s. 5.)

Art. 6. Power of Appointment.

§ 39-33. Method of release or limitation of power.—A release or limitation of a power of appointment with respect to real or personal property exercisable by deed or will or otherwise may be effected, if such power may be released or limited under the laws of this state, by the execution by the holder of such power of an instrument in writing stating that the power is released or limited to the extent set forth therein, and the delivery of such instrument to any person who might be adversely affected if such power were exercised or to the fiduciary or one of the fiduciaries, if any, having possession or control of the property over which the power is exercisable. (1943, c. 665, s. 1.)

§ 39-34. Method prescribed in § 39-33 not exclusive.—The method of release prescribed in § 39-33 is not exclusive, and this article shall not invalidate or be construed to invalidate any instrument or contract of release or limitation of a power not executed and delivered in the manner provided in § 39-33, or as invalidating any other act of release or limitation of a power, whether such instrument, contract or act has been heretofore or may be hereafter executed, delivered or done. (1943, c. 665, s. 2.)

§ 39-35. Requisites of release or limitation as against creditors and purchasers for value.—No release or limitation of a power of appointment after the effective date of this article which is made by the owner of the legal title to real property in this state shall be valid as against creditors and purchasers for a valuable consideration until an instrument in writing setting forth the release or limitation is executed and acknowledged in the manner required for a deed and recorded in the county where the real property is. (1943, c. 665, s. 3.)

Editor's Note.—The act from which this article was codified was ratified March 8, 1943.

§ 39-36. Necessity for actual notice of release or limitation to bind fiduciary.—No fiduciary having possession or control of property over which a power of appointment is exercisable shall be bound or affected by any release or limitation of such power without actual notice thereof. (1943, c. 665, s. 4.)

Chapter 40. Eminent Domain.

Art. 1. Right of Eminent Domain.

Art. 2. Condemnation Proceedings.

Art. 1. Right of Eminent Domain.

§ 40-1. Corporation in this chapter defined.—For the purposes of this chapter, unless the context clearly indicates the contrary, the word "corporation" includes the bodies politic and natural persons, enumerated in the following section, which possess the power of eminent domain. (C. S. 1705.)

§ 40-2. By whom right may be exercised.—The right of eminent domain may, under the provisions of this chapter, be exercised for the purpose of constructing their roads, canals, pipe lines originating in North Carolina for the transportation of petroleum products, lines of wires, or other works, which are authorized by law and which involve a public use or benefit, by the bodies politic, corporation, or persons following:

1. Railroads, street railroads, plankroad, tramroad, turnpike, canal, pipe lines originating in North Carolina for the transportation of petroleum products, telegraph, telephone, electric power or lighting, public water supply, flume, or incorporated bridge companies.

2. Municipalities operating water systems and sewer systems and all water companies operating under charter from the state or license from municipalities, which may maintain public water supplies, for the purpose of acquiring and maintaining such supplies.

3. Person or persons, firms, corporations or copartnerships operating or authorized by law to operate electric light plants, or distributing electric current for lights or power, or for the purpose of constructing wires, poles or other necessary things, and for such purposes or things.

4. Public institutions of the state for the purpose of providing water supplies, or for other necessary purposes of such institutions.

5. School committees of public school districts, county boards of education, boards of trustees or of directors of any corporation holding title to real estate upon which any public school, private school, high school, academy, university or college is situated, in order to obtain a pure and adequate water supply for such school, college or university.

6. The department of conservation and development in the administration of the laws relating to fish and fisheries.

7. Any educational, penal, hospital or other institution incorporated or chartered by the state of North Carolina, for the furtherance of any of its purposes, such institution being wholly or partly dependent upon the state for maintenance, and such institution shall be in need of land for its location, or such institution shall be in need of adjacent land for necessary enlargement or extension, or for land for the building of a road or roads or a side-track for railroads, necessary to the proper operations and completion of any such institution, and shall so declare through its board of directors, trustees or other governing boards by a resolution inserted in the minutes at a regular meeting or special meeting called for that purpose, such institution shall have all the powers, rights and privileges of eminent domain given under this chapter, to condemn and procure such land, and shall follow the procedure established under this chapter.

8. Franchised motor vehicle carriers or union bus station companies organized by authority of the utilities commission, for the purpose of constructing and operating union bus stations: Provided, that this subsection shall not apply to any city or town having a population of less than sixty thousand. (Rev., s. 2575; Code, s. 1698; R. C., c. 61, s. 9; 1852, c. 92, s. 1; 1874-5, c. 83; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 97, s. 1; 1941, c. 254; C. S. 1706.)

I. Source of Power.
II. Strict Construction.
III. Nature and Purpose.
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Cross References.

As to the power given railroad companies to condemn land, see § 60-37, paragraph 2. As to power of street and interurban railways to condemn land for water-power plants, see § 60-134. As to power of electric, telegraph and power companies to acquire property, see § 56-2 et seq. As to condemning of land for water supply, see §§ 130-111, 130-112. As to right of eminent domain conferred on pipe-line companies, see § 60-146. As to power of municipal corporations to acquire property by eminent domain, see §§ 160-204, 160-205. As to power of state institutions to condemn land for water supplies, etc., see §§ 143-144, 143-145. As to condemning land for school buildings, see § 115-85. As to condemning land for hospitals, see § 131-15. As to condemning lands for roads, see §§ 136-19, 136-52. As to condemning lands for mill where land on one side of stream is owned, see § 73-5 et seq. As to condemnation for races, waterways, etc., by owner of a mill or millsite, see § 73-14 et seq. As to condemnation for drainage ditches, see § 156-1 et seq.

I. SOURCE OF POWER.

Editor's Note.—The phrase "eminent domain" was first used by Hugo Grotius, celebrated writer and publicist, in 1625. Grotius says, "The property of subjects is under the eminent domain of the State, so that the state or he who acts for it, may use and even alienate and destroy such property, not only in case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way." Grotius De Jure Belli et Pacis, Lib., 3, c. 20.

Thus the right to take private property for public use is one of the inherent attributes of every sovereign state. It lies dormant in the state until the right to exercise it is granted by the state to some public or quasi public corporation or until it is exercised by the state itself. **Foltz v. St. Louis, etc., R. Co.,** 60 Fed. 316, 317. See also Adirondack R. Co. v. New York State, 176 U. S. 335, 346, 20 S. Ct. 460, 44 L. Ed. 492.

As adopted in 1919 this section contained but five subsections. Subsection 6 was added by c. 118, Public Laws of 1924 and subsection 7 by c. 205, Public Laws 1923. Pub-Laws 1941, c. 254, added subsection 8. For comment on subsection 8, see 19 N. C. L. Rev. 480.

The 1937 amendment inserted the reference to pipe lines in the first sentence of this section, and also in subsection 1. The 1939 amendment changed subsection 3.

Definitions.—Eminent domain is the power of a government to take private property for public uses upon payment of a just compensation. Western Union Tel. Co. v. Pennsylvania R. Co., 195 U. S. 540, 583, 25 S. Ct. 133, 49 L. Ed. 312. It has also been defined to be the right of disposing in case of necessity and for the public safety of all of the wealth of the country. See United States v. Jones, 109 U. S. 513, 519, 3 S. Ct. 346, 27 L. Ed. 1015.

Founded on Necessity.—This power, or right of eminent domain is possessed by the government, and may be exercised by the Legislature or under its authority. Unless vested there, it can not be called into action, and without it neither the government nor the state could hold together. It is peculiarly fit to be wielded by the Legislature—it is a power founded on necessity. Raleigh, etc., R. Co. v. Davis, 19 N. C. 451, 458.

It was a right at common law and is not a right in equity or the creature of a statute. And while the time of its exercise may be prescribed by statute, the right itself is superior to any statute. Kohl v. United States, 91 U. S. 367, 377, 23 L. Ed. 449.

All private property is held subject to the necessities of the government, which may take personal or real property whenever its necessities or the exigencies of the occasion demand. United States v. Lynch, 188 U. S. 445, 465, 23 S. Ct. 349, 47 L. Ed. 539.

All property is held by tenure for the state, and all contracts are made subject to the right of eminent domain. Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 692, 17 S. Ct. 718, 41 L. Ed. 1165.

Legislature Has Exclusive Control.—The method of taking land for a public use is within the exclusive control of the Legislature, limited by organic law, and the courts cannot help the injured landowner, where the statute has been strictly followed, until the question of compensation is reached. Durham v. Rigsbee, 141 N. C. 128, 53 S. E. 531.

A public service corporation has no power to condemn land by reasons of its being a riparian proprietor, but only under authority given by a valid statute to do so. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 96 S. E. 99.

II. STRICT CONSTRUCTION.

In General.—In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict rather than liberal construction is the rule. Such statutes assume to call into active operation a power which, however essential to the existence of the Government, is in derogation of the ordinary rights of private ownership and control which the owner usually had of his property. Carolina, etc., R. Co. v. Pennearden Lumber, etc., Co., 132 N. C. 644, 652, 44 S. E. 358; Board v. Forrest, 193 N. C. 519, 137 S. E. 431.

The exercise of the power is in derogation of common right, and all laws conferring such power must be strictly construed. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 25, 10 S. E. 1041. And the right can be exercised only in the mode pointed out in the statute conferring it. Allen v. Wilmington, etc., Railroad, 102 N. C. 381, 9 S. E. 4.

For example, it has been held that the statutory authority given the county board of education to condemn land for school purposes is in derogation of a common-law right, and its terms will be strictly construed as to the extent or limit of the power given. Board v. Forrest, 193 N. C. 519, 137 S. E. 431.

A corporation furnishing electricity for public use may condemn lands of a private owner necessary for its transmission lines under the provisions of this section, but it is unlawful for a power company to enter upon and take the lands of the owner for such purpose without complying with the statutory procedure. Crisp v. Nanthala Power, etc., Co., 201 N. C. 46, 158 S. E. 845.

Power Not Implied.—The power of eminent domain cannot be implied or inferred from vague or doubtful language. Commissioners v. Bonner, 153 N. C. 66, 69, 68 S. E. 970.

If the legislative act is silent on the subject it is to be presumed that the Legislature intended that the necessary property should be obtained by contract. Commissioners v. v. Bonner, 153 N. C. 66, 69, 68 S. E. 970.

General Act Governs.—The provisions of the general railroad act prevail over provisions in the charter of a railroad company, unless the charter specifically designates and repeals these provisions of the general act. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 27, 10 S. E. 1041.

III. NATURE AND PURPOSE.

Purpose of Grant.—The right of eminent domain is granted because the public interest requires that private property shall be taken for public use under the circumstances and in the manner prescribed by law. Raleigh, etc., R. Co. v. Mecklenberg Mfg. Co., 166 N. C. 168, 173, 82 S. E. 5.

The right of eminent domain can only be exercised where the property taken is to be used for the benefit of the public, and under no circumstances can it be taken for a private use, as the taking of the property of one man for the benefit of another is not a constitutional exercise of this power. Strickley v. Highland Boy Gold Min. Co., 200 U. S. 527, 530, 26 S. Ct. 301, 50 L. Ed. 581.

Draining Public Road.—Digging a ditch across private land for the purpose of draining a public road, amounts to a taking of private property for a public use. State v. New, 130 N. C. 731, 41 S. E. 1033.

Remedy for Abuse.—If, after acquiring the land under condemnation for a public use, a company should devote it to private purposes, there is a remedy by quo warranto and otherwise. Wadsworth Land Co. v. Piedmont Tract. Co., 162 N. C. 314, 315, 78 S. E. 297.

IV. EXTENT OF POWER.

Discretion of Grantees.—A perusal of this entire chapter will clearly disclose that the extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of fact tending to show bad faith on the part of the companies or an oppressive or manifest abuse of their discretion. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 274, 76 S. E. 267.

A railroad company may use and occupy a right of way acquired by it under condemnation proceedings when, in its own judgment, the proper management and business necessities of the road may require it. Virginia, etc., R. Co. v. McLean, 158 N. C. 498, 74 S. E. 461.

In Selma v. Nobles, 183 N. C. 322, 325, 111 S. E. 543, the court said:—"In construing this legislation, the court has held that where the general power to condemn exists, the right of selection as to route, quantity, etc., is left largely to the discretion of the company or corporation, and does not become the subject of judicial inquiry except on allegations of fact tending to show bad faith on the part of the company or corporation or an oppressive and manifest abuse of the discretion conferred upon them by the law."

A Continuing Power.—The power of eminent domain conferred on electric public service corporations by this section is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 76 S. E. 267.

Rights Acquired.—Only an easement in lands passes from the owner to a railroad company under condemnation proceedings, divesting all the rights of owners who are parties to the proceedings in such easement during the corporate existence of the company, but allowing them to use and occupy the right of way in any manner not inconsistent with the easement acquired. Virginia, etc., R. Co. v. McLean, 158 N. C. 498, 74 S. E. 461; Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022.

Same—As to Part Not Needed.—To the extent that the right of way is not presently required for the purpose of the road it may be occupied and used by the original owner in any manner not inconsistent with the easement acquired. Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 126 N. C. 254, 35 S. E. 458; Virginia, etc., R. Co. v. McLean, 158 N. C. 498, 74 S. E. 461.

Unless the land is needed for some use, the occupation and cultivation by the owner of the servient tenement will be disturbed only when it becomes necessary for the company to enter in order to remove something which endangers the safety of its passengers, or which might, if undisturbed, subject the owner to liability for injury to adjacent lands or property. Ward v. Wilmington, etc., R. Co., 113 N. C. 566, 18 S. E. 211, and Ward v. Wilmington, etc., R. Co., 109 N. C. 358, 13 S. E. 926; Blue v. Aberdeen, etc., R. Co., 117 N. C. 644, 649, 23 S. E. 275.

Land acquired by one railroad company under a legislative grant of the right of eminent domain, and unnecessary for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of another railroad company. North Carolina, etc., R. Co. v. Carolina Cent. R. Co., 83 N. C. 489.

V. TO WHOM GRANTED.

Editor's Note.—The cross references above should be referred to for a list of the various corporations to which the right of eminent domain is especially granted by statute.

Public Service Corporations.—Where a corporation is authorized by its charter to generate and sell electricity, build dams and hydroelectric plants necessary to the generation of such hydroelectric power, and is therein given power of eminent domain to acquire the necessary rights of way and lands for its dams and the ponding of water, such corporation is a public-service corporation and has the power of eminent domain, as provided by this section, and it cannot be successfully contended that its taking of lands for ponding water necessary for one of its dams is a taking of private lands for a private use, nor does the fact that such public-service corporation also engages in private enterprises not connected with its public service alter this result. Whiting Mfg. Co. v. Carolina Aluminum Co., 207 N. C. 52, 175 S. E. 698.

Quasi-Public Corporations.—Where a corporation is authorized to conduct the quasi-public business of operating a street railway, it may exercise the right of eminent domain, in respect to this business, given to it by its charter and by this section, notwithstanding it is also authorized to conduct business of a private nature. Wadsworth Land Co. v. Piedmont Tract. Co., 162 N. C. 314, 78 S. E. 297.

The right of a corporation, having the statutory powers, to condemn lands for a public use is not affected or impaired because in the charter it may be given rights of a more private nature to which the right of condemnation may not attach. Mountain Retreat Ass'n v. Mt. Mitchell Develop. Co., 183 N. C. 43, 110 S. E. 524.

The use of the word "commercial railway" in a petition does not indicate that the land is to be used for private purposes, for the company engages in commerce when it carries articles of merchandise for the public. Wadsworth Land Co. v. Piedmont Tract. Co., 162 N. C. 314, 78 S. E. 297.

Stockholders of Railroad.—The Legislature may by the exercise of the power of eminent domain authorize the consolidation of railroads and, in effect, condemn the shares of dissenting stockholders. Spencer v. Railroad, 137 N. C. 107, 49 S. E. 96.

Overseer of Roads.—Rev. Code, c. 101, secs. 14, 15, and 16, giving power to overseers of roads to cut poles on adjacent land is an instance of the exercise on the part of the sovereign of the right to take private property for the use of the public, making compensation. Collins v. Creecy, 53 N. C. 333, cited in note in 42 L. R. A., N. S., 1046.

VI. COMPENSATION ESSENTIAL.

As to determining compensation, see note to section 40-17.

Definition of Compensation. — The word compensation imports that a wrong or injury has been inflicted, which must be expressed in money. Money must be paid to the extent of the injury, whether more or less than the value of the property. Bauman v. Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. Ed. 270.

Necessity for Compensation. — By the general law of European nations and the common law of England it was a qualification of the right of eminent domain that compensation should be made for private property taken or sacrificed for the public use. See Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L. Ed. 557.

This qualification founded on justice and a due regard for basic property rights is applied in North Carolina. Bennett v. Winston-Salem South-Bound R. Co., 170 N. C. 389, 87 S. E. 133.

In Johnston v. Rankin, 70 N. C. 550, the court said, on page 555: "Notwithstanding there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation, and although the clause to that effect in the Constitution of the United States applies only to acts by the United States, and not to the government of the State, yet the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina." See Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 520, 41 S. E. 1022.

A citizen must surrender his private property in obedience to the necessities of a growing and progressive state, but in doing so he is entitled to be paid full, fair and ample compensation, to be reduced only by such benefits as are special and peculiar to his land. He has the right to have and enjoy the general benefits which are common to him and to his neighbors, without being required to pay therefor because it so happens that the use of his land is necessary for the needs of the public. Stamey v. Brunsville, 189 N. C. 39, 126 S. E. 103, 105.

Unconstitutional Unless Compensation Provided.—A statutory amendment to a former statute, which destroys and sensibly impairs vested property rights acquired under the former statute, or which attempts to transfer them either to the public or any other, except under the principles of eminent domain, and upon compensation duly made, is unconstitutional and invalid. Watts v. Lenoir, etc., Turnpike Co., 181 N. C. 129, 130, 106 S. E. 497.

Where a statute makes no provision for compensation, it is to be presumed that the Legislature did not intend that the power of eminent domain should be exercised. Commissioners v. Bonner, 153 N. C. 66, 68 S. E. 970.

When Implied.—Whenever the government in the exercise of its governmental rights takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Lloyd v. Venable, 168 N. C. 531, 84 S. E. 855, 857.

See 15 N. C. Law Rev. 362.

§ 40-3. Right to enter on and purchase lands.—Such bodies politic, corporation, or persons, may at any time enter upon the lands through which they may desire to conduct the roads or works authorized under § 40-2 and lay out the same, and they may also enter upon such contiguous land along the route as may be necessary for depots, warehouses, engine sheds, workshops, water stations, tool-houses, and other buildings necessary for the accommodation of their officers, servants and agents, horses, mules and other cattle, and for the protection of their property; and shall pay to the proprietors of the land so entered on such sum as may be agreed on between them. (Rev., s. 2575; Code, s. 1698; R. C., c. 61, s. 9; 1852, c. 92, s. 1; 1874-5, c. 83; C. S. 1707.)

Nature of the Right.—The right of entry granted a railroad company under this section, is only for the purpose of marking out the route and designating the building sites desired, to the end that the parties may come to an intelligent agreement as to the price. State v. Wells, 142 N. C. 590, 55 S. E. 210. And without the consent of the owner the company cannot enter by virtue of this section, for the purpose of building its road. Id.

Company Not a Trespasser.—A railroad company having the right of eminent domain, entering upon and occupying lands for building its tracks, is not a trespasser. Abernathy v. South, etc., R. Co., 150 N. C. 97, 63 S. E. 180.

§ 40-4. Power of railroad companies to condemn land for union depots, double-tracking, etc. —Any railroad company operating a line of railroad in North Carolina whenever it shall find it necessary to occupy any land for the purpose of getting to a union depot which has been ordered by the utilities commission, or for the purpose of maintaining, operating, improving, or of straightening its line, or of altering its location, or of constructing double tracks, or of enlarging its yard or terminal facilities, or of connecting two of its lines already in operation not more than six miles apart, shall have the power to condemn all lands needed for such purpose under the provisions of this chapter. More than two acres may be condemned for yard or terminal facilities if required for due operation of the railroad. No lands in any incorporated towns shall be condemned under this section until approved by the utilities commission, nor shall any yard, garden or dwelling-house be condemned, unless the utilities commission, upon petition filed by the railroad seeking to condemn, shall, after due inquiry, find that the railroad company cannot make the desired improvement without condemning the yard, garden or dwelling-house, except at an excessive cost. The power to condemn land under this section shall be enforceable and matters arising in regard thereto shall be tried only in the courts created by or under the constitution of this state. No rights granted or acquired under the provisions of this section shall in any way destroy or abridge the rights of the state to regulate or control such railroad company or to exclude foreign corporations from doing business in this state. (1907, c. 458, ss. 1, 2, 3; 1933, c. 134, s. 8; 1941, c. 97, s. 1; C. S. 1708.)

Cross References.—As to when the utilities commission may order depots, etc., to be built, see §§ 62-41, 62-42, 62-43. As to powers and liabilities of railroads, see § 60-37, et seq.

In General.—This section confers on the roads the incidental right to make such changes in their line and route as are necessary to accomplish the purpose designed and to make the depot available a..d accessible to the traveling public as contemplated by the act. Dewey v. Railroad, 142 N. C. 392, 55 S. E. 292.

And it was intended to apply to all the cities and towns in the State, where, in the legal discretion of the commissioners, the move is practicable. Dewey v. Railroad, 142 N. C. 392, 55 S. E. 292.

Right of Access to Union Depot. — This section confers upon any railroad company the right to condemn land for the purpose of getting to a union depot required by the order of the Utilities Commission to be built. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563.

Section 60-49 Does Not Apply.—Section 60-49, requiring that a contemplated change in the route of a railroad in a city can only be made when sanctioned by a two-thirds vote of the aldermen, only applies where the railroad of its own volition, and for its own convenience, contemplates a change of route, and not to a case where the Utilities Commission, acting under express legislative authority and direction, requires the railroad to make the change for the convenience of the general public. Dewey v. Railroad, 142 N. C. 392, 55 S. E. 292.

Injunction Will Not Issue. — Where the Utilities Commission, acting under this section, has selected a site after due inquiry, the railroads will not be enjoined, at the instance of citizens and property owners, from erecting the depot, either on the ground that the city is being sidetracked or that their property will be damaged by the proposed change. Dewey v. Railroad, 142 N. C. 392, 55 S. E. 292.

§ 40-5. Condemning land for industrial sidings. —Any railroad company doing business in this state, whether such railroad be a domestic or foreign corporation, which has been or shall be ordered by the utilities commission to construct an industrial siding as provided in § 62-45, is empowered to exercise the right of eminent domain for such purpose, to condemn property as provided in this chapter, and to acquire such right of way as may be necessary to carry out the orders of the utilities commission. Whenever it is necessary for any railroad company doing business in this state to cross the streets or streets in a town or city in order to carry out the orders of the utilities commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the state: Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city. (1911, c. 203; 1933, c. 134, s. 8; 1941, c. 97, s. 1; C. S. 1709.)

Cited in State v. Allen, 197 N. C. 684, 150 S. E. 337.

§ 40-6. Condemnation by schools for water supply.—If the school authorities mentioned in subsection 5 of § 40-2 shall be unable to agree with the owners of any lands which, or the use of which, it is necessary to appropriate in obtaining a pure and adequate water supply for the school, they shall file a petition for the condemnation of such lands in conformity with the provisions of this chapter. In addition to the particulars required to be set out in § 40-12, the petition shall state whether the water supply is desired to be obtained from a spring, from a stream, or by digging artesian wells. The proceedings for such condemnation shall conform to the requirements of this chapter. No greater amount of land in area or width shall be condemned under this section than is necessary to obtain a pure and adequate water supply.

Any person holding title to land upon which any school, public or private, is located is empowered to obtain water supplies from the springs, streams or artesian wells the use of which is acquired under this section by building intakes, reservoirs, digging ditches, laying pipes or doing such other things as may be needful to obtain the water supply. (1907, c. 671; C. S. 1710.)

Cross Reference.—As to condemning of land for school buildings, see § 115-85.

§ 40-7. Condemnation for steamboat wharves and warehouses.—Upon the order of the utilities commission that any steamboat company provide wharf and warehouse facilities as may be deemed reasonable and just, at any particular point, such company shall have power to condemn land for such purpose in accordance with the provisions of this chapter. (Ex. Sess. 1913, c. 52; 1933, c. 134, s. 8; 1941, c. 97, s. 1; C. S. 1711.)

Cross Reference.—As to power and duty of Utilities Commission to require steamboat companies to provide wharf and warehouse facilities, see § 62-39.

§ 40-8. May take material from adjacent lands. —For the purpose of constructing and operating its works and necessary appurtenances thereto, or of repairing them after they shall have been made, or of enlarging or otherwise altering them, the corporation entitled to exercise the powers of eminent domain may, at any time, enter on any adjacent lands, and cut, dig, and take therefrom any wood, stone, gravel, water or earth,

which may be deemed necessary: Provided, that they shall not, without the consent of the owner, destroy or injure any ornamental or fruit trees. (Rev., s. 2576; Code, s. 1702; R. C., c. 61, s. 22; 1874-5, c. 83; 1907, c. 39, s. 2; C. S. 1712.)

In General.—The power of condemnation granted to these companies is not confined to a right of way, delimited by surface boundaries, but may be extended to cutting of trees or removing obstructions outside of these boundaries when required for the reasonable preservation and protection of their lines and other property. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 275, 76 S. E. 267.

Liability to Adjacent Owners.—A corporation damaging adjacent property while constructing a railroad is liable in damages just as a private individual would be. Staton v. Norfolk, etc., Railroad, 111 N. C. 278, 16 S. E. 181.

Compensation Granted.—The owner of the land is entitled to compensatory damages for the cutting of cross-ties on land not included in the right-of-way, and the negligent filling of ditches instead of building bridges over them in constructing the roads necessary to remove the timber, and for breaking down fences. Waters v. Greenleaf-Johnson Lumber Co., 115 N. C. 648, 20 S. E. 718.

§ 40-9. How material paid for.—If for the value of the damages done to the owner by reason of the acts mentioned in § 40-8 the parties may be unable to agree, the same shall be valued in the manner hereinafter provided. (Rev., s. 2577; Code, s. 1703; R. C., c. 61, s. 23; 1874-5, c. 83; C. S. 1713.)

§ 40-10. Dwelling-houses and burial grounds cannot be condemned.—No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling-house, yard, kitchen, garden or burial ground, unless condemnation of such property is expressly authorized in its charter or by some provision of this code. (Rev., s. 2578; C. S. 1714.)

Cross Reference.—As to acquisition of residence property, graveyards, etc., by electric, telegraph and power companies, see § 56-6.

Exercise of Discretion Not Permitted.—The principle arising under the general power to condemn, leaving the matter largely within the discretion of the governing authorities seeking condemnation, does not apply to the statutory exceptions. Selma v. Nobles, 183 N. C. 322, 111 S. E. 543.

No Application to Tenant Houses.—This section does not apply to tenant houses, but only to the dwellings of the owner of the lands, which is preserved to him for sentimental reasons; and which could not exist where such owner is a corporation renting the dwellings to its tenants. Raleigh, etc., R. Co. v. Mecklenberg Mfg. Co., 166 N. C. 168, 169, 82 S. E. 5.

Subsequent Use by Owner Not Protected.—When a provision in a charter of a railroad company or a deed granting it a right of way prohibited it from entering upon the yard, garden, burial ground, etc., of the defendants, but no portion of the right of way was so used at the date of its acquisition, the right of the company would not be interfered with by the fact that it has since been appropriated to such use. Railroad v. Olive, 142 N. C. 257, 55 S. E. 263; Dargan v. Carolina Cent. R. Co., 131 N. C. 623, 625, 42 S. E. 979.

Nuisance a Taking under Section. — The creation and maintenance of a nuisance which sensibly impairs the value of lands of private owners is a taking within the principle of eminent domain and condemnation proceedings thereunder, and within the exception contained in this section, withdrawing dwellings from the effect of the statute. Selma v. Nobles, 183 N. C. 322, 111 S. E. 543.

Municipal Corporations.—Where a city, under its charter, is given the same power to condemn lands of private owners for municipal purposes that is given to railroads and other public utilities, it is bound by the restrictions placed on them by this section. Selma v. Nobles, 183 N. C. 322, 111 S. E. 543.

House Not Property of Railroad. — A house standing on the right of way does not become the property of the company. Shields v. Norfolk, etc., R. Co., 129 N. C. 1, 6, 39 S. E. 582; Raleigh, etc., R. Co. v. Mecklenburg Mfg. Co., 166 N. C. 168, 82 S. E. 5.

The North Carolina National Park Commission created by Public Acts 1927, c. 48, is an agency of the State created by statute, vested with the power of eminent domain, and is not subject to the limitations provided in this section and § 40-11. Yarbrough v. Park Commission, 196 N. C. 284, 145 S. E. 563.

Art. 2. Condemnation Proceedings.

§ 40-11. Proceedings when parties cannot agree.—If any corporation, enumerated in § 40-2, possessing by law the right of eminent domain in this state, is unable to agree for the purchase of any real estate required for purposes of its incorporation or for the purposes specified in this chapter, it shall have the right to acquire title to the same in the manner and by the special proceedings herein prescribed. (Rev., s. 2579; Code, ss. 1943, 2009; 1885, c. 168; 1893, c. 63; 1901, cc. 6, 41, s. 2; 1899, c. 64; 1903, cc. 562, 159, s. 16; 1871-2, c. 138, s. 13; C. S. 1715.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

Proceeding Governed by Same Rules Laid Down for Civil Actions.—As a proceeding to condemn land under statutory power is a special proceeding and is so denominated by this section, the requirements of § 1-393 that, "except as otherwise provided," special proceedings shall be governed by the same rules laid down for civil actions are applicable thereto. Nantahala Power, etc., Co. v. Whiting Mfg. Co., 209 N. C. 560, 561, 184 S. E. 48.

Not Exclusive Remedy.—It has been held formerly that this statutory remedy, modifying the charters of the railroad companies, is the only one open to one whose land is appropriated as a right of way. Allen v. Wilmington, etc., Railroad, 102 N. C. 381, 9 S. E. 4; McIntire v. Western, etc., Co., 67 N. C. 278.

This doctrine has been limited however as only applying to the preliminary entry upon land and the acquisition of the same for such purposes. And where a railroad or other public service corporation has made the entry, appropriated the right of way, constructed its road and is operating the same, and neither party has seen fit to resort to the statutory method, the owner of the land has the right at his election to sue for permanent damages and on payment of the same the easement will pass to the defendant. Mason v. Durham County, 175 N. C. 638, 641, 96 S. E. 110, citing numerous cases.

Applies to All Railroads.—The method of proceeding for the condemnation of land by railroad corporations prescribed by this section is applicable to all railroads, whether formed under the general law or special act of incorporation. Allen v. Wilmington, etc., Railroad, 102 N. C. 381, 9 S. E. 4.

Prior Attempt to Agree Mandatory. — The statutory method of condemning a right of way can be exercised only when the parties are unable to agree upon the terms of acquirement. Allen v. Wilmington, etc., Railroad, 102 N. C. 381, 9 S. E. 4.

Attempt to Acquire Title. — The clause, "the corporation had not been able to acquire title thereto" has no reference to the pecuniary resources of the corporation; it may apply to the owner's refusal to sell except at a price which in the judgment of the corporation is excessive, to cases in which the owner by reason of some disability cannot convey his title, and likewise in other instances. Western Power Co. v. Moses, 191 N. C. 744, 746, 133 S. E. 5.

It is not required of a quasi public-service corporation authorized to condemn land under the provisions of section 40-2, that it first endeavor to agree with the owners, when it is made to appear that infants have an interest therein, and otherwise that a title to the lands could not be acquired in this way. Western Power Co. v. Moses, 191 N. C. 744, 133 S. E. 5.

No Right of Entry Until Payment.—In case the parties cannot agree, then the company may proceed to condemn the land, and the company does not acquire the right to enter for the purpose of constructing the road until the amount of the appraisement has been paid into court. State v. Wells, 142 N. C. 590, 55 S. E. 210.

No Application to Trespasser.—The provisions of this section only apply to the mode of acquiring title to real estate and getting a right of way, but it has no application to trespasses committed outside of the right of way in building the road. and for such trespasses the corporations are liable in a civil action. Bridgers v. Dill, 97 N. C. 222, 1 S. E. 767.

Condemnation by Board of Education.—Sections 40-11 to 40-19 apply only to those corporations enumerated in section 40-2, and have no application to a county board of education condemning land for school buildings, such proceedings are controlled by section 115-85. Board v. Forrest, 193 N. C. 519, 520, 137 S. E. 431.

The state highway and public works commission is an unincorporated agency of the state and may only be sued by the citizen when authority is granted by the general assembly, but in the matter of condemnation of land for highways and compensation therefor right of action lies. Yancey v. North Carolina State Highway, etc., Commission, 222 N. C. 106, 22 S. E. (2d) 256.

Cited in Winston-Salem v. Ashby, 194 N. C. 388, 139 S. E. 764; Reed v. State Highway, etc., Comm., 209 N. C. 648, 184 S. E. 513.

§ 40-12. Petition filed; contains what; copy served.—For the purpose of acquiring such title the corporation, or the owner of the land sought to be condemned, may present a petition to the clerk of the superior court of the county in which the real estate described in the petition is situated, praying for the appointment of commissioners of appraisal. Such petition shall be signed and verified according to the rules and practice of such court; and if filed by the corporation it must contain a description of the real estate which the corporation seeks to acquire; and it must, in effect, state that the corporation is duly incorporated, and that it is its intention in good faith to conduct and carry on the public business authorized by its charter, stating in detail the nature of such public business, and the specific use of such land; that the land described in the petition is required for the purpose of conducting the proposed business, and that the corporation has not been able to acquire title thereto, and the reason of such inability. The petition, whether filed by the corporation or the owner of the land, must also state the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have, estates or interests in the said real estate; and if any such persons are infants, their ages, as near as may be, must be stated; and if any such persons are idiots or persons of unsound mind or are unknown, that fact must be stated, together with such other allegations and statements of liens or encumbrances on said real estate as the corporation or the owner may see fit to make. A summons as in other cases of special proceedings, together with a copy of the petition, must be served on all persons whose interests are to be affected by the proceedings, at least ten days prior to the hearing of the same by the court. (Rev., s. 2580; Code, s. 1944; 1893, c. 396; 1871-2, c. 138, s. 14; 1907, c. 783, s. 3; C. S. 1716.)

Cross References.—As to summons in contested special proceedings, see §§ 1-394, 1-395. As to service of map and profile in condemnation proceeding by a railroad, see § 60-71.

Editor's Note.—In Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 23, 10 S. E. 1041 the court states that the reasons for the requirements which are found in this section are based upon past experience. Before this section was passed the roads could locate their route according to their discretion, and they could not be controlled by the courts unless they abused their discretion. The remedy was usually by injunction which caused a great deal of litigation and delay both to the road and to the landowner. It was therefore deemed necessary, so that the landowner might know what land was intended to be appropriated and could have his grievances adjusted, to require the filing of maps, profiles, etc.

Strict Compliance.—This section stating the requisites of a petition in condemnation proceedings must be strictly complied with, especially by a private corporation as distinguished from a public one or municipality. Johnson City, etc., R. Co. v. South, etc., R. Co., 148 N. C. 59, 61 S. E. 683. See also, Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 10 S. E. 1041.

Summons Should Issue. — The proceeding authorized by this section is a special proceeding and a summons should issue as in all other cases. R. R. v. Lumber Co., 132 N. C. 644, 653, 44 S. E. 358.

General Language Permitted.—It is not essential that the particular language of the statute should be used. If the facts alleged plainly show that the petitioner has been unable to acquire title, and the reason why, that is a compliance with the statute. Durham v. Rigsbee, 141 N. C. 128, 53 S. E. 531.

What Petition Must Allege.—It is necessary for the petition in condemnation proceedings to allege, and the burden is upon the petitioner to show, a previous effort to acquire title to the right of way by agreement, and the reason of the failure to do so. In the absence of proof thereof the petition should be dismissed. Johnson City, etc., R. Co. v. South, etc., R. Co., 148 N. C. 59, 61 S. E. 683; Power Co. v. Moses, 191 N. C. 744, 746, 133 S. E. 5.

And the petition, whether filed by an owner or by the company, should state the names of all persons interested, and all of them should be in court before the Commissioners are appointed. Hill v. Glendon, etc., Mfg. Co., 113 N. C. 259, 18 S. E. 171.

Same—Where Landowner Files.—It is not necessary that the petition filed by a landowner in proceedings for the assessment of damages for land taken by a railroad company for a right of way, shall state that the petitioners and the company have failed to come to an agreement as to the sum to be paid, such averment being necessary only when the railroad company is the actor in such proceedings. Hill v. Glendon, etc., Mfg. Co., 113 N. C. 259, 18 S. E. 171; Durham v. Rigsbee, 141 N. C. 128, 130, 53 S. E. 531.

Description of Property Sought to Be Acquired Is Necessary.—A description of the property sought to be acquired and not merely a description of the entire tract over which the right of way, privilege, or easement is to run is necessary. Gastonia v. Glenn, 218 N. C. 510, 11 S. E. (2d) 459.

Map and Profile.—The filing of a proper profile is a condition precedent before an order of condemnation shall be granted to a railroad. Kinston, etc., R. Co. v. Stroud, 132 N. C. 413, 414, 43 S. E. 913; Holly Shelter R. Co. v. Newton, 133 N. C. 132, 45 S. E. 549. But the failure to so file the map and profile may be cured by amendment. R. R. v. Newton, supra; State v. Wells, 142 N. C. 590, 55 S. E. 210.

Fraudulent Deed May Be Set Aside.—Where a deed for a right of way was obtained from a landowner by fraud on the part of a railroad company, the superior court has jurisdiction to set aside the conveyance, but cannot go further in the same action, and ascertain and enforce payment of damages suffered by the grantor by reason of the appropriation of his land as a right of way by the company, although such appropriation was made by the company under the deed in question. Allen v. Wilmington, etc., Railroad, 102 N. C. 381, 9 S. E. 4.

Co-tenant Can File Petition.—The fact that a co-tenant of land has granted a right of way to a railroad company will not prevent another owner from instituting proceedings for the assessment of damages sustained by him, nor will such facts prevent the co-tenant who has made such grant from becoming a party to the proceedings and having his rights adjusted thereunder, upon a claim that the company had forfeited its right under the grant by failure to comply with the conditions thereof, and this, although such forfeiture did not occur until after the petition was first filed by his co-tenant. Hill v. Glendon, etc., Mfg. Co., 113 N. C. 259, 18 S. E. 171.

Clerk Has Jurisdiction.—The charter of a railroad company provided that it might condemn land by a proceeding commenced before a court of record having common law jurisdiction; it was held, that the clerk of a superior court has jurisdiction of such proceeding. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 10 S. E. 1041.

In condemnation proceedings, the statement required by this section, that the plaintiff has not been able to acquire title to the land, and the reason of such inability, is the allegation of a preliminary jurisdictional fact, not triable by the jury—a question of fact for the decision of the clerk in the first instance, and perhaps subject to review by the judge on appeal. Durham v. Rigsbee, 141 N. C. 128, 53 S. E. 531.

Clerk's Finding of Facts Not Final.—The finding of the fact of the clerk upon preliminary allegations, under this section, in condemnation proceedings are not final and may be appealed from. Johnson City, etc., R. Co. v. South, etc., R. Co., 148 N. C. 59, 61 S. E. 683.

Section Does Not Apply to Telegraph Companies.—Inasmuch as section 56-7 sets forth all the necessary statements for the petition of the telegraph company, and section 56-8 provides for its service, only so much of the railroad law as directs proceedings after the petition is before the court is made applicable to telegraph companies, and section 40-12

cannot be made to apply to telegraph companies. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 525, 41 S. E. 1022.

Limit of Plaintiff's Recovery Where Evidence Is Insufficient to Show Taking Was for Private Purpose.—Where there is no evidence upon the record showing that the taking over of a road was for a private purpose sufficient to raise an issue of fact, the plaintiff is remitted to his rights under this section and § 136-19 for the recovery of just compensation. Reed v. State Highway, etc., Comm., 209 N. C. 648, 184 S. E. 513.

Waiver of Preliminary Hearing.—Where it is stipulated by the parties in condemnation proceedings that a hearing before commissioners apppointed by the clerk under the provisions of this section should be waived, and judgment is rendered determining the amount of damages, and on appeal the Supreme Court affirms the judgment as to the compensation allowed and remands the cause for error in the exclusion of another element of compensation to which defendants are entitled, on the subsequent trial to determine the amount recoverable on such other element of compensation the parties are bound by the stipulation waiving a preliminary hearing by commissioners, and plaintiff's exception to the trial of the issue without such preliminary hearing will not be sustained. State v. Wilmington-Wrightsville Beach Causeway Co., 205 N. C. 508, 171 S. E. 859.

What Constitutes Waiver.—Where a city is sued for damages for running its water-supply pipe on the plaintiff's lands, and it is made to appear that the pipe line is upon the state's highway over the plaintiff's land, the plaintiff, as the servient owner, may maintain his action, and the denial of this title or right by the defendant is a waiver of its right that the plaintiff should have proceeded before the clerk under this section; and the plaintiff may maintain his action of trespass in the superior court. Rouse v. Kinston, 188 N. C. 1, 123 S. E. 482.

Cited in State v. Suncrest Lumber Co., 199 N. C. 199, 201, 154 S. E. 72.

§ 40-13. How process served.—The summons and a copy of the petition shall be served in the same manner as in special proceedings. (Rev., s. 2581; Code, s. 1944; 1871-2, c. 138, s. 14; C. S. 1717.)

Cross Reference.—As to service of summons in special proceedings generally, see §§ 1-394, 1-395.

Editor's Note.—In the case of Click v. Western, etc., R. Co., 98 N. C. 390, 4 S. E. 183, referring to a proceeding instituted against a railroad company by the owner of land the court said "This is neither a special proceeding nor a civil action as defined by the code. It is a summary proceeding."

This construction is overruled in Carolina, etc., R. Co. v. Permearden Lumber, etc., Co., 132 N. C. 644, 653, 44 S. E. 358, where the court decides that the Legislature has correctly called this a special proceeding and therefore a summons should issue as in all other cases.

§ 40-14. Service where parties unknown.—If the person on whom such service of summons and petition is to be made is unknown, or his residence is unknown and cannot by reasonable diligence be ascertained, then such service may be made under the direction of the court, by publishing a notice, stating the time and place within which such person must appear and plead, the object thereof, with a description of the land to be affected by the proceedings, in a paper, if there be one, printed in the county where the land is situated, once in each week, for four weeks previous to the time fixed by the court, and if there be no paper printed in such county, then in a newspaper printed in the city of Raleigh. (Rev., s. 2582; Code, s. 1944, subsec. 5; C. S. 1718.)

§ 40-15. Orders served as in special proceedings in absence of other provisions.—In all cases not herein otherwise provided for, service of orders, notices, and other papers in the special proceedings authorized by this chapter may be made as in other special proceedings. (Rev., s. 2583; Code, s. 1944, subsec. 7; C. S. 1719.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

§ 40-16. Answer to petition; hearing; commissioners appointed.—On presenting such petition to the superior court, with proof of service of a copy thereof, and of the summons, all or any of the persons whose estates or interests are to be affected by the proceedings may answer such petition and show cause against granting the prayer of the same, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders who reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners. (Rev., s. 2584; Code, s. 1945; 1871-2, c. 138, s. 15; C. S. 1720.)

Finding of Facts Conclusive. — In condemnation proceedings, when it is proper for the lower court to find the facts, his findings upon competent supporting evidence are conclusive. Johnson City, etc. R. Co. v. South, etc., R. Co., 148 N. C. 59, 61 S. E. 683.

Collateral Attack by Landowner.—The court will not sustain a collateral attack, and deny the right of condemnation, upon a suggestion that the petitioner may exceed its chartered right in the use of the property thus acquired by condemnation. Wadsworth Land Co. v. Piedmont Tract. Co., 162 N. C. 314, 317, 78 S. E. 297.

Same—Charter Cannot Be Attacked. — The charter of a corporation cannot be collaterally attacked, and a direct proceeding must be brought to annul it. But if the charter were on its face inoperative and void, a court would so declare it in any proceedings to condemn lands by virtue of the right of eminent domain claimed thereunder. Kinston, etc., R. Co. v. Stroud, 132 N. C. 413, 414, 43 S. E. 913; Holly Shelter R. Co. v. Newton, 133 N. C. 132, 45 S. E. 549.

Same—Advisability of Project.—The advisability of widening a street is a matter committed by law to the sound discretion of the aldermen, with the exercise of which neither the defendants nor the courts can interfere. It is a political and administrative measure of which the defendants are not even entitled to notice or to be heard. Durham v. Rigsbee, 141 N. C. 128, 53 S. E. 531.

Same—Denial That Land Necessary.—A railroad company is entitled to so much of the right of way as may be necessary for the purpose of the company, and the denial by a person in the possession of a portion of the right of way that the portion in controversy is necessary for the purposes of the company does not raise an issue of fact to be determined by a jury, as the company is the judge of the necessity and extent of such use. Railroad v. Olive, 142 N. C. 257, 55 S. E. 263.

What Matters Issuable.—A perusal of the entire statute discloses that the extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of fact tending to show bad faith on the part of the companies or an oppressive or manifest abuse of their discretion. Carolina Cent. R. Co. v. Love, 81 N. C. 434, cited and distinguished. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 76 S. E. 267.

Where issuable matters are raised before the clerk under this section he should pass upon these matters presented in the record, have the land assessed through commissioners, as the statute directs, allowing the parties, by exceptions, to raise any question of law or fact issuable or otherwise to be considered on appeal to the superior court from his award of damages, as provided by law. Selma v. Nobles, 183 N. C. 322, 111 S. E. 543.

Rights Protected by Injunction. — And the rights of the parties may be protected in the meantime from interference by an injunction issued by the judge on application made in the cause, and in instances properly calling for such course. Selma v. Nobles, 183 N. C. 322, 111 S. E. 543.

Appointment of Appraisers.—The judge of the court may appoint the appraisers either in term or vacation, while the clerk can do so only in vacation, and then only as representing the court. Click v. Western, etc., R. Co., 98 N. C. 390, 4 S. E. 183.

No Appeal from Order Appointing Commissioners. — An order appointing commissioners to assess damages is inter-

locutory, and no appeal will be entertained until after final judgment upon the report of the commissioners. Telegraph Co. v. R. R., 83 N. C. 420; Commissioners v. Cook, 86 N. C. 18; Norfolk, etc., R. Co. v. Warren, 92 N. C. 620; Hendrick v. Carolina Cent. R. Co., 98 N. C. 431, 4 S. E. 184, and cases cited.

§ 40-17. Powers and duties of commissioners.— The commissioners, before entering upon the discharge of their duties, shall take and subscribe an oath that they will fairly and impartially appraise the lands mentioned in the petition. Any one of them may issue subpœnas, administer oaths to witnesses, and any two of them may adjourn the proceedings before them from time to time, in their discretion. Whenever they meet, except by the appointment of the court or pursuant to adjournment, they shall cause ten days notice of such meeting to be given to the parties who are to be affected by their proceedings, or their attorney or agent. They shall view the premises described in the petition, hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing; and after the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of them all being present and acting, shall ascertain and determine the compensation which ought justly to be made by the corporation to the party or parties owning or interested in the real estate appraised by them. They shall report the same to the court within ten days. (Rev., s. 2585; Code, s. 1946; 1871-2, c. 138, ss. 16-18; 1891, c. 160; C. S. 1721.)

Editor's Note.—In the published Acts of 1871-72, ch. 138 a large part of section 18 was erroneously printed under section 16. This error was repeated in the Revisal, ch. 99. See note to American Union Tel. Co. v. Wilmington, etc., Railroad, 83 N. C. 420, 424. In the Code of 1883 section 1946 included sections 16-18 of ch. 138 supra. In the Consolidated Statutes sections 1721 and 1723 both contained a part of section 1946 of the Code of 1883. Those sections have been brought forward in the General Statutes as § 40-17 and § 40-19.

Just Compensation.—It seems to be the general rule in this jurisdiction that the compensation which ought justly to be made "just compensation," under our general statute, is such compensation after special benefits peculiar to the land are set off against damages. "The value of the land subject to such special benefits as may accrue to the remainder of the tract." Stamey v. Burnsville, 189 N. C. 39, 126 S. E. 103, 104.

Not an Interference with Right to Jury Trial.—It seems to have been settled in the case of Raleigh, etc., R. Co. v. Davis, 19 N. C. 451, that the Constitution (Art. 1, Sec. 19), guarantees the right to trial by jury in controversies respecting property only in cases where, under the common law, the demand that the facts should be so found could not have been refused, and that in fixing the quantum of compensation to the landowner for the right-of-way condemned to the use of a railroad, commissioners do not invade the province that, under the ancient law, belonged peculiarly and exclusively to the jury. The Chowan, etc., R. Co. v. Parker, 105 N. C. 246, 248, 11 S. E. 328.

Basis of Award.—The damages are not assessed upon the idea of a proposed actual dominion, occupation and perception of the profits of the whole right of way by the corporation, but the calculation is based upon the principle that possession and exclusive control will be asserted only over so much of the condemned territory as may be necessary for corporate purposes, such as additional tracks, ditches and houses to be used for stations and section hands. Blue v. Aberdeen, etc., R. Co., 117 N. C. 644, 649, 23 S. E. 275.

Measure of Damages.—In condemnation proceedings the measure of damages is not the difference between the value of the owner's property before and after the taking, but the fair value of the land taken reduced by any special benefits received. Stamey v. Burnsville, 189 N. C. 39, 126 S. E. 103.

The owner of lands, through which a railroad has acquired a right of way by condemnation, is entitled to recover therefor the damages done to the remainder of the tract or portions of the land used by him as one tract, deducting from the estimate the pecuniary benefits or advantages which are special and peculiar to the tract in question, but not those which are shared by him in common with other owners of lands of like kind in the same vicinity. Virginia, etc., R. Co. v. McLean, 158 N. C. 498, 74 S. E. 461.

Same—Market Value. — In awarding damages to the owner of lands for an easement therein acquired for railroad purposes, there should, as a general rule, be included the market value of the land actually covered by the right of way, subject to modification under special circumstances, as where there is a mineral deposit with the use of which the easement does not interfere. Virginia, etc., R. Co. v. McLean, 158 N. C. 498, 74 S. E. 461.

Same—General Benefits. — Prior to 1872 in estimating damages the jury were not allowed to deduct any benefits, arising from the railroad under construction, which were common to the owner and all other persons in the vicinity, but could set off any benefits peculiar to the particular tract involved. Freedle v. North Carolina R. Co., 49 N. C. 89. At the session of 1871-2 the Legislature changed this rule so that no benefits whatever could be deducted. Code section 1946. This latter provision was repealed in 1891, Laws 1891, ch. 160. The courts have subsequently construed this repeal to mean a restoration of the old rule as stated in Freedle's Case, supra. Southpart, etc., R. Co. v. Platt Land, 133 N. C. 266, 45 S. E. 589.

The Legislature has the power to allow municipal corporations to have the general benefits assessed as offsets against damages in an action to acquire land for a public purpose. But the power or authority must be given either by special charter or general state act. Stamey v. Brunsville, 189 N. C. 39, 126 S. E. 103, 104.

Date When Taken Governs.—For the purpose of determining the sum to be paid as compensation for land taken under the right of eminent domain, the value of the land taken should be ascertained as of the date of the taking, and the land is taken within the meaning of this principle when the proceeding is begun. Western Carolina Power Co. v. Hayes, 193 N. C. 104, 107, 136 S. E. 353.

Only Actual and Direct Damage Considered. — In estimating damages of any kind to lands taken by a railroad company it is only proper to consider actual damages, not those remote or speculative or dependent upon a future possible use of the property. Madison County R. Co. v. Galligan, 161 N. C. 190, 194, 76 S. E. 696.

The owner is entitled to compensation for the actual and direct damages which he may sustain by being deprived of his property. Raleigh, etc., R. Co. v. Mecklenberg Mfg. Co., 166 N. C. 168, 173, 82 S. E. 5.

Evidence Admissible.—In a proceeding to condemn land for a right of way, evidence to show the value of the land by its location and surroundings is admissible. Railroad v. Land Co., 137 N. C. 330, 49 S. E. 350. But a tax list is not admissible for that purpose. Id.

Damage to Adjoining Land.—The landowner will be entitled to have included in his assessment damages for injuries to lands adjoining those upon which the railroad is constructed. Hendrick v. Carolina Cent. R. Co., 101 N. C. 617, 8 S. E. 236.

The owner of land, a part of which is taken under the right of eminent domain, may recover as compensation not only the value of the land taken, but also the damages thereby caused, if any, to the remaining land. Western Carolina Power Co. v. Hayes, 193 N. C. 104, 107, 136 S. E 353.

These damages are limited to those which embrace the actual value of the property taken and the direct physical injuries to the remaining property. Raleigh, etc., R. Co. v. Mecklenberg Mfg. Co., 166 N. C. 168, 173, 82 S. E. 5.

Additional Burden.—When a railroad company puts additional burdens upon a right of way which it has acquired by condemnation not properly embraced in the general purpose for which it was obtained, the owner is entitled to compensation for them. Virginia, etc., R. Co. v. McLean, 158 N. C. 498, 74 S. E. 461.

A telegraph line along a railroad and on the right of way of the railroad is an additional burden upon the land, for which the landowner is entitled to just compensation. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868; Query v. Postal Tel. Cable Co., 178 N. C. 639, 101 S. E. 390, 8 A. L. R. 1290; Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572. The same rule applies to electric light wires placed along the street. Brown v. Asheville Electric Light Co., 138 N. C. 533, 51 S. E. 62, 60 L. R. A. 631, 107 Am. St. Rep. 554. But the use of streets for a street railway is one of the ordinary purposes for which streets and highways may be used, and does not impose an additional burden or servitude so as

to entitle the abutting property owner to further compensation. Hester v. Durham Traction Co., 138 N. C. 288, 50 S. E. 711, 1 L. R. A. (N. S.) 981.

Owner at Time of Taking Is One to Be Paid.—Compensation for property taken in the exercise of the power of eminent domain is due to the owner at the time of the taking, and not to the owner at an earlier or later date. Empie v. United States, 131 F. (2d) 481.

The right to flood lands in derogation of plaintiffs' easement of access does not arise merely upon the erection of the structure causing the flooding, but upon the institution of proceedings looking to the award of due compensation; and, until such proceedings are instituted by one side or the other, the flooding constitutes a mere invasion of rights which pass with a conveyance of the property to which they are attached. Id.

If plaintiff does not own the land upon which the defendant has constructed its road and imposed a burden, he has nothing to be "taken," and therefore nothing for which he is entitled to compensation. Abernathy v. South, etc., R. Co., 150 N. C. 97, 104, 63 S. E. 180.

Diversion of Water.—Damages caused by diversion of water are not covered by the statute, providing for the equipment of a right of way by railroad companies. Ward v. Albermarle, etc., R. Co., 112 N. C. 168, 16 S. E. 921.

Finding of Commissioners Conclusive.—The finding of commissioners that land taken for railroad purposes received no special benefit is conclusive. Southport, etc., Co. v. Platt Land, 133 N. C. 266, 45 S. E. 589.

Cited in Ayden v. Lancaster, 197 N. C. 556, 560, 150 S. E. 40.

§ 40-18. Form of commissioners' report.—When the commissioners shall have assessed the damages, they shall forthwith make and subscribe a written report of their proceedings, in substance as follows:

To the Clerk of the Superior Court of ..... County:

We, ..., commissioners appointed by the court to assess the damages that have been and will be sustained by ....., the owner of certain land lying in the county of ....., which the ..... corporation proposes to condemn for its use, do hereby certify that we met on ..... (or the day to which we were regularly adjourned), and, having first been duly sworn, we visited the premises of the owner, and after taking into full consideration the quality and quantity of the land aforesaid, the additional fencing likely to be occasioned by the work of the corporation, and all other inconveniences likely to result to the owner, we have estimated and do assess the damages aforesaid at the sum of $.....

We have estimated the special benefits which the said owner will receive from the construction of said works to be the sum of $.....

Given under our hands, the ..... day of ....., A. D. 19..... (Rev., s. 2586; Code, s. 1700; R. C., c. 61, s. 17; 1874-5, c. 83; C. S. 1722.)

Editor's Note.—It was formerly provided that the report of the commissioners should be under seal. In Hanes v. North Carolina R. Co., 109 N. C. 490, 13 S. E. 896 the court held that this provision was not mandatory but directory only and the omission of the seal was not a fatal defect.

Report Need Not State Particulars.—The report of the commissioners will not be set aside because it fails to show in what the benefits assessed consist, where no objection was made when the report was submitted. Wilmington, etc., R. Co. v. Smith, 99 N. C. 131, 5 S. E. 237.

Description of Land Not Essential.—A report of the commissioners is not invalid because it does not contain a description of the land, as that can be ascertained by reference to the location of the roadbed and right of way. Hanes v. North Carolina R. Co., 109 N. C. 490, 13 S. E. 896.

But as the easement is conveyed to the petitioner by the report of the commissioners when confirmed, it seems that the said easement should be described therein as fully and correctly as it would be in a grant. Railroad v. Land Co., 137 N. C. 330, 336, 49 S. E. 350.

Cited in Ayden v. Lancaster, 197 N. C. 556, 560, 150 S. E. 40.

§ 40-19. Exceptions to report; hearing; appeal; when title vests; restitution.—Within twenty days after filing the report the corporation or any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the supreme court. The court or judge on the hearing may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper. If the said corporation, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said corporation may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal. And if there shall be no appeal, or if the final judgment rendered upon said petition and proceedings shall be in favor of the corporation, and upon the payment by said corporation of the sum adjudged, together with the costs and counsel fees allowed by the court, into the office of the clerk of the superior court, then and in that event all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such easement in such real estate during the corporate existence of the corporation aforesaid. A certified copy of such judgment under the seal of the court shall be registered in the county where the land is situated, and a copy of the same, or the original certified, may be given in evidence in all actions and proceedings as deeds for land are now allowed to be read in evidence. All real estate acquired by any corporation under and pursuant to the provisions of this chapter for its purposes shall be deemed to be acquired for the public use. But if the court shall refuse to condemn the land, or any portion thereof, to the use of such corporation, then, and in that event, the money paid into court, or so much thereof as shall be adjudged, shall be refunded to the corporation. And the corporation shall have no right to hold said land not condemned, but shall surrender the possession of the same, on demand, to the owner or owners, or his or their agent or attorney. And the court or judge shall have full power and authority to make such orders, judgments and decrees, and issue such executions and other process as may be necessary to carry into effect the final judgment rendered in such proceedings. If the amount adjudged to be paid the owner of any property condemned under this chapter shall not be paid within one year after final judgment in the proceeding, the right under the judgment to take the property or rights condemned shall ipso facto cease and determine, but the claimant under the judgment shall still remain liable for all amounts adjudged against him except the consideration for the property. (Rev., s. 2587; Code, s. 1946; 1893, c. 148; 1915, c. 207; C. S. 1723.)

Exceptions May Be General.—Upon proper denial of the matters alleged in the petition, exceptions to the clerk's order appointing commissioners in condemnation proceedings may be of a general character, and, upon appeal, will present any question appearing upon the record. Johnson City, etc., R. Co. v. South, etc., R. Co., 148 N. C. 59, 61 S. E. 683.

No Appeal to Judge at Chambers.—No appeal lies to the judge at chambers under this section. R. R. v. Stewart, 132 N. C. 248, 43 S. E. 638.

Effect of Appeal.—The appeal, provided by this section, from a judgment by the clerk of the superior court in condemnation proceedings, under sec. 40-12, takes the entire record up for review upon questions of fact to be tried by the court, and neither party is entitled to demand a trial by jury in term before the report of the jury of view has been made and confirmed. Johnson City, etc., R. Co. v. South, etc., R. Co., 148 N. C. 59, 61 S. E. 683.

Same—By Both Parties.—On appeal by both parties in proceedings to condemn land to the superior court in term, the trial is de novo; and where the defendant has substantially recovered damages for the taking of his land, the costs are taxable against the plaintiff, though the recovery is in a smaller sum than the amount theretofore awarded by the appraisers or viewers. Durham v. Davis, 171 N. C. 305, 88 S. E. 433.

Power of Judge.—The judge has authority unquestionably to set aside the report, and to direct a new appraisement by the same commissioners or others appointed in their stead, on the ground that the damage assessed was excessive. Hanes v. North Carolina R. Co., 109 N. C. 490, 492, 13 S. E. 896.

Same—No Appeal from Remanding Order.—An order of the superior court in condemnation proceedings remanding the cause to the clerk, that he may hear the same, is interlocutory, and no appeal lies therefrom. Cape Fear, etc., R. Co. v. King, 125 N. C. 454, 34 S. E. 541. This is true though a plea in bar was filed by the defendant. Holly Shelter R. Co. v. Newton, 133 N. C. 132, 45 S. E. 549.

Payment before Entry.—Formerly the landowner had no right to a jury trial in fixing compensation upon condemnation of the right of way, nor was the compensation required to be paid before entry. This section changed this by requiring the company to pay into court the sum assessed before entry. Holly Shelter R. Co. v. Newton, 133 N. C. 132, 134, 45 S. E. 549; State v. Jones, 139 N. C. 613, 620, 52 S. E. 240.

But Injunction Will Not Issue.—Where a railroad company, seeking to condemn land for its right of way, has given ample bond to cover any damages resulting from its wrongful entry upon the land, an injunction will not issue to restrain such company from entering upon the land before the appraisal of damages and the payment thereof into court. Wellington, etc., R. Co. v. Cashie, etc., R. Co., 116 N. C. 924, 20 S. E. 964; Holly Shelter R. Co. v. Newton, 133 N. C. 132, 45 S. E. 549.

The title of the landowner is not divested until final confirmation and the payment in full of the amount appraised. Nantahala Power, etc., Co. v. Whiting Mfg. Co., 209 N. C. 560, 562, 184 S. E. 48. See § 40-26 and note.

While the value of lands taken in condemnation proceedings is fixed as of the date the petition is filed, title to the land does not pass until the award, as assessed by the commissioners, is paid into court after confirmation of the commissioners' report, since this section provides that title shall pass at that time, and since petitioner may withdraw at any time prior thereto, and in proceedings instituted by the United States, the Federal practice requires that the proceedings shall conform, as nearly as may be, to the law of the state in which they are brought. Bemis Hardwood Lbr. Co. v. Graham County, 214 N. C. 167, 198 S. E. 843.

It is obvious that a procedural statute may specify the stage of a condemnation proceeding at which the taking of the property of the owner and the acquisition of title by the condemnor shall occur; and this is precisely what this section has been held to accomplish. Empie v. United States, 131 F. (2d) 481, 484.

If Value of Land Is Not Paid within Year the Right to Condemn Ceases.—After final judgment fixing petitioner's rights to condemn, if the appraised value of the land be not paid within one year, the petitioner's right to take the property shall end, and the petitioner or claimant shall not be liable for the consideration (value of the land). Nantahala Power, etc., Co. v. Whiting Mfg. Co., 209 N. C. 560, 562, 184 S. E. 48.

And Petitioners Are Liable for Costs.—This section contemplates that in the event, for any reason, the condemnation proceedings are not carried through, all the costs of the proceeding, except the appraised value of the land, shall be paid by the petitioners. Nantahala Power, etc., Co. v. Whiting Mfg. Co., 209 N. C. 560, 563, 184 S. E. 48.

Charter May Grant Power to Enter before Condemnation.—The Legislature may by charter empower a railroad company to enter land and construct their road before instituting condemnation proceedings. State v. Jones, 170 N. C. 753, 87 S. E. 235; Watauga, etc., R. Co. v. Ferguson, 169 N. C. 70, 85 S. E. 156; State v. Lyle, 100 N. C. 497, 5 S. E. 379. Compensation must be provided to warrant the taking, but it need not precede the taking and the owner is confined to the special remedy given him by the statute under which his property is seized. R. R. v. Ferguson, supra; State v. Lyle, supra.

Same—Power Must Be Express.—When the Legislature intended to confer the right to enter before the assessment is made or the damage paid, it has so declared in express terms in the charters. State v. Jones, 139 N. C. 613, 631, 52 S. E. 240.

When Counsel Fees Allowed.—The counsel fees authorized to be taxed in proceedings to condemn lands for railway uses under this section, can only be allowed and taxed in those cases where the court, under section 40-24, is directed to appoint an attorney to represent a party in interest who is unknown or whose residence is unknown. North Carolina R. Co. v. Goodwin, 110 N. C. 175, 14 S. E. 687; Durham v. Davis, 171 N. C. 305, 88 S. E. 433.

Judgment Should Fix Boundaries.—In an action for damages for the location of a railroad the judgment should definitely fix the land over which the road is located and the width of the right of way. Beal v. Railroad Co., 136 N. C. 298, 48 S. E. 674.

Section 24-5 Applies.—Damages given in proceedings under this section fall directly under section 24-5 and the law gives interest only from the rendition of the judgment. Hence a judgment allowing interest from the date of condemnation would be erroneous. Durham v. Davis, 171 N. C. 305, 308, 88 S. E. 433.

Effect of Judgment.—A railroad company by condemnation proceedings acquires an easement upon the land condemned with the right to actual possession of so much only thereof as is necessary for the operation of its road and to protect it against contingent damages. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 524, 41 S. E. 1022. And hence a house situated on the right of way at the time of the condemnation proceedings does not become the absolute property of the company. Shields v. Norfolk, etc., R. Co., 129 N. C. 1, 39 S. E. 582 and cases cited.

No Nonsuit after Order of Ejectment.—In proceedings by one railroad company to condemn a right of way upon which another has lawfully constructed its roadbed, the plaintiff may not, as a matter of right, submit to a judgment of nonsuit after a decree has been made, for rights which the defendant is entitled to have settled by the action have attached. Johnson City, etc., Co. v. South, etc., R. Co., 148 N. C. 59, 61 S. E. 683.

Cited in Carolina Power & Light Co. v. Reeves, 198 N. C. 404, 408, 151 S. E. 871.

§ 40-20. Provision for jury trial on exceptions to report.—In any action or proceeding by any railroad or other corporation to acquire rights of way or real estate for the use of such railroad or corporation, and in any action or proceeding by any city or town to acquire rights of way for streets, any person interested in the land, or the city, town, railroad or other corporation shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury of the superior court in term, if upon the hearing of such appeal a trial by a jury be demanded. (Rev., s. 2588; 1893, c. 148; C. S. 1724.)

Editor's Note.—Previous to 1893 if the parties did not demand trial by jury before the appointment of the commissioners they were deemed to have waived it and it would not be thereafter granted. This section however specifically grants the right of trial by jury upon an appeal from the report of the commissioners. Chowan, etc., R. Co. v. Parker, 105 N. C. 246, 11 S. E. 328; Durham v. Rigsbee, 141 N. C. 128, 133, 53 S. E. 531; Holly Shelter R. Co. v. Newton, 133 N. C. 132, 134, 45 S. E. 549.

Limits of Right to Jury Trial.—This section is a limitation upon the right to demand trial by jury and clearly excludes the idea that any such right is given in respect to the questions of the fact to be decided preliminary to the question of damages. Madison County R. Co. v. Gahagan, 161 N. C. 190, 193, 76 S. E. 696.

Thus a landowner is not entitled at the hearing before the clerk to have issues tried by a jury. Holly Shelter R. Co. v. Newton, 133 N. C. 132, 45 S. E. 549.

Municipal Corporations.—Where the charter of a city or town provides for condemning lands of private owners for cemetery purposes in the manner prescribed for condemnation thereof for street or other purposes, without

specific provision for appeal in conformity with the constitutional due-process clause, under the general statute (this section), applying to municipal corporations, this right of appeal is preserved, and the charter provisions of the city or town will not be declared for that reason unconstitutional by the courts. Long v. Rockingham, 187 N. C. 199, 121 S. E. 461.

In condemnation proceedings instituted by a town for the taking of lands for a public municipal purpose, the owner is entitled to a trial by jury in the Superior Court to determine his damages when he has duly preserved the right by his exceptions and proper procedure, and when the trial judge has exercised his discretion in setting aside the amount theretofore awarded by the viewers, the cause continues in the court for the jury trial given him by statute; and an order directing the appointment of other commissioners by the clerk to go upon the land and assess the damages is erroneous. Ayden v. Lancaster, 195 N. C. 297, 142 S. E. 18.

Cited in Carolina Power & Light Co. v. Reeves, 198 N. C. 404, 405, 151 S. E. 871.

§ 40-21. When benefits exceed damage, corporation pays costs.—In any case where the benefits to the land caused by the erection of the railroad, street railway, telephone, telegraph, water supply, bridge, or electric power or lighting plant or other structure, are ascertained to exceed the damages to the land, then the corporation acquiring the same by right of eminent domain shall pay the costs of the proceeding except as provided by law, and shall not have a judgment for the excess of benefits over the damage. (Rev., s. 2589; 1891, c. 160; C. S. 1725.)

Cross Reference.—As to provision that petitioner pay costs in certain condemnation proceedings, see § 6-22, paragraph 3.

Costs in Trial Court.—Where, in an action to recover damages for the taking of land for use as a sidewalk by defendant municipality, the jury finds plaintiff is entitled to recover nothing, the court may properly tax the costs against defendant. Jervis v. Mars Hill, 214 N. C. 323, 199 S. E. 96.

Costs upon Appeal.—When it is decided by the superior court that the defendant's benefit equals the damages, the plaintiff corporation pays the costs, but if the defendant appeals and the decision of the lower court is affirmed then the cost of the appeal falls upon the defendant. Madison County R. Co. v. Gahagan, 161 N. C. 190, 76 S. E. 696.

§ 40-22. Title of infants, persons non compos, and trustees without power of sale, acquired.—In case any title or interest in real estate required by any corporation for its purposes shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, idiot, or person of unsound mind, the superior court shall have power, by a special proceeding, on petition, to authorize and empower such trustee or the general guardian or committee of such infant, idiot, or person of unsound mind, to sell and convey the same to such corporation, on such terms as may be just; and in case any such infant, idiot, or person of unsound mind has no general guardian or committee, the said court may appoint a special guardian or committee for the purpose of making such sale, release or conveyance, and may require such security from such general or special guardian or committee as said court may deem proper. But before any conveyance or release authorized by this section shall be executed, the terms on which the same is to be executed shall be reported to the court on oath; and if the court is satisfied that such terms are just to the party interested in such real estate, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of said land having legal power to sell and convey the same. (Rev., s. 2590; Code, s. 1956; 1871-2, c. 138, s. 28; C. S. 1726.)

Cross References.—As to requirement that judge approve special proceeding where a petitioner is an infant, see § 1-402. As to sales of ward's estate by guardian, see §§ 33-31, 33-33. As to sale of land required for public use on cotenant's petition, see § 46-27.

§ 40-23. Rights of claimants of fund determined.—If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into the said court by the corporation, and may determine who is entitled to the same and direct to whom the same shall be paid, and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made. (Rev., s. 2591; Code, s. 1947; 1871-2, c. 138, s. 19; C. S. 1727.)

Editor's Note.—The purpose of this section is to prevent a corporation, having the right of eminent domain, from being indefinitely postponed in acquiring title and going on with its work or from being subjected to a succession of suits for compensation. Under the provisions of the section the company acquires the right of way and the court distributes the compensation. See Abernathy v. South, etc., R. Co., 150 N. C. 97, 104, 63 S. E. 180.

Applied in Stubbs v. United States, 21 F. Supp. 1007.

§ 40-24. Attorney for unknown parties appointed; pleadings amended; new commissioners appointed.—The court shall appoint some competent attorney to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown, and who has not appeared in the proceedings by an attorney or agent, and shall make an allowance to said attorney for his services, which shall be taxed in the bill of costs. The court shall also have power at any time to amend any defect or informality in any of the special proceedings authorized by this chapter as may be necessary, or to cause new parties to be added, and to direct such further notices to be given to any party in interest as it deems proper; and also to appoint other commissioners in place of any who shall die, refuse or neglect to serve or be incapable of serving. (Rev., s. 2592; Code, s. 1948; 1871-2, c. 138, s. 20; C. S. 1728.)

Counsel fees for attorneys appointed under this section are provided for in section 40-19. See Durham v. Davis, 171 N. C. 305, 88 S. E. 433; North Carolina R. Co. v. Goodwin, 110 N. C. 175, 14 S. E. 687.

§ 40-25. Court may make rules of procedure in.—In all cases of appraisal under this chapter where the mode or manner of conducting all or any of the proceedings to the appraisal and the proceedings consequent thereon are not expressly provided for by the statute, the courts before whom such proceedings may be pending shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this chapter, and the practice in such cases shall conform as near as may be to the ordinary practice in such courts. (Rev., s. 2593; Code, s. 1949; 1871-2, c. 138, s. 21; C. S. 1729.)

In General.—The provisions of the statute regarding the mode of procedure and rules of practice are indefinite and obscure, and the Legislature, recognizing the difficulty of doing more than outlining the practice so as to safeguard the rights of the parties, has conferred upon the court the power to make rules of procedure when they are not ex-

pressly provided by the statute. Abernathy v. South, etc., R. Co., 150 N. C. 97, 103, 63 S. E. 180.

Quoted in Nantahala Power, etc., Co. v. Whiting Mfg. Co., 209 N. C. 560, 184 S. E. 48.

§ 40-26. Change of ownership pending proceeding.—When any proceedings of appraisal shall have been commenced, no change of ownership by voluntary conveyance or transfer of the real estate or other subject-matter of the appraisal, or any interest therein, shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made. (Rev., s. 2594; Code, s. 1950; 1871-2, c. 138, s. 22; C. S. 1730.)

Subsequent Purchaser May Recover.—An owner of land who acquires title subsequent to the location by a railroad company is not barred of his remedy for compensation where the road was not finished more than two years before he begins his action. Hendrick v. Carolina Cent. R. Co., 101 N. C. 617, 8 S. E. 236; Beattie v. Carolina Cent. R. Co., 108 N. C. 425, 429, 12 S. E. 913.

The purchaser of land subsequent to the location thereon of a railroad may recover permanent damages for the easement taken. Beal v. Railroad Co., 136 N. C. 298, 48 S. E. 674; Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022.

Until a purchase or condemnation, the corporation's occupation is without title, and the conveyance of the land will pass to the vendee the right to compensation for damages. Liverman v. Roanoke, etc., R. Co., 109 N. C. 52, 13 S. E. 734.

Action for Unlawful Entry Personal.—The damages incident to the act of an unlawful entry upon land by a railway corporation are personal to the owner of the land and do not pass by his subsequent conveyance of the premises. Liverman v. Roanoke, etc., R. Co., 109 N. C. 52, 13 S. E. 734.

The purchaser at the mortgage sale, while not entitled to the damages incident to the act of entry, might recover compensation for the land appropriated to the use of the company. Liverman v. Roanoke, etc., R. Co., 109 N. C. 52, 13 S. E. 734.

The right to convey the land is not affected by the mere filing of condemnation proceedings, nor by appraisement without confirmation and payment, as all rights would pass to the grantee. Nantahala Power, etc., Co. v. Whiting Mfg. Co., 209 N. C. 560, 562, 184 S. E. 48, citing Liverman v. Roanoke, etc., R. Co., 109 N. C. 52, 13 S. E. 734; Beal v. Durham, etc., R. Co., 136 N. C. 298, 48 S. E. 674.

§ 40-27. Defective title; how cured.—If at any time after an attempt to acquire title by appraisal of damages or otherwise it shall be found that the title thereby attempted to be acquired is defective, the corporation may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceedings the court may authorize the corporation, if in possession, to continue in possession, and if not in possession, to take possession and use such real estate during the pendency and until the final conclusion of such new proceedings, and may stay all actions or proceedings against the corporation on account thereof, on such corporation paying into court a sufficient sum or giving security as the court may direct to pay the compensation therefor when finally ascertained, and in every such case the party interested in such real estate may conduct the proceedings to a conclusion if the corporation delays or omits to prosecute the same. (Rev., s. 2595; Code, s. 1951; 1871-2, c. 138, s. 23; C. S. 1731.)

§ 40-28. Title to state lands acquired.—The secretary of state shall have power to grant to any railroad company any land belonging to the people of this state which may be required for the purposes of its road, on such terms as may be agreed on by them, or such company may acquire title thereto by appraisal, as in the case of lands owned by individuals; and if any land belonging to a county or town is required by any company for the purposes of the road, the county or town officers having the charge of such land may grant such land to such company for such compensation as may be agreed upon. (Rev., s. 2596; Code, s. 1955; 1871-2, c. 138, s. 27; C. S. 1732.)

§ 40-29. Quantity which may be condemned for certain purposes:

1. Right of way of railroad.—The width of the land condemned for any railroad shall not be less than eighty feet nor more than one hundred, except where the road may run through a town, when it may be of less width; or where there may be deep cuts or high embankments, when it may be of greater width.

2. Plankroads, etc.—No greater width of land than sixty feet shall be condemned for the use of any plankroad, tramroad, canal, street railway or turnpike; or greater width than sixteen feet for the use of any flume.

3. Depot or station.—No greater quantity of land than two acres, contiguous to any railroad, plankroad, tramroad, turnpike, flume, or canal, shall be condemned at one place for a depot or station. (Rev. s. 2597; Code, ss. 1707, 1708, 1709; R. C., c. 61, ss. 27, 28, 29; 1852, c. 92; 1874-5, c. 83; 1907, c. 39; C. S. 1733.)

Cross Reference.—As to power of railroad companies to condemn more than two acres, see § 40-4.

In General.—"It is universally held in this jurisdiction that a railroad corporation acquires by condemnation an easement over that portion of its right of way not actually occupied by its roadbed, tracks, drains and side ditches. Ward v. R. R., 109 N. C. 358, 13 S. E. 926; Blue v. R. R., 117 N. C. 644, 23 S. E. 275; R. R. v. Sturgeon, 120 N. C. 225, 26 S. E. 779; Neal v. R. R., 128 N. C. 143, 38 S. E. 474; Shields v. R. R., 129 N. C. 1, 39 S. E. 582; McCullock v. R. R., 146 N. C. 316, 59 S. E. 882; R. R. v. McLean, 158 N. C. 498, 74 S. E. 461; Hendrix v. R. R., 162 N. C. 9, 77 S. E. 1001; R. R. v. Bunting, 168 N. C. 579, 84 S. E. 1009; Tighe v. R. R., 176 N. C. 239, 97 S. E. 164." Griffith v. Southerland Ry. Co., 191 N. C. 84, 87, 131 S. E. 413.

When Section Applies.—If the charter prescribes no maximum or minimum width of the right of way, then paragraph 1 of this section applies, and the law presumes the width therein specified subject to the right of the owner to recover compensation by compliance with section 1-51, paragraphs 1 and 2. Griffith v. R. R., 191 N. C. 84, 88, 131 S. E. 413.

Company May Use Entire Right of Way. — A railroad company may occupy its right of way to its full extent whenever the proper management and business necessities of the road, in its own judgment, may require it, though the owner of the land can use and occupy a part of the right of way not used by the railroad in a manner not inconsistent with its full enjoyment of the easement. Atlantic Coast Line R. Co. v. Bunting, 168 N. C. 579, 84 S. E. 1009; Tighe v. Seaboard Air Line R. Co., 176 N. C. 239, 244, 97 S. E. 164.

A right of way of specified width must be located and constructed in order to be exclusive. Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 126 N. C. 254, 35 S. E. 458.

Owner's Right to Use.—To the extent that the land covered by the right of way is not presently required for the purposes of the road, the owner may continue to occupy and use it in a manner not inconsistent with the full and proper enjoyment of the easement. Virginia, etc., R. Co. v. McLean, 158 N. C. 498, 74 S. E. 461; Earnhardt v. Southern R. Co., 157 N. C. 358, 72 S. E. 1062; Railroad v. Olive, 142 N. C. 257, 273, 55 S. E. 263; Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 126 N. C. 254, 35 S. E. 458; Railroad Co. v. Sturgeon, 120 N. C. 225, 26 S. E. 779; Coit v. Owenby-Wofford Co., 166 N. C. 136, 138, 81 S. E. 1067.

Same—Permitting Others to Use.—The grant of a right of way of a specified width does not preclude the grantor from such use of his land himself or permitting the same

to others, which is not in conflict therewith. Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 126 N. C. 254, 35 S. E. 458.

Crop Raised Must Not Endanger Company's Business.— While land included in the right of way of a railroad company, not necessary for the purposes of the company, may be cultivated by the servient owner, the crop must not be of such inflammable or combustible nature when matured or maturing, as to endanger the safety of the company's passengers or cause injury to adjoining lands in case of ignition of such crops by sparks from the company's engines, for, in such case, the company would have the right to enter and remove such crops. Raleigh, etc., R. Co. v. Sturgeon, 120 N. C. 225, 26 S. E. 779.

Duty of Company to Clear Right of Way. — A railroad company is not negligent in failing to cut down bushes or weeds on the right of way beyond the portion over which it is exercising actual control for corporate purposes; but is required to keep the right of way clear of such growth to the outside of the side ditches on either side of the track. Ward v. Wilmington, etc., R. Co., 109 N. C. 358, 13 S. E. 926.

Same—Negligence. — Where a railroad company permits dry grass or leaves or other combustible rubbish to remain near its track, and the same take fire from sparks emitted from one of its locomotives which had no spark-arrester, and the fire is thereby communicated to the plaintiff's adjoining land, destroying timber, etc.: Held, that the injury resulted from the negligence of the defendant company. Aycock v. Raleigh, etc., Railroad, 89 N. C. 321.

Cited in Dowling v. So. Ry. Co., 194 N. C. 488, 490, 140 S. E. 213.

Art. 3. Public Works Eminent Domain Law.

§ 40-30. Title of article.—This article may be referred to as the "Public Works Eminent Domain Law." (1935, c. 470, s. 1.)

Editor's Note.—For act authorizing North Carolina Cape Hatteras Seashore Commission, created by Public Laws 1939, c. 257, to condemn land according to the procedure contained in this article, see Public Laws 1941, c. 100.

§ 40-31. Finding and declaration of necessity. —(a) It is hereby declared that widespread unemployment exists throughout the State, making it impossible for many people in the State to support themselves and their families; that these conditions create a public emergency and constitute a menace to the health, safety, morals and welfare of the people of the State; that it is essential that public works projects, financed in whole or in part by the United States of America or by the State, be commenced as soon as possible in order to reduce and relieve this unemployment and prevent irreparable injury to the people of the State; that to this end, it is necessary to provide a method for the expeditious acquisition of any lands necessary for such public works projects; that such public works projects are hereby declared to be in furtherance of the public welfare and to be public uses and purposes for which public money may be spent and private property acquired; and the necessity in the public interest for the provision hereinafter enacted is hereby declared as a matter of legislative determination.

(b) Without limitation upon the generality of the foregoing paragraph hereof, it is hereby declared that insanitary or unsafe dwelling accommodations exist in various areas of the State and that consequently many persons of low income are forced to reside therein; that these conditions cause an increase in and spread of disease and crime, constitute a menace to the health, safety, morals and welfare of the citizens of the State, impair economic values and are not being, and cannot within a reasonable time be corrected by the investment of private capital available for profit-making enterprises; that the clearance, replanning and reconstruction of the areas in which insanitary or unsafe conditions exist and the provision of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which private property may be acquired. (1935, c. 470, s. 2.)

§ 40-32. Definitions.—The following terms whenever used or referred to in this article shall have the following respective meanings unless a different meaning clearly appears from the context:

(a) "Public works project" shall mean any work or undertaking which is financed in whole or in part by a federal agency, as herein defined, or by a state public body, as herein defined.

(b) "Federal agency" shall mean the United States of America, the federal emergency administration of public works, or any other agency or instrumentality, corporate or otherwise, of the United States of America.

(c) "State public body" shall mean this State or any county, city, town, municipal corporation, authority, or any other subdivision, agency, or instrumentality, corporate or otherwise, thereof.

(d) "Authorized corporation" shall mean any corporation or association engaged or about to engage in any public works project, as herein defined, for a public use: Provided, that the construction of said public works project and its conduct thereafter by the corporation or association shall be subject to regulation or supervision by a federal agency, as heretofore defined, or a state public body, as herein defined, whether by virtue of an agreement, provision of law, or otherwise.

(e) "Real property" or "property" or "land" shall include all lands, including improvements and fixtures thereon, lands under water, all easements and hereditaments, corporeal or incorporeal, and every estate, interest and right, legal or equitable, in lands or water, and all rights, interests, privileges, easements, encumbrances, and franchises relating to the same, including terms for years and liens by way of judgment, mortgage or otherwise.

(f) "Court" shall mean the court in which jurisdiction over proceedings hereunder is vested by the provisions of § 40-33.

(g) "Petitioner" shall mean the one by whom proceedings for the acquisition of real property, as herein defined, are instituted hereunder pursuant to the provisions of § 40-33. (1935, c. 470, s. 3.)

§ 40-33. Filing of petition; jurisdiction of court; entry upon land by petitioner. — Any federal agency, state public body or authorized corporation may institute proceedings hereunder for the acquisition of any real property necessary for any public works project.

Such proceedings may be instituted in the superior court in any county in which any part of the real property or of the proposed public works project is situate. The court, whether during a term or during a vacation, shall cause said proceedings to be heard and determined without delay. All condemnation proceedings shall be preferred cases, and shall be entitled to precedence over all other civil cases.

The petitioner may enter upon the land proposed to be acquired for the purpose of making a survey and of posting any notice thereon which

is required by this article: Provided, that such survey and posting of notice shall be done in such manner as will cause the least possible inconvenience to the owners of the real property. (1935, c. 470, s. 4.)

§ 40-34. Form of petition.—A proceeding may be instituted hereunder by the filing of a petition which shall be sufficient if it sets forth:

(a) The name of the petitioner.

(b) A description of the property, sufficient for the identification thereof, to which there may be attached a plat or map thereof.

(c) A statement that the acquisition of such property by the petitioner is necessary for a public works project and a brief general description of said public works project.

(d) A statement that the proceedings are being instituted under this article.

(e) A suitable prayer for relief. (1935, c. 470, s. 5.)

§ 40-35. Inclusion of several parcels. — Any number of parcels of land, whether owned by the same or different persons and whether contiguous or not, may be included and condemned in one proceeding: Provided, such parcels are to be used for a single public works project. (1935, c. 470, s. 6.)

§ 40-36. Notice of proceedings.—Notice of such proceedings shall be given by one publication in a newspaper having a general circulation in each county in which any part of the property sought to be condemned is located. Such publication shall be at least twenty days and not more than thirty days prior to the date set for the hearing of the validity of the proceedings. Such notice shall be in substantially the following form (the blanks being appropriately filled):

TO WHOM IT MAY CONCERN:

Notice is hereby given that..... (here insert name of petitioner) has filed a petition in the above court under the Public Works Eminent Domain Law to acquire by condemnation for ..... (here give brief general description of the public works project for which the land is sought to be acquired) the following described land:

(Here describe the land sufficiently for the identification thereof. Such description may be by use of a plat or map.)

Notice is further given that on.....(here insert date of hearing, which must be at least twenty days and not more than thirty days after the date of publication) there will be a hearing in this court, at the opening thereof, for (1) determining the validity of said proceedings and the right of the petitioner, if it so elects, to take title to and possession of such property prior to final judgment, as authorized by § 40-45, of the Public Works Eminent Domain Law, and any persons having any interest in or lien upon the above described property shall be deemed to have waived their rights thereafter to object to the court's decision with respect to such issues, unless prior to said date they shall have filed in writing with the clerk of said court their objections thereto; (2) the appointment of a special master to determine the compensation to be awarded for such property and the persons entitled thereto; (3) the fixing of the date and place at which said special master shall hear and determine the compensation to be paid for such property and the person entitled thereto.

Notice is further given that all claims or demands for compensation because of the taking and condemnation of such property must be filed with the above court before.....(here insert date fifteen days after the date above specified for the court hearing), or the same shall be deemed waived.

Dated, the.....day of....., A. D., ...

.....
Clerk of said Court.

Notice of such proceedings shall also be given (a) by posting a copy of the above notice in conspicuous places on the real property sought to be condemned, (b) by filing a copy thereof in the office of the clerk of the court in which such proceedings are pending, and (c) by filing a copy thereof in the proper office or offices for the filing of lis pendens in each county in which any part of the real property is situated.

Such publication, posting and filing shall constitute a legal and sufficient notice to all persons having any interest in or lien upon the property described in said notice. The filing of such notice in the aforesaid county office shall also be a constructive notice of the proceeding to any person who subsequently acquires any interest in or lien upon said property, and the petitioner shall take all property condemned under this article free of the claims of any such person. (1935, c. 470, s. 7.)

§ 40-37. Determination of issues raised by objections; waiver by failure to file; final judgment; guardian ad litem.—All persons who have not filed written objections with the court prior to the time of the hearing specified in the notice prescribed by § 40-36 shall be deemed to have waived the right to file objections as to the sufficiency and validity of the petition, the proceedings and the relief sought thereby, and as to the right of the petitioner to take title and possession prior to final judgment, as authorized by § 40-45.

The court, at the time specified in said notice, after hearing and determining all issues of fact and law raised by the objections which have been filed, if any there be, shall enter a final judgment with respect to such issues, and thereafter there shall remain for determination only the amount of the compensation to be paid and the persons entitled thereto.

If any infant or other person under a legal disability shall not have appeared in the proceedings by his duly authorized legal representative, the court shall appoint a guardian ad litem to represent such person's interest in the proceedings before the special master. (1935, c. 470, s. 8.)

§ 40-38. Appointment of special master.—The court, at the time of said hearing, shall appoint a special master to fix the amount of damages and compensation for the taking and condemnation of the property described in the petition and the persons entitled thereto, and to report thereon to the court. The special master shall be a disinterested person not related to any one having an interest in or lien upon the property sought to be condemned. The compensation of said special

master shall not exceed fifteen ($15.00) dollars per day plus travel and subsistence expenses. The special master immediately after his appointment shall subscribe to an oath that to the best of his ability he will truly find and return the compensation for the taking and condemnation of the property and the persons entitled thereto. (1935, c. 470, s. 9.)

§ 40-39. Notice of hearing by special master. —Immediately after his appointment and taking of oath, the special master shall cause notice to be sent by registered mail to all persons who have appeared in the proceedings or to their attorneys of record and to all others having any interest in or lien upon the property sought to be condemned, as shown by the record of the proper county office or offices for the recording of documents pertaining to such real estate, and to all guardians ad litem appointed pursuant to the provisions of § 40-37, such notice to be addressed to such persons at their respective last known addresses. Such notice shall be substantially in the following form (with the blanks appropriately filled):

IN THE.....COURT FOR THE..... OF.....

TO WHOM IT MAY CONCERN:

Notice is hereby given that..... (here insert name of petitioner) has filed a petition in the above court under the Public Works Eminent Domain Law to acquire by condemnation for ..... (here give brief general description of the public works project for which the land is sought to be acquired), the following described land:

(Here describe the land sufficiently for the identification thereof. Such description may be by use of a plat or map.)

All persons having an interest in or lien upon the above described property, for which compensation will be demanded, are hereby notified that all claims or demands for compensation by reason of the taking and condemnation of such property shall be filed in writing with said court before ..... (here insert date at least fifteen days after the date set for the court hearing in the notice specified in § 40-36 hereof), and shall be deemed waived unless so filed, and that on..... .....a hearing will be held by the special master at..... (insert time and place fixed by the court for such hearing in blanks) with respect to (1) the amount of compensation to be paid for the property sought to be condemned, and (2) the persons entitled to such compensation.

Dated.....day of ....., A. D., ...

.....

Special master appointed by said Court.

The special master shall also cause a copy of said notice to be posted in conspicuous places on the property sought to be condemned.

After such notice by mailing and posting, the special master, on the date for hearing specified in the aforesaid notice, shall proceed immediately to hear and determine the question of just compensation for the taking and condemnation of the property and the persons entitled to such compensation. To this end, the special master may issue subpoenas, administer oaths to witnesses, and receive evidence and cause same to be recorded. (1935, c. 470, s. 10.)

§ 40-40. Evidence admissible; increase in value; improvements.—For the purpose of determining the value of the land sought to be condemned and fixing just compensation therefor, the following evidence (in addition to other evidence which is relevant, material and competent) shall be relevant, material and competent and shall be admitted and considered by the special master:

(a) Evidence that a building or improvement is unsafe or insanitary or a public nuisance, or is in a state of disrepair, and of the cost to correct any such condition, notwithstanding that no action has been taken by local authorities to remedy any such condition.

(b) Evidence that any state public body, charged with the duty of abating or requiring the correction of nuisances or like conditions or demolishing unsafe or insanitary structures, issued an order directing the abatement or correction of any conditions existing with respect to said building or improvement or the demolition of said building or improvement, and of the cost which compliance with any such order would entail.

(c) Evidence of the last assessed valuation of the property for purposes of taxation and of any affidavits or tax returns made by the owner in connection with such assessment which state the value of such property and of any income tax returns of the owner showing sums deducted on account of obsolescence or depreciation of such property.

(d) Evidence that such buildings and improvements are being used for illegal purposes or are being so overcrowded as to be dangerous or injurious to the health, safety, morals or welfare of the occupants thereof and the extent to which the rentals therefrom are enhanced by reason of such use.

(e) Evidence of the price and other terms upon any sale or the rent reserved and other terms of any lease or tenancy relating to such property or to any similar property in the vicinity when the sale or leasing occurred or the tenancy existed within a reasonable time of the hearing.

The award of compensation shall not be increased by reason of any increase in the value of the property resulting from the public works project to be placed thereon.

No allowance shall be made for improvements begun on property after the publication of the notice specified in § 40-36, except upon good cause being shown. (1935, c. 470, s. 11.)

§ 40-41. Report of special master. — The report of the special master must be filed with the clerk of the court in which said proceeding is pending within thirty days after the date of the taking of the oath, unless further time is granted by the court. The court shall grant additional time for the filing of the report only on a showing that the report cannot, with all due diligence, be prepared within the time fixed. (1935, c. 470, s. 12.)

§ 40-42. Notice of report. — Upon the filing of such report by the special master, the court, without delay, shall fix a date for the hearing of any objections filed thereto. Notice that said report has been filed, that all objections thereto

must be filed with the court within ten days after the date of the mailing of such notice and that the court has fixed a certain date (which shall be stated therein) for the hearing of such objections, shall be given by sending a copy of such notice by registered mail to all persons who have appeared in the proceeding or their attorneys of record at their last known addresses. Upon the expiration of ten days after the mailing of such notice, all objections to the report shall be deemed waived by all persons who have not filed written objections with the court. (1935, c. 470, s. 13.)

§ 40-43. Hearing of objections by the court. —If no objections are filed to the special master's report, the court (but only on motion of the petitioner unless title to the property has vested in the petitioner) shall enter a final judgment fixing the compensation to be paid for the property and the persons entitled to such compensation. If any objections are filed to the special master's report, the court on the date specified in the aforesaid order shall hear and determine such questions of law and fact as are raised by such exceptions and may approve, disapprove or modify the special master's findings or may reject the special master's report in toto. In the event the special master's report is rejected in toto, the court shall at once appoint another special master in the same manner that the first special master was appointed, and such special master shall have the same powers and duties as the special master first appointed, except that notice of the time for filing claims and of the hearing of the special master may be given by registered mail to all persons who have appeared in the proceedings or their attorneys of record at their last known addresses, and no other notice shall be necessary. If the court shall approve the special master's report, with or without modification, the court (but only on motion of the petitioner unless title to the property has previously vested in the petitioner) shall enter a final judgment, fixing the compensation to be paid for such property and the persons entitled to such compensation.

If title to said property has not previously been vested in the petitioner, the title and right to possession of said property shall vest in the petitioner immediately upon the entry of such final judgment and upon the deposit in court by the petitioner of the amount of the judgment fixed by the court as the compensation for such property. Upon the entry of such judgment and the vesting of title aforesaid, the court shall designate the day (not exceeding thirty days thereafter, except upon good cause shown) on which the parties in possession of said property shall be required to surrender possession to the petitioner. (1935, c. 470, s. 14.)

§ 40-44. Certified copy of judgment. — Upon the rendition of the final judgment vesting title in the petitioner, the clerk of the court shall make and certify, under the seal of the court, a copy or copies of such judgment, which shall be filed or recorded in the proper county office or offices for the recording of documents pertaining to the real property described therein, and such filing or recording shall constitute notice to all persons of the contents thereof. A copy of the judgment certified by the clerk of the court as aforesaid shall be competent and admissible evidence in any proceedings at law or in equity. (1935, c. 470, s. 15.)

§ 40-45. Declaration of taking; property deemed condemned; fixing day for surrender of property; security for compensation and payment of award. —At any time at or after the filing of the petition referred to in § 40-34, and before the entry of final judgment, the petitioner may file with the clerk of the court a declaration of taking signed by the duly authorized officer or agent of the petitioner declaring that all or any part of the property described in said petition is to be taken for the use of the petitioner.

Said declaration of taking shall be sufficient if it sets forth: (1) a description of the property, sufficient for the identification thereof, to which there may be attached a plat or map thereof; (2) a statement of the estate or interest in said property being taken; and (3) a statement of the sum of money estimated by the petitioner to be just compensation for the property taken.

Upon the filing of said declaration of taking and the deposit in court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration title to the property specified in said declaration shall vest in the petitioner and said property shall be deemed to be condemned and taken for the use of the petitioner, and the right to just compensation for the same shall vest in the persons entitled thereto. Upon the filing of the declaration of taking, the court shall designate a day (not exceeding thirty days after such filing, except upon good cause shown) on which the parties in possession shall be required to surrender possession to the petitioner. In the event that the petitioner is an authorized corporation, the court, prior to directing surrender of possession to the petitioner, shall require such security to be given, in addition to the amount deposited in court, as will reasonably assure the payment of any amount ultimately determined as the compensation to be paid.

The ultimate amount of compensation shall be fixed in the manner heretofore specified. If the amount so fixed shall exceed the amount so deposited in court by the petitioner, the court shall enter judgment against the petitioner in the amount of such deficiency, together with interest at the rate of six per centum per annum on such deficiency from the date of the vesting of title to the date of the entry of the final judgment (subject, however, to abatement for use, income, rents or profits derived from such property by the owner thereof subsequent to the vesting of title in the petitioner) and the court shall order the petitioner to deposit the amount of such deficiency in court. (1935, c. 470, s. 16.)

§ 40-46. Right to dismiss petition. — At any time prior to the vesting of title to the property in the petitioner, the petitioner may withdraw or dismiss its petition with respect to any or all of the property therein described. (1935, c. 470, s. 17.)

§ 40-47. Divesting title of owner.—Upon vesting of title to any property in the petitioner, all the right, title and interest of all persons having any interest therein or lien thereupon shall be divested immediately, and such persons thereafter

shall be entitled only to receive compensations for such property. (1935, c. 470, s. 18.)

§ 40-48. Payment of award into court and disbursement thereof.—The payment into court by the petitioner of the amount of any award or the deposit into court by the petitioner of the amount of any award or the deposit in court of the amount estimated by the petitioner to be the just compensation for the property taken or condemned shall be deemed to be a payment or deposit of money for the use of the persons entitled thereto. Such payment or deposit shall constitute a payment to the persons entitled thereto to the extent of the moneys so paid or deposited into court.

Any such payment shall be as valid and effectual in all respects as if it were made by the petitioner directly to the person entitled thereto or, in the case of a person under legal disability, to his guardian, whether or not (a) such person or his whereabouts is known or unknown, (b) such person is under a legal disability, or (c) there are adverse or conflicting claims to such awards.

The money paid into court shall be secured in such manner as may be directed by the court and shall be paid out by the special master to the persons found to be entitled thereto by the final judgment of the court. (1935, c. 470, s. 19.)

§ 40-49. Recovery of award.—If an award shall be paid to a person not entitled thereto, the sole recourse of the person to whom it should have been paid shall be against the person to whom it shall have been paid. In such event the person entitled to the award may sue for and recover the same, with the lawful interest and costs of suit, as such money had and received to his use by the person to whom the same shall have been paid. (1935, c. 470, s. 20.)

§ 40-50. Appeal.—Any time within thirty days from the filing of any interlocutory or final order or judgment by the court, any person or persons of record in the proceedings, who shall have filed exceptions at any stage of the proceedings within the time and in the manner specified, may appeal therefrom, but only with respect to those questions or issues which were raised by such exceptions.

The taking of an appeal shall not operate to stay the proceedings under this article except when the person or persons appealing shall have obtained a stay of the execution of the judgment or order appealed from, in which event the proceedings shall be stayed only with respect to the person or persons appealing and their respective interests in the proceedings. Upon the taking of an appeal the proceedings shall be deemed severed as to the person or persons appealing and their respective interests in the proceedings.

Any interlocutory or final order or judgment shall be final and conclusive upon all persons affected thereby who have not appealed within the time herein prescribed.

Any petitioner, other than an authorized corporation, may appeal without giving bond; but any other person or persons appealing shall give bond, with good and sufficient surety, to be approved by the court, conditioned to pay all costs taxed against appellant on such appeal. (1935, c. 470, s. 21.)

§ 40-51. Costs.—If the petitioner, prior to the making of the award, shall have tendered to an interested person for his property or deposited in court for such property an amount which such interested person refused to accept or agree to as just compensation, all costs shall be assessed against such person in the event that the aforesaid amount tendered or deposited is equal to or in excess of the award fixed or confirmed by the court with respect to such parcel. (1935, c. 470, s. 22.)

§ 40-52. Powers conferred are supplemental.—The powers conferred by this article shall be in addition and supplemental to and not in substitution for the power conferred by any other law. The power of eminent domain may be exercised hereunder, notwithstanding that any other law may provide for the exercise of said power for like purposes and without regard to the requirements, restrictions or procedural provisions contained in any other law.

Procedure hereunder, which is not prescribed herein, shall be that which is otherwise prescribed by the law of the State. (1935, c. 470, s. 23.)

§ 40-53. Necessity for certificate of public convenience and necessity from utilities commission. — Notwithstanding any finding of public convenience and necessity, either in general or specific, by the terms of this article, the right of eminent domain shall not be exercised unless and until a certificate of public convenience and necessity for such project has been issued by the utilities commission of North Carolina, and the proceedings leading up to the issuing of such certificate of public convenience and necessity, and the right to appeal therefrom shall be as now provided by law and said rights are hereby expressly reserved to all interested parties in said proceedings. In addition to the powers now granted by law to the utilities commission of North Carolina, the said utilities commission is hereby vested with full power and authority to investigate and examine all projects set up or attempted to be set up under the provisions of this article and determine the question of the public convenience and necessity for said project. (1935, c. 470, s. 25.)

Chapter 41. Estates.

§ 41-1. Fee tail converted into fee simple. — Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple. (Rev., s. 1578; Code, s. 1325; R. C., c. 43, s. 1; 1784, c. 204, s. 5; C. S. 1734.)

Cross Reference.

As to fee presumed, though word "heirs" omitted, see § 39-1.

I. GENERAL CONSIDERATIONS.

Editor's Note.—Estates are now held in the British Isles granted by William, the Conqueror (1085), and by Bruce. after the battle of Bannockburn, (1314), estates tail general or special, estates tail male and estates tail female. This system, one of the last relics of the feudal system, is so pregnant with involved technical problems, and so potent with possibilities of fraud, as to have no place in our present economic and social order. The heavy tax brought about by the World War has forced many of the estates to be divided and sold. Thus the land is gradually coming into the possession of the masses.

The system gained a foot-hold in America during Colonial days, but, with the advent of Independence, this hierarchy, under our conception of freedom, could not exist. So it was that primogeniture, which existed under the Mosaic as well as the English Law, never took root in the states of the American Union. Estates tail were soon abolished. Of these estates it is only necessary to say that they existed in this State in Colonial days; that by section 43 of the Constitution of 1776 it was provided that, "The future Legislature of this State shall regulate entails in such a manner as to prevent perpetuities;" that in 1784 the Legislature passed the act by which all estates tail then in existence were converted into fee-simple estates, and it was enacted that all such estates as should be thereafter created should be deemed to be in fee simple. Mordecai's Law Lectures, vol. 1, p. 498. Walter v. Trollinger, 192 N. C. 744, 747, 135 S. E. 871.

Under our form of government the law favors the early vesting of estates to the end that property may be kept in the channels of trade and commerce. This policy of the law is clearly indicated by Article 1. Secs. 30 and 31, of our constitution, which bars hereditary emoluments and perpetuities, and section 31-38 of this Code, providing that a devise shall be presumed to be in fee simple.

The word "estate" in its true legal significance embraces an interest in anything that is the subject of property, especially in lands. Preston defines it to be "the interest which any one has in lands or in any other subject of property." 1 Prest. Est., 20; 2 Blk. Com., 10; 2 Crabb Real Prop., p. 2, § 942. To the same effect are Coke and all other English authorities. Coke Litt., 345. In the American courts the word "estate" is a word of the greatest extension and broadest significance. It comprehends every species of property, real and personal. Glascock v. Gray, 148 N. C. 346, 349, 62 S. E. 433.

" 'Estate' is derived from status, and in its most general sense means position or standing in respect to the things and concerns of this world. In this sense it includes choses in action. Webb v. Bowler, 50 N. C. 362; Pippin v. Ellison, 34 N. C. 61; Hurdle v. Outlaw, 55 N. C. 75, 76. But it is also used in a much more restricted sense, and is then put in opposition to a chose in action, or mere right, to signify something which one has in possession, or a vested remainder, or reversion without dispute or adverse possession. Thus, we say, the estate is divested and put to a mere right by a disseisin or discontinuance; and so, in equity, where the trust is by agreement of the parties, we say the cestui qui trust has the estate, but where a decree is necessary, in order to convert one into a trustee against his consent, the party has a mere right." Taylor v. Dawson, 56 N. C. 87, 91.

The word "estate" was used in this later sense by the Rev. Stat., ch. 43, § 2, which enacted: "In all estates, real or personal, the part or share of any tenant dying shall not descend or go to the surviving tenant or tenants, but shall descend or be vested in the heirs, executors or administrators of the tenant so dying, in the same manner as estates held by tenancy in common," etc. Bond v. Hilton, 51 N. C. 180, 181.

Remainder Dependent upon Estate Tail.—The section will bar a remainder dependant upon an estate tail, in possession of tenant in tail, at the time of passing the section. Lane v. Davis, 2 N. C. 277.

Estates Tail Converted.—The section converted by one stroke of the legislative pen estates tail into fee simple. Hodges v. Lipscomb, 128 N. C. 57, 63, 38 S. E. 281.

"Heirs of their bodies" are equivalent to the words "heirs general." Revis v. Murphy, 172 N. C. 579, 90 S. E. 573; Cohoon v. Upton, 174 N. C. 88, 91, 93 S. E. 446.

Form of Acquisition Not Changed.—The Act of 1784, which subsequently converted the estate tail into a fee simple, did not change the original form of the acquisition, which still continued to be by purchase. Ballard v. Griffin, 4 N. C. 237.

Confirmation of Alienation in Fee.—The section converted no estates tail into estates in fee, but such whereof there was a person "seized and possessed," and confirmed only such alienations in fee as had been made by tenants in tail in possession since the year 1777. Wells v. Newbolt, 1 N. C. 537, 538.

II. RULE IN SHELLEY'S CASE.

Editor's Note.—The question has been raised as to the effect of this section upon the application of the Rule in Shelley's Case. It would be well to quote here from the excellent discussion of the subject in 1 N. C. Law Rev., 110, 111. "A disposition of property of frequent occurrence especially in wills, is (a) a life estate to A, who is usually a near relative, say son or daughter of the testator, settler, or grantor, followed by (b) an estate tail to the heirs of A's body, with (c) on failure of such heirs of the body or issue or the like, a limitation over in fee simple to the heirs general of A.

"The statute of 1784, C. S. sec. 1734 [G. S. § 41-1], changed an estate tail to a fee simple in the first taker under the entail. The Rule in Shelley's Case by its very terms unites the life estate, (a) above, with the remainder in tail, (b) above, into a fee tail in the ancestor, which the statute of 1784 thereupon converts to a fee simple. The limitation over, (c) above, can no longer be a remainder after a fee tail, as at common law, upon which the Rule could operate, but becomes instantly a limitation over after a fee simple, that is, an executory limitation, which is not within the operation of the Rule.

"There were two freeholds which the ancestor might take under the limitation within the Rule, an estate for life and an estate tail. But in North Carolina since the statute of 1784, sec. 1734 [G. S. § 41-1], there is left only a life estate which the ancestor may take under the limitation and which satisfies the conditions for the Rule. We might with a gain in simplicity and exactness embody this statutory result in our statement of the Rule, so as to make it, if Coke's language is adopted, read: 'When by any gift or conveyance the ancestor takes a life estate,' etc., or if Preston and Kent's statement is preferred, it could read: 'When a person takes a life estate legally or equitably....., etc.' " See the statements of the Rule in the words of Coke and

Kent, who follows Preston, in Smith v. Proctor, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. (N. S.) 172 (1905). See also, Walter v. Trollinger, 192 N. C. 744, 135 S. E. 871.

For further consideration including a resume of the rule, see the Editor's Note to § 41-6.

Force of Rule in North Carolina.—The common-law doctrine known as the rule in Shelley's case is in force in this state. Nichols v. Gladden, 117 N. C. 497, 23 S. E. 459. It has never been abolished in North Carolina. Dawson v. Quinnerly, 118 N. C. 188, 24 S. E. 483. And this section does not affect that principle of law. Dawson v. Quinnerly, 118 N. C. 188, 24 S. E. 483.

Statement of Rule.—"A good definition of the rule (in Shelley's case), and the most general, is as follows: 'That when the ancestors by any gift or conveyance taketh an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs, in fee or in tail, the word "heirs" is a word of limitation of the estate and not a word of purchase.'" Nichols v. Gladden, 117 N. C. 497, 500, 23 S. E. 459.

Nature and Operation of Rule.—The rule in Shelley's case is a rule of law and not of construction, and, no matter what the intention of the grantor or testator may have been, if an estate is granted or given to one for life and after his death to his heirs or "heirs of his body," and no other words are superadded which to a certainty show that other persons than the heirs general of the first taker are meant, the rule applies and the whole estate vests in the first taker. Nichols v. Gladden, 117 N. C. 497, 23 S. E. 459.

"Heirs" or "Heirs of Body."—In order to an application of the rule in Shelley's case appreciation of the words "heirs" or "heirs of the body" must be taken in their technical sense, or carry the estate to the entire line of heirs to hold as inheritors under our canons of descent; but should these words be used as only designating certain persons, or confining the inheritance to a restricted class of heirs, the rule does not apply, and the ancestor or the first taker acquires only a life estate according to the meaning of the express words of the instrument. Wallace v. Wallace, 181 N. C. 158, 106 S. E. 501.

Fee Simple.—A limitation coming within the rule in Shelley's case, recognized as existent in this State, operates as a rule of property, passing when applicable a fee simple, both in deeds and wills, regardless of a contrary intent on the part of the testator or grantor appearing in the instrument. Wallace v. Wallace, 181 N. C. 158, 106 S. E. 501.

A devise of lands to the testator's named children "for life only and then to their body heirs," falls within the rule in Shelley's case, notwithstanding the use of the words "for life only," and carries to the remainderman a fee tail under the old law, converted by our statute into a fee-simple title. Harrington v. Grimes, 163 N. C. 76, 79 S. E. 301, cited and applied. Merchants Nat. Bank v. Dortch, 186 N. C. 510, 120 S. E. 60.

Where a husband conveys his lands to his wife for life and to her bodily heirs begotten by him, the estate conveyed is an estate tail special under the rule in Shelley's case, converted into a fee simple absolute by this section. Morehead v. Montague, 200 N. C. 497, 157 S. E. 793.

III. APPLICATION AND ILLUSTRATIVE CASES.

Deed Sufficient Formerly to Convey Fee Tail.—A deed, which was sufficient under the old law to confer a fee tail, is sufficient under this section, where a contrary intent may not be gathered from the instrument construed as a whole to convey an estate in a fee simple, but must be distinguished from cases in which the words "bodily heirs" are used in a conveyance as descriptio personarum, which merely conveys to them an estate in remainder and as purchasers from the grantor. Harrington v. Grimes, 163 N. C. 76, 79 S. E. 301. Decisions in support of this construction of deeds will be found in Perrett v. Bird, 152 N. C. 220, 67 S. E. 507; Sessoms v. Sessoms, 144 N. C. 121, 56 S. E. 687; Jones v. Ragsdale, 141 N. C. 200, 53 S. E. 842; Whitfield v. Garris, 134 N. C. 24, 45 S. E. 904, and many others. The well considered cases of Acker v. Pridgon, 158 N. C. 337, 74 S. E. 335, and Puckett v. Morgan, 158 N. C. 344, 74 S. E. 15, in no way militate against this position.

Same—Life Estate with Limitation over to Bodily Heirs.—A devise of lands for life, followed by a separate paragraph, to the "bodily heirs" of the devisees named after their death, creates an estate in fee tail, which is enlarged into a fee simple under this section. Keziah v. Medlin, 173 N. C. 237, 91 S. E. 836.

Where land is devised to a person for life at her death to vest in the children of the testator during their natural lives and at their death to vest in their lawful heirs, such children take a fee on the death of the life tenant. Wool v. Fleetwood, 136 N. C. 460, 48 S. E. 785.

Same—Conveyance to One and Heirs of the Body.—A conveyance of land to A. and "her heirs by the body of R. (her husband) and assigns forever" was a fee tail at common law, but under our statute, Revisal, sec. 1578, now this section, it is converted into a fee-simple absolute, unaffected by the fact that there were children of the marriage living at the time of the execution of the conveyance; and in this case, construing the instrument as a whole, it evidences the intent of the grantor that it should be so interpreted. Revis v. Murphy, 172 N. C. 579, 90 S. E. 573; Whitley v. Arenson, 219 N. C. 121, 12 S. E. (2d) 906.

A conveyance to a granddaughter and the heirs of her own body passed an estate in fee tail, which by this section was converted into a fee simple, defeasible under the terms of the deed if no child was born to her, but which became absolute upon the birth of a child. Sharpe v. Brown, 177 N. C. 294, 298, 98 S. E. 825.

Where a deed is executed to "M. and the heirs of her body by her husband S. begotten, or upon failure thereafter her death to the nearest heirs of S.," and at the date of the execution of the deed M. has children living, the deed conveys a fee tail special to M. which is converted to a fee simple by this section, defeasible upon her dying without surviving children by S., and her children do not take as tenants in common with her, § 41-6, providing that a limitation to the heirs of a living person shall be construed to be the children of such person, being applicable only when there is no precedent estate conveyed to the living person, and the condition as to the failure of heirs referring to the death of M. without surviving children and not to the birth of issue, there being issue born at the date of the execution of the deed, and the ulterior limitation is not barred by the birth of such issue. Sharpe v. Brown, 177 N. C. 294, 98 S. E. 825, cited and distinguished. Paul v. Paul, 199 N. C. 522, 154 S. E. 825.

A deed to a widow and the heirs of her body by her late husband creates an estate tail which is converted by this section, into a fee simple absolute in the widow, and her children by her deceased husband take no interest in the land, § 41-6, not being applicable, since it applies only when no preceding estate is conveyed to the "ancestor" of the "heirs." Bank of Pilot Mountain v. Snow, 221 N. C. 14, 18 S. E. (2d) 711.

A devise to testator's wife, "to her and her heirs by me," vests in the wife a fee tail special, converted by this section into a fee simple, and her estate is not affected or limited to a life estate with remainder in fee to the heirs of testator by subsequent provision in the item that testator's wife should have exclusive and sole use of the property and "should she have living heirs by me, then all my estate . . . shall belong to her and her heirs in fee simple," in the absence of a reverter or limitation over in the event the wife should not have children born to her marriage with testator. Sharpe v. Isley, 219 N. C. 753, 14 S. E. (2d) 814.

Same—Heiresses.—A devise to P, "during her natural life, and after her death to the begotten heirs or heiresses of her body," vested in P an absolute estate in fee simple. Leathers v. Gray, 101 N. C. 162, 7 S. E. 657.

Same—Devise to One and Lawful Heirs of the Body.—A devise to S. and the lawful heirs of his body forever confers an estate fee tail, converted into a fee simple under the section. Sessoms v. Sessoms, 144 N. C. 121, 56 S. E. 687.

Same—Conveyance a Defeasible Fee.—The interpretation that a deed for life and then to "the surviving heirs of her body" conveys the fee-simple title, under the section does not apply when the grantor uses the additional words, "but should she die without leaving such heir or heirs, then the same is to revert back to her nearest of kin according to law," for then the intent is manifest that the conveyance is of a defeasible fee depending upon whether the first taker died without leaving children surviving her. Smith v. Parke, 176 N. C. 406, 97 S. E. 209.

Where a testator devises realty to a grandson, and in the event of the death of the grandson without children, then the realty to descend to other grandchildren, such devise vests a fee simple estate in the first devisee, defeasible only on condition that he die without leaving heirs of his body. Whitefield v. Garris, 134 N. C. 24, 45 S. E. 904.

Devise to Daughter and Her "Bodily Heirs" Creates Fee-Simple Estate in Daughter.—A devise to testator's daughter and her bodily heirs, and if she dies without bodily heirs, then in trust for the heirs of testator's sisters, is held to create a fee-simple estate in the daughter, defeasible upon her dying without children or issue, it being apparent that the words "bodily heirs" used in the devise meant children or issue, as otherwise the limitation over to the heirs of testator's sisters would be meaningless. Murdock v. Deal, 208 N. C. 754, 182 S. E. 466.

The will in question devised certain lands to testator's son for life "and then to be divided equally among his male heirs, they to share and share alike" and it was held that

even if it be conceded that the words "male heirs" should be construed "heirs" under the provisions of this section, the addition of the words "share and share alike" prevents the application of the rule in Shelley's Case, and upon the death of the son, his sole male heir takes the fee in the property by purchase under the will. Cheshire v. Drewry, 213 N. C. 450, 197 S. E. 1.

An estate in remainder to the testator's son "and to his children or issue, but in case he should die childless and without issue, then . . . to my heirs in equal degree in fee simple," there being no child or children of the son until long after the testator's death, was held to create an estate tail at common law, which is converted into a fee-simple by this section, defeasible upon the testator's son dying without issue, and where there is an ultimate limitation over to persons coming within its terms, the testator's son and his child or issue cannot convey a fee-simple title. Ziegler v. Love, 185 N. C. 40, 115 S. E. 887.

An estate to H. during his life, with remainder to the testator's son "and his bodily heirs," vests a life estate in the land in H., with an estate tail in remainder to the son, which, under our statute, is converted into a fee simple. And upon the falling in of the life estate, the son can convey a good fee-simple title. Chamblee v. Broughton, 120 N. C. 170, 27 S. E. 111; Leathers v. Gray, 101 N. C. 162, 7 S. E. 657, cited and distinguished. Howard v. Edwards, 185 N. C. 604, 116 S. E. 1.

Illustrative Cases.—A devise of lands to the wife of the testator for life, and at her death or remarriage to their two children, by name, for their natural lives for the heirs of their bodies, constitutes an estate tail, converted by this section into a fee simple. Washburn v. Biggerstaff, 195 N. C. 624, 143 S. E. 210.

A deed to a married woman and her heirs by her present husband, with granting clause, habendum and warranty to "parties of the second part, their heirs and assigns," is held to convey to the married woman a fee tail special, which is converted into a fee simple absolute by this section. Whitley v. Arenson, 219 N. C. 121, 12 S. E. (2d) 906.

Cited in Williamson v. Cox, 218 N. C. 177, 10 S. E. (2d) 662.

§ 41-2. Survivorship in joint tenancy abolished; proviso as to partnership.— In all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, or assigns, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common: Provided, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, are vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same is effected, the survivor shall account with, and pay, and deliver to the heirs, executors, administrators and assigns respectively of such deceased partner all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners. (Rev., s. 1579; Code, s. 1326; R. C., c. 43, s. 2; 1784, c. 204, s. 6; C. S. 1735.)

I. General Considerations.
II. Estates of Husband and Wife.
III. Joint Tenancy in Partnership Property.
IV. Actions by, against and between Joint Tenants.

Cross References.

As to executors, administrators, or collectors holding in joint tenancy, see § 28-184. As to survivorship among trustees given power of sale, see § 45-8.

I. GENERAL CONSIDERATIONS.

Editor's Note.—Joint tenancy is a child of the common law, wholly without a statutory basis. It has long been looked upon by the Courts, especially in America, with marked disfavor. As a result of being singled out by the questioning eye of the judiciary, it has fallen easy prey to the Legislative knife. In most of the American States it has been abolished, either wholly or in part, by statutory enactment. The right of survivorship, its chief distinguishing feature, has been the one most disliked by Court and Legislature. This right has been very generally abolished by the statutes, being spared only when the instrument conveying the estate expressly, or by necessary implication, shows that the intention is to create such an estate.

A joint tenancy and a tenancy in common are similar in that in both cases the cotenants hold by unity of possession; but in the case of tenancy in common, the parties hold by separate rights and titles, or by separate rights under a single title, while in joint tenancy the cotenants hold by a single joint right and a single joint title. The difference is the basis of the right of survivorship in a joint tenancy, which, in the absence of a statute abolishing it, is an additional difference.

At common law the right of survivorship differentiated the joint tenancy from the partnership. In the case of the partnership the survivors held in the nature of trustees, until the deceased's interests were placed in the hands of those entitled thereto by law. This section, abolishing survivorship, accomplishes practically the same result in the case of joint tenancy in this state.

In the ancient language of the law joint tenants were said to hold "per my et per tout," the true interpretation of this being that these tenants were seized of the entire realty for the purpose of tenure and survivorship, while for the purpose of immediate alienation, each had only a particular part of the interest.

Scope of Section.—The section abolishes survivorship, where the joint tenancy would otherwise have been created by the law, but does not operate to prohibit persons from entering into written contracts as to land, or verbal agreements as to personalty, such as to make the future rights of the parties depend upon the fact of survivorship. Taylor v. Smith, 116 N. C. 531, 535, 21 S. E. 202; Jones v. Waldroup, 217 N. C. 178, 7 S. E. (2d) 366.

Joint tenancies are not abolished by the section. It abolishes the right of survivorship, only in joint tenancies in fee, but does not affect joint estates for life or estates by entirety. Vass v. Freeman, 56 N. C. 221; Powell v. Allen, 75 N. C. 450; Blair v. Osborne, 84 N. C. 417; Powell v. Morisey, 84 N. C. 421; Burton v. Cahill, 192 N. C. 505, 508, 135 S. E. 332.

Same—Joint Tenants for Life.—In Powell v. Allen, 75 N. C. 450, 452, in construing the act of 1784, now this section, Chief Justice Pearson says: "It is obvious that these words cannot be made to apply to joint tenants for life." Burton v. Cahill, 192 N. C. 505, 508, 135 S. E. 332.

Same—Estates of Inheritance.—Act 1784, converting joint tenancies into estates in common, applies only to estates of inheritance. Blair v. Osborne, 84 N. C. 417; Powell v. Morisey, 84 N. C. 421.

Same—Estates Less than of Inheritance.—If the purpose had been to include all estates in joint tenancy, that purpose would have been better served by abolishing the "jus accrescendi" in a few direct words to that effect, instead of resorting to words applicable only to estates of inheritance held in joint tenancy in real estate, and absolute estates held in joint tenancy in personalty. Powell v. Allen, 75 N. C. 450, 454.

Creation and Existence—Four Unities.—"When two or more acquire land by purchase, as distinguished from descent, and the four unities exist, to-wit: 'time, title, estate and possession,' they take as joint tenants unless there be an express provision that they shall take as tenants in common, and not as joint tenants. In devises, the rule has been further released by allowing such words, 'to take, share and share alike,' or 'to be equally divided between them,' to have the effect of making the devisees take as tenants in common and not as joint tenants, because of an inference from the use of these words that the devisor so intended. 2 Black Com." Powell v. Allen, 75 N. C. 450, 452.

Same—Verbal Agreement.—A verbal agreement between two parties owning a note, payable to them jointly, that upon the death of either without issue it shall belong to the survivor is valid. Taylor v. Smith, 116 N. C. 531, 21 S. E. 202.

Same—Act of Parties.—"The estate of joint tenancy is purely conventional, i. e., created by act of the parties—and never arises by operation of law." 2 Black 180; Mordecai's Law Lectures, vol. 1, 60; Burton v. Cahill, 192 N. C. 505, 507, 135 S. E. 332.

Same—Gift without Explanatory Words.—A deed to five grandchildren, without the use of any restrictive, exclusive,

or explanatory words, conveys an estate for life in joint tenancy. Powell v. Morisey, 84 N. C. 421.

Same—Premises Enlarged by Habendum.—Where in the premises of a deed a life estate is given to a mother alone, and in the habendum the estate is given to her and her children, such deed operates to convey an estate for life to the mother and an estate for life in joint tenancy in remainder to her children. Blair v. Osborne, 84 N. C. 417.

Severance—By Marriage and Act of 1784.—A widow and her two children were joint tenants of a slave. By the marriage of the widow her joint tenancy was severed, as was that between the children, by the act of 1784. (See Rev. Code, ch. 43, § 2, now this section.) And in a suit in trover by one of the children he was allowed to recover only one-third part of the value. Witherington v. Williams, 1 N. C. 89.

Equal Rights to Possession.—Joint tenants of a chattel have equal rights to its possession. Cole v. Terry, 19 N. C. 252; Lucas v. Wasson, 14 N. C. 398.

Same—Division and Sale.—If one joint-owner of a crop sells to the other his share of it to pay a debt, and it is divided in the presence of both, for the purpose of ascertaining the amount to be credited on the debt, there is no trespass in the purchasing partner removing the property, though forbidden by the other. Warbritton v. Savage, 49 N. C. 382.

Same—Same—Title of Purchaser.—If one joint owner of a crop sells to the other his share of it, to pay a debt he owed him, and it is divided in the presence of both, for the purpose of ascertaining the amount to be credited on the debt, the title passes to the purchaser, whether the agreement for the sale was made before or after the division of the crop. Warbritton v. Savage, 49 N. C. 382.

Legatees May Hold as Joint Tenant.—The legatees may still hold by a joint tenancy in North Carolina, though the incident of survivorship was abolished by the Act of 1784, now this section. Vass v. Freeman, 56 N. C. 221, 227.

When Remaindermen Take as Tenants in Common.—A deed of gift, executed by W B to his son J B, "during his natural life only, and then to return to the male children of the said J B, lawfully begotten of his body, for the want of such to return to the male children of my other sons W and B, their proper use, benefit and behoof of him, them and every of them, and to their heirs and assigns forever," vested a life estate in J B, with remainder in fee to his sons as tenants in common under the section. Brown v. Ward, 103 N. C. 173, 9 S. E. 300.

Applied in Powell v. Malone, 22 F. Supp. 300.

II. ESTATES OF HUSBAND AND WIFE.

Conveyance to Husband and Wife.—The section abolishing survivorship, in joint tenancies, does not apply to conveyances to husband and wife. Phillips v. Hodges, 109 N. C. 248, 13 S. E. 769, cited in notes in 30 L. R. A. 328, 329, 1 L. R. A., N. S., 312.

The act of 1784, now this section, abolishing survivorship in joint tenancies does not apply to conveyances to husband and wife, for the reason assigned by Gaston, J., in Motley v. Whitemore, 19 N. C. 537, that "being in law but one person they have each the whole estate as one person; and on the death of either of them the whole estate continues in the survivor." Long v. Barnes, 87 N. C. 329; Phillips v. Hodges, 109 N. C. 248, 250, 13 S. E. 769.

In construing this statute, the Supreme Court held that it had no application to an estate granted to husband and wife, on the ground that it is not an estate in joint tenancy, but an entirety estate. Motley v. Whitemore, 19 N. C. 537; Gray v. Bailey, 117 N. C. 439, 443, 23 S. E. 318.

The right of survivorship applies to estates in land conveyed jointly to husband and wife, and title vests in the heirs of the one surviving the other. Murchison v. Fogleman, 165 N. C. 397, 81 S. E. 627.

Joint Tenancy or Entirety.—Where the husband and wife purchase property, each furnishing a portion of the purchase money, an estate in entirety and not a joint estate is created which they hold per tout et non per my. Ray v. Long, 132 N. C. 891, 44 S. E. 652, cited in note in 9 L. R. A., N. S., 1029.

Same—Creation.—Where, in a conveyance to a husband and wife, it appears that no such estate was intended, but the parties were to take and hold their interests as tenants in common, the intent as expressed in the deed must be allowed to prevail. (Isley v. Sellars, 153 N. C. 374, 69 S. E. 279; Stalcup v. Stalcup, 137 N. C. 305, 49 S. E. 210), * * * and that this intent must be arrived at from a perusal of the entire instrument. Hendricks v. Mocksville Furniture Co., 156 N. C. 569, 72 S. E. 592; Triplett v. Williams, 149 N. C. 394, 63 S. E. 79; Highsmith v. Page, 158 N. C. 226, 229, 73 S. E. 998.

In construing a deed to a husband and wife as a whole, to arrive at its intent, it is held that in a conveyance of land to them, "each a one-half interest," creates a tenancy in common, and the right of survivorship does not apply; and when the wife is dead, the husband remarries and then dies, leaving a widow, the widow is only entitled to dower in the undivided one-half interest in the lands. Eason v. Eason, 159 N. C. 439, 75 S. E. 797.

Same—Not Abolished.—It has been held in several well considered decisions of the Supreme Court that our constitution and the later statutes relative to the property and rights of married women have not thus far destroyed or altered the nature of this estate by entireties, a conveyance to a husband and wife. Jones v. Smith & Co., 149 N. C. 318, 62 S. E. 1092; West v. Railroad, 140 N. C. 620, 53 S. E. 477; Bynum v. Wicker, 141 N. C. 95, 53 S. E. 478; Bruce v. Nicholson, 109 N. C. 202, 13 S. E. 790; Ray v. Long, 132 N. C. 891, 44 S. E. 652; McKinnon, etc., Co. v. Caulk, 167 N. C. 411, 412, 83 S. E. 559.

This estate by entirety is an anomaly, and it is perhaps an oversight that the legislature has not changed it into a cotenancy, as has been done in so many states. This not having been done, it still possesses here the same properties and incidents as at common law. Long v. Barnes, 87 N. C. 329; West v. Railroad, 140 N. C. 620, 53 S. E. 477; Bynum v. Wicker, 141 N. C. 95, 96, 53 S. E. 478.

The estate by entireties was not created, either in England or in this State, by any statute, and it has been contended that it was abolished by our statute in 1784, now this section, converting all joint estates into tenancy in common, and still more so by the constitutional change (Article X, sec. 6), conferring upon a married woman the same rights in her property "as if she had remained single." By reason of similar statutes, or statutes especially repealing the estate by entireties, that anomalous estate has disappeared in all but a very few states in this country, and in them, as above said, there is no case to be found which does not hold that upon a joint judgment against husband and wife the estate by entirety can be sold. Martin v. Lewis, 187 N. C. 473, 476, 122 S. E. 180.

Incidents of Estate by Entireties.—"Where land is conveyed to 'husband and wife jointly, they will take and hold an estate by entireties, and that, on the death of one, the whole belongs to the survivor.'" Morton v. Blades Lumber Co., 154 N. C. 278, 70 S. E. 467; Hood v. Mercer, 150 N. C. 699, 64 S. E. 897; Jones v. Smith & Co., 149 N. C. 318, 62 S. E. 1092; West v. Railroad, 140 N. C. 620, 53 S. E. 477. Highsmith v. Page, 158 N. C. 226, 228, 73 S. E. 998.

Where a conveyance of land is made to husband and wife, they do not take interests, either as joint tenants or tenants in common, but they take estates in fee by entireties, and not by moieties. The husband can not, by his own conveyance, divest the wife's estate, and, on her surviving him. she is entitled to the whole estate. Needham v. Branson, 27 N. C. 426.

A conveyance to a husband and wife, as such, creates an estate of entirety, and does not make them joint tenants or tenants in common. Neither can alien without the consent of the other, and the survivor takes the whole. Needham v. Branson, 27 N. C. 426; Todd v. Zachary, 45 N. C. 286, cited in note to 30 L. R. A. 324; Woodford v. Highly, 60 N. C. 234; Long v. Barnes, 87 N. C. 329.

III. JOINT TENANCY IN PARTNERSHIP PROPERTY.

Joint Tenancy of Partnership in Land.—This section provides that land jointly purchased for partnership purposes shall, upon the death of one partner, survive the others for the purpose of paying the partnership debts. And when the partnership debts are satisfied, if there is any remainder, such share as would have fallen to the deceased partner, shall be delivered over to the heirs, executors, administrators or assigns; and real estate held and sued for partnership purposes is subject to partnership debts, to the exclusion of the heir or widow of the deceased. Stroud v. Stroud, 61 N. C. 525, 526.

Upon Settlement Descends as Real Estate.—Where land is purchased in fee by partnership funds and for partnership purposes, and one partner dies, upon the settlement of the partnership debts his share of the land descends to his heir as real estate. Summey v. Patton, 60 N. C. 601.

When lands are purchased by a partnership with partnership funds, upon the death of one of the partners, in the absence of any agreement in the articles of partnership to the contrary, his share therein descends to his heir at law as real estate, if the personal property of the partnership is sufficient to pay all the partnership debts and demands. Sherrod v. Mayo, 156 N. C. 144, 72 S. E. 216.

Same—Immaterial Whether Claim Is by Deed or Inheritance.—When the rule applies that lands purchased by part-

nership funds descend to the heir at law, it is immaterial whether the heir of the deceased partner claims his interest by deed from him or by inheritance. Sherrod v. Mayo, 156 N. C. 144, 72 S. E. 216.

Same—Heir Claiming by Deed.—The heir at law to whom a deceased partner had conveyed by deed his share of lands purchased with partnership funds is entitled to the lands against the rights of the surviving partner, in an action by the latter for possession for the purpose of winding up the partnership affairs, when it appears that the partnership personalty is sufficient for the purpose of paying the partnership debts and satisfying any claim the surviving partner may have, and there is no provision in the articles of the partnership agreement of a contrary purpose. Sherrod v. Mayo, 156 N. C. 144, 72 S. E. 216.

IV. ACTIONS BY, AGAINST, AND BETWEEN JOINT TENANTS.

Actions by and against Joint Tenants.—It seems to be well settled that joint tenants must sue jointly, differing in that respect from tenants in common. Mr. Freeman says: "Whenever the title of the cotenants, as in the case of joint tenancy and coparcenary, is joint, the action must also be joint, and whenever, as in tenancy in common, such tenant is deemed to possess a separate and distinct estate, the remedy of each must be separately and distinctly pursued. Joint tenants being seized per my et per tout and deriving but one and the same title, must jointly interplead and be interpleaded. If twenty joint tenants be, and they be disseized, they shall have, in all their names, but one assize, because they have but one joint title." Cotenancy, 329. To the same effect is Sedgwick and Wait Trials, etc., sec. 302. Cameron v. Hicks, 141 N. C. 21, 34, 53 S. E. 728.

"It was at one time held in this State that two tenants in common could not join in one demise, because there was no unity of title—one might recover and the other fail. It was afterwards held, for the reason set out by Ruffin, J., in Hoyle v. Stowe, 13 N. C. 318, that they could join in one demise. He says: 'It is the universal rule that the title must be truly stated in the declaration. A joint demise, therefore, can only be supported by showing a title in each to demise the whole. If one of the lessors has no title, the plaintiff must fail.' He says that this is 'common learning.' An examination of the opinion shows the ground upon which tenants in common are permitted to make a joint demise and recover in respect to their interests. Allred v. Smith, 135 N. C. 443, 47 S. E. 597. The difference is in this: Joint tenants must join in one demise because of the essential unities; tenants in common may join, or, if they prefer, may sue separately, because there is no unity of title. It would seem to follow that joint tenants must recover in respect to their title, and if they fail in that, they cannot recover at all." Cameron v. Hicks, 141 N. C. 21, 35, 53 S. E. 728.

Actions between Joint Tenants—Trover.—The exclusive possession of a chattel by one joint tenant will not entitle the other to maintain trover against him for it. Cole v. Terry, 19 N. C. 252.

A person claiming under a joint tenancy, which was severed, can recover only his proper proportion. Witherington v. Williams, 1 N. C. 89.

§ 41-3. Survivorship among trustees. — In all cases where only a naked trust not coupled with a beneficial interest has been created or exists, or shall be created, and the conveyance is to two or more trustees, the right to perform the trust and make estates under the same shall be exercised by any one of such trustees, in the event of the death of his cotrustee or cotrustees or the refusal or inability of the cotrustee or cotrustees to perform the trust; and in cases of trusts herein named the trustees shall hold as joint tenants, and in all respects as joint tenants held before the year one thousand seven hundred and eighty-four. (Rev., s. 1580; 1885, c. 327, s. 1; C. S. 1736.)

Cross References.—As to survivorship among trustees with power of sale, see § 45-8. As to limitation on actions by cotenants of personal property, see § 1-29.

The trustees of a trust estate hold as joint tenants, and not as tenants in common. Cameron v. Hicks, 141 N. C. 21, 53 S. E. 728; Webb v. Borden, 145 N. C. 188, 58 S. E. 1083.

Loss of Right to Trustee Is Loss to Cestui Que Trust.—When the right of entry is barred and the right of action lost by the trustee, through an adverse occupation, the cestui que trust is also concluded from asserting claim to the land. Cameron v. Hicks, 141 N. C. 21, 53 S. E. 728.

Cotrustee Barred.—When a trustee is barred the cotrustees are likewise barred. Cameron v. Hicks, 141 N. C. 21, 53 S. E. 728.

§ 41-4. Limitations on failure of issue.—Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: Provided, that the rule of construction contained in this section shall not extend to any deed or will made and executed before the fifteenth of January, one thousand eight hundred and twenty-eight. (Rev., s. 1581; Code, s. 1327; R. C., c. 43, s. 3; 1827, c. 7; C. S. 1737.)

Purpose.—This section was enacted for the primary purpose of making contingent limitations good by fixing a definite time when the estate of the first taker shall become absolute, and also to establish a rule of interpretation by which the estate of the first taker shall be affected with the contingency till the time of his death unless a contrary intent appears on the face of the instrument. Kirkman v. Smith, 174 N. C. 603, 94 S. E. 423; Harrell v. Hagan, 147 N. C. 111, 60 S. E. 909; Sain v. Baker, 128 N. C. 256, 138 S. E. 858; Bell v. Kessler, 175 N. C. 525, 528, 95 S. E. 881.

Provision Is Obligatory.—The rule laid down by the statute is obligatory on the courts and must be observed in all cases except, as provided by the statute, when a contrary intent is "expressly and plainly declared in the face of the deed or will." Patterson v. McCormick, 177 N. C. 448, 452, 99 S. E. 401.

Does Not Interfere with Rule in Shelley's Case.—The section does not interfere with the application of the principle laid down in Shelley's Case in determining the nature and extent of the precedent estate. This is declared in Sanderlin v. Deford, 47 N. C. 75, in construing a will executed in 1838. King v. Utley, 85 N. C. 59, 61. See under analysis line II, "Rule in Shelley's Case": section 41-1.

Provisions of Section Prevail over Rule of Stare Decisis.—A vested interest in lands cannot be established under the doctrine of stare decisis in direct conflict with the expressions of a statutory change of the rule to the contrary, nor where the decisions relied upon are upon a construction of a written instrument made or executed before the statutory enactment and excepted by it from its provisions, and the subsequent decisions of affirmance of the old rule of construction are either conflicting among themselves or upon prior executed instruments excepted by the statute, or without express reference thereto; and this section, changing the rule of construction as to the vesting of an interest contingent upon a death with issue, cannot be affected by the rule laid down in Hilliard v. Kearney, 45 N. C. 221, and subsequent decisions on the subject. Patterson v. McCormick, 177 N. C. 448, 99 S. E. 401.

Common Law Rule Superseded.—Where there was a devise of lands for life, then to J. and C. equally, and in case "they or either of them die without issue," then to the heirs of certain others and the survivor of J. and C. equally, it was held, the common-law doctrine that a limitation contingent upon death and an indefinite failure of issue is void for remoteness, gives place to the new rule of construction enacted by our statute, Rev., sec. 1581, now this section, made applicable since 15 January, 1828, without restriction as to immediate estates, and a contrary intent, not expressly and plainly declared in the face of the instrument, presently construed, the death without issue refers to the death of J. and C.; and it appearing that J. died without issue after the death of the first taker, and C. survives, with issue, the absolute fee-simple title to the lands is in C. and the other ulterior remaindermen, and their deed, otherwise sufficient, is valid. Patterson v. McCormick, 177 N. C. 448, 99 S. E. 401.

Rule in Hilliard v. Kearney.—Under the rule at common law a limitation contingent upon death without issue was void for remoteness because it referred to an indefinite failure of issue; and in order to give effect to the testator's intention the courts began to look for some intermediate time, such as the termination of the life estate, or some other designated period, and held that the phrase "dying without issue" was to be referred to this intermediate period. Hilliard v. Kearney, 45 N. C. 221; American Yarn, etc., Co. v. Dewstoe, 192 N. C. 121, 124, 133 S. E. 407.

Same—Changed.—This principle was entirely changed by the act of 1827, which is now this section. American Yarn, etc., Co. v. Dewstoe, 192 N. C. 121, 124, 133 S. E. 407.

In the following cases the court had under consideration the construction of a limitation in a will executed since 15 January, 1828, and which therefore came under the act of 1827, now this section; in each of these cases the court expressly referred to the Act of 1827 and construed the limitation in accordance with the plain words of that act and not according to the rule stated in Hilliard v. Kearney, 45 N. C. 221: Clapp v. Fogleman, 21 N. C. 467; Tillman v. Sinclair, 23 N. C. 183; Moore v. Barrow, 24 N. C. 436; Garland v. Watt, 26 N. C. 287; Jones v. Oliver, 38 N. C. 369, 370; Weeks v. Weeks, 40 N. C. 111, 115; Spruill v. Moore, 40 N. C. 284; Holton v. McAllister, 51 N. C. 12. Patterson v. McCormick, 177 N. C. 448, 453, 99 S. E. 401.

To those cases cited in Patterson v. McCormick may be added Love v. Love, 179 N. C. 115, 101 S. E. 562; Willis v. Mutual Loan, etc., Co., 183 N. C. 267, 111 S. E. 163; Vinson v. Gardner, 185 N. C. 193, 116 S. E. 412; Alexander v. Fleming, 190 N. C. 815, 130 S. E. 867; American Yarn, etc., Co. v. Dewstoe, 192 N. C. 121, 125, 133 S. E. 407.

Dying without Heirs Or Issue Construed.—The section has been construed by the Supreme Court at least twenty-six times, and in every case in which it has come before the court for construction it has uniformly been held that "Dying without heirs or issue," upon which a limitation over takes effect, is referable to the death of the first taker of the fee without issue living at the time of his death, and not to the death of any other person or to any intermediate period. See Patterson v. McCormick, 177 N. C. 448, 455, 99 S. E. 401, which lists the twenty-six decisions supporting the same holding.

As was said by Mr. Justice Hoke in Harrell v. Hagan, 147 N. C. 111, 113, 60 S. E. 909, 125 Am. St. Rep. 539, "the event by which the interest of each is to be determined must be referred, not to the death of the devisor, but to that of the several takers of the estate in remainder, respectively, without leaving a lawful heir." Williams v. Lewis, 100 N. C. 142, 5 S. E. 435.

Where a contingent limitation over is made to depend upon the death of the first taker without children or issue, the limitation takes effect when the first taker dies without issue or children living at the time of his death. Williamson v. Cox, 218 N. C. 177, 10 S. E. (2d) 662.

Same—Dependent upon Death of Donee without Issue.—A contingent remainder dependent upon the death of a certain donee without issue means, under the terms of this section without issue living at the time of death. Lee v. Oates, 171 N. C. 717, 88 S. E. 889.

Devise to One for Life with Limitation over.—As a general rule where a devise is made to one for life and after his death to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator and not those who answer the description at the death of the first taker. Jenkins v. Lambeth, 172 N. C. 466, 90 S. E. 513; Goode v. Hearne, 180 N. C. 475, 105 S. E. 5; Witty v. Witty, 184 N. C. 375, 114 S. E. 482; Dupree v. Daughtridge, 188 N. C. 193, 124 S. E. 148. It is otherwise, however, where it appears from the terms of the will that some intervening time is indicated. Citizens Bank v. Murray, 175 N. C. 62, 94 S. E. 665; American Yarn, etc., Co. v. Dewstoe, 192 N. C. 121, 124, 133 S. E. 407.

"Ordinarily a devise to the survivors of a class will take effect at the testator's death, but not if a particular estate is created and the remainder is given to those who survive the life tenant. Mercer v. Downs, 191 N. C. 203, 131 S. E. 575." American Yarn, etc., Co. v. Dewstoe, 192 N. C. 121, 124, 133 S. E. 407.

Intervening Life Estate.—The more recent cases where there were intervening life estates, in which the Supreme Court has held that the statute applies, are as follows: Cowand v. Meyers, 99 N. C. 198, 199, 6 S. E. 82; Dunning v. Burden, 114 N. C. 33, 34, 18 S. E. 969; Kornegay v. Morris, 122 N. C. 199, 29 S. E. 875; Harrell v. Hagan, 147 N. C. 111, 60 S. E. 909; Dawson v. Ennett, 151 N. C. 543, 544, 66 S. E. 566; Perrett v. Bird, 152 N. C. 220, 67 S. E. 507; Elkins v. Seigler, 154 N. C. 374, 70 S. E. 636; Hobgood v. Hobgood, 169 N. C. 485, 486, 86 S. E. 189; Vinson v. Wise, 159 N. C. 653, 75 S. E. 732; Whichard v. Craft, 175 N. C. 128, 95 S. E. 94; Kirkman v. Smith, 175 N. C. 579, 96 S. E. 51. The case of Vinson v. Wise construed the will of the late Chief Justice Smith, in which there were two intervening life estates, notwithstanding which the court held that:

"Under numerous decisions of the Court in a devise of this character, and unless a contrary intent appears from the will, the event by which the estate must be determined will be referred not to the death of the devisor, but the holder of the particular estate itself, and the determinable quality of such an estate, or interest, will continue to affect it till 'the event occurs by which same is to be determined, or the estate becomes absolute.'" Patterson v. McCormick, 177 N. C. 448, 456, 99 S. E. 401.

Rule When Ambiguity in Will.—Where there is ambiguity in a will as to whether the vesting of an estate devised for life with contigent limitation over, shall be at the death of the testatrix or that of the first taker, under the principle that the law favors the early vesting of estates, the former will be taken; and where it clearly appears from the terms of the will and surrounding circumstances that was the intent of the testatrix, it will not be affected by the section, by which a contingent limitation depending upon the dying of a person without heir, etc., is to vest at the death of such person. Westfeldt v. Reynolds, 191 N. C. 802, 133 S. E. 168.

Doctrine of Shifting Uses and Executory Devises.—The section is a rule of construction upholding the second and contingent estate upon the death of the first taker without heirs, etc., and does not change the application of the doctrine of shifting uses and executory devises in determining the nature and extent of the precedent estate. Sessoms v. Sessoms, 144 N. C. 121, 56 S. E. 687.

Same—Estate Created Direct to Second Taker.—When by the operation of the statute a fee tail is converted into a fee simple, with a limitation of a fee upon the death of the first taker without heirs, a separate estate is created direct from the testator to the second taker upon the happening of the contingency, under the doctrine of shifting uses and by way of executory devise, and is not a qualification of the estate of the first taker, or too remote since the enactment of the section. Sessoms v. Sessoms, 144 N. C. 121, 56 S. E. 687.

"Children" Does Not Extend to Grandchildren.—A devise to the "wife and children" of the testator will not include therein his grandchildren, unless the contrary intent is shown by necessary implication from the terms or expressions used in the will. Thompson v. Batts, 168 N. C. 530, 84 S. E. 858.

A Base and Unqualified Fee.—O. devised his lands to certain of his children S., D., and J. By item 3 of the will a certain tract was devised to D. and "the lawful heirs of his body lawfully begotten"; by item 9 it was provided that in case of death of either of the children, his portion should revert to the surviving one, with further contingent limitations. It was held, that these items should be construed together, and that the estate devised to D. was not in fee simple, but a base and qualified fee, defeasible on the death of D. without leaving living lineal descendants. Perrett v. Bird, 152 N. C. 220, 67 S. E. 507.

Illustrative Cases.—An estate to M. and her bodily heirs is converted into a fee simple under our statute, § 41-1, without further limitation, but followed by the words "if no heirs, said lands shall go back to my estate," the estate will go over to the heirs of the grantor at the death of M., upon the nonhappening of the event as a shifting use under the statute of uses, 27 Henry VIII, ch. 10; § 41-7, whereunder a fee may be limited after a fee, by deed, and under the provisions of this section that every contingent limitation in a deed or will made to depend upon the dying of any person without heir or heirs of the body, or issue, shall be held to be a limitation to take effect when such person dies not having such heir, or issue, or child living at the time of his death. Willis v. Mutual Loan, etc., Co., 183 N. C. 267, 111 S. E. 163.

When a testator devises land to his son with a limitation over to his daughters, provided the son dies without heirs, the son dying without children, cannot by will give his wife a life estate with the remainder to a third party. Sain v. Baker, 128 N. C. 256, 38 S. E. 858.

A devise of lands to B. in fee, "provided he has a child or children; but if he has no child, then to him for life," with limitation over to the testator's heirs at law, carries to the devisee a fee-simple estate, defeasible upon his death without having had a child, the contingent event by which the estate is determined referring to the death of the devisee and holder of the prior estate unless a contrary intent clearly appears from the will itself; and upon his death and nonhappening of the contingency named, the inheritance passes di-

rectly from the testator to the ultimate devisees. Burden v. Lipsitz, 166 N. C. 523, 82 S. E. 863.

A devise of land to L. with limitation that if she "shall die leaving issue surviving her, then to such issue and their heirs forever," but if she "die without issue surviving her, then the property to return to my eldest daughter," the vesting of the estate in remainder depends upon the contingency of the death of L. without leaving "issue" surviving her, and not upon the death of the testatrix. Rees v. Williams, 164 N. C. 128, 80 S. E. 247.

On devise of an estate to M. for life, then to G. and K., and if they should die without bodily heirs, then over, the creation and existence of the life estate, without more, does not, of itself, affect the statutory rule of construction as to estates in remainder, and the contingency affecting such estates will continue to affect the same till the death of the first takers in remainder. Kirkman v. Smith, 175 N. C. 579, 96 S. E. 51.

Same.—Where an estate is granted to M., and the heirs of her body in the premises, with warranty to her and the heirs of her body, it was held, that the intent of the grantor by proper construction was to limit over the estate to M. in case she should die without issue or bodily heirs. Willis v. Mutual Loan, etc., Co., 183 N. C. 267, 111 S. E. 163.

Same.—An estate to testator's daughter N. for life, and to the lawful heirs of her body, creates an estate tail converted by our statute into a fee simple; and a further limitation "and if she should die leaving no heirs, then the lands to return to the G. family," gives N. a fee defeasible upon her death without issue, children, etc., under this section and on her death, leaving children surviving, they take an unconditional fee, and can make an absolute conveyance thereof. Vinson v. Gardner, 185 N. C. 193, 116 S. E. 412.

Where father devised the land in question to plaintiff "to be hers and to her heirs, if any, and if no heirs, to be equally divided with my other children," and at the time plaintiff executed deed to defendant, which was refused by him, plaintiff was married, but had been abandoned by her husband, and had no children, it was held that the plaintiff's deed did not convey the indefeasible fee to the land free and clear of the claims of all persons, whether the limitation over be regarded as a limitation over on failure of issue, or as not coming within the rule in Shelley's case. Hudson v. Hudson, 208 N. C. 338, 180 S. E. 597.

Cases Where Wills Executed before 1828.—In the following cases the wills were executed before 15 January, 1828, but the Court, in delivering the opinions, adverts to the Act of 1827, and states that the law since the will was executed had been materially changed and that the construction of the limitation would be different under the act. Rice v. Satterwhite, 21 N. C. 69, opinion by Gaston, J.; Brown v. Brown, 25 N. C. 131, opinion by Ruffin, C. J.; Gibson v. Gibson, 49 N. C. 425, opinion by Battle, J. This last case was decided in 1857. Patterson v. McCormick, 177 N. C. 448, 453, 99 S. E. 401.

Cited in West v Murphy, 197 N. C. 488, 149 S. E. 731; Rigsbee v. Rigsbee, 215 N. C. 757, 3 S. E. (2d) 331; Perry v. Bassenger, 219 N. C. 838, 15 S. E. (2d) 365.

§ 41-5. Unborn infant may take by deed or writing.—An infant unborn, but in esse, shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born. (Rev., s. 1582; Code, s. 1328; R. C., c. 43, s. 4; C. S. 1738.)

When Applicable.—In 13 Cyc., page 663, it is declared: "Where property is conveyed to a certain person and his children it has been determined that no title will pass to after-born children. But where a deed creates an estate for life with remainder over to the children, the remainder will vest in children already born, subject to be opened at the birth of each succeeding child." See, also, Adams v. Ross, 30 N. J. L. 505; Coursey v. Davis, 46 Pa. St. 25, to the same effect. Quoted with approval in Powell v. Powell, 168 N. C. 561, 563, 84 S. E. 860.

Under a deed to a woman "and her children" a child en ventre sa mere at the date of the conveyance will take, but children born more than a year thereafter will not. Heath v. Heath, 114 N. C. 547, 19 S. E. 155.

Remainder after Freehold Conveyed — Children Not in Esse. — Where there is a deed to lands to an unmarried grantee for life, with remainder to his children, not then in esse, the first taker holds the legal title until the birth of children after his marriage, at which time such estate becomes vested, such remainder being contingent until the birth of a child during the existence of the freehold estate, and then vests in such child or children who would then take and hold the interest. Johnson Bros. v. Lee, 187 N. C. 753, 122 S. E. 839.

Takes as Tenant in Common.—By virtue of this section a child if en ventre sa mere at the time the deed is executed takes as tenant in common with the living children. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201, 202.

Grant Directly to Children of Living Person.—A grant of land directly to the children of a living person conveys the title only to those who are alive at the time of the execution of the deed, including a child then en ventre sa mere. Powell v. Powell, 168 N. C. 561, 84 S. E. 860.

Life Estate to Parent with Limitation Over.—Where there is a reservation of a life estate in the parent or another, with limitation over to the children and all the children who are alive at the termination of the first estate, whether born before or after the execution of the deed, take thereunder. Powell v. Powell, 168 N. C. 561, 84 S. E. 860.

§ 41-6. "Heirs" construed "children" in certain limitations.—A limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will. (Rev., s. 1583; Code, s. 1329; R. C., c. 43, s. 5; C. S. 1739.)

Editor's Note.—In many of the cases dealing with estates the rule in Shelley's Case is referred to and the question is raised as to whether or not the rule is abrogated by this section, and answered in the negative in the splendid opinion of Shepherd, C. J., in Starnes v. Hill, 112 N. C. 1, 16 S. E. 1011. For the purpose of showing the relation of the rule to this section, it will be fitting to give a brief resume of the rule.

The rule takes its name from an early case decided in the reign of Queen Elizabeth (Shelley's Case, 1 Rep. 94), though even at that time the principle it enunciated was looked upon as an ancient dogma of the common law. Indeed Justice Blackstone traced it to a case decided in the reign of Edward II. However, be that as it may, what is probably the earliest intelligible decision on the subject is the case of the Provost of Beverly, in the time of Edward III., and reported in the Year Books. Numerous theories have been suggested as furnishing a reason for the rule in the first instance, some respectable authorities with a show of much plausability tracing it to the same principle which applied originally to "heirs" when used in a conveyance. "It was at first understood that, in case of such a limitation, the estate was in fact to go to the heirs of the grantee named; that though he had a right to enjoy it during life, he had no right to cut off the descent by alienation, and that when, therefore, the word heirs in the progress of estates came to be regarded as a mere term of limitation, giving the grantee a complete ownership with an unrestricted right of alienation, it was not easy to distinguish between a case where the limitation was to one and his heirs, and that where it was to him for life, and after his death to his heirs, the effect at common law being the same in both forms of limitation." 2 Wash. Real Prop., 647; Williams Real Prop., 254.

Nor does it seem that this result worked any particular hardship to the heir, as in those days ready money was extremely scarce and the alienation of lands assumed the form of perpetual lease, granted in consideration of certain services or rents reserved to the grantor and his heirs, and, as such services or rents descended to the heir, it was not so great a disadvantage to him as at first might be supposed. Williams Real Prop., 39.

It is not to be doubted that this construction was aided and greatly strengthened by other considerations such as the prevention of frauds upon feudal lords and specially creditors (2 Fearne, ch. 12, sec. 3), the prevention of the inheritance from being, as was supposed, in abeyance (Justice Blackstone's argument in Perrin v. Blake, 1 Ex. Chamber, 4 Burr., 2,579), and to preserve the marked distinction between title by descent and purchase. Hargrave Law Tracts. "But whatever may have been the grounds of the rule in its origin, another reason subsequently existed as an inducement to the preservation of the rule from legislative abolition and judicial discouragements, after the feudal reason had ceased with the feudal system itself, and that subsequent reason is the desire to faciliate alienation by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease." 2 Fearne, sec. 421.

In Perrin v. Blake, 1 Ex. Chamber, 4 Burr., 2,579, Justice Blackstone said: "Another foundation of the rule probably was laid in a principle diametrically opposite to the genius of feudal institutions, namely, a desire to facilitate the alien-

ation of land, and to show it into the track of commerce one generation sooner by vesting the inheritance in the ancestor." See, also, Rawle's Note, Williams Real Prop., 253.

In Polk v. Faris, 30 Am. Dec., 400, Reese, J., in a very able opinion in vindication of the rule, uses this language: "It is a rule or canon of property, which, so far from being at war with the genius of our institutions or with the liberal and commercial spirit of the age, which alike abhor the locking up and rendering inalienable real estate and other property, seems to be in perfect harmony with both. It is owing, perhaps, to this circumstance that the rule, a gothic column, found among the remains of feudality, has been preserved in all its strength to aid in sustaining the fabric of the modern social system." In Hillman v. Bauslaugh, 53 Am. Dec. 474, the distinguished Chief Justice Gibson says: "Though of feudal origin, it is not a relic of barbarism, or a part of the rubbish of the dark ages. * * * It has other than feudal objects, to wit, the unfettering of estates, by vesting the inheritance in the ancestor and making it alienable a generation sooner than it otherwise would be."

That this result accords most thoroughly with the general tendency of judicial evolution is apparent from the progress of the law and the gradual falling away of entails and other restraints on alienation from the times of Henry I to the present. It seems clear that in a highly complex state of society, with greatly diversified industries and immense commercial activities, it would be desirable to remove every clog on the free and easy alienability of all kinds of property, and that such has been the spirit of the legislation in this State is manifest from a perusal of the various statutes enacted upon the subject. Starnes v. Hill, 112 N. C. 1, 2, 15, 16 S. E. 1011.

The existence of this ancient rule has for many years been unquestionably recognized in the courts of this State as one of the "ligaments of property," the only doubt upon the subject having been suggested by dicta in a few cases. This section seems clearly not to abolish the rule. It would seem to be the opinion of many of the ablest law writers that the said rule is not abolished. Thus Mr. Washburn, in the fourth edition of his work on Real Property (Vol. 2, 607), undertakes to give a list of the states with reference to the acts which have abolished the rule, and he does not include North Carolina, although he was familiar with our act, as is shown by a reference to section 3, chapter 43, of the Revised Code. The same observation applies to Mr. Rawle, the learned editor of Williams on Real Property. He also gives a list of the states which have abolished the rule, without including North Carolina. The same may be said of Mr. Freeman, the very able and discriminating editor of the American Decisions, in a note to 30 Am. Dec., 415, and also of the editors of Jarman on Wills and Lawson R. & R.

It seems that the main object of the section is to convert a contingent into a vested remainder under certain circumstances. It seems also to have been the purpose of the act to sustain a direct conveyance to the heirs of a living person. As there can be no heirs during the life of the ancestor, such a conveyance at common law would have been void unless there was something in the deed which indicated "that by 'the heirs' was meant the children of the person named." 3 Washburn Real Prop., 282. The act in question provides that in such a case the word "heirs" shall be construed to mean "children" and the limitation therefore would be good. By this construction of the section it does not affect the rule in Shelley's case. Starnes v. Hill, 112 N. C. 1, 2, 23, 16 S. E. 1011; Hartman v. Flynn, 189 N. C. 452, 127 S. E. 517.

For further discussion of the rule, see the Editor's note to sec. 41-1.

Common-Law Rule Changed.—While as a general common-law rule, subject to some exceptions, a conveyance of an estate for life in lands to another, with remainder to the heirs of the grantor, could not divest the grantor of the fee, under the rule that nemo est haeres viventis, this does not prevail under the provisions of this section. Thompson v. Batts, 168 N. C. 333, 84 S. E. 347.

Same—Construed to Be Limitation.—A deed to "the heirs" of John A. Barrett, he being still alive, although void at common law, is good under the section, and is construed to be a limitation to the children of John A. Barrett, and includes after-born children. Graves v. Barrett, 126 N. C. 267, 35 S. E. 539.

Limitation Explained.—The word limitation has two-fold meaning. To quote the language of Mr. Fearne: "Great confusion has frequently arisen from not observing that the word limitation is used in two different senses; the one of which may, for the sake of convenience of distinction, be termed the original sense; namely, that of a member of a sentence, expressing the limits or bounds to the quantity of an estate; and the other, the derivative sense; namely, that of an entire sentence, creating and actually or constructively marking out the quantity of an estate." 2 Fearne on Remainders (4 Am. Ed.), sec. 24, marg. page 10. In our statute, the word is manifestly used in its derivative or secondary sense, which is made very clear to us by the learned, able and elaborate opinion of Chief Justice Shepherd in the leading case of Starnes v. Hill, 112 N. C. 1, 16 S. E. 1011; Campbell v. Everhart, 139 N. C. 503, 510, 52 S. E. 201.

This section would not apply when the limitation is to a living person and his heirs. Whitley v. Arenson, 219 N. C. 121, 12 S. E. (2d) 906.

Same—Applies Only When No Precedent Estate.—The Code of 1883, sec. 1329, now this section, providing that a limitation to the heirs of a living person shall be construed to be the children of such person, applies only when there is no precedent estate conveyed to said living person. Jones v. Ragsdale, 141 N. C. 200, 53 S. E. 842; Whitley v. Arenson, 219 N. C. 121, 12 S. E. (2d) 906.

If it were not true that the section applies only when there is no precedent estate conveyed to said living person, it would not only repeal the rule in Shelley's case, but would pervert every conveyance to "A and his heirs" into something entirely different from what those words have always been understood to mean. Marsh v. Griffin, 136 N. C. 333, 334, 48 S. E. 735.

This section applies only when there is "no precedent estate conveyed to said living person," nor is this section applicable "where there is a conveyance to a living person, with a limitation to his heirs." Bank of Pilot Mountain v. Snow, 221 N. C. 14, 16, 18 S. E. (2d) 711.

When Not Applicable—Intent.—Where a devise of lands is limited over should the first taker die without heirs, evidencing that the intent of the testator made the contingency to depend upon his dying without issue, this section has no application. Massengill v. Abell, 192 N. C. 240, 134 S. E. 641.

A devise to the "heirs" of a person will be construed to be his "children" in the absence of a contrary intention expressed in the instrument. Moseley v. Knott, 212 N. C. 651, 194 S. E. 100.

Conveyance Directly to Heirs of Living Person.—By virtue of the section a deed conveying land directly to the "heirs" of a living person, passes whatever title the grantor had to the children of such person. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201.

Limitation to Heirs of Living Person.—A limitation to the heirs of a living person, if no contrary intention appear in the deed or will, will be construed to be to the children of such person. Massengill v. Abell, 192 N. C. 240, 242, 134 S. E. 641.

An estate granted to D. for life and then to the heirs of S., who was then alive, is operative as to the conveyance of the remainder under Revisal, sec. 1583, now this section, which construes the word "heirs" to mean children, in such instances. Condor v. Secrest, 149 N. C. 201, 62 S. E. 921.

Lawfully Begotten Heirs of the Body.—In Lockman v. Hobbs, 98 N. C. 541, 544, 4 S. E. 627, it was held "that the lawfully begotten heirs of her body" in a will referred most obviously to the children of the devisee for life, of whom there were only two, and was construed to mean "the children of such person" since contrary intention did not appear from the will.

Bodily Heirs.—"The words 'bodily heirs' have the same meaning as 'heirs of the body,' and are words of limitation and not words of purchase." Marsh v. Griffin, 136 N. C. 333, 335, 48 S. E. 735.

Child Born during Life of Life Tenant.—A devise of lands to the widow of the testator for life, then to the heirs of his son J., and it appears that the son was living at the time and had living children at the death of the testator and one born thereafter, during the continuance of the life estate; it was held that the devise, being to the heirs of a living person, conveyed such interest to the children of the person designated, and being, in terms, to a class, it will include all who are members of the class and fill the description at the time the particular estate terminated, and therefore the child born after the death of the testator, but during the lifetime of the tenant for life, takes his share with the other children of J. Cooley v. Lee, 170 N. C. 18, 86 S. E. 720.

Devise to One with Conditional Limitation over.—Where a testator devises land to his son with a limitation over to his daughters, provided the son dies without heirs. the word "heirs" is construed to mean "children." Sain v Baker, 128 N. C. 256, 38 S. E. 858.

A conveyance of land in contemplation of marriage, to M., "to descend to the heirs of the body of the said M. in fee simple, the issue of such marriage, and on failure of

issue to revert to the heirs of" the grantor, the "reverter" to his heirs, under the section meant to his children after the death of his wife and the nonhappening of the stated contingency. Thompson v. Batts, 168 N. C. 333, 84 S. E. 347.

Limitation to Heirs of One with Conditional Limitation over.—Where an estate was devised to A "and the heirs of his body, but if he die without heirs living at the time of his death, then to the heirs of B," "heirs" was construed to mean children. Smith v. Brisson, 90 N. C. 284.

Devise to "Heirs of His Children."—By his will, the testator devised the vacant lot to the trustees for twenty years from the date of his death, and at the expiration of such term to the "heirs of his children, to be equally divided between them, per stirpes." The testator left surviving two children, a son and a daughter, both of whom had children living at the date of testator's death. The son and daughter are now living. Under this section the word "heirs," used in item 11 of the will, must be construed to mean "children." Lide v. Wells, 190 N. C. 37, 128 S. E. 477, 480.

Application.—Where a testator, by separate devises, gives to each of his three daughters, who are his only heirs at law, a certain tract of his land, with provision in each item, "to her and the lawful heirs of her body in fee simple forever, and if she should die without a lawful heir of her body, then the property to go to the other surviving heirs," by the expression, "lawful heirs of her body," in the connection used, the testator intended "child" of his daughters. Kornegay v. Cunningham, 174 N. C. 209, 93 S. E. 754.

Where a testator devises land to his son with a limitation over to his daughters, provided the son dies without heirs, the word "heirs" is construed to mean "children." Sain v. Baker, 128 N. C. 256, 38 S. E. 858.

Same—When Children Illegitimates.—Where a bequest is immediate—not dependent upon a preceding limited estate—to the heirs of a living person, and the children of such person are illegitimate, they have the right to take under the section which declares that a limitation to the "heirs" shall be construed to be the "children" of such person, unless a contrary intention appears. Howell v. Tyler, 91 N. C. 207, 208.

Cited in Williamson v. Cox, 218 N. C. 177, 10 S. E. (2d) 662.

§ 41-7. Possession transferred to use in certain conveyances.—By deed of bargain and sale, or by deeds of lease and release, or by covenant to stand seized to use, or deed operating by way of covenant to stand seized to use, or otherwise, by any manner or means whatsoever it be, the possession of the bargainor, releasor, or covenanter shall be deemed to be transferred to the bargainee, releasee, or person entitled to the use, for the estate or interest which such person shall have in the use, as perfectly as if the bargainee, releasee or person entitled to the use had been enfeoffed at common law with livery of seizin of the land intended to be conveyed by such deed or covenant. (Rev., s. 1584; Code, s. 1330; R. C., c. 43, s. 6; 27 Hen. VIII, c. 10; C. S. 1740.)

Editor's Note.—After the Statute of Wills, 32 Hen. 8, a question was made, whether 27 Hen. 8, applied where one was seized to the use of another by force of a devise. The question, however, has long been at rest. Mr. Blackstone, in his learned commentaries, classifies the exceptions to the operation of the statute under three heads, and does not allude to the fact, that the question referred to, had ever been started, but passes it over as one of "the refinements and niceties suggested by the ingenuity of the times." 2 Black. 336. See also Broughton v. Langley, Salk 679, where Lord Holt treats the question as settled. The curious reader will find the subject treated of in Powell on Devises, 211, 13-14.

It is conceded, on all hands, that the Statute of Uses, 27 Hen. 8, chap. 10, was in force and in use, in this State, up to the passage of the Revised Statutes (1836). Indeed, all of the conveyances of land, adopted and used in this State, are based on, and take effect by, the operation of that statute. In the Rev. Stat., chap. 43, sec. 4, and the Rev. Code, ch. 43, sec. 6, the words used in 27 Hen. 8, chap. 10—i. e., "When one person or persons stand, or be seized, or at any time thereafter shall happen to be seized of land, etc., to the use of any other person, persons, or body politic, by reason of any bargain, sale, feoffment, etc., or otherwise, by any manner or means whatsoever it be, the persons, etc., having the use, shall have the legal estate, etc.," are omitted and the provision is simply "By deed of bargain and sale, lease and release and covenant to stand seized, the possession shall be transferred to the bargainee, releasee, covenantee, etc." Substantially in this form the section is carried through all the various codes up to this one. The tendency, while no material change, has been to make the section all inclusive by extending its application to every possible case involving the principle. Wilder v. Irelland, 53 N. C. 85, 90.

Necessity of Consideration.—A deed of bargain and sale is governed in this State by the same principles which were applied to it in England. It must have a pecuniary, or other valuable consideration. Blount v. Blount, 4 N. C. 389; Brocket v. Foscue, 8 N. C. 64; Bruce v. Faucett, 49 N. C. 391, 393.

If no consideration, either good or valuable, appear on the face of the instrument, or can be proved aliunde, it will be void. Springs v. Hanks, 27 N. C. 30; Jackson v. Hampton, 30 N. C. 457; Bruce v. Faucett, 49 N. C. 391, 393.

Same—Love and Affection.—Though in form, a deed of bargain and sale, yet if the only consideration is that of love and affection, it will operate as a covenant to stand seized. Slade v. Smith, 2 N. C. 248; Hatch v. Thompson, 14 N. C. 411; Cobb v. Hines, 44 N. C. 343; Bruce v. Faucett, 49 N. C. 391, 393.

Same Footing with Feoffments at Common Law.—Deeds of bargain and sale and covenants to stand seized to uses, are put on the same footing with feoffments at common law, with respect to seizin, the declaration of uses thereon, and the consideration. Love v. Harbin, 87 N. C. 249, and Ivey v. Granberry, 66 N. C. 224. A use may be limited on a use. Rowland v. Rowland, 93 N. C. 214, 221.

Common Law Rule.—At common law, where there was no consideration, the use would result to the feoffor, unless the declaration of the use or trust was contemporaneous with the transmutation of the legal title. Pittman v. Pittman, 107 N. C. 159, 12 S. E. 61.

When Legal and Equitable Title United.—In Lee v. Oates, 171 N. C. 717, 726, 88 S. E. 889, it was said: "As to Mrs. Lee's life estate, so long as her husband lived, it was necessary that the trust for her separate use and maintenance should continue, as it was then active; but when her husband died, and the disability of coverture was removed, and there was no longer any necessity for a trustee to protect her interest, and as the trust then became passive, the statute executed the use and united the legal and equitable estates in her." Cameron v. Hicks, 141 N. C. 21, 53 S. E. 728; Perkins v. Brinkley, 133 N. C. 154, 45 S. E. 541; Springs v. Hopkins, 171 N. C. 486, 88 S. E. 774. See also Security Nat. Bank v. Sternberger, 207 N. C. 817, 819, 178 S. E. 595.

This section merges the legal and equitable titles in the beneficiary of a passive trust, but as to active trust, the legal title vests and remains in the trustee for the purpose of the trust. Fisher v. Fisher, 218 N. C. 42, 9 S. E. (2d) 493.

Same—Merger. — "In Peacock v. Stott, 101 N. C. 149, 7 S. E. 885, Smith, C. J., said: 'Where one who has an equitable title acquires the legal title so that the same becomes united in the same person, the former is merged in the latter, and numerous decisions elsewhere are to the same effect.' Wills v. Cooper, 25 N. J. L., 137; Swisher v. Swisher, 157 Iowa, 55; Greene v. Greene, 125 N. Y. 506; Clark v. Listers, etc., 82 Neb. 85; Weeks v. Weeks, 197 N. Y. 304; Langley v. Conlan, 212 Mass. 135; Perry on Trusts (6 Ed.), sec. 347; 39 Cyc., 248; 2 Pomeroy's Equity, sec. 788." Quoted with approval in Odom v. Morgan, 177 N. C. 367, 369, 99 S. E. 195.

When Legal Title Passes to Trustee.—"Where the use is executed by the statute, the trustee takes no estate or interest, both the legal and equitable estates vesting in the cestui que trust; but where the use is not executed, the legal title passes to the trustee." 39 Cyc., 207, quoted with approval in Lee v. Oates, 171 N. C. 717, 88 S. E. 889.

Proceeds of Sale of Equitable Life Estate. — A deed in trust for the purpose of allowing the grantor's daughter to enjoy the "proceeds, rents, and income" during her natural life, with limitation over, creates an equitable estate for life, but upon a sale, the daughter would not be entitled to have the value of her life estate turned over to her. Braddy v. Dail, 156 N. C. 30, 72 S. E. 88.

Shifting Use to Take Effect.—"Whenever the event happens when a shifting or springing use is to take effect, the statute of uses vests the legal seizin and ownership in the person entitled by virtue of the use." Perry on Trusts, (5 Ed.), sec. 378. Lee v. Oates, 171 N. C. 717, 727, 88 S. E. 889.

Future Contingent Use.—In the case of Smith v. Smith, 46 N C. 135, other incidents which attached to deeds of bargain and sale in England were held to apply to them in this State. Thus, the Court said "it is settled that, a future contingent use to one unknown, or not in esse, cannot be raised by a deed of bargain and sale. It is also settled that

a use cannot be raised by a general power of appointment given to the taker of the first estate in the use; and the case is much stronger where the power of appointment is given to a stranger." Bruce v. Faucett, 49 N. C. 391, 393.

Estates of Freehold to Commence in Futuro.—As estate of freehold to commence in futuro can be conveyed by a deed of bargain and sale operating under the section or by executory devise; therefore, an estate to H. for life and at her death to her children in fee, reserving a life estate to the grantor, is good. Savage v. Lee, 90 N. C. 320.

Life Estate to Woman with Limitation Over to Children.—Where one devised, in 1828, to a trustee, to the use and benefit of a woman, for her life, remainder to the use of all her children, it was held that the legal estate in the remainder, by force of the same statute, passed to the children she had at the time of the devise, subject to the participation of such as she might thereafter have. Wilder v. Ireland, 53 N. C. 85.

Fee Simple Limited after a Fee Simple.—A fee-simple may be limited after a fee-simple either by a deed or will by operation of the statute of uses; if by deed, it is a conditional limitation; if by will, it is an executory devise. Smith v. Brisson, 90 N. C. 284.

Possession Transferred. — The statute of uses, substituted for 27 Hen. VIII. (The Code, sec. 1330), now this section, provides that the possession of the bargainee shall be transferred to the bargainee as perfectly as if the bargainee "had been enfeoffed at common law with the livery of seizin of the land intended to be conveyed, etc." Kirby v. Boyette, 118 N. C. 244, 263, 24 S. E. 18.

When One Seized to the Use of Another.—It was said in Wilder v. Ireland, 53 N. C. 85: "Where one person is seized to the use of another, the statute carries the legal estate to the person having the use. But three classes of cases are made exceptions to its operation, i. e., (1) where a use is limited on a use, (2) where a trustee is not seized but only possessed of a chattel interest, and (3) where the purposes of the trust make it necessary for the legal estate and the use to remain separate, as in the case of land conveyed for the separate use and maintenance of a married woman." Kirby v. Boyette, 118 N. C. 244, 263, 24 S. E. 18.

"Sole and Separate Use" Construed.—The words "for the sole and separate use," or equivalent language, qualifying the estate of a trustee for a married woman, must be construed as manifesting the intent on the part of the grantor to limit her right of alienation to the mode and manner expressly provided in the instrument by which the estate is created. Kirby v. Boyette, 118 N. C. 244, 24 S. E. 18.

Covenant to Stand Seized to Use of Another.—"In Davenport v. Wynne, 28 N. C. 128, where there was a conveyance of real property upon the consideration of love and affection, reserving a life estate to the donor, it was held by the court that the conveyance was good; that it was a conveyance to stand seized to the use of the vendee on his death. To the same effect is Hodges v. Spicer, 79 N. C. 223. And in Sasser v. Blythe, 2 N. C. 259, overruling Ward v. Ward, 1 N. C. 59, a similar construction was given to an instrument of like import. In the note to that case Judge Battle says: 'There cannot be the least doubt but that a covenant to stand seized to the use of another, after his own life, is good to pass the estate intended; for the law raises in the grantor an estate for life in the meantime to support the future estate. This has been decided in a vast number of instances. There is no point better established by the authorities.' And he cites in support of the position, besides Coke, a number of English authorities." Savage v. Lee, 90 N. C. 320, 323.

Rule That Beneficial Use Is Converted into Legal Ownership Does Not Apply to Active Trusts.—While this section converts the beneficial use into the legal ownership and unites the legal and equitable estates in the beneficiary, this rule applies only to passive or simple trusts and not to active trusts. Chinnis v. Cobb, 210 N. C. 104, 108, 185 S. E. 638, citing Lee v. Oates, 171 N. C. 717, 88 S. E. 889; Patrick v. Beatty, 202 N. C. 454, 163 S. E. 572.

An active trust is one where there is a special duty to be performed by the trustee in respect to the estate, such as collecting the rents and profits, or selling the estate, or the execution of some particular purpose. Chinnis v. Cobb, 210 N. C. 104, 108, 185 S. E. 638, citing Perkins v. Brinkley, 133 N. C. 154, 45 S. E. 541.

§ 41-8. Collateral warranties abolished; warranties by life tenants deemed covenants.—All collateral warranties are abolished; and all warranties made by any tenant for life of lands, tenements or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void; and all such warranties, as aforesaid, shall be deemed covenants only, and bind the covenanter in like manner as other obligations. (Rev., s. 1587; Code, s. 1334; R. C., c. 43, s. 10; 4 Anne, c. 16, s. 21; 1852, c. 16; C. S. 1741.)

Editor's Note. — The section is a re-enactment of the Statute of 4 Anne, c. 16, s. 21 made first because estates tail were converted into estates in fee simple. The last clause in the section was inserted to qualify the words "abolished" and "void," used in the two preceding clauses. By it such warranties, that is, collateral warranties, and all warranties descending upon an heir, entitled to a remainder or reversion, are allowed the effect of a personal covenant of quiet enjoyment, by which the heir if he receives real assets, is bound to pay a purchaser damages to the amount of the consideration paid for the land, in case of eviction by title paramount, in lieu of "other land of equal value," so as to put such warranties upon the same footing as lineal warranties which the Court had been forced after the action of ejectment was substituted for real actions, for the sake of giving a remedy, to treat as personal covenants for quiet enjoyment. This was by reason of the fact that there could not be "a vouchee" upon a covenant real or the old warranty, except in real actions. Rickets v. Dickens, 5 N. C. 342, 343; Williams v. Beeman, 13 N. C. 483; Southerland v. Stout, 68 N. C. 446, 449; Smith v. Ingram, 130 N. C. 100, 40 S. E. 984.

Estoppel and Rebutter by Warranty.—Mr. Mordecai in his instructive and valuable law lectures, volume 2, p. 858, says: "I shall take 'Estoppel by Warranty' to mean the effect which such covenants have in passing, so to speak, any title to the land which the bargainor in a deed may acquire after the execution of the deed; and 'Rebutter by Warranty,' to mean the effect which such modern covenants have in barring, estopping, or rebutting the heirs of the covenantor, should they assert title to the land conveyed by the covenanting ancestor." Olds v. Richmond Cedar Works, 173 N. C. 161, 164, 91 S. E. 846.

Where land is devised to a person for life, and at her death to her children, the children are not estopped by a deed with covenant of warranty executed by the life tenant. Hauser v. Craft, 134 N. C. 319, 46 S. E. 756.

Same—Warranty by Tenant by Curtesy.—Where a tenant by the curtesy sells land belonging to his wife, by deed or bargain and sale, in fee, with general warranty the right of the heir of the wife to the land is not rebutted by the warranty. Johnson v. Bradley, 31 N. C. 362.

Same—Remainder Not Defeated by Warranty. — A warranty in a deed of a life tenant cannot defeat the remainder of the heirs by way of rebutter. Moore v. Parker, 34 N. C. 123; Starnes v. Hill, 112 N. C. 1, 13, 16 S. E. 1011.

Warranty to Grantee but Not to Assigns.—Where a deed contains a warranty to the grantee, but not to his assigns, such assignees can neither maintain an action on such covenant nor defend under it against the grantor. Smith v. Ingram, 130 N. C. 100, 40 S. E. 984.

Burden of Proof.—Where in an action to recover lands the plaintiff claims by paper title to his ancestor, without claim of possession, and it appears that his ancestor has conveyed the land to a stranger with full covenants and warranty of title prior to his having acquired it, it was held, that the burden of proof is on the plaintiff to establish his title, and he cannot recover, for his ancestor's deed to the stranger, with covenant and warranty, destroys his right of action by rebutter, and passes the title to the grantee by estoppel. Olds v. Richmond Cedar Works, 173 N. C. 161, 91 S. E. 846.

§ 41-9. Spendthrift trusts. — It is lawful for any person by deed or will to convey any property, which does not yield at the time of the conveyance a clear annual income exceeding five hundred dollars, to any other person in trust to receive and pay the profits annually or oftener for the support and maintenance of any child, grandchild or other relation of the grantor, for the life of such child, grandchild or other relation, with remainder as the grantor shall provide; and the property so conveyed shall not be liable for or subject to be seized or taken in any manner for the debts of such child, grandchild or other relation, whether the same be contracted

or incurred before or after the grant. (Rev., s. 1588; Code, s. 1335; 1871-2, c. 204, s. 1; C. S. 1742.)

Substantial Compliance Necessary. — The provisions of the section should be at least substantially met and complied with to create the trust with its incidents contemplated by the statute. Gray v. Hawkins, 133 N. C. 1, 6, 45 S. E. 363.

Same—Mere Declaration.—A mere declaration that it is the object of the deed, in part, to create a trust under this section, and that the appointment of a trustee is left to the court, does not create such a trust as the court would enforce by the appointment of a trustee. Gray v. Hawkins, 133 N. C. 1, 6, 45 S. E. 363.

Restricted as to Amount and Duration. — In Bank v. Heath, 187 N. C. 54, 64, 121 S. E. 24, the court said: "A perusal of the law will disclose that such trusts are only permissible for a restricted amount, 'an annual income not to exceed $500 net', and by correct interpretation to be applied to the support of the beneficiary for his life only."

Not a Passive Trust Subject to Debts.—A devise creating a spendthrift trust, under this section, for the trustees to receive and pay the profits, annually, or oftener for the support and maintenance of the testator's named son, is not a passive trust either as to the principal or income, nor is it one executed under the statute of uses, and it is not subject to the payment of the debts created by the cestui que trust, though he be a nonresident of the State. Fowler v. Webster, 173 N. C. 442, 92 S. E. 157.

"The courts cannot, without violating the right of property possessed by the trustor, and the proper discharge of the trust by the trustee, condemn any part of the income for the foreign purpose of paying the debts of the cestui que trust, since the whole idea and purpose of this trust is that the beneficiary is unfit to handle the income of the fund." Fowler v. Webster, 173 N. C. 442, 445, 92 S. E. 157.

Not Personal Property Exemption. — The effect of the spendthrift trust, Revisal, sec. 1588, now this section, is not to create a personal property exemption in favor of a nonresident cestui que trust in the income from the trust estate. Fowler v. Webster, 173 N. C. 442, 92 S. E. 157.

Not Subject to Alienation.—"In a spendthrift trust the beneficiary cannot 'exercise the highest right of property, namely, alienation' as to the income, nor will it 'upon his death undoubtedly be assets.' In spendthrift trusts authorized by the statute the beneficiary acquires no interest or property in the income any more than he does in the principal of the fund. He cannot alienate the income, he cannot direct its application in the purchase of any article whatever, or its disposal for any purpose." Fowler v. Webster, 173 N. C. 442, 444, 92 S. E. 157.

Trustee Makes All Disbursements.—The trustee holds the income just as he holds the principal, to be applied for the designated purposes. It is his duty to make the disbursement, whether for board or clothing or in any other method in his judgment required for the support of the beneficiary. Fowler v. Webster, 173 N. C. 442, 445, 92 S. E. 157.

Same—Not to Pay over Income to Cestui Que Trust.—The trustee is not authorized to pay over any part of the income to the beneficiary that he may spend it or use it or disburse it. The cardinal idea is that the cestui que trust is "incompetent and cannot be trusted with the handling of the income," (Beach on Trusts, § 554), which duty is to be discharged by the trustee. Fowler v. Webster, 173 N. C. 442, 445, 92 S. E. 157.

Trust Limitations Defeated by Fee Simple Devise.—In a fee simple devise with a subsequent provision that during the life of the devisee the property is to be "managed" by the trustees, paying to him the income and exempting the property from liability for his debts, the provision is repugnant to the fee, and the limitations imposed are void; and at the suit of a purchaser for value under a deed from the devisee and the trustee, judgment against the latter and in favor of the plaintiff for possession should be granted. Vaughan v. Wise, 152 N. C. 31, 67 S. E. 33.

Spendthrift Trust Held to Be an Active Trust as to Corpus of Estate.—A spendthrift trust directing the trustee to collect the rents and profits and pay same over to the beneficiary is an active trust so far as the corpus of the estate is concerned, upon which § 41-7 does not operate to unite the beneficial and legal interests. Chinnis v. Cobb, 210 N. C. 104, 185 S. E. 638.

Trustee May Defend Action without Appearance of the Cestui.—The trustee of a spendthrift trust may defend an action seeking to attach the interest of the cestui que trust, both in the Superior Court and in the Supreme Court on appeal, without the appearance of the cestui, the preservation and protection of the property being incumbent upon him under the terms of the trust. Chinnis v. Cobb, 210 N. C. 104, 185 S. E. 638.

The interest of the cestui que trust in a spendthrift trust is not subject to attachment under § 1-440 et seq., since by express provision of this section the property is not liable for the debts of the cestui que trust in any manner. Chinnis v. Cobb, 210 N. C. 104, 185 S. E. 638.

§ 41-10. Titles quieted. — An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims; and by any man or woman against his or her wife or husband or alleged wife or husband who have not lived together as man and wife within the two years preceding, and who at the death of such plaintiff might have or claim to have an interest in his or her estate, and a decree for the plaintiff shall debar all claims of the defendant in the property of the plaintiff then owned or afterwards acquired: Provided, that no such relief shall be granted against such husband or wife or alleged wife or husband, except in case the summons in said action is personally served on such defendant.

If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs. In any case in which judgment has been or shall be docketed, whether such judgment is in favor of or against the person bringing such action, or is claimed by him, or affects real estate claimed by him, or whether such judgment is in favor of or against the person against whom such action may be brought, or is claimed by him, or affects real estate claimed by him, the lien of said judgment shall be such claim of an estate or interest in real estate as is contemplated by this section. (Rev., s. 1589; 1893, c. 6; 1903, c. 763; 1907, c. 888; C. S. 1743.)

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I. GENERAL CONSIDERATIONS.

Editor's Note.—The modern trend of Legislative enactments has been to remove, before sale, and as quickly and efficiently as possible, all defects of title to property sold under judicial process. The courts have been liberal in the construction of all such remedial legislation. In Campbell v. Cronly, 150 N. C. 457, 64 S. E. 213, Mr. Justice Connor, in an able and elaborate opinion, reviews the policy and effect of this legislation and the decisions of many courts, and says: "The wisdom of enlarging the power of the court to deal with the subject is manifest. It is highly important to private right and public interest that titles shall be rendered secure and certain.....The unanimity with which judges have recognized the wisdom of the legislation, giving it a liberal construction, has made it effective." The first legislative act of this state looking to this end was the act of 1893 (chapter 6). Under this act, the court held, in Daniels v. Baxter, 120 N. C. 14, 26 S. E. 635, "as to the fifth ground of demurrer, there is an allegation that the defendants claim that S. H. Fowler made a deed of trust, that what purports to be such is on record, and that defendants are holding under it. This is sufficient, under Laws 1893, ch. 6, to proceed to have the cloud removed, though the plaintiffs are not in possession." And in McLean v. Shaw, 125 N. C. 491, 34 S. E. 634, it was said: "Under a line of decisions of this Court, culminating with McNamee v. Alexander, 109 N. C. 242, 13 S. E. 777, it was held that a plaintiff could not maintain an action to remove a cloud upon his title unless it appeared affirmatively that he was rightfully in possession of the land. The act of 1893 (chapter 6) extended such relief to those who were not in possession. Daniels v. Baxter, 120 N. C.

14, 26 S. E. 635. It is not in contemplation of the act that a judgment lien should be included in the terms 'estate' and 'interest,' as they are used in the act." This case was decided at September Term, 1899. The Legislature, at its session in 1903, by chapter 763, amended the Public Laws 1893, ch. 6, sec. 1, by adding thereto the last sentence of the present section. Crockett v. Bray, 151 N. C. 615, 617, 66 S. E. 666.

This Section Is Highly Remedial.—Plotkin v. Merchants Bank, etc., Co., 188 N. C. 711, 715, 125 S. E. 541. This is a remedial statute which has been liberally construed quieting land titles, more comprehensive than the old suit in equity to remove a cloud from title. Jacobi Hdw. Co. v. Jones Cotton Co., 188 N. C. 442, 445, 124 S. E. 756; Maynard v. Holder, 216 N. C. 524, 5 S. E. (2d) 535.

This section and the amendatory acts thereto being remedial in nature, should have a liberal construction in order to execute fully the legislative intention and will. Stocks v. Stocks, 179 N. C. 285, 289, 102 S. E. 306. And to advance the remedy and permit the courts to bring the parties to an issue. Asheville Land Co. v. Lange, 150 N. C. 26, 30, 63 S. E. 164.

Does Not Deprive Defendant of Right.—The section deprives the defendant of no right, but affords him every opportunity of defending the validity of his title; but in the interest of peace and the settlement of controversies, it allows his adversary to put to the test of early judicial investigation, and does not compel plaintiff to wait on the defendant's pleasure as to the time when the inquiry shall be made, and thus give defendant an unfair advantage over him. Jersey City v. Lembeck, 31 N. J. Eq., 265; Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 684, 96 S. E. 99.

Restraining Sale under Execution.—Under this section the sheriff's sale of land by execution under a judgment may now be restrained by suit in equity when it will cast an additional cloud upon the title of the owner of the lands. Mizell v. Bazemore, 194 N. C. 324, 139 S. E. 453.

An usurious charge of interest on notes does not affect the validity of the mortgage or deed of trust securing them, under § 24-2, and a suit brought to remove a cloud upon title to the lands under this section to the extent of the usurious charge of interest on the notes cannot be maintained. Briggs v. Industrial Bank, 197 N. C. 120, 147 S. E. 815.

Cited in Johnson v. Fry, 195 N. C. 832, 834, 143 S. E. 857; Sears v. Braswell, 197 N. C. 515, 526, 149 S. E. 846; Bechtel v. Bohannan, 198 N. C. 730, 731, 153 S. E. 316; Hinton v. Whitehurst, 214 N. C. 99, 198 S. E. 579.

II. NATURE AND SCOPE.

A. Purpose.

General Observations. — In a recent case the Supreme Court gave the section a broad interpretation in order to carry out the evident purpose of its enactment, and said: "Having reference to the broad and inclusive language of the statute, the mischief complained of and the purpose sought to be accomplished, we are of opinion that the law, as its terms clearly import, was designed and intended to afford a remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another wrongfully sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner and which is reasonably calculated to burden and embarrass such owner in the full and proper enjoyment of his proprietary rights, including the right to dispose of the same at its fair market value. And it should and does extend to such adverse and wrongful claims, whether in writing or parol, whenever a claim by parol, if established, could create an interest or estate in the property, as in case of a parol trust or a lease not required to be in writing. And it should be allowed, too, when existent records or written instruments reasonably present such a claim, the statute preventing all hardship in such cases by its provision that if the holder does not insist on the same in his answer or does not answer at all, the plaintiff shall pay the costs." Satterwhite v. Gallagher, 173 N. C. 525, 528, 92 S. E. 369, citing Rumbo v. Gay Mfg. Co., 129 N. C. 9, 39 S. E. 581; Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 684, 96 S. E. 99.

Referring to a similar statute of Nebraska, Mr. Justice Field said in Holland v. Challen, 110 U. S. 15, 3 S. Ct. 495, 28 L. Ed. 52, (cited in Christman v. Hilliard, 167 N. C. 4, 82 S. E. 949): "Any person claiming title to real estate, whether in or out of possession, may maintain the suit against one who claims an adverse estate in it for the purpose of determining such estate and quieting his title. It is certainly for the interest of the State that this jurisdiction of the court should be maintained, and that causes of apprehended litigation respecting real property necessarily affecting its use and enjoyment should be removed, for so long as they remain they will prevent improvement and consequent benefit to the public. It is a matter of everyday observation that many lots of land in our cities remain unimproved because of conflicting claims to them. It is manifestly to the interest of the community that conflicting claims to property thus situated should be settled so that it may be subject to use and improvement. To meet cases of this character, statutes like the one in Nebraska have been passed by several states, and they accomplish a most useful purpose." Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 684, 96 S. E. 99.

Includes Any Adverse Interest. — The language of this section is broad and liberal, showing the purpose of General Assembly to permit any person to bring an action against another who claims an interest or estate in real property adverse to him. Plotkin v. Merchants Bank, etc., Co., 188 N. C. 711, 715, 125 S. E. 541.

To Leave Lands Unfettered.—The beneficial purpose of the statute is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion, instead of remaining idle and unremunerative. Christman v. Hilliard, 167 N. C. 4, 82 S. E. 949; Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 684, 96 S. E. 99; Plotkin v. Merchants Bank, etc., Co., 188 N. C. 711, 125 S. E. 541.

Effect of Busbee Cases.—In Plotkin v. Merchants Bank, etc., Co., 188 N. C. 711, 715, 125 S. E. 541, the Court further said: "In Rumbo v. Gay Mfg. Co., 129 N. C. 9, 10, 39 S. E. 591, Clark, C. J., says: It was because the General Assembly thought the equitable doctrines (as laid down in Busbee v. Macy, 85 N. C. 329, and Busbee v. Lewis, 85 N. C. 332, and like cases) inconvenient or unjust that the act of 1893 (this section) was passed."

To Broaden the Equitable Remedy.—This section giving the owner of lands the right to remove a cloud upon his title, is much broader in its scope and purpose than the equitable remedy theretofore allowed and administered in this State, and includes not only the right to remove an apparent lien under a docketed judgment, but also the potential claim of a wife to her inchoate right of dower in her husband's lands. Southern State Bank v. Sumner, 187 N. C. 762, 122 S. E. 848.

"The statute has been said to be an extension of the remedy in equity theretofore existing for the removal of clouds on title, and is intended to afford an easy and expeditious mode of determining all conflicting claims to land, whether derived from a common source or from different and independent sources. It is highly remedial and beneficial in its nature, and should therefore be construed liberally. It is also a statute of repose, and also for that reason is entitled to favorable consideration. Adler v. Sullivan, 115 Ala. 582; Walton v. Perkins, 33 Minn. 357; Holmes v. Chester, 26 N. J. Eq. 81." Christman v. Hilliard, 167 N. C. 4, 82 S. E. 949; Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 683, 96 S. E. 99.

B. Interest Necessary to Bring Action.

Editor's Note.—In the case of Rutherford v. Ray, 147 N. C. 253, 61 S. E. 57, it was held that suit may be instituted by any person against any other person claiming an interest adverse to his title.

In Plotkin v. Merchants Bank, etc., Co., 188 N. C. 711, 715, 125 S. E. 541, it was held that "the contention that a plaintiff in an action brought under this section must allege and prove that at the commencement of the action and at its trial he had an estate in or title to the land, cannot be sustained. It is only required that he have such an interest in the land as that the claim of the defendant is adverse to him." It would seem that, in this case, the court lays down a much more liberal rule than had been formulated by any of the previous cases on the subject. It is interesting to note here the holding of a Federal Case, arising in North Carolina, Johnston v. Kramer Bros. & Co., 203 Fed. 733, 741, involving an interpretation of this statute, and decided prior to Plotkin v. Bank, supra, in which it was held that the plaintiff could maintain his action provided he had the legal title to either the whole or an undivided interest in the land. This holding was in perfect concord with the decided cases up to Plotkin v. Bank, supra, but is out of harmony with that case.

Apparent Invalidity of Defendant's Title.—The plaintiff is not required to have possession as a condition precedent to his right of action, nor will the apparent invalidity of defendant's title deprive him of the statutory remedy. Daniels v. Baxter, 120 N. C. 14, 26 S. E. 635; Rumbo v. Gay Mfg. Co., 129 N. C. 9, 39 S. E. 581; Beck v. Meroney, 135 N. C.

532, 47 S. E. 613; Campbell v. Cronly, 150 N. C. 457, 64 S. E. 213; Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 684, 96 S. E. 99.

Remedy Given Whether in or out of Possession.—This section affords the remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner and which is reasonably calculated to burden and embarrass such owner in the full enjoyment or disposition of his property at a fair market value; the statute affords a remedy by disclaimer when the party does not in fact claim the "adverse interest" which is alleged to be a cloud on the title of the true owner. Satterwhite v. Gallagher, 173 N. C. 525, 92 S. E. 369; Vick v. Winslow, 209 N. C. 540, 183 S. E. 750.

Same—Former Law. — The authorities to the effect that only one in possession may maintain an action to remove a cloud from title, were decisions rendered prior to the act of 1893, Chapter 6; Revisal, sec. 1589. Since that statute, it is held that the action is maintainable, though plaintiff is not in the present possession or control of the property. Campbell v. Cronly, 150 N. C. 457, 64 S. E. 213; Daniels v. Baxter, 120 N. C. 14, 26 S. E. 635; Speas v. Woodhouse, 162 N. C. 66, 69, 77 S. E. 1000.

Adverse Claimant to Execution Debtor.—If real estate levied upon should be claimed by one other than the execution debtor, then nothing can more quickly bring up for trial the plaintiff's prayer to have the cloud removed from his title than to allow the execution sale to take place. If the purchaser should delay to commence suit for recovery of possession, then the claimant can commence proceedings under the section. McLean v. Shaw, 125 N. C. 491, 492, 34 S. E. 634.

Correction of Life Estate into Fee Simple. — Defendants have a right, in order to avoid multiplicity of suits, to ask for the correction of a life estate deed, under which they claim, into a fee simple deed, by way of counterclaim, not merely as a matter of defense, but to remove a cloud upon the title, under the section. McLamb v. McPhail, 126 N. C. 218, 35 S. E. 426.

Obscure Contingent Limitations.—The section enlarges the power of the courts to entertain suits to quiet titles, where the conditions were formerly such that a possessory action could not be brought; and this statute is liberally construed, so that the court can acquire jurisdiction to clear up obscure contingent limitations which are imposed upon titles. Campbell v. Cronly, 150 N. C. 457, 64 S. E. 213.

When Land Conveyed Pendente Lite.—Where the owner of lands in possession thereof or entitled thereto brings his action claiming as such owner to remove as a cloud upon his title the lien of one claiming under his mortgage, and pendente lite has conveyed the land to another with full warranty deed, he may continue to prosecute his suit against the mortgagee as to the title, being a real party in interest, § 1-57, without claim of the right to the possession, under the provisions of this section; and where issue has been joined, he may, if successful, recover his costs. Plotkin v. Merchants Bank, etc., Co., 188 N. C. 711, 125 S. E. 541.

Judgment Lien.—It is not in contemplation of the act that a judgment lien should be included in the terms "estate" and "interest" as they are used in the section. McLean v. Shaw, 125 N. C. 491, 492, 34 S. E. 634. This was changed by the Laws of 1903, C. 763. "Estate" and "Interest" now expressly embrace a judgment lien. See Editor's Note under Analysis line I, "General Considerations," of this section.

Action Lies to Prevent Creation of Cloud.—An action will lie, not only to remove an existing cloud on title, but also to prevent one from being created (Thomas v. Simmons, 103 Ind. 538), and where the object is merely preventive an injunction is the proper remedy to restrain the doing of the wrongful act. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N. C. 668, 686, 96 S. E. 99.

C. What Constitutes Cloud.

Deed without Married Woman's Privy Examination.—A contract to convey the lands of the wife, signed by her and her husband, but without having taken her privy examination, when recorded is a cloud upon her title to the lands and subject to her suit to remove the same, as such, within the intent and meaning of the section, though she be and remain in possession of the land. Satterwhite v. Gallagher, 173 N. C. 525, 92 S. E. 369.

Invalid Judgment as Cloud.—A judgment, if invalid, would be such a cloud on the title, or such a direct menace to it, as to fall within the provisions of this section. Stocks v. Stocks, 179 N. C. 285, 289, 102 S. E. 306.

Same—Judgment Obtained by Fraud.—The complaint in this suit alleged, in effect, that the plaintiff had her dower laid off in the lands of her deceased husband, in which the defendant, her son, was properly represented, and thereafter the son, without the service of summons upon her, instituted an independent proceeding to annul the judgment, and falsely represented to her that the action had been withdrawn, and that she should not further consider it, and in consequence, and through his false representation, obtained a judgment in his favor, destroying her dower right, it is held, sufficient for her to maintain an independent action to set aside the former judgment upon the issue of fraud, and also under our statute to remove the former judgment as a cloud upon her title. Stocks v. Stocks, 179 N. C. 285, 102 S. E. 306.

Tax Deed as Cloud upon Title.—Where a judgment entered in favor of the county in an action against the owner for taxes has been set aside upon motion after notice to the parties, the owner, in an action to remove cloud upon title, is entitled to judgment canceling the tax deed. Galer v. Auburn-Asheville Co., 204 N. C. 683, 169 S. E. 642.

Proof Required of Plaintiff.—In a suit to remove a cloud upon the plaintiff's title under this section, the defendant claimed under a sale by foreclosure of a mortgage which the plaintiff attacked for fraud. It was held, that the burden of proof was on the plaintiff to show the fraud by the preponderance of the evidence, and not by clear, strong and cogent proof as required in the information or correction of a conveyance of land. Ricks v. Brooks, 179 N. C. 204, 102 S. E. 207.

Foreclosure of Mortgage Given by Tenant in Common Prior to Partition.—The purchaser of land from one tenant in common after the land had been allotted to the tenant in a special proceeding for partition may maintain a suit to restrain foreclosure of a mortgage executed by the other tenant in common prior to partition when the mortgagee advertises and seeks to sell a one-half interest in the entire tract, since such foreclosure would constitute a cloud on the purchaser's title. Rostan v. Huggins, 216 N. C. 386, 5 S. E. (2d) 162, 126 A. L. R. 410.

III. ACTIONS.

A. In General.

Treated as Suit in Ejectment.—A suit instituted to determine conflicting claims to real property, under Act of 1893, chap. 6, may be properly treated as an action of ejectment, when the complaint alleges ownership in the plaintiff and possession in the defendant. Hines v. Moye, 125 N. C. 8, 34 S. E. 103.

When Adverse Claim Invalid.—Under Laws 1893, ch. 6, where, in an action to determine conflicting claims to real property, plaintiff being in possession, the court finds the claim of defendant to be invalid, the action should not be dismissed. Rumbo v. Gay Mfg. Co., 129 N. C. 9, 39 S. E. 581.

But the court should enter its decree removing the cloud upon the title. Rumbo v. Gay Mfg. Co., 129 N. C. 9, 10, 39 S. E. 581.

A judgment binds parties and privies only. Hines v. Moye, 125 N. C. 8, 34 S. E. 103.

When Court Will Hear and Determine without Action.—The courts will hear and determine a controversy submitted without action in suits brought by and against the parties in interest, wherein the vendee has refused to accept the title on the ground of its being doubtful, either in its equitable jurisdiction as treating the controversy as a bill for specific performance or under the provisions of the section, for the purpose of removing clouds upon obscure titles. Campbell v. Cronly, 150 N. C. 457, 64 S. E. 213.

Costs.—Where the defendant disclaims title to lands in a suit to remove a cloud thereon, the plaintiff is chargeable with the costs under the express provisions of this section. Clemmons v. Jackson, 183 N. C. 382, 111 S. E. 609.

In an action for trespass and for damages, the plaintiff, after trial of issues as to trespass, etc., may not abandon these contentions upon the trial, and have the court consider the action as an equitable one to remove a cloud upon the title, and so avoid the payment of the full amount of the costs incident to the litigated issues. Clemmons v. Jackson, 183 N. C. 382, 111 S. E. 609.

B. Pleadings.

Sufficiency of Bill of Complaint.—Where a bill asserts that the complainant is the owner of certain designated lands, sets forth the chain of title, and alleges that the defendant claims an adverse interest in the said lands, which said claim renders sale impossible and otherwise casts a cloud over complainant's title, it sufficiently states a cause of action to quiet title under this section. North Carolina Min. Co. v. Westfieldt, 151 Fed. 290.

In an action to remove a cloud from plaintiffs' title, caused by a docket judgment alleged to be invalid, a demurrer to

the complaint, as not stating a cause of action, was properly overruled, this section being sufficiently broad to entitle plaintiff to maintain an independent action. Exum v. Carolina R. Co., 222 N. C. 222, 22 S. E. (2d) 424.

Defendant Need Only Be Claimant.—It is true that under the act of the Legislature, 1893, ch. 6, now this section, a plaintiff may maintain an action to remove a cloud from his title without showing that the defendant is an occupant or any more than a claimant of the land in controversy. Duncan v. Hall, 117 N. C. 443, 446, 23 S. E. 362.

Same—Unnecessary to Allege Possession. — This section removed the necessity for alleging the defendant was in possession. The plaintiff may now set out his claim of title, and if defendant disclaims any adverse claim, the plaintiff pays the cost, and the title as between them is settled. Asheville Land Co. v. Lange, 150 N. C. 26, 30, 63 S. E. 164.

When Occupation Is Alleged.—But where he alleges an occupation as the cause of action, not only must the allegation and proof correspond, but the testimony offered to show possession is open to objection and exception on the ground of competency. Duncan v. Hall, 117 N. C. 443, 447, 23 S. E. 362.

Allegation of Nonpayment of Taxes. — In a suit to remove a cloud on the title to lands, the suggestion that plaintiff's ancestors have not, for many years, paid the tax on the land, is immaterial because to do so does not, under any statute in force in this state, work a forfeiture of title, otherwise than by a sale conducted in conformity with the law. Johnston v. Kramer Bros. & Co., 203 Fed. 733, 741.

Sufficient to Raise Issue.—Where the complaint in a suit to remove a cloud upon plaintiff's title to land, alleges that the plaintiff is the owner of the locus in quo, and asks for a reformation of his deed to the lands to show that by mutual mistake the name of the grantee therein was that of a private business enterprise he was conducting, and that accordingly the defendants claimed an interest therein, an allegation in the answer in reply that the defendant had no knowledge or information sufficient to form a belief as to whether the plaintiff was conducting a business in the name of the grantee in the deed, is sufficient to raise the issue, and a judgment in plaintiff's favor upon the pleadings is reversible error. Brinson v. Morris, 192 N. C. 214, 134 S. E. 453.

Issue as to Delivery of Deed.—Delivery of a deed is essential to its validity, and where the pleadings and evidence raise the question of delivery under this section the court's refusal to submit an issue thereon entitles appellant to a new trial. Ferguson v. Ferguson, 206 N. C. 483, 174 S. E. 304.

Pleadings Sufficient for Determination of Damages as in Condemnation.—Where, in addition to the fact that general relief was prayed, the parties specifically asked that their rights be determined, and defendant, relying upon the right of eminent domain, asserted its right to flood lands in which plaintiffs own mineral interests in derogation of plaintiffs' right of access, it was held that the damages resulting to plaintiffs from such floodings must be ascertained as in a suit for condemnation. Duke Power Co. v. Toms, 118 F. (2d) 443, 446.

C. Jurisdiction of Courts.

Advisory Jurisdiction of Courts.—The advisory jurisdiction of courts of equity does not extend to the mere construction of a will to ascertain the rights thereunder of devisees or legatees. Such is not sustained under this section, when not brought by the plaintiff against some person claiming an adverse estate or interest. Heptinstall v. Newsome, 146 N. C. 503, 60 S. E. 416.

Concurrent Jurisdiction.—Where there is an action pending in the State Courts to try the title to lands under this section, the State Courts have thereby acquired jurisdiction over the property, and the Federal Courts will not entertain a suit in equity on the same facts and for the same relief. Westfeldt v. North Carolina Min. Co., 166 Fed. 706.

Diverse Citizenship.—The Circuit Court of the United States for the Eastern District of Arkansas has jurisdiction of a suit in equity, brought by a citizen of Ohio against a citizen of Illinois, to remove a cloud from the title to real estate situated in that district. Dick v. Foraker, 155 U. S. 404, 15 S. Ct. 124, 39 L. Ed. 201.

The remedy given by statutes of this character may be enforced in the federal court when the parties are inhabitants of different states. Holland v. Challen, 110 U. S. 15, 3 S. Ct. 495, 28 L. Ed. 52. Johnston v. Kramer Bros. & Co., 203 Fed. 733, 741.

Equity Jurisdiction of Federal Courts.—In an action under this section, while it is true that a federal court of equity lacks jurisdiction of a suit brought against a number of defendants claiming severally different portions of the land in dispute, on the ground of avoiding a multiplicity of suits, that ground may oust the court's jurisdiction in respect to those defendants who raise the objection, and, where title and possession in the complainant is sufficiently alleged, it is error to dismiss it as to those defendants who have made no defense, but submitted themselves and their interests to the jurisdiction of the court. New Jersey, etc., Co. v. Gardner-Lacy Lumber Co., 178 Fed. 772.

This section does not enlarge the jurisdiction of federal courts of equity, as it merely regulates procedure and does not create any substantive right. And, even if it could be considered as creating an equitable right, it would not authorize the trial by a federal court of equity of what is in essence an action of ejectment, for the reason that in such action the defendant is entitled under the federal constitution to a trial by jury. Wood v. Phillips, 50 F. (2d) 714, 716.

§ 41-11. Sale, lease or mortgage in case of remainders.—In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale, lease or mortgage of the property by a proceeding in the superior court, which proceeding shall be conducted in the manner pointed out in this section. Said proceeding may be commenced by summons by any person having a vested interest in the land, and all persons in esse who are interested in said land shall be made parties defendant and served with summons in the way and manner now provided by law for the service of summons in other civil actions, as provided by § 1-94, and service of summons upon nonresidents, or persons whose names and residences are unknown, shall be by publication as now required by law or such service in lieu of publication as now provided by law. In cases where the remainder will or may go to minors, or persons under other disabilities, or to persons not in being, or whose names and residences are not known, or who may in any contingency become interested in said land. but because of such contingency cannot be ascertained, the clerk of the superior court shall, after due inquiry of persons who are in no way interested in or connected with such proceeding, designate and appoint some discreet person as guardian ad litem, to represent such remainderman, upon whom summons shall be served as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such actions, and when counsel is needed to represent him, to make this known to the clerk, who shall by an order give instructions as to the employment of counsel and the payment of fees.

The court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof for reinvestment, either in purchasing or in improving real estate, less expense allowed by the court for the proceeding and sale, and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as was the property ordered to be sold. The court may authorize the loaning of such money subject to its approval until such time when it can be reinvested in real estate. And after the sale of such property in all proceedings hereunder, where there is a life estate, in lieu of said interest or investment of proceeds to which the life tenant would be entitled to, or to the use of, the court may in its discretion order the value of said life tenants' share during the probable life of such life tenant, to be ascertained as now provided by law, and

paid out of the proceeds of such sale absolutely, and the remainder of such proceeds be reinvested as herein provided. Any person or persons owning a life estate in lands which are unproductive and from which the income is insufficient to pay the taxes on and reasonable upkeep of said lands shall be entitled to maintain an action, without the joinder of any of the remaindermen or reversioners as parties plaintiff, for the sale of said property for the purpose of obtaining funds for improving other non-productive and unimproved real estate so as to make the same profit-bearing, all to be done under order of the court, or reinvestment of the funds under the provisions of this section, but in every such action when the rights of minors or other persons not sui juris are involved, a competent and disinterested attorney shall be appointed by the court to file answer and represent their interests. The provisions of the preceding sentence, being remedial, shall apply to cases where any title in such lands shall have been acquired before, as well as after, its passage—March 7, 1927.

The clerk of the superior court is authorized to make all orders for the sale, lease or mortgage of property under this section, and for the reinvestment or securing and handling of the proceeds of such sales, but no sale under this section shall be held or mortgage given until the same has been approved by the resident judge of the district, or the judge holding the courts of the district at the time said order of sale is made.

The court may authorize the temporary reinvestment, pending final investment in real estate, of funds derived from such sale in any direct obligation of the United States of America or any indirect obligation guaranteed both as to principal and interest or bonds of the state of North Carolina issued since the year one thousand eight hundred and seventy-two; but in the event of such reinvestment, the commissioners, trustees or other officers appointed by the court to hold such funds shall hold the bonds in their possession and shall pay to the life tenant and owner of the vested interest in the lands sold only the interest accruing on the bonds, and the principal of the bonds shall be held subject to final reinvestment and to such expense only as is provided in this section. Temporary reinvestments, as aforesaid, in any direct obligation of the United States of America or any indirect obligation guaranteed both as to principal and interest or state bonds heretofore made with the approval of the court of all or a part of the funds derived from such sales are ratified and declared valid.

The court shall, if the interest of the parties require it and would be materially enhanced by it, order such property mortgaged for such term and on such condition as to the court seems proper and to the best interest of the interested parties. The proceeds derived from the mortgage shall be used for the purpose of adding improvements to the property or to remove existing liens on the property as the court may direct, but for no other purpose. The mortgagees shall not be held responsible for determining the validity of the liens, debts and expenses where the court directs such liens, debts and expenses to be paid. In all cases of mortgages under this section the court shall authorize and direct the guardian representing the interest of minors and the guardian ad litem representing the interest of those persons unknown or not in being to join in the mortgage for the purpose of conveying the interest of such person or persons. In all cases of mortgages under this section the owner of the vested interest or his or her legal representative shall within six months from the date of the mortgage file with the court an itemized statement showing how the money derived from the said mortgage has been expended, and shall exhibit to the court receipts for said money. Said report shall be audited in the same manner as provided for the auditing of guardian's accounts. The owner of the vested interest or his or her legal representative shall collect the rents and income from the property mortgaged and apply the proceeds first to taxes and discharge of interest on the mortgage and the annual curtailment as provided thereby, or if said person uses or occupies said premises he or she shall pay the said taxes, interest and curtailments and said party shall enter into a bond to be approved by the court for the faithful performance of the duties hereby imposed, and such person shall annually file with the court a report and receipts showing that taxes, interest and the curtailment as provided by the mortgage have been paid.

The mortgagee shall not be held responsible for the application of the funds secured or derived from the mortgage. The word mortgage whenever used herein shall be construed to include deeds in trust. (Rev., s. 1590; 1903, c. 99; 1905, c. 548; 1907, cc. 956, 980; 1919, c. 17; Ex. Sess. 1921, c. 88; 1923, c. 69; 1925, c. 281; 1927, cc. 124, 186; 1933, c. 123; 1935, c. 299; 1941, c. 328; 1943, cc. 198, 729; C. S. 1744.)

I. General Constructions.
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Cross References.

As to constitutional restriction against perpetuities, see North Carolina Const., Art. I, § 31. As to partition sales of real property generally, see §§ 46-22 to 46-34. As to vagueness of description of land in pleadings, see § 8-39; in conveyance, see § 39-2.

I. GENERAL CONSIDERATIONS.

Editor's Note.—The 1925 amendment inserted in the fourth paragraph the provisions as to state bonds and made other changes.

The section was further amended by the Laws 1927, ch. 124, so as to permit a life tenant to bring an action for sale and reinvestment without joinder of remaindermen or reversioners. The rights of persons not sui juris are to be protected by a disinterested attorney appointed by the court. The amendment, being remedial in its nature, is made applicable to all cases where any title or interest in such lands was acquired before, as well as after, its enactment, with a proviso exempting pending litigation from its effect.

The only change effected by the 1933 amendment occurs in the second paragraph of the section. In the next to the last sentence of that paragraph, Public Laws of 1933, c. 123 inserted, following the word "property" and preceding the word "reinvestment", the words "for the purpose of obtaining funds for improving other non-productive," etc.

The amendment of 1935 inserted the provision at the end of the second sentence of the fifth paragraph relating to existing liens.

The 1941 amendment inserted the word "lease" in the first sentence of the first paragraph and in the third paragraph. It also added the provision that the mortgagees shall not be held responsible for determining the validity of liens, etc., where the court directs such liens, etc., to be

paid. For comment on the 1941 amendment, see 19 N. C. L. Rev. 506.

The 1943 amendment made changes in the fourth paragraph. And, as amended by Acts 1943, c. 729, it expressly provided that its intent and purpose was "to provide for the temporary reinvestment of funds received from the sale of contingent remainders in United States bonds and bonds guaranteed as to principal and interest by the United States."

Constitutionality and Validity.—Revisal, sec. 1590, now this section, providing for the sale of contingent remainders, is constitutional and valid. Smith v. Miller, 151 N. C. 620, 66 S. E. 671.

This section does not interfere with the essential rights of ownership but operating in addition to those already possessed, is constitutional and valid. Pendlen v. Williams, 175 N. C. 248, 95 S. E. 500.

Retroactive Effect.—In Springs v. Scott, 132 N. C. 548, 44 S. E. 116, Mr. Justice Connor, speaking for the Court as to the validity of chapter 99, Laws 1903 (Rev., sec. 1509), now this section, in respect to its retrospective operation upon the will considered in that case and the estates that were created thereby, demonstrates by reason and authority that the act is valid, even when allowed to reach back and affect estates already created by will, so far though only as it is permitted to apply to interests not yet vested. Anderson v. Wilkins, 142 N. C. 154, 159, 55 S. E. 272.

The decision in Springs v. Scott was approved in Hodges v. Lipscomb, 133 N. C. 199, 45 S. E. 556, a case in which it appeared that the will was made prior to the passage of the Act of 1903. It was there held that the Act of 1903 operated retrospectively, so as to apply to contingent interest created by a will which had already taken effect by the death of the testator. Anderson v. Wilkins, 142 N. C. 154, 160, 55 S. E. 272.

Purpose of Section.—It was not the purpose of this section to destroy the interest of the remote contingent remaindermen, but to enable the present owners to sell the property and make a good title to the same, and to require that the proceeds be held as a fund, subject to the claims of persons who may ultimately be entitled thereto, and safeguard their rights in all respects. Poole v. Thompson, 183 N. C. 588, 112 S. E. 323. See Lancaster v. Lancaster, 209 N. C. 673, 184 S. E. 527.

It will be noted that the statute does not, either in its terms or purpose, profess or undertake to destroy the interest of the contingent remaindermen in the property, but only contemplates and provides for a change of investment and, subject to the right to use a reasonable portion of the amount for the improvement of remainder, when properly safeguarded, it impresses upon the fund the same contingencies and limitations as were imposed upon the original property. Dawson v. Wood, 177 N. C. 158, 163, 98 S. E. 459.

To prevent any possible doubt of the existence of the power of the Court, upon the application of all the parties in interest, the trustee representing contingent remaindermen, to provide for its exercise and protect the interest of all parties in remainder, whether in esse or not, the Act of 1903, now this section, was passed. McAfee v. Green, 143 N. C. 411, 417, 55 S. E. 828.

When Applicable.—This section and § 41-12 apply only to a sale of property in which there are or have been contingent interests. Waddell v. United Cigar Stores, 195 N. C. 434, 142 S. E. 585.

A lease authorized by the decree of a court of chancery may be binding upon beneficiaries not in esse, when their interests are same as those of persons in being who are subjected by due process to the jurisdiction of the court. Waddell v. United Cigar Stores, 195 N. C. 434, 142 S. E. 585, containing illustration of lease of trust property held valid over the objection that it may extend beyond the term of the trust.

In Stepp v. Stepp, 200 N. C. 237, 240, 156 S. E. 804, 806, 76 A. L. R. 536, Justice Clarkson said: "This amendment [Public Laws 1927, c. 124], where the land is unproductive, etc., extends the right of action to include life estates where there are vested remaindermen and reversioners without their joinder. The section 1744 [G. S. § 44-11] which is amended, theretofore had reference only to contingent remainders."

Mortgage for Permanent Improvements.—The locus in quo was devised to testator's daughter for life with limitation over to the daughter's children. The daughter and her husband expended large sums in making permanent improvements upon the property, and instituted this proceeding against their children, in esse or which might thereafter be born, seeking to have a mortgage in the sum of $20,900 placed on the property to refinance an existing mortgage on the property in the sum of $10,000, and also unsecured notes executed by the life tenant representing a part of the moneys used in making said improvements. It was held that since the remaindermen are in no way liable for any sums expended by the life tenant in making permanent improvements, the finding by the court that the execution of the mortgage to refinance the indebtedness would materially enhance the interest of the remaindermen was erroneous, and judgment directing the execution of the mortgage to refinance the indebtedness should be reversed. Hall v. Hall, 219 N. C. 805, 15 S. E. (2d) 273.

Foreclosure of Tax Lien.—Where land held by a life tenant with contingent limitation over, the persons entitled to the remainder not being determinable until the death of the life tenant, was mortgaged by the life tenant and the mortgage was foreclosed upon default, it was held that in an action to forclose the lien for taxes against the land under § 105-414, in which the purchaser at the foreclosure sale, the life tenant and the known contingent remaindermen were made parties, the minor contingent remaindermen and those not in esse, and the unknown contingent remaindermen were represented by guardian ad litem under this section, and when the provisions of both statutes have been fully and accurately followed the purchaser at the commissioner's sale acquired the fee simple title. Rodman v. Norman, 221 N. C. 320, 20 S. E. (2d) 294.

Status of Remainders.—"Contingent remainders are no longer considered mere possibilities which cannot be transferred, but a remainder-man whose estate is contingent may convey it." 2 N. C. Law Rev. 126; Beacon v. Amos, 161 N. C. 357, 77 S. E. 407.

Cited in Greene v. Stadiem, 198 N. C. 445, 448, 152 S. E. 398; Hines v. Williams, 198 N. C. 420, 152 S. E. 39.

II. ACTIONS IN SUPERIOR COURT FOR SALE.

General Requirements for Sale. — Lands devised for life with contingent limitations over may be sold for reinvestment under the provisions of this section, under the court's order, subject to its future approval of the sale, when it is made to appear that the best interest of all parties so require, those living and in present interest are represented in persons, and unborn children by guardian ad litem. McLean v. Caldwell, 178 N. C. 424, 100 S. E. 888.

Power of Court to Order Sale.—It is within the power of the court, having jurisdiction, to order the private sale of lands for the purpose of dividing the proceeds among tenants in common. Ryder v. Oates, 173 N. C. 569, 92 S. E. 508.

While the courts of this State do not have inherent power to decree a sale and pass title to the purchaser of lands, with remainder limited upon a contingency that would prevent the ascertainment of the ultimate takers, or any of them, till the death of the life tenant, this power is now conferred by the express terms of our statute in all cases where there was "a vested interest in real estate, with a contingent interest over to persons not in being, or when the contingency has not happened which shall determine whom the remaindermen are," under the procedure therein laid down. Dawson v. Wood, 177 N. C. 158, 98 S. E. 459.

The court, without regard to the Act of 1903, has the power to order the sale of real estate limited to a tenant for life, with remainder to children or issue, upon failure thereof, over to persons, all or some of whom are not in esse, when one of the class being first in remainder after the expiration of the life estate is in esse and a party to the proceeding to represent the class, and that, upon decree passed, and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons in esse or in posse. Springs v. Scott, 132 N. C. 548, 44 S. E. 116.

The court has the power to order the private sale of lands affected with contingent interests under the provisions of this section under a proper finding that it would be to the best interests of all concerned, without submitting this issue to the jury, and where the proceedings are properly had and all parties are before the court, the objection is untenable that the sale was made under the decision of the court, and the parties had not agreed thereto. DeLaney v. Clark, 196 N. C. 282, 145 S. E. 398.

Failure to Serve Summons on Infant—Setting Aside Sale.—Where in proceedings to sell lands affected with contingent interests the provisions of § 41-11, have been observed, and the clerk has appointed a guardian ad litem for contingent interests and for infant parties, the failure to serve summons on a minor is to be regarded as an irregularity that will not render the sale void and a nullity. However, on a proper showing, the sale may be set aside as to all the parties except an innocent purchaser without notice of the irregularity; and on appeal to the Supreme Court, when this fact is not apparent, the case will be remanded for its ascertainment. Welch v. Welch, 194 N. C. 633, 140 S. E. 436.

Appeal from Proceedings Improperly Brought before Clerk. — Lands subject to contingent limitations may be

sold by order of the judge of the superior court in term, on appeal in proceedings in partition improperly brought before the clerk, by retaining jurisdiction for the purpose of settling the controversy. Ryder v. Oates, 173 N. C. 569, 92 S. E. 508.

Where an action is wrongfully brought before the clerk of the superior court and is taken to the superior court by appeal, the superior court having original jurisdiction, it will be retained for hearing. Springs v. Scott, 132 N. C. 548, 44 S. E. 116.

When No Appeal Taken Parties Estopped. — Where an executor under a will with power to sell the lands of his testate and reinvest the proceeds, etc., has died, and all persons in present and contingent interest have been made parties to an action wherein the court has substituted another as trustee, upon like trusts in every respect, and the decree was not appealed from, all the privies and parties are estopped as to all issuable matters therein, and may not deny the power of the substituted trustee to make sale of the lands as fully as the executor under the will was therein authorized to make. Hayden v. Hayden, 178 N. C. 259, 100 S. E. 515.

Same—Payment of Betterments. — Where a preliminary judgment in proceedings to sell lands with contingent interests provides for the payment of betterments to the life tenant, and in this respect the judgment is not excepted to or appealed from, it is conclusive upon the parties as an estoppel. Pendleton v. Williams, 175 N. C. 248, 95 S. E. 500.

Who May Institute Suit. — Proceedings to have lands sold that are subject to a life estate, with limitation over, upon contingencies which will prevent the ascertainment of the remaindermen during the life of the first taker, etc., may be instituted by any person having a present vested interest in the lands. Dawson v. Wood, 177 N. C. 158, 98 S. E. 459.

Where one who had no vested estate in land brought action in superior court against contingent remaindermen to sell land, the court lacked jurisdiction of the action, and hence the judgment ordering sale of the land was void and could be collaterally attacked. Watson v. United States, 34 F. Supp. 777.

Necessary Parties.—Where timber growing upon lands is devised to testator's daughter for her life, and at her death to such of her children and grandchildren then living as she may have appointed in her will, or, upon her failure to exercise the power of appointment, to her children and grandchildren then living, objection to proceedings brought by the devisee and her children and grandchildren then living on the ground that no one having a vested interest in the land had been made a party cannot be sustained. Midyette v. Lycoming Timber, etc., Co., 185 N. C. 423, 117 S. E. 386; Thompson v. Humphrey, 179 N. C. 44, 101 S. E. 738.

In proceedings under the section certain contingent interest in land held in trust were sold and reinvested in other lands in accordance with the terms of the trust in the original deed conveying them. The title acquired, under the original deed in trust, by the trustee had become passive in him, and it is held that as, under the statute of uses, the legal and equitable title had merged in the same person neither the trustee nor his heirs were necessary parties to the owner's action against a purchaser to enforce his contract of purchase, and especially so when all vested and contingent interests were represented by some of the parties to the suit. Lee v. Oates, 171 N. C. 717, 718, 88 S. E. 889.

Same—Defendants.—Construing the statute, as amended, in the carefully considered case of Hodges v. Lipscomb, 133 N. C. 199, 45 S. E. 556, the court held that it was only necessary to make parties defendant those of the contingent remaindermen who, on the happening of the contingency, would presently have an estate in the property at the time of action commenced, and as to others more remotely interested they could have their interest represented and protected by a guardian ad litem as the statute provides. Dawson v. Wood, 177 N. C. 158, 163, 98 S. E. 459; Hodges v. Lipscomb, 133 N. C. 199, 45 S. E. 556.

Jurisdiction Cannot Be Conferred by Consent.—Jurisdiction of the superior court of an action by owner of a vested estate against contingent remaindermen to sell land cannot be conferred by consent and this section authorizing such an action must be strictly complied with. Watson v. United States, 34 F. Supp. 777.

Judgment under Former Law Does Not Work an Estoppel.—A former action determined before the enactment on the subject by the Legislature, holding that contingent remainders in lands, etc., cannot be sold unless all persons who may by any possibility be interested, united in such decree, cannot estop the parties to proceedings thereafter brought under the provisions of the section authorizing the judicial sale of property, or portions thereof, when there is a vested interest with remainder over to persons not in being, or when the contingency has not yet happened, etc. Pendleton v. Williams, 175 N. C. 248, 95 S. E. 500.

When Action Abates.—An action against a contingent remainderman to sell the lands under this section, abates upon the death of the remainderman prior to the termination of the life estate when his limitation over is made to depend upon his surviving the life tenant. Redden v. Toms, 211 N. C. 312, 190 S. E. 490.

III. SALE AND REINVESTMENT.

A. General Rules and Incidents Governing.

Effect of Invalid Decree for Sale and Reinvestment.—In an action brought under the provisions of the section, to sell certain lands devised to E. for life and a contingent remainder to her children, it appeared that to further a scheme to erect a hotel on one of the city lots, the court had decreed the sale of certain other of the lands and had appointed a commissioner to act in furtherance of its object. The lands were sold and the proceeds applied to the building of the hotel, but only having funds sufficient to erect the skeleton work of the hotel, other of the lands were decreed by the court to be sold, and their proceeds to be likewise applied; these would not be sufficient for the purpose, and when erected the hotel would not be a desirable investment, especially in the unfurnished condition in which it then would be left. It was held, (1) the decree for the further sale and reinvestment was void, not meeting the statutory requirement that the interest involved should be properly safeguarded; (2) that the court was without authority to order an investment or reinvestment of funds not then available, but depending upon the outcome of future sales of the land, and of this, notice was implied to third persons; (3) that the purchasers at the sale of the land derived to a clear title thereto; (4) that the commissioner came under no personal liability to the contractor or material men of the hotel building; (5) that endorsers of a note made to procure money for building the hotel had no claim on the hotel lot; (6) that the commissioner sell the hotel lot and report to the court, and that the proceeds be held for the benefit of the devisees to the extent of the value of the lots and the costs of improvements thereon free from the claims of material men, etc. Smith v. Miller, 151 N. C. 620, 66 S. E. 671.

Effect of Omitting Bond.—In all cases where property affected with unascertainable contingent remainders is ordered sold under the provisions of this section, it is now required by the amendatory act of 1919, chapters 17 and 259, that a bond be given to assure the safety of the funds arising from the sale; but where this is omitted from a judgment otherwise regular, it will not affect the title conveyed, though the decree should be modified in that respect by proper steps taken in the superior court. Poole v. Thompson, 183 N. C. 588, 112 S. E. 323.

Where Commissioner's Authority Was Limited to Sale of Property and Distribution of Proceeds.—Where a commissioner was authorized by the court to sell part of the lands of an estate for reinvestment under the provisions of this section, and there were no restrictions in regard to the use of the property of the estate, and in the commissioner's report and recommendation of the offer to purchase no authority to restrict the use of the property was asked, and none granted in the order of the court, it was held that the commissioner was without authority to insert restrictions in the deed to the purchaser, his authority being limited under the order of the court to the sale of the property and the distribution of the proceeds of sale. Southern Real Estate Loan, etc., Co. v. Atlantic Refining Co., 208 N. C. 501, 181 S. E. 633.

Public or Private Sale Permissible.—The sale of estates affected, with contingent interests, made under the provision of this section, may, in the sound discretion of the trial judge, and subject to his approval, be sold either at public auction or by private negotiation, as the best interests of the parties may require. Middleton v. Rigsbee, 179 N. C. 437, 102 S. E. 780; McAfee v. Green, 143 N. C. 411, 55 S. E. 828.

Where the sale of land affected with remote contingent interests not ascertainable at the time, comes within the provisions of this section, the court having jurisdiction may order the property disposed of either at a public or private sale, when it is shown that, as to the one or the other, the best interests of the parties will be promoted, subject always to the approval of the court. Poole v. Thompson, 183 N. C. 588, 112 S. E. 323.

Where the provisions of this section, have been observed in the sale of lands affected with contingent interests, the

commissioner appointed to make the sale may effect the same by private negotiations, subject to the approval of the court, when it is properly made to appear that the best interests of the parties so require. Midyette v. Lycoming Timber, etc., Co., 185 N. C. 423, 117 S. E. 386.

Decree Must Provide for Reinvestment. — Where real estate is sold under order of the court, the decree must provide for investment of the fund in such way as the court may deem best for the protection of all persons who have or may have remote or contingent interests. Springs v. Scott, 132 N. C. 548, 44 S. E. 116.

Discretion of Court and Clerk in Reinvestment. — The preservation of the proceeds of the sale of lands, affected with contingent interests, under this section is referred to the sound discretion of the trial judge and in this case no error is found to the order requiring the funds to be paid into the office of the clerk of the superior court, to be loaned out by him or otherwise invested as required by law until the happening of the contingency, except that it should be so modified as to require that interest on these loans be allowed the owners of the particular estate, whether the estate, under correct interpretation of the deed, be one for life to be enlarged into a fee, or a fee simple, determinable on their death without issue, it appearing that they were given the usufruct of the land. Pendleton v. Williams, 175 N. C. 248, 249, 95 S. E. 500. It would seem that by amendment of 1923, the question of reinvestment rests within the discretion of the clerk.

Same—Time of Reinvestment. — In Laws of 1905, ch. 548, this reinvestment in realty was required to be within two years, but such requirement was removed by the later Acts of 1907, chs. 956 and 980, leaving the matter of reinvestment somewhat in the discretion of the court, but with clear intimation that the fund should be reinvested in realty when an advantageous opportunity should be offered. Dawson v. Wood, 177 N. C. 158, 163, 98 S. E. 459.

Applied to Charitable and Other Trusts.—Courts, in the exercise of general equitable jurisdiction, may, in proper instances, decree a sale of estate in remainder and affected by contingent interests, for reinvestment, or a portion thereof, when it is shown that it is necessary for the preservation of the estate and the protection of its owners; and this principle is not infrequently applied in the proper administration of charitable and other trusts, notwithstanding limitations in instruments creating them that apparently impose restrictions on the powers of the trustee in this respect, when it is properly established that the sale is required by the necessities of the case and the successful carrying out of the dominant purposes of the trust. Middleton v. Rigsbee, 179 N. C. 437, 441, 102 S. E. 780.

The sale of an estate in remainder affected under the terms of a will with certain ultimate and contingent interests in trust will not be affected by a clause in the will requiring that the principal of the trust fund shall not be used or diminished during the period of thirty years, with a certain exception, the limitation applying only to the administration of the trust estate, and not preventing the court from ordering a sale when required by the necessities of the estate for its preservation. Middleton v. Rigsbee, 179 N. C. 437, 441, 102 S. E. 780.

Applied to Sale of Growing Timber.—The timber growing upon lands devised to the testator's named daughter for her sole and separate use during her life only, and at her death to such of her children and grandchildren then living as she may have appointed in her will, and upon her failure to have done so, to her children and grandchildren then living, during the life of the daughter, is affected by the contingencies contemplated by this section. Midyette v. Lycoming Timber, etc., Co., 185 N. C. 423, 117 S. E. 386.

Same—Supplementary Decree. — Where an order has been made for the sale of timber growing upon lands affected with contingent interests, the court should also require its commissioner appointed for the sale to give bond for the preservation and proper application of the proceeds of sale, etc. (Laws 1919, ch. 259); but this provision does not affect the title of the purchaser, who is not required to see to the application of the funds, and the proper order in this respect may be supplied by amendment or supplementary decree. Midyette v. Lycoming Timber, etc., Co., 185 N. C. 423, 117 S. E. 386.

Purchaser's Liability Ends When Money Paid into Court.—A purchaser of devised lands affected with a life estate and contingent limitation over, sold for reinvestment under the provisions of this section, is not ordinarily charged with the duty of looking after the proper disposition of the purchase money, and upon paying it into court, under its order, he is quit of further obligation concerning it. McLean v. Caldwell, 178 N. C. 424, 100 S. E. 888.

Where the purchaser at a sale of lands for reinvestment pays his money into the court or to the person authorized by order of court to receive it, ordinarily he is not required to see to the proper application of the funds, its safety being taken care of by the court in its final decree. DeLaney v. Clark, 196 N. C. 282, 145 S. E. 398.

Same—Takes Fee Simple Title.—A purchaser at a sale of land with contingent interests allowed under the provisions of the section acquires a fee simple title, upon payment of purchase price to the court or person authorized to receive it, without being required to see to the application of the funds, and on such payment made is quit of all obligations concerning it. Pendleton v. Williams, 175 N. C. 248, 95 S. E. 550.

Sale for Reinvestment.—A tenant for life in lands may not by adversary proceedings against the remaindermen compel the sale of lands for partition of the proceeds under § 46-24, but upon a proper showing the sale for reinvestment may be ordered in equitable proceedings under the provisions of this section. Smith v. Suitt, 199 N. C. 5, 153 S. E. 602.

B. Powers of Clerk of Superior Court.

Authority of Clerk.—It was not contemplated by this section that the rights of parties should be entrusted to the clerks of the superior court in ordinary special proceedings without approval or confirmation by a judge of the superior court. The section prescribes the method in which there shall be a sale decreed when there is a contingent remainder and requires a decree for proper investment of the funds of remaindermen. Ray v. Poole, 187 N. C. 749, 751, 123 S. E. 5.

Sales of Contingent Interests of Persons Non Sui Juris.—The clerks of courts do not have jurisdiction to order the sale of contingent interests of persons not sui juris in lands, and suits to sell such interest, when the circumstances of the ward require it, should be determined in the Superior Court, in its equitable jurisdiction, which is required to order an investment of the funds in proper instances in accordance with the terms and conditions imposed by the conveyance, in order that the lawful intent of the donor may not be defeated. Smith v. Witter, 174 N. C. 616, 94 S. E. 402.

The order of sale by the clerk of the court of the contingent interest of a lunatic in lands approved by the judge, in proceedings brought for the purpose, is void for the lack of jurisdiction, and deed thereto of the guardian conveys nothing to his grantee. Smith v. Witter, 174 N. C. 616, 94 S. E. 402. It would seem that the amendment of 1923 extended the jurisdiction of the clerk to cover this situation. It will be noted that this case was decided in the Fall Term, 1917.

Proceedings Brought Under Section 46-3.—A tenant for life may not, directly or indirectly, affect the title of those in remainder, whether having a vested or contingent interest in the lands, by joining them in their proceedings for a division or sale for that purpose, brought before the clerk of the court under the provisions of § 46-3, and these proceedings so brought cannot be validated by derivative jurisdiction in the superior court, on appeal, under the provisions of this section, it being required that the proceedings be originally brought in the latter jurisdiction, with certain requirements for the protection of contingent remaindermen, which must be strictly followed; and, though under §§ 46-23, 46-24 a sale is provided when the land is affected with contingent interest in remainder, not presently determinable, the proceedings are therein required to be brought upon petition of such remaindermen, and not upon that of the life tenants. Ray v. Poole, 187 N. C. 749, 123 S. E. 5.

C. Application.

General Illustrations.—Where lands are affected with a contingent interest in remainder, not determinable during the life of the tenant for life, the holder of the vested interest and those in immediate remainder may proceed to have the lands sold under the provisions of this section, and have those remotely interested represented by guardian ad litem for the protection of their interests; and where it is made to appear that the interest of all parties require, or will be materially enhanced by it, the court may order a sale of the property, or any part thereof, for reinvestment, either in purchasing or improving real estate, etc., or invested temporarily to be held under the same contingencies in like manner as the property ordered to be sold. Poole v. Thompson, 183 N. C. 588, 112 S. E. 323.

A testator devised his improved and unimproved lands, in the corporate limits of a town, to his daughter for life with remainder to her children living at her death, with ulterior limitations over to trustees on certain contingencies, and the life tenant brought proceedings for sale and reinvestment of the proceeds under the provisions of this section, having made parties of the persons interested in accordance with the statute, and alleged that by the sale the income would be largely increased, that the sale of the contemplated part

to a purchaser she had secured for a certain price would enable her to make improvements on the land then without income, to make houses on other parts of the land more profitable for rental purpose, etc., that the property as it stood was rapidly depreciating, and there were no available funds, otherwise, to meet the necessary and insistent demands. Held, a demurrer was bad, and properly overruled. Middleton v. Rigsbee, 179 N. C. 437, 102 S. E. 780.

Where the grantors in a deed have erroneously assumed that they had title to the lands they conveyed in fee, but which was affected by future contingent interest not at present ascertainable, and thereafter bring action to make title under the provisions of this section, which authorizes the sale of land affected by such contingencies, and in these proceedings have protected the interest of the remote remainderman by the appointment for them of a guardian ad litem, and have fully set forth the facts and circumstances of the former sale, and bring in the proceeds and submit them to the jurisdiction and orders of the court, the final judgment properly authorizing and confirming the sale, and being had in conformity with the provisions of the statute, perfects the title and same will inure to the benefit of the covenantee in the former deed, and for a breach of this covenant only nominal damages are recoverable. Myer v. Thompson, 183 N. C. 543, 112 S. E. 328.

This proceeding in which the order for the sale of the said lot has been made was not instituted and has not been conducted in accordance with this section. The power of sale has not been exercised by virtue of the statute. The proceeding was brought before the clerk, and not in term. The minors are not represented by guardian ad litem appointed by the judge, but by a next friend appointed by the clerk. The order of sale was signed, not during the term of the superior court in Haywood county, but by the judge holding the courts of the twentieth district (which includes Haywood county) at Sylva, in Jackson county, in said district. The order of sale cannot therefore be held valid. Lide v. Wells, 190 N. C. 37, 128 S. E. 477, 480.

Where the complaint of a life tenant alleges that the land is unproductive and income therefrom is insufficient to pay the taxes and reasonable upkeep, and prays that the land be sold in accordance with this section, the demurrer of the vested remaindermen is improperly sustained, the complaint alleging at least one good cause for action. Stepp v. Stepp, 200 N. C. 237, 156 S. E. 804.

In a suit regarding the management of the trust estate where the trustee and the testator's wife and children are parties and the one living grandchild is made a party defendant and is represented by a guardian ad litem, who also represents as a class the other grandchildren not in esse, all parties having an interest in the estate are properly represented, and the judgment of the court is binding as to all interests. Spencer v. McCleneghan, 202 N. C. 662, 163 S. E. 753.

§ 41-12. Sales or mortgages of contingent remainders validated.—In all cases where property has been conveyed by deed, or devised by will, upon contingent remainder, executory devise, or other limitations, where a judgment of a superior court has been rendered authorizing the sale or mortgaging, including execution of deeds of trust, of such property discharged of such contingent remainder, executory devise, or other limitations in actions or special proceedings where all persons in being who would have taken such property if the contingency had then happened were parties, such judgment shall be valid and binding upon the parties thereto and upon all other persons not then in being or whose estates had not then vested: Provided, that nothing herein contained shall be construed to impair or destroy any vested right or estate. (Rev., s. 1591; 1905, c. 93; 1923, c. 64; 1935, c. 36; C. S. 1745.)

Cross Reference.—As to revocation of deeds of future interests made to persons not in esse, see § 39-6.

Editor's Note.—By the amendment of 1935 this section was made to apply to mortgages and deeds of trust. The amendment also added the clause just preceding the proviso reading "or whose estates had not then vested."

Constitutionality and Validity.—The section is a valid exercise of legislative power. Anderson v. Wilkins, 142 N. C. 154, 55 S. E. 272.

The section, rendering valid judgments authorizing the sale of lands wherein there are contingent remainders, is constitutional and valid. Bullock v. Planters Cotton-Seed Oil, 165 N. C. 63, 80 S. E. 972.

"So long as the interest remains contingent only, the Legislature may act, for a bare expectancy or any estate depending for its existence on the happening of an uncertain event is within its control, not being a vested right which is protected by constitutional guaranties." Anderson v. Wilkins, 142 N. C. 154, 158, 55 S. E. 272.

Partition Sale Not Authorized.—The section does not authorize or validate a partition sale at the instance of a life tenant against vested remaindermen, who are not infrequently children. Ray v. Poole, 187 N. C. 749, 751, 123 S. E. 5.

Application. — A testator devised certain lands to his wife during her widowhood or life, which, at her death, were to be equally divided between the children or "their heirs." The lands were sold in partition in 1904, during the lifetime of the widow, and the children were made parties. One of these children died in 1906, before the death of her mother (1909) and her children, the grandchildren of the testator, brought suit to recover their interests in the land devised, claiming they had a vested interest therein in 1904, and not being parties to the proceedings, were not estopped by the judgment in partition: It was held, that the plaintiffs had a contingent interest in the lands at the time of the sale, and were concluded from claiming the lands under the validating act of 1905 (Revisal, sec. 1591, now this section.) Bullock v. Planters Cotton-Seed Oil Co., 165 N. C. 63, 80 S. E. 972.

Same—Extended to 1923.—"C. 64 Laws 1923 re-enacts section 1745 [of the Consolidated Statutes], validating sales of property under a judgment of the superior court, where the property has been conveyed by deed or devised by will, upon contingent remainder, executory devise, or other limitation, and the judgment has authorized a sale of the property discharged of the contingent remainder or other limitation. This section was enacted in 1905, validating such sales made before that date, and the present statute extends to such sales made since 1905 and up to March 6, 1923." I N. C. Law Rev. 285.

Cited in Hines v. Williams, 198 N. C. 420, 152 S. E. 39; Watson v. United States, 34 F. Supp. 777.

§ 41-13. Freeholders in petition for special taxes defined.—In all cases where a petition by a specific number of freeholders is required as a condition precedent to ordering an election to provide for the assessment or levy of taxes upon realty, all residents of legal age owning realty for life or longer term, irrespective of sex, shall be deemed freeholders within the meaning of such requirement. (1915, c. 22; C. S. 1746.)

Former Law.—The word "freeholders," used in chapter 135, sec. 1, Public Laws of 1911, amending Revisal, sec. 4115, as to who are required to sign the petition for the laying off special school districts and levying a tax therein, did not include females. Gill v. Board, 160 N. C. 176, 76 S. E. 203.

Women Now Included. — In ascertaining the necessary number of resident freeholders for a petition in a proposed new school district, women freeholders must be counted, under the provisions of this section. Chitty v. Parker, 172 N. C. 126, 90 S. E. 17.

Chapter 42. Landlord and Tenant.

Art. 1. General Provisions.

§ 42-1. Lessor and lessee not partners. — No lessor of property, merely by reason that he is to receive as rent or compensation for its use a share of the proceeds or net profits of the business in which it is employed, or any other uncertain consideration, shall be held a partner of the lessee. (Rev., s. 1982; Code, s. 1744; 1868-9, c. 156, s. 3; C. S. 2341.)

In General.—The lessor and lessee are not partners. State v. Keith, 126 N. C. 1114, 1115, 36 S. E. 169. Thus, where B. was to furnish land, farming implements, feed and team and W. was to do the work, and the crops were to be equally divided, it was held that this was not an agricultural partnership. Lawrence v. Week, 107 N. C. 119, 12 S. E. 120. See also Day v. Stevens, 88 N. C. 83, explaining and correcting Curtis v. Cash, 84 N. C. 41.

Duration.—A demise may be for a day as well as for a year, and may be terminable at the will of the lessor. It is not ended until the property is returned to the owner. United States v. Shea, 152 U. S. 178, 189, 190, 14 S. Ct. 519, 38 L. Ed. 403.

The legal understanding of a lease for years is a contract for the possession and profits of land, for a determinate period, with the compensation of rent. Thomas v. Railroad Co., 101 U. S. 71, 78, 25 L. Ed. 950.

Effect of Words "Grant" and "Demise."—In a United State's Supreme Court case it was held that the words "grant" and "demise" in a lease for years create an implied warranty of title and a covenant of quiet enjoyment. See Scott v. Rutherford, 92 U. S. 107, 23 L. Ed. 486.

§ 42-2. Attornment unnecessary on conveyance of reversions, etc.—Every conveyance of any rent, reversion, or remainder in lands, tenements or hereditaments, otherwise sufficient, shall be deemed complete without attornment by the holders of particular estates in said lands: Provided, no holder of a particular estate shall be prejudiced by any act done by him as holding under his grantor, without notice of such conveyance. (Rev., s. 947; Code, s. 1764; 4 Anne, c. 16, s. 9; 1868-9, c. 156, s. 17; C. S. 2342.)

§ 42-3. Term forfeited for nonpayment of rent. —In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within ten days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reëntry in the lease. (1919, c. 34; C. S. 2343.)

Purpose of Section.—This section was passed to protect landlords who made verbal or written leases and omitted in their contracts to make provision for reentry on nonpayment of rent when due. The consequence was that often an insolvent lessee would avoid payment of rent, refuse to vacate and stay on until his term expired. Ryan v. Reynolds, 190 N. C. 563, 565, 130 S. E. 156.

Lease or Contract of Rental.—No technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command and control. United States v. Shea, 152 U. S. 178, 189, 14 S. Ct. 519, 38 L. Ed. 403.

Written into Leases.—The section writes into a contract of a lease of lands, when the lease is silent thereon, a forfeiture of the terms of the lease upon failure of the lessee to pay the rent within ten days after a demand is made by the lessor or his agent for all past due rent, with right of

the lessor to enter and dispossess the lessee. Ryan v. Reynolds, 190 N. C. 563, 130 S. E. 156.

Forfeiture for Benefit of Lessor.—The forfeiture implied by this section is for the benefit of the lessor, and to be declared only at his application. Monger v. Lutterloh, 195 N. C. 274, 142 S. E. 12, holding section not applicable to facts of the case.

Forfeiture Denied upon Tender of Rent and Costs.—Where, during the hearing and before judgment on a petition for forfeiture of a lease under this section, all rents and costs lawfully incurred are tendered to the petitioner, the petition is properly denied. Coleman v. Carolina Theatres, 195 N. C. 687, 143 S. E. 7.

Reentry after Forfeiture.—It was held in the Supreme Court of the United States in Ewell v. Daggs, 108 U. S. 143, 149, 2 S. Ct. 408, 27 L. Ed. 682, that leases which contain a forfeiture of lessee's estate for nonpayment of rent, or breach of other conditions, declare that on the happening of the contingency the demise shall thereupon become null and void, meaning that the forfeiture may be enforced by reentry at the option of the lessor.

Construed with Section 42-33.—This section and section 42-33 are in pari materia, and should be construed together. Ryan v. Reynolds, 190 N. C. 563, 130 S. E. 156.

Section Not Applicable Where in the Lease the Lessee Waives All Notice to Vacate.—Tucker v. Arrowood, 211 N. C. 118, 119, 189 S. E. 180.

§ 42-4. Recovery for use and occupation. — When any person occupies land of another by the permission of such other, without any express agreement for rent, or upon a parol lease which is void, the landlord may recover a reasonable compensation for such occupation, and if by such parol lease a certain rent was reserved, such reservation may be received as evidence of the value of the occupation (Rev., s. 1986; Code, s. 1746; 1868-9, c. 156, s. 5; C. S. 2344.)

Cross Reference.—As to contracts requiring writing, see § 22-2.

Where Lease Void under Statute of Frauds.—Where a lease was void under the statute of frauds, the lessors could only recover for the time the premises were occupied. Harty v. Harris, 120 N. C. 408, 411, 27 S. E. 90.

§ 42-5. Rent apportioned, where lease terminated by death.—If a lease of land, in which rent is reserved, payable at the end of the year or other certain period of time, is determined by the death of any person during one of the periods in which the rent was growing due, the lessor or his personal representative may recover a part of the rent which becomes due after the death, proportionate to the part of the period elapsed before the death, subject to all just allowances; and if any security was given for such rent it shall be apportioned in like manner. (Rev., s. 1987; Code, s. 1747; 1868-9, c. 156, s. 6; C. S. 2345.)

§ 42-6. Rents apportioned, where right to payment terminated by death.—In all cases where rents, rent charges, annuities, pensions, dividends, or any other payments of any description, are made payable at fixed periods to successive owners under any instrument, or by any will, and where the right of any owner to receive payment is terminable by a death or other uncertain event, and where such right so terminates during a period in which a payment is growing due, the payment becoming due next after such terminating event, shall be apportioned among the successive owners according to the parts of such periods elapsing before and after the terminating event. (Rev., s. 1988; Code, s. 1748; 1868-9, c. 156, s. 7; C. S. 2346.)

Not Applicable to Certain Annuities.—This section providing that annuities shall be apportionable in certain instances, has no application to disability benefits payable annually under the terms of an insurance policy, since there is no provision for successive owners, but the right to payment terminates upon the death of insured. Wells v. Guardian Life Ins. Co., 213 N. C. 178, 195 S. E. 394, 116 A. L. R. 130.

§ 42-7. In lieu of emblements, farm lessee holds out year, with rents apportioned.—When any lease for years of any land let for farming on which a rent is reserved determines during a current year of the tenancy, by the happening of any uncertain event determining the estate of the lessor, or by a sale of said land under any mortgage or deed of trust, the tenant in lieu of emblements shall continue his occupation to the end of such current year, and shall then give up such possession to the succeeding owner of the land, and shall pay to such succeeding owner a part of the rent accrued since the last payment became due, proportionate to the part of the period of payment elapsing after the termination of the estate of the lessor to the giving up such possession; and the tenant in such case shall be entitled to a reasonable compensation for the tillage and seed of any crop not gathered at the expiration of such current year from the person succeeding to the possession. (Rev., s. 1990; Code, s. 1749; 1868-9, 156, s. 8; 1931, c. 173, s. 1; C. S. 2347.)

Editor's Note.—Under the common law a tenant for an uncertain time was entitled to the annual production of his annual labor although his tenancy was terminated by the happening of some contingent event, and the remainderman might be deprived of his rent for a part of the current year. This section was passed to protect the right of the remainderman and to secure for him his rent for the part of the year which had not elapsed at the time his title vested. See Hayes v. Wrenn, 167 N. C. 229, 231, 83 S. E. 356.

The Act of 1931, which amended this section to permit an agricultural tenant for years, in case the tenancy is terminated by the sale of the land under any mortgage or deed of trust, to continue his occupation to the end of the current year and to apportion the rent, excepted pending litigation. The act became effective March 23, 1931. See 9 N. C. Law Rev. 379.

Section Reasonable and Constitutional.—This section is but a reasonable legislative regulation of the method and means whereby the remainderman, or succeeding owner, comes into possession and complete enjoyment of his estate and is constitutional. King v. Foscue, 91 N. C. 116, 120.

When No Limitation Exists.—Wherever the relation of landlord and tenant exists, without any limitation as to time, such tenancy shall be from year to year, nor shall either party be at liberty to put an end to it unless by a regular notice. Stedman v. McIntosh, 26 N. C. 291.

Lease Continued.—A lease of land made by a tenant for life terminates at his death, but by this section the lease is continued to the end of the current lease-year so that the tenant's representatives may gather his crop. King v. Foscue, 91 N. C. 116.

Amount Remainderman Entitled to.—The common law being in force in this jurisdiction and the representatives of the life tenant upon his uncertain tenure from death being entitled to the emblements, this section was passed. This was done to protect the right of the remainderman and to secure for him his rent for the part of the year which had not elapsed at the time his title vested. Under the statute the remainderman is entitled to a part of the rent proportionate to the part of the year elapsing after the termination of the life estate and before the surrendering of possession to the remainderman. See King v. Foscue, 91 N. C. 116; Collins v. Bass, 198 N. C. 99, 102, 150 S. E. 706; Hayes v. Wrenn, 167 N. C. 229, 83 S. E. 356.

Lease for One Year Included.—The phrase employed in this section, "a lease for years," is used in a technical sense, like the similar phrase, "an estate for years," by which is meant, an estate for a definite period of time, and it embraces a lease for a single year. King v. Foscue, 91 N. C. 116, 119.

§ 42-8. Grantees of reversion and assigns of lease have reciprocal rights under covenants.—The grantee in every conveyance of reversion in lands, tenements or hereditaments has the like advantages and remedies by action or entry against the holders of particular estates in such

real property, and their assigns, for nonpayment of rent, and for the nonperformance of other conditions and agreements contained in the instruments by the tenants of such particular estates, as the grantor or lessor or his heirs might have; and the holders of such particular estates, and their assigns, have the like advantages and remedies against the grantee of the reversion, or any part thereof, for any conditions and agreements contained in such instruments, as they might have had against the grantor or his lessors or his heirs. (Rev., s. 1989; Code, s. 1765; 32 Hen. VIII, c. 34; 1868-9, c. 156, s. 18; C. S. 2348.)

§ 42-9. Agreement to rebuild, how construed in case of fire.—An agreement in a lease to repair a demised house shall not be construed to bind the contracting party to rebuild or repair in case the house shall be destroyed or damaged to more than one-half of its value, by accidental fire not occurring from the want of ordinary diligence on his part. (Rev., s. 1985; Code, s. 1752; 1868-9, c. 156, s. 11; C. S. 2349.)

Common Law Rule.—In 24 Cyc., 1089 the common law rule is stated as follows: "According to the common law rule, which has been followed generally in this country, a covenant on the part of the lessee to repair or keep in good repair imposes on him an obligation to rebuild the demised premises if they are destroyed during the term by fire or other casualty, even where he is without fault," citing a large number of cases. Chambers v. North River Line, 179 N. C. 199, 202, 102 S. E. 198.

Same—Examples.—"In Pasteur v. Jones, 1 N. C., 393, the court held that where a tenant covenanted to build and leave in repair, and did build, but the houses were destroyed by fire the court of equity would compel him either to rebuild or pay the value of the buildings." Chambers v. North River Line, 179 N. C. 199, 202, 102 S. E. 198.

The lessee's covenant to maintain the leased premises in its present condition is equivalent to a general covenant to repair and leave in repair under the common law, and unless otherwise stated in the lease or provided by statute this duty is not affected by the lessee's negligence or the fact that the property had been destroyed during the continuance of the lease by the act of God or the public enemy. Chambers v. North River Line, 179 N. C. 199, 102 S. E. 198.

Changes Made by Section.—This section was enacted to change the rule, formerly existing, but limits its application to the destruction of a house by accidental fire, and only then where it is damaged to more than half its value. It does not apply to a case where the destruction is not by fire, but by ice and flood. Chambers v. North River Line, 179 N. C. 199, 202, 102 S. E. 198.

The word "maintain" is practically the same thing as repair, which means to restore to a sound or good state, after decay, injury, dilapidation, or partial destruction. Chambers v. North River Line, 179 N. C. 199, 102 S. E. 198.

§ 42-10. Tenant not liable for accidental damage.—A tenant for life, or years, or for a less term, shall not be liable for damage occurring on the demised premises accidentally, and notwithstanding reasonable diligence on his part, unless he so contract. (Rev., s. 1991; Code, s. 1751; 1868-9, C. 156, s. 10; C. S. 2350.)

Duty of Landlord and Tenant Distinguished.—I Jaggard Torts, 223, thus sums up the law: "Normally, the occupant and not the owner or landlord is liable to third persons for injuries caused by the failure to keep the premises in repair. The liability may, however, be extended to the landlord or owner; (a) when he contracts to repair; (b) where he knowingly demises the premises in a ruinous condition or in a state of nuisance; (c) where he authorizes a wrong." Knight v. Foster, 163 N. C. 329, 330, 79 S. E. 614.

Covenant against Accident from External Causes.—It was held in the United States Supreme Court that the law does not imply a warranty that no accident shall befall the tenant from external forces, such as storms, tornadoes, earthquakes or snowslides. Doyle v. Union Pac. R. Co., 147 U. S. 413, 423, 13 S. Ct. 333, 37 L. Ed. 223.

When Lessor Liable for Injuries.—While ordinarily the tenant and not the landlord is liable to third persons for injuries caused to them by the failure to keep the premises in repair, the liability may be extended to the owner, where the condition existed at the time the premises were leased, and for months and years, and the owner knew of it and had promised to rectify it at the solicitation of the tenant. Knight v. Foster, 163 N. C. 329, 79 S. E. 614.

No Implied Obligation on Lessor to Make Repairs.—It was held in the United States Supreme Court that a covenant is never implied that the lessor will make any repairs. Sheets v. Selden, 7 Wall. 416, 423, 19 L. Ed. 166.

Lessor and Lessee Both Liable.—Where a landlord has leased the lower floor of his building as a store and has rented an office above, which has defective plumbing, to a dentist, in an action by the lessee of the store for water damages to his stock of goods, evidence that the lessor had contracted to repair, but for years had failed to inspect or repair the plumbing, and that the dentist had approved an insufficient outlet for the water flowing from his cuspidor and had negligently left his cuspidor turned on during the night, is sufficient, if believed by the jury, to sustain a verdict against the landlord and the dentist jointly, the negligence of each being the proximate cause of the injury. Rucker, etc., Co. v. Willey, 174 N. C. 42, 93 S. E. 379.

Lessee's Duty to Repair or Rebuild.—It was held in a United States Supreme Court case that in the absence of an express covenant to repair, a tenant is not answerable for accidental damages, nor is he bound to rebuild, if the buildings are accidentally destroyed by fire or otherwise. United States v. Bostwick, 94 U. S. 53, 24 L. Ed. 65.

Mismanagement of Ferry.—Where the owner of land, to which a ferry is annexed as a franchise, leases the land together with the ferry, he is not responsible for any damage sustained by a third person, from the mismanagement of the ferry while in possession of the lessee. Biggs v. Ferrell, 34 N. C. 1.

§ 42-11. Willful destruction by tenant misdemeanor.—If any tenant shall, during his term or after its expiration, wilfully and unlawfully demolish, destroy, deface, injure or damage any tenement house, uninhabited house or other outhouse, belonging to his landlord or upon his premises by removing parts thereof or by burning, or in any other manner, or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure or any part thereof, built or standing upon the premises of such landlord, or shall wilfully and unlawfully cut down or destroy any timber, fruit, shade or ornamental tree belonging to said landlord, he shall be guilty of a misdemeanor. (Rev., s. 3686; Code, s. 1761; 1883, c. 224; C. S. 2351.)

Cross References.—As to burning or destroying crops, see § 14-141. As to larceny of ungathered fruit and crops, see § 14-78. As to other regulations of landlord and tenant, see §§ 14-358, 14-359.

Meaning of "Willfull."—The word willful as used in this section means something more than an intention to do a thing. It implies the doing of the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute. State v. Whitener, 93 N. C. 590, 592.

Same—Where Acts Bona Fide.—If the defendants reasonably and bona fide believe that they have the right to remove the buildings, etc., they are not guilty of removing them "willfully" so as to bring their act within the meaning of this section. State v. Rowland Lumber Co., 153 N. C. 610, 614, 69 S. E. 58.

Right to Remove Certain Fixtures.—It is intimated that an away-going tenant has the right to remove fixtures put on the premises by himself for his own convenience. State v. Whitener, 93 N. C. 950. Approved in State v. Morgan, 136 N. C. 628, 630, 48 S. E. 670.

Houses Covered by Section.—For meaning of "tenement house," "uninhabited house" and "outhouse" as used in this section, see State v. Rowland Lumber Co., 153 N. C. 610, 612, 613, 69 S. E. 58.

Corporation Liable.—A corporation is indictable for the acts of its officers and agents under this section. State v. Rowland Lumber Co., 153 N. C. 610, 69 S. E. 58.

The Indictment.—An indictment charging the defendant with burning a dwelling house occupied by him "as lessee" falls within this section. State v. Graham, 121 N. C. 623, 28 S. E. 409.

Burden of Proof.—In an indictment under this section the burden of proof is upon the State to establish, first, that the relation of landlord and tenant existed, and, second, that during the tenant's term or after its expiration he did willfully and unlawfully injure the tenement-house. State v. Godwin, 138 N. C. 582, 50 S. E. 277.

Evidence.—In the trial of an indictment for burning a dwelling house occupied by the defendant as lessee, evidence that the defendant at a prior time was guilty of a similar offence is inadmissible. State v. Graham, 121 N. C. 623, 28 S. E. 409.

§ 42-12. Lessee may surrender, where building destroyed or damaged.—If a demised house, or other building, is destroyed during the term, or so much damaged that it cannot be made reasonably fit for the purpose for which it was hired, except at an expense exceeding one year's rent of the premises, and the damage or destruction occur without negligence on the part of the lessee or his agents or servants, and there is no agreement in the lease respecting repairs, or providing for such a case, and the use of the house damaged or destroyed was the main inducement to the hiring, the lessee may surrender his estate in the demised premises by a writing to that effect delivered or tendered to the landlord within ten days from the damage or destruction, and by paying or tendering at the same time all rent in arrear, and a part of the rent growing due at the time of the damage or destruction, proportionate to the time between the last period of payment and the occurrence of the damage or destruction, and the lessee shall be thenceforth discharged from all rent accruing afterwards; but not from any other agreement in the lease. This section shall not apply if a contrary intention appear from the lease. (Rev., s. 1992; Code, s. 1753; 1868-9, c. 156, s. 12; C. S. 2352.)

In General.—An inspection of this section will show that not only is it in terms confined to a demised house or other building but that it expressly excepts from its provisions those leases in which there is an "agreement respecting repairs." Also by its express terms it requires, as a condition precedent to its application, that a lessee "surrender his estate in the demised premises by a writing to that effect, delivered or tendered to the landlord within ten days from the damages." Chambers v. North River Line, 179 N. C. 199, 202, 102 S. E. 198.

The modification of the common law liability of the lessee of a building, etc., to pay the rent, when the building was accidentally destroyed, etc., during the term of his lease, by this section, under certain conditions, is to some extent a legislative recognition that, without its provisions, the principles of the common law would prevail; and neither the statute, being for the benefit of the lessee, nor the common law principle, has application, when the lessee is insisting on certain rights arising to him under the provisions of the lease. Miles v. Walker, 179 N. C. 479, 102 S. E. 884.

When Landlord Restores Building.—Though the landlord may be under no implied obligation to restore or repair a building which had been destroyed, etc., if he does enter and make the required repairs without further agreement on the subject, the building so rebuilt or restored will come under the provisions of the lease as far as the same may be applied, and for a breach the landlord may be held responsible. Miles v. Walker, 179 N. C. 479, 102 S. E. 884.

Crack in Swimming Pool.—Where a swimming pool is leased for a year, under a written contract that the lease would terminate upon the pool becoming unfit for use, it was held, that a crack in the walls thereof by which the pool was drained of water, and repaired by the lessor at an inappreciable sum, is not sufficient to give the lessee the right to cancel the lease when repair was made under a parol agreement within a reasonable time. Archibald v. Swaringen, 192 N. C. 756, 135 S. E. 849.

Time Allowed for Repairs.—Where a monthly rental to be paid by the lessee of a building, and an obligation to make certain repairs by him, are specified as the consideration for the lease, with forfeiture of the lease upon the non-payment of the rent at stated times, the lessee's liability to repair and to pay rent are, as a rule, distinct and independent obligations, and the law will imply that the lessee be given a reasonable time in which to make the repairs if no time is stated in the lease. Miles v. Walker, 179 N. C. 497, 102 S. E. 884.

Reasonable Time.—Where the controversy is made to depend upon whether the damage to the leased premises had been repaired by the lessor within a reasonable time when the extent of the damage is insufficient to terminate the lease under its written terms, evidence that three days had elapsed between the time the lessor and lessee had agreed upon the repairs necessary and the time the repairs were made, is sufficient to sustain an affirmative verdict that they were made in a reasonable time. Archibald v. Swaringen, 192 N. C. 756, 135 S. E. 849.

Where the terms of a lease fully provide for the rights of the parties upon destruction of the property by fire such rights will be determined in accordance with the written agreement, without reference to this section, or the common law. Grant v. Borden, 204 N. C. 415, 168 S. E. 492.

Damage Insufficient to Enable Lessee to Surrender Premises.—Carolina Mtg. Co. v. Massie, 209 N. C. 146, 183 S. E. 425.

§ 42-13. Wrongful surrender to other than landlord misdemeanor.—Any tenant or lessee of lands who shall willfully, wrongfully and with intent to defraud the landlord or lessor, give up the possession of the rented or leased premises to any person other than his landlord or lessor, shall be guilty of a misdemeanor. (Rev., s. 3682; Code, s. 1760; 1883, c. 138; C. S. 2353.)

§ 42-14. Notice to quit in certain tenancies.—A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days. (Rev., s. 1984; Code, s. 1750; 1891, c. 227; 1868-9, c. 156, s. 9; C. S. 2354.)

Local Modification.—Forsyth: 1935, c. 119; Halifax: 1935, c. 22; Hertford: 1939, c. 367; Montgomery: 1925, c. 196, s. 2; Perquimans: 1935, c. 472; Pitt: 1925, c. 196, s. 2; Randolph: 1925, c. 196, s. 2; Wake: 1931, c. 20.

Notice Must Be Given.—A tenant from year to year is entitled to a written or verbal notice to quit, and a mere demand for possession is insufficient. Vincent v. Corbin, 85 N. C. 108, cited in note in 25 L. R. A., N. S., 103.

A landlord has no right to dispossess his tenant from year to year, without first giving the statutory notice, where the tenant acknowledges the tenancy, sets up no adverse claim or other defense, and relies upon the want of legal notice. Fayetteville Waterworks Co. v. Tillinghast, 119 N. C. 343, 348, 25 S. E. 960.

Effect of Notice.—On May 18, 1897, a landlord gave a tenant from month to month notice "to get out within 30 days." The landlord had received the rent for May. It was held, that such notice was invalid as to May, as the rent had been paid, and as to June, because not ending with the month. Simmons v. Jarman, 122 N. C. 195, 29 S. E. 332, cited in notes in 25 L. R. A., N. S., 857, 858.

Verbal Notice Sufficient.—A verbal notice by landlord to tenant is sufficient. Section 1-585 applies to a different class of notices. Poindexter v. Call, 182 N. C. 366, 109 S. E. 26.

Tenancies at Will.—Where a person is put in possession of land by the owner, without any agreement for rent, and with an express provision that he shall leave it whenever the owner may require him to do so, he is not a tenant from year to year, but strictly a tenant at will, and is not entitled to notice to quit as provided in this section. Humphries v. Humphries, 25 N. C. 362, cited in notes in 35 L. R. A., N. S., 708; 41 L. R. A., N. S, 405.

Where a tenancy is from year to year, and, after the commencement of a year, there is an express lease for a certain time and an agreement to quit at the end of that time, no notice is necessary in order to terminate the tenancy after such time. Williams v. Bennett, 26 N. C. 122.

Where one occupied land claiming it as his own, and when possession was demanded refused to deliver it up, it was held that he could not afterwards insist upon the statutory notice. Head v. Head, 52 N. C. 620, cited in note in 25 L. R. A., N. S., 105.

Effect of Holding Over.—When a tenant for a year or longer time holds over and is recognized by the landlord without further agreement or other qualifying facts or circumstances, he becomes tenant from year to year, and is subject to the payment of the rent and other stipulations

of the lease as far as the same may be applied to existing conditions. Murrill v. Palmer, 164 N. C. 50, 80 S. E. 55; Holton v. Andrews, 151 N. C. 340, 66 S. E. 212; Harty v. Harris, 120 N. C. 408, 27 S. E. 90; Scheelky v. Koch, 119 N. C. 80, 25 S. E. 713; Stedman v. McIntosh, 26 N. C. 291. But it is competent to rebut the presumption that he is a tenant from year to year by proof of a special agreement. Harty v. Harris, 120 N. C. 408, 27 S. E. 90.

Same Tenant Entitled to Notice. — It was not error to charge the jury that, if the tenant leased the premises at five dollars per month and had held over several months, paying the same rent without any new agreement, he was a tenant from month to month, and entitled to fourteen days' (now seven days') notice to quit. Branton v. O'-Briant, 93 N. C. 99.

But the fact that a tenant, who entered into the occupation of premises under an express lease from month to month, continued the occupation for more than two years, is no reason why he should be considered a tenant from year to year, and entitled to the one month's notice to quit. Jones v. Willis, 53 N. C. 430.

Effect of Leaving Premises after Waiver of Notice.—A tenant from year to year, who waives his right to notice to quit, and goes out of possession, has no right to go back on the premises. Torrans v. Stricklin, 52 N. C. 50.

Different Agreement Not Prohibited.—This section does not preclude the parties from making a different agreement as to notice of intention to terminate tenancy. Cherry v. Whitehurst, 216 N. C. 340, 4 S. E. (2d) 900.

Art. 2. Agricultural Tenancies.

§ 42-15. Landlord's lien on crops for rents, advances, etc., enforcement. — When lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands are paid and until all the stipulations contained in the lease or agreement are performed, or damages in lieu thereof paid to the lessor or his assigns, and until said party or his assigns is paid for all advancements made and expenses incurred in making and saving said crops. A landlord, to entitle himself to the benefit of the lien herein provided for, must conform as to the prices charged for the advance to the provisions of the article Agricultural Liens, in the chapter Liens.

This lien shall be preferred to all other liens, and the lessor or his assigns is entitled, against the lessee or cropper, or the assigns of either, who removes the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property.

Provided, that when advances have been made by the federal government or any of its agencies, to any tenant or tenants on lands under the control of any guardian, executor and/or administrator for the purpose of enabling said tenant or tenants to plant, cultivate and harvest crops grown on said land, the said guardian, executor and/or administrator may waive the above lien in favor of the federal government, or any of its agencies, making said advances. (Rev., s. 1993; Code, s. 1754; 1876-7, c. 283; 1917, c. 134; 1933, c. 219; C. S. 2355.)

I. In General.
II. Lien of Lessor.
III. Possession and Title to Crop.
IV. Advancements.
V. Remedy of Lessor to Enforce Lien.

Cross References.

As to agricultural liens for advances, see § 44-52 et seq. As to laborer's crop lien date, see § 44-41. As to short form for lien in certain counties, see § 44-62.

I. IN GENERAL.

Editor's Note.—Public Laws 1933, c. 219, added the proviso now appearing at the end of this section. For a summary of the 1933 amendment, see 11 N. C. L. Rev., 265.

A Statutory Remedy.—In Howland v. Forlaw, 108 N. C. 567, 13 S. E. 173, the court held that the common-law remedy of lessors by distress does not obtain in this State; and that, except as specifically given by statute, a landlord has no lien on the product of the leased property for rent. Reynolds v. Taylor, 144 N. C. 165, 167, 56 S. E. 871.

Applies Only to Agriculture.—This statutory lien is only given when lands are rented or leased for agricultural purposes. Reynolds v. Taylor, 144 N. C. 165, 167, 56 S. E. 871.

What "Crops" Include.—The words "crop raised" mean simply the crop grown or gathered during the year. The word "raised" appears nowhere else in the section, nor in succeeding sections, only the word "crops" is used. The Legislature had in mind no distinction between fructus industriales (products obtained by labor and cultivation) and fructus naturales (products which emanate from the power of nature alone), and there was no need of any. State v. Crook, 132 N. C. 1053, 1056, 44 S. E. 32.

The section gives the landlord a lien for his rent "on any and all crops," that is, on all that is "cropped, cut or gathered" in that season from his land. State v. Crook, 132 N. C. 1053, 1057, 44 S. E. 32.

The operation of a mortgage or agricultural lien in respect to crops is confined to crops then or about to be planted, and will not be extended further than those planted next after the execution of the instrument. Wooten v. Hill, 98 N. C. 49, 3 S. E. 846.

Same—Hay.—Hay is ordinarily embraced in the word "crop" as used in this section. But not, it seems, when it is merely a spontaneous growth, as crab-grass, which sprung up after another crop is housed. State v. Crook, 132 N. C. 1053, 44 S. E. 32.

What Constitutes One a Cropper.—An agreement by him who cultivates land that the owner who advances "guano, seed-wheat," etc., shall out of the crop be repaid in wheat for such advancements, constitutes the former a cropper, and not a tenant. State v. Burwell, 63 N. C. 661.

Cropper Has No Estate.—A cropper has no estate in the land, and his possession is that of the landlord. State v. Austin, 123 N. C. 749, 31 S. E. 731.

When Lessee Has Lien.—When a lessee sublets a part of the farm he becomes lessor to his sublessee and is entitled to the same lien on his crop which the statute gives a lessor. Moore v. Faison, 97 N. C. 322, 2 S. E. 169; Perry v. Perry, 127 N. C. 23, 37 S. E. 71; and therefore holds a prior lien to a mortgagor of the crops. Perry v. Perry, 127 N. C. 23, 37 S. E. 71. The lien of the original landlord is not, however, impaired. See note under the succeeding analysis line, catchline "Effect of Subrenting."

Agreements between Tenants.—Where A and B, tenants in common, agreed to make partition of lands and fix the boundaries, and A agreed that B should occupy the whole and pay to him a portion of the crop raised thereon, it was held, that although this was valid as an agreement for a year, it did not constitute a lease, so as to create the relation of landlord and tenant between the parties. Medlin v. Steele, 75 N. C. 154.

Cited in Jennings v. Keel, 196 N. C. 675, 679, 146 S. E. 716. Never Fail Land Co. v. Cole, 197 N C. 452, 457, 149 S. E. 585.

II. LIEN OF LESSOR.

Landlord's Lien Superior.—The landlord's lien, where the same attaches, by the express terms of the statute is made superior to all other liens. Reynolds v. Taylor, 144 N. C. 165, 167, 56 S. E. 871; Wooten v. Hill, 98 N. C. 49, 3 S. E. 846; Ledbetter v. Quick, 90 N. C. 276; Brewer v. Chappell, 101 N. C. 251, 7 S. E. 670; Rhodes v. Smith-Douglass Fertilizer Co., 220 N. C. 21, 16 S. E. (2d) 408. Including the right of the purchaser of a crop. Burwell v. Coopers Co-op. Warehouse Co., 172 N. C. 79, 89 S. E. 1064.

The lien of a landlord takes precedence to that of a third party for advances, notwithstanding the priority of the latter in time. Spruill v. Arrington, 109 N. C. 192, 13 S. E. 779; Crinkley v. Egerton, 113 N. C. 444, 18 S. E. 669. And this precedence is to the extent of the advances made. Wooten v. Hill, 98 N. C. 49, 3 S. E. 846. See Wise Supply Co. v. Davis, 194 N. C. 328, 139 S. E. 599.

A contract expressed and purporting to be a lease of lands for agricultural purposes, does not change the relationship of landlord and tenant between the parties upon

the ground that if the amount of stipulated rent should be paid at a certain time it should be regarded as a credit upon the purchase of the land at a stated price, it not appearing that the transaction of the contemplated purchase had been made under option given; and the landlord or one to whom the contract has been validly assigned may enforce his lien under this section in priority to the lien, under § 44-52, of one furnishing advancements for the cultivation of the crop. Wise Supply Co. v. Davis, 194 N. C. 328, 139 S. E. 599.

The landlord's lien under this section does not attach to a crop made entirely in a year subsequent to that in which the advancements are furnshed to the tenant. Brooks v. Garrett, 195 N. C. 452, 142 S. E. 486.

The statutory landlord's lien under this section is superior to that of one furnishing supplies to the cropper under § 44-52, but where the cropper under a separate contract with the landlord raises a certain crop, the lien for advancements attaches to such crop, and where the landlord has received the payment for the entire crop including the special crop under separate contract with the cropper and pays himself the amount due as rent, the lien for advancements attaches to the surplus and the holder of the lien may recover thereon from the landlord. Glover v. Dail, 199 N. C. 659, 155 S. E. 575.

Third Person Charged with Notice. — Every person who makes advancements to a tenant or cropper of another does so with notice of the rights of the landlord, and that any lien that he may have on the tenant's crop is preferred to all others, and the risk is his if the tenant does not satisfy the preferred lien by complying with the contract and all stipulations in regard thereto. Thigpen v. Leigh, 93 N. C. 47. Thigpen v. Maget, 107 N. C. 39, 46, 12 S. E. 272.

Same—Caveat Emptor.—This section gives a landlord the title to the crop until the rent is actually paid (whether the claim be reduced to a judgment or not), and such title is not impaired by the fact that the tenant conveys the crop to a third person, who takes without notice of the landlord's claim. The rule caveat emptor applies. Belcher v. Grimsley, 83 N. C. 88.

Liability to Other Lienholders.—A landlord is liable to account to persons who have a lien for supplies furnished for the value of the crops in excess of his lien. Crinkley v. Egerton, 113 N. C. 142, 146, 18 S. E. 341.

Liability of Landlord for Marketing of Tenant's Tobacco. —The landlord and tenant act (this section) gives the landlord only a preferred lien on his tenant's crop on his rented lands for the payment of the rent; and unless and until the landlord has acquired a part of his tenant's crop for the rent, he has acquired no tobacco from his tenant that comes within the provisions of his membership contract in the Tobacco Growers Co-operative Association, and is not liable for the penalty therein contained for failure to market the tobacco raised by his tenant. Tobacco Growers Co-op. Ass'n v. Bissett, 187 N. C. 180, 121 S. E. 446. For an article discussing the effect of the landlord's lien upon cooperative marketing in North Carolina and citing the above case, see 2 N. C. Law Rev. 188.

Effect of Subrenting.—The landlord's right to the crop to secure payment of rent is not impaired by the sub-letting of his tenant. The sub-tenant's crop may thereby be subjected to a double lien, that of the landlord and that of his immediate lessor, but the lien of the landlord is paramount. Montague v. Mial, 89 N. C. 137. Moore v. Faison, 97 N. C. 322, 324, 2 S. E. 169; State v. Crook, 132 N. C. 1053, 1054, 44 S. E. 32.

Antecedent Debts Not Included.—It was not intended to confer a lien upon the landlord for antecedent debts which the lessee might stipulate to pay, and give them a preference over the agricultural lienee, whose money and supplies materially assisted in the production of the crops. This view is assumed to be correct in Thigpen v. Maget, 107 N. C. 39, 12 S. E. 272, and is undoubtedly in harmony with the policy of the law in securing the landlord his rent, and at the same time enabling the tenant to obtain advances from third parties. Ballard Co. v. Johnson, 114 N. C. 141, 144, 19 S. E. 98.

Although under this section and sections 44-52 and 44-60 the lien of a landlord for rent and advances is superior to that of a third party making advances to the tenant, yet such priority exists only for rent accruing or advances made during the year in which the crops are grown, and not for a balance due for an antecedent year. Ballard v. Johnson, 114 N. C. 141, 19 S. E. 98.

Assignee of Tenant's Rent Note.—The assignee of a note, given by a tenant for rent, has a landlord's lien on the crop. Avera v. McNeill, 77 N. C. 50, 52.

Where a landlord furnishes advancements for the making of crops, the lien for the rent and for advancements are in equal degree, and now attach, since the amendment of § 44-52, by chapter 302, Public Laws 1925, to the crops raised by the tenant on the same lands, planted during one calendar year and harvested in the next. Brooks v. Garrett, 195 N. C. 452, 142 S. E. 486.

Conferred Upon Mortgagee.—An agreement after default, between mortgagor and mortgagee, that the mortgagor was to remain in possession as tenant, would confer a landlord's lien upon the mortgagee. Cooper v. Kimbell, 123 N. C. 120, 31 S. E. 346.

Vendor after Default.—After default by a vendee of land to pay the purchase money, the vendor may by contract become landlord of the vendee so as to avail himself of the landlord's lien given by this section. Jones v. Jones, 117 N. C. 254, 23 S. E. 214; Ford v. Green, 121 N. C. 70, 73, 28 S. E. 132.

Certain Costs Included.—The landlord's lien extends to and includes the costs of such legal proceedings as are necessary to recover his rents; and, as all the crops are his until such lien is duly discharged, the tenant has no property therein which he can claim as his constitutional exemption as against such costs. Slaughter v. Winfrey, 85 N. C. 159.

Judgment for Rent.—This section makes a judgment for rent a lien on the crop. Hargrove v. Harris, 116 N. C. 418, 21 S. E. 916.

III. POSSESSION AND TITLE TO CROP.

Common Law Provision.—Before this section was passed, the title to the whole of the crop was, in contemplation of law, vested in the tenant (even where the parties had agreed upon the payment as rent of a certain portion of the crop) until a division had been made and the share of the landlord had been set apart to him in severalty. Deaver v. Rice, 20 N. C. 567; Gordon v. Armstrong, 27 N. C. 409; Biggs v. Ferrell, 34 N. C. 1; Ross v. Swaringer, 31 N. C. 481. Howland v. Forlaw, 108 N. C. 567, 569, 13 S. E. 173.

Section Applies Only to Landlord and Tenant.—Except in the case of landlord and tenant provided for specifically by this section, the lessor has no lien upon the product of the leased property as rent; it is for all purposes, until division, deemed vested in the tenant, and his sale to third persons before the rent is ascertained and set apart conveys a good title. Howland v. Forlaw, 108 N. C. 567, 13 S. E. 173.

Where the occupant of land is a vendee or mortgagor in default, although he may for some purposes be considered a tenant at will, he is not a lessee whose crop, under the provisions of this section, is vested in the landlord. Taylor v. Taylor, 112 N. C. 27, 16 S. E. 924.

Vested in Lessor.—All crops raised on the land, whether by tenant or cropper, are by this section deemed to be vested in the landlord, in the absence of an agreement to the contrary, until the rents and advancements are paid. State v. Austin, 123 N. C. 749, 31 S. E. 731; State v. Keith, 126 N. C. 1114, 1115, 36 S. E. 169; Durham v. Speeke, 82 N. C. 87; Smith v. Tindall, 107 N. C. 88, 12 S. E. 121; Batts v. Sullivan, 182 N. C. 129, 108 S. E. 511; Rhodes v. Smith-Douglass Fertilizer Co., 220 N. C. 21, 16 S. E. (2d) 408.

Assignee of landlord's lien for rent is the owner of the crops raised to the extent of cash rent due and is entitled thereto as against tenant and third party holder of note for rent. Rhodes v. Smith-Douglass Fertilizer Co., 220 N. C. 21, 16 S. E. (2d) 408.

Same—For His Protection.—For the lessor's protection, as between him and the tenant, the possession of the crop is deemed vested in the lessor. State v. Higgins, 126 N. C. 1112, 36 S. E. 113.

Lessor May Use Force.—An attempt to appropriate and carry off the crop may be repelled by the landlord by force, provided no more force is used than is necessary to protect his possession. State v. Austin, 123 N. C. 749, 31 S. E. 731.

Actual Possession in Tenant.—Though the constructive possession of the crop is vested by statute in the landlord, yet, during the cultivation, and for all purposes of making and gathering the crop, the actual possession is in the tenant until the rent and advances become due, or a division can be had. Jordan v. Bryant, 103 N. C. 59, 9 S. E. 135.

The whole tenor of this and the following sections contemplates the right of the lessee or cropper to hold the actual possession, until such time as a division shall be made. State v. Copeland, 86 N. C. 692, 694.

Same—May Maintain Action.—As against third parties the tenant is entitled to the possession both of the land and crop while it is being cultivated, and he may maintain an action in his own name for any injury thereto. Bridgers v. Dill, 97 N. C. 222, 1 S. E. 767. And the ownership of the crop is well charged as his in the indictment. State v. Higgins, 126 N. C. 1112, 36 S. E. 113.

But in Desert Salt Co. v. Tarpey, 142 U. S. 241, 245, 12 S. Ct. 158, 35 L. Ed. 999, it was stated, as follows: "The

lessee can of course, as against strangers, have no greater right of possession than his lessor."

Tenant Has Insurable Interest.—That the possession and title to the crop are deemed vested in the landlord does not divest the tenant of an insurable interest in the crops before division. "It is well settled that any person has an insurable interest in property by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself." Harrison v. Fortlage, 161 U. S. 57, 16 S. Ct. 488, 40 L. Ed. 616; Batts v. Sullivan, 182 N. C. 129, 131, 108 S. E. 511.

When Crop Divided.—Unless otherwise provided by an agreement, the crop should be divided from time to time, as considerable parts thereof shall be gathered, especially where the gathering of the whole is delayed for a considerable length of time. Smith v. Tindall, 107 N. C. 88, 91, 12 S. E. 121.

Crop Left in Field.—A crop cultivated by a tenant and left standing in the field after the expiration of this term, becomes the property of the landlord. And this is so, whether or not the tenant has assigned the crop. Sanders v. Ellington, 77 N. C. 255.

IV. ADVANCEMENTS.

Purchaser Takes with Knowledge.—A purchaser or mortgagee of a crop takes with a full knowledge that if advances shall be necessary to enable the cultivator to make the crop, and without which there would perhaps be no crop, such advances shall be a preferred lien upon the crop, made by reason of such advances, and that this preference shall extend to "existing" liens. Wooten v. Hill, 98 N. C. 49, 53, 3 S. E. 846.

What Included.—The "advancements" referred to in this section embrace anything of value supplied by the landlord to the tenant, or cropper, in good faith, directly or indirectly, for the purpose of making and saving the crop. Brown v. Brown, 109 N. C. 124, 13 S. E. 797.

Where a landlord either pays or becomes responsible for supplies to enable the tenant to make a crop, such supplies are advances. Powell v. Perry, 127 N. C. 22, 37 S. E 276.

Supplies necessary to make and save a crop are such articles as are in good faith furnished to and received by the tenant for that purpose. Ledbetter v. Quick, 90 N. C. 176.

Where a landlord advanced certain cotton-seed, etc., to his tenant in 1884, and in 1885 and 1886 allowed his tenant to retain parts of the undivided cotton-seed and crops by way of advancement, it was held that the plaintiff had a landlord's lien on such seed and crops. Thigpen v. Maget, 107 N. C. 39, 12 S. E. 272.

Same—Board.—Where the landlord supplied the tenant and his family with board, to the end that he might make and save the crop, nothing to the contrary appearing, the reasonable value of such board would constitute an advancement within the meaning of this section. Brown v. Brown, 109 N. C. 124, 13 S. E. 797.

Same—Presumption.—When advancements are of such things as in their nature are appropriate and necessary to the cultivation of the crop, e. g. farming implements and work animals, they will be presumed to create the lien; but where they are of articles not in themselves so appropriate and necessary—e. g., dry goods and groceries—whether they will constitute a lien depends upon the purpose for which they were furnished, and it must affirmatively appear that they were made in aid of the crop. Brown v. Brown, 109 N. C. 124, 13 S. E. 797.

Same—Question for Jury. — It was proper in the court to leave it to the jury to find whether upon the evidence a mule and wagon, etc., were treated as advancements. Ledbetter v. Quick, 90 N. C. 276.

Where Diverted.—That the lessee diverts the advancements from the purpose contemplated cannot change their nature and the purpose of them. Womble v. Leach, 83 N. C. 84; Ledbetter v. Quick, 90 N. C. 276; Brown v. Brown, 109 N. C. 124, 127, 13 S. E. 797.

Collusion and Fraud.—Where landlord and tenants undertake by collusion and fraud to create an indebtedness to the former, under color of "advancements," to the prejudice of creditors of the tenant, such a transaction will not be sustained. Ledbetter, v. Quick, 90 N. C. 276.

Crop of Sublessee.—The original lessor, after his lessee has paid him in full, has no lien under the statute on the crop of the sublessee for advances made by him to the sublessee. Moore v. Faison, 97 N. C. 322, 2 S. E. 169.

V. REMEDY OF LESSOR TO ENFORCE LIEN.

In General.—The landlord may bring claim and delivery to recover possession of crops raised by the tenant or cropper, where his right of possession under this section is denied, or he may resort to any other appropriate remedy to enforce his lien for the rent due and the advances made. Livingston v. Farish, 89 N. C. 140.

Tenant's Liability.—If the tenant, at any time before satisfying the landlord's liens for rent and advances, removes the crop, or any part of it, he becomes liable civilly and criminally. Jordan v. Bryan, 103 N. C. 59, 9 S. E. 135.

When Action Lies.—The action will lie, not only where the crops are removed from the land leased, but also in a case where the tenant or cropper, or any other person, takes the crops into his absolute possession and denies the right of the landlord thereto. Livingston v. Farish, 89 N. C. 140.

The remedy of claim and delivery was designated for the landlord's protection, and it cannot, either by the terms of the statute or by any fair construction, be resorted to before the time fixed for division, unless the tenant is about to remove or dispose of the crop, or abandon a growing crop; otherwise, the tenant might be sued for parcel of the crop as it was gathered. Neither the language nor the spirit of the statute will permit this. Jordan v. Bryan, 103 N. C. 59, 65, 9 S. E. 135.

Same—When No Time for Division Fixed.—Where, in a contract between the landlord and tenant, no time was fixed for the division of the crop, the landlord was not obliged to wait until the whole crop had been gathered, but had a right to bring his action for the possession of the crop before it was fully harvested. Rich v. Hobson, 112 N. C. 79, 16 S. E. 931; Smith v. Tindall, 107 N. C. 88, 12 S. E. 121.

Action for Undivided Portion.—The lessor can maintain an action for recovery of an undivided portion of a crop, and it is not necessary that he shall specifically designate in his complaint or, affidavit in claim and delivery, such undivided part. Boone v. Darden, 109 N. C. 74, 13 S. E. 728.

Denial of Landlord's Title.—Where in his answer in an action of claim and delivery, the defendant tenant denies that the crop, for the possession of which the action is brought, is vested in the plaintiff landlord, such denial avoids the necessity of proving a demand before the commencement of the action. Rich v. Hobson, 112 N. C. 79, 16 S. E. 931.

Not a Personal Property Exemption.—The right to enforce the landlord's lien cannot be defeated by the lessee's claiming the crop as a part of his personal property exemption. Durham v. Speeke, 82 N. C. 87.

Action against Tenant by Third Party.—In an action against a tenant to recover damages for his failure to deliver a crop under his contract of sale, the defense that the tenant had not settled with his landlord, and that the contract was therefore illegal, is not available, when it is shown that the landlord had consented to the sale and had thereafter taken possession of the crop at the tenant's request. Lee v. Melton, 173 N. C. 704, 91 S. E. 697.

§ 42-16. Rights of tenant. — When the lessor or his assigns gets the actual possession of the crop or any part thereof otherwise than by the mode prescribed in § 42-15, and refuses or neglects, upon a notice, written or oral, of five days, given by the lessee or cropper or the assigns of either, to make a fair division of said crop, or to pay over to such lessee or cropper or the assigns of either, such part thereof as he may be entitled to under the lease or agreement, then and in that case the lessee or cropper or the assigns of either is entitled to the remedies against the lessor or his assigns given in an action upon a claim for the delivery of personal property to recover such part of the crop as he, in law and according to the lease or agreement, may be entitled to. The amount or quantity of such crop claimed by said lessee or cropper or the assigns of either, together with a statement of the grounds upon which it is claimed, shall be fully set forth in an affidavit at the beginning of the action. (Rev., s. 1994; Code, s. 1755; 1876-7, c. 283, s. 2; C. S. 2356.)

In General.—The action allowed to a cropper by this section is given against the lessor or employer, and, also, against any person to whom he may assign, or sell, the crop, or any interest therein as, for example, the person who might have an "agricultural lien" upon it, acquired subsequently to the making of the contract with the cropper. Rouse v. Wooten, 104 N. C. 229, 232, 10 S. E. 190.

Purpose.—This section intends to encourage and favor the laborer as to those matters and things upon which his labor has been bestowed, and that he shall certainly reap

the just benefit of his toil. Rouse v. Wooten, 104 N. C. 229, 233, 10 S. E. 190.

Same—Creates a Lien.—While one who labors in the cultivation of a crop, under a contract that he shall receive his compensation from the crops when matured and gathered, has no estate or interest in the land, but is simply a laborer—at most, a cropper—his right to receive his share is protected by this section, which for certain purposes creates a lien in his favor, and which will be enforced against the employer or landlord, or his assigns, and which has precedence over agricultural liens made subsequent to his contract, but before the crop is harvested. Rouse v. Wooten, 104 N. C. 229, 10 S. E. 190.

Lessor Cannot Seize Crop.—The lessor has no right, when there is no agreement to that effect, to take the actual possession from the lessee or cropper, and can never do so, except when he obtains the same by an action of claim and delivery, upon the removal of the crop by the lessee or cropper. State v. Copeland, 86 N. C. 692, 694.

Lessee Left to Civil Remedy.—When the lessee is wrongfully deprived of the actual possession of his crop by the lessor, he is left to his civil remedy, under this section for the breach of trust, should the lessor refuse to account. State v. Keith, 126 N. C. 1114, 36 S. E. 169.

Same—Claim and Delivery.—Where a lessor gets possession of the crop by his own act, the remedy of the lessee to recover his part thereof is by claim and delivery. Wilson v. Respass, 86 N. C. 112.

Same—Trover Not Proper.—Where a landlord took the crop into his sole possession, and refused to divide when it was demanded, on the ground that the crop was not then in condition for a division, but he did not deny the tenant's right to a division, and while in his possession the crop was destroyed by fire; it was held, that this did not amount to a conversion, and an action in the nature of trover could not be maintained. Shearin v. Riggsbee, 97 N. C. 216, 1 S. E. 770.

Lessee's Right to Bring Trespass.—In the U. S. Supreme Court, Van Allen v. Assessors, 3 Wall. 573, 598, 18 L. Ed. 229, it was held, that a man who has leased a farm has no right to possession or control during the lease, and if he wrongfully enters upon the building, or land, and retains wrongful possession of it, he may be liable to the tenant in an action of trespass quare clausum fregit.

Where Lessor Seizes Too Much.—If a lessor seizes more than enough to satisfy his lien, and refuses "to make a fair division of the crop," the defendant can compel him to do so in the manner prescribed in this section. Boone v. Darden, 109 N. C. 74, 78, 13 S. E. 728.

When Cropper Dies.—Where a cropper dies before harvesting his crop, his personal representatives are entitled to recover his share of the crop. Parker v. Brown, 136 N. C. 280, 48 S. E. 657.

§ 42-17. Action to settle disputes between parties.—When any controversy arises between the parties, and neither party avails himself of the provisions of this chapter, it is competent for either party to proceed at once to have the matter determined in the court of a justice of the peace, if the amount claimed is two hundred dollars or less, or in the superior court of the county where the property is situate if the amount so claimed is more than two hundred dollars. (Rev., s. 1995; Code, s. 1756; 1876-7, c. 283, s. 3; C. S. 2357.)

Editor's Note.—This and the following section were formerly part of the same section and should be read together. This should be noted in considering the following annotations.

In General.—It is quite apparent that this and the following section contemplate an action to determine a dispute growing out of the agreement, and the relative rights and obligations created by its stipulations, without disturbing the possession of the lessee, cropper or assignee of either, and this intent is very clearly expressed in the terms used in the enactment. It is a method of settling a controversy without resort to the possessory actions authorized in the antecedent sections. Wilson v. Respass, 86 N. C. 112, 115.

Purpose.—The purpose of the section is to provide a summary mode for ascertaining a disputed liability, and, in case of delay, to secure the fruits of the judgment by requiring of the lessee, as a condition of his remaining in possession of the property, an adequate undertaking for the payment of what may be recovered. Deloatch v. Coman, 90 N. C. 186, 188.

No Application to Vendee.—This and the following section, like section 42-15, are plainly inapplicable where the occupant of land is a vendee or mortgagor. Taylor v. Taylor, 112 N. C. 27, 31, 16 S. E. 924.

Jurisdiction of Justice.—An action by a landlord against a tenant for the recovery of rent, the sum demanded not exceeding two hundred dollars, is an action upon the contract of lease and cognizable in the court of a justice of the peace. Deloatch v. Coman, 90 N. C. 186.

In an action by a landlord to recover the rent, when neither the sum demanded nor the amount ascertained to be due exceeds two hundred dollars, it was held that the superior court has no jurisdiction. Foster v. Penny, 76 N. C. 131.

Same—Tort Actions.—The special jurisdiction of justices of the peace under this section does not extend to torts, but is confined to actions for enforcing contracts. Montague v. Mial, 89 N. C. 137.

Action by Tenant's Widow.—The widow of a tenant cultivating land on shares, after the crop is allotted to her in her year's support, may maintain an action for conversion against the landlord. Parker v. Brown, 136 N. C. 280, 48 S. E. 657.

Same—Recovery.—And she was not compelled to resort to the remedy prescribed by this section. She may pursue her remedy by a civil action to recover the value of the crops, subject to such deductions as the lessor was entitled to by reason of advancements, costs of housing, and such damage as he may have sustained by reason of the inability of the lessee to perform his contract. Parker v. Brown, 136 N. C. 280, 287, 48 S. E. 657.

§ 42-18. Tenant's undertaking on continuance or appeal.—In case there is a continuance or an appeal from the justice's decision to the superior court, the lessee or cropper, or the assigns of either, shall be allowed to retain possession of said property upon his giving an undertaking to the lessor or his assigns, or the adverse party, in a sum double the amount of the claim, if such claim does not amount to more than the value of such property, otherwise to double the value of such property, with good and sufficient surety, to be approved by the justice of the peace or the clerk of the superior court, conditioned for the faithful payment to the adverse party of such damages as he shall recover in said action. (Rev., s. 1995; Code, s. 1756; 1876-7, c. 283, s. 3; C. S. 2358.)

§ 42-19. Crops delivered to landlord on his undertaking. — In case the lessee or cropper, or the assigns of either, at the time of the appeal or continuance mentioned in § 42-18, fails to give the undertaking therein required, then the constable or other lawful officer shall deliver the property into the actual possession of the lessor or his assigns, upon the lessor or his assigns giving to the adverse party an undertaking in double the amount of said property, to be justified as required in § 42-18, conditioned for the forthcoming of such property, or the value thereof, in case judgment is pronounced against him. (Rev., s. 1996; Code, s. 1757; 1876-7, c. 283, s. 4; C. S. 2359.)

Court Will Not Restrain Lessor.—Where the lessor has taken possession of the crop, and is solvent and has been required to give the bond of indemnity, the court will not restrain him from selling the crop. Wilson v. Respass, 86 N. C. 112. In such a case it seems that the tenant cannot regain possession of the crop under the provisions of section 42-18 since that section contemplates non-intervention on the part of the court and not a removal of possession from one party to another. Id.

§ 42-20. Crops sold, if neither party gives undertaking.—If neither party gives the undertaking described in § 42-18 and § 42-19, it is the duty of the justice of the peace or the clerk of the superior court to issue an order to the constable or sheriff, or other lawful officer, directing him to take into his possession all of said property, or so

much thereof as may be necessary to satisfy the claimant's demand and costs, and to sell the same under the rules and regulations prescribed by law for the sale of personal property under execution, and to hold the proceeds thereof subject to the decision of the court upon the issue or issues pending between the parties. (Rev., s. 1997; Code, s. 1758; 1876-7, c. 283, s. 5; C. S. 2360.)

§ 42-21. Tenant's crop not subject to execution against landlord.—Whenever servants and laborers in agriculture shall by their contracts, oral or written, be entitled, for wages, to a part of the crops cultivated by them, such part shall not be subject to sale under executions against their employers, or the owners of the land cultivated. (Rev., s. 1998; Code, s. 1796; C. S. 2361.)

§ 42-22. Unlawful seizure by landlord or removal by tenant misdemeanor.—If any landlord shall unlawfully, willfully, knowingly and without process of law, and unjustly seize the crop of his tenant when there is nothing due him, he shall be guilty of a misdemeanor. If any lessee or cropper, or the assigns of either, or any other person, shall remove a crop, or any part thereof, from land without the consent of the lessor or his assigns, and without giving him or his agent five days notice of such intended removal, and before satisfying all the liens held by the lessor or his assigns, on said crop, he shall be guilty of a misdemeanor. (Rev., ss. 3664, 3665; Code, s. 1759; 1876-7, c. 283, s. 6; 1883, c. 83; C. S. 2362.)

I. In General.
II. The Wrongful Act.
III. The Intent.
IV. Notice.
V. The Indictment.

I. IN GENERAL.

Purpose of Section.—The leading and material part of the purpose is to keep the crops on the land, so that they may be easily seen, known, identified and protected, and to prevent fraud and fraudulent practices that would be greatly facilitated by removing them from the land to any distance. State v. Williams, 106 N. C. 646, 648, 10 S. E. 901.

The purpose of this section is to render the statutory provisions and regulations of the preceding sections more effective, and this penal provision must be interpreted in that light and in that view. It embraces both the landlord and the tenant, and intends the more effectually to secure their respective rights as prescribed. State v. Ewing, 108 N. C. 755, 757, 13 S. E. 10.

Applies Only to Specified Liens.—It will be observed that the section does not extend to, and embrace, all liens the lessor may have on any property of the tenants, but only "all the liens held by the lessor or his assigns on the crop." State v. Turner, 106 N. C. 691, 693, 19 S. E. 1026.

Extends to Receivers.—This section extends to and protects receivers charged with the management of lands. State v. Turner, 106 N. C. 691, 693, 10 S. E. 1026.

The lessor's rights cannot be abridged by any subordinate contracts of the lessee. Montague v. Mial, 89 N. C. 137, 139.

Cited in Never Fail Land Co. v. Cole, 197 N. C. 452, 457, 149 S. E. 585.

II. THE WRONGFUL ACT.

A Misdemeanor Only.—The offense of removing crops, without payment, or giving notice of such removal, although it may have been committed secretly, or at night, is a simple misdemeanor, and cannot be punished by imprisonment in the penitentiary. State v. Powell, 94 N. C. 921.

Actual Seizure Unnecessary.—To constitute the offense of an unlawful seizure of crops by the landlord, under this section, it is not essential that the landlord should take forcible or even manual possession of them; the offense will be complete if he exercises that possession or control which prevents the tenant from gathering and removing his crop in a peaceable manner. State v. Ewing, 108 N. C. 755, 13 S. E. 10.

Possession Important.—An indictment for larceny will not lie against a lessee or cropper for secretly appropriating the crop, to his own use, even if done with a felonious intent, where he is in the actual possession of the same. State v. Copeland, 86 N. C. 692.

An indictment for larceny will lie against a lessee or cropper for secretly appropriating the crop to his own use, where his actual possession thereof has terminated by a delivery to the landlord. State v. Webb, 87 N. C. 558.

If the crop is in the actual possession of the landlord, though undivided, the tenant may be convicted of larceny for feloniously taking and carrying it away; and the ownership of the property will be laid properly in the name of the landlord. State v. King, 98 N. C. 648, 4 S. E. 44.

Gathering the Crop.—How far the tenant might be justified under the statute in severing the crops from the land and storing them on it simply for the purpose of protection to them has been doubtful, but it has been held that he may do so in good faith for such purpose; he may not go beyond that. Varner v. Spencer, 72 N. C. 381; State v. Williams, 106 N. C. 646, 648, 10 S. E. 901.

The gathering and preservation of crops was not the evil intended to be remedied by this section, but the wrongful appropriation, whether by carrying them off the premises or consuming them on the premises, was the evil. Varner v. Spencer, 72 N. C. 381, 383.

Feeding Crop to Stock.—Where a lessee after putting a crop in the crib converted a portion thereof to his own use by feeding it to his stock without the consent of the landlord, this was a removal within the meaning of this section and indictable. Varner v. Spencer, 72 N. C. 381.

Removal from Premises.—Where a tenant without the consent of, or notice to, his landlord, and before satisfying the latter's lien, removed a portion of the crop from the land upon which it was produced and stored it in a building upon his (the tenant's) own land; it was held that he was guilty of unlawfully removing crops, notwithstanding he made the removal for the purpose of sheltering the crop, and kept it separate from others. State v. Williams, 106 N. C. 646, 10 S. E. 901.

Where Tenant Aids Subtenant.—If a tenant aids and abets a subtenant in removing a crop, before paying the lien of the landlord, he is guilty of a misdemeanor. State v. Crook, 132 N. C. 1053, 44 S. E. 32.

Damages by Landlord No Defense.—A tenant indicted for removal of crops without giving the landlord five days' notice cannot show in defense that he had sustained damage by the failure of the landlord to comply with the contract to the amount of the rents due. State v. Bell, 136 N. C. 674, 49 S. E. 163; State v. Neal, 129 N. C. 692, 40 S. E. 205, overruled.

III. THE INTENT.

Need Not Be Shown.—While the obvious purpose of this section is the protection of the lessor's interest against a fraudulent disposition or appropriation of the property, inconsistent with his right and tending to defeat the lien for rent, the wrongful intent is not a constituent of the criminal act described, and the offense is sufficiently charged in the substantial words of the act. State v. Pender, 83 N. C. 651, 653.

The intent in making the removal is immaterial. State v. Williams, 106 N. C. 646, 10 S. E. 901; State v. Crook, 132 N. C. 1053, 1055, 44 S. E. 32.

Implied from the Act.—The statute broadly forbids the removal of the crops, or any part of them, from the land, except in the case and in the way prescribed, and that without regard to the actual intent. The removal implies the intent to commit the offense. State v. Williams, 106 N. C. 646, 649, 10 S. E. 901.

IV. NOTICE.

Removal of Crops.—If it shall be necessary, in possible cases, to remove crops from the land for their protection, this should be done on notice, or legal steps taken as contemplated and allowed by the statute. State v. Williams, 106 N. C. 646, 649, 10 S. E. 901.

A Part of the Offense.—The offense of removing a crop by a tenant before paying the rent and discharging all liens of the landlord on it is not complete unless the crop is removed without giving the five days' notice, for if the notice is given, removing the crop is not an offense. State v. Crowder, 97 N. C. 432, 1 S. E. 690.

"Without Any Notice" Sufficient in Indictment. — An averment in an indictment for removing a crop, "without having given any notice of such intended removal" is equivalent to the averment that the removal was made without giving "five days' notice." State v. Powell, 94 N. C. 921.

Burden of Proof.—In order to convict the defendant of the offense of removing a crop without the consent of the landlord, the burden is on the State to show that the defendant had not given his landlord the statutory five days'

previous notice before the crop had been removed. State v. Harris, 161 N. C. 267, 76 S. E. 683.

How Proven.—The want of such notice may be proved by any competent evidence, and it is not necessary that it should be proved by the landlord or his agent or assignee. State v. Crowder, 97 N. C. 432, 1 S. E. 690.

V. THE INDICTMENT.

Statute Must Be Followed.—An indictment under this section charging the defendant with removing the crop "without satisfying all liens on said crop," is defective. The words of the statute, "before satisfying all liens held by the lessor or his assigns on said crop," should have been followed. State v. Merritt, 89 N. C. 506; State v. Rose, 90 N. C. 712.

Sufficient Averment.—In an indictment under this section, it is sufficient to aver, in the words of the statute, that the act was done, "willfully and unlawfully," leaving it to the defendant to show in excuse, if he can, that such removal was made in good faith and for the preservation of the crop. State v. Pender, 83 N. C. 651.

Where an indictment for removing a crop alleged that the defendant did "rent from B," and subsequently, that he did "remove the crop without satisfying all liens held by said B"; it was held that this, in effect, sufficiently charged the relation of landlord and tenant, and that the "liens held by the lessor" were unpaid at the time of the alleged unlawful removal. State v. Turner, 106 N. C. 691, 10 S. E. 1026.

In this section the word "crop" includes those ungathered as well as those gathered, and an indictment that the landlord seized the "crop growing and unmatured in the field," etc., charges an indictable offense, when it is otherwise sufficient. State v. Townsend, 170 N. C. 696, 86 S. E. 718.

Lien Implied.—It is not necessary to allege, in an indictment under this section, that the lessor or landlord had a lien on the crop, where the bill contains an averment of the lease and of the relation of landlord and tenant, or cropper. By virtue of the statute the law implies a lien, and of this the courts will take notice. State v. Rose, 90 N. C. 712; State v. Merritt, 89 N. C. 506, distinguished. State v. Smith, 106 N. C. 653, 11 S. E. 166.

In an indictment for removing a crop, it is not necessary to negative the fact that, by agreement between the parties, it was stipulated that the crops should not be subjected to the statutory liens. State v. Turner, 106 N. C. 691, 10 S. E. 1026.

Variance.—Where an indictment for removal of crops without notice to the landlord charged an agreement by the defendant to raise a crop on the land of G., and on the trial the proof showed the title to be in another, who rented the land to G; it was held that there was no variance. State v. Foushee, 117 N. C. 766, 767, 23 S. E. 247.

Judgment Arrested.—When on the trial it was proved that the defendants had a license from the tenant, and such fact is not charged in the indictment, the judgment will be arrested. State v. Sears, 71 N. C. 295.

§ 42-23. Terms of agricultural tenancies in certain counties.—All agricultural leases and contracts hereafter made between landlord and tenant for a period of one year or from year to year, whether such tenant pay a specified rental or share in the crops grown, such year shall be from December first to December first, and such period of time shall constitute a year for agricultural tenancies in lieu of the law and custom heretofore prevailing, namely from January first to January first. In all cases of such tenancies a notice to quit of one month as provided in § 42-14 shall be applicable. If on account of illness or any other good cause, the tenant is unable to harvest all the crops grown on lands leased by him for any year prior to the termination of his lease contract on December first, he shall have a right to return to the premises vacated by him at any time prior to December thirty-first of said year, for the purpose only of harvesting and dividing the remaining crops so ungathered. But he shall have no right to use the houses or outbuildings or that part of the lands from which the crops have been harvested prior to the termination of the tenant year, as defined in this section.

This section shall only apply to the counties of Anson, Ashe, Bladen, Brunswick, Columbus, Cumberland, Duplin, Gaston, Hoke, Lincoln, Pender, Robeson, Sampson, and Yadkin. (Pub. Loc. 1929, c. 40; Pub. Loc. 1935, c. 288; Pub. Loc. 1937, cc. 96, 600; Pub. Loc. 1941, c. 41; 1943, c. 68.)

§ 42-24. Turpentine and lightwood leases.—This chapter shall apply to all leases or contracts to lease turpentine trees, or use lightwood for purposes of making tar, and the parties thereto shall be fully subject to the provisions and penalties of this chapter. (Rev., s. 1999; Code, s. 1762; 1893, c. 517; 1876-7, c. 283, s. 7; C. S. 2363.)

Extension of Section 42-22.—This section extends section 42-22 to "all leases or contracts to lease turpentine trees," and thus it is made a misdemeanor for the lessee of turpentine trees to remove any part of the turpentine crop in the like case as when the removal of the crop by an agricultural tenant is made such offense. State v. Turner, 106 N. C. 691, 692, 10 S. E. 1026.

Cited in Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 339, 171 S. E. 368.

§ 42-25. Mining and timber land leases. — If in a lease of land for mining, or of timbered land for the purpose of manufacturing the timber into goods, rent is reserved, and if it is agreed in the lease that the minerals, timber or goods, or any portion thereof, shall not be removed until the payment of the rent, in such case the lessor shall have the rights and be entitled to the remedy given by this chapter. (Rev., s. 2000; Code, s. 1763; 1868-9, c. 156, s. 16; C. S. 2364.)

Not a Lease.—Where the owner of lands conveys the timber standing and growing thereon, with provision that the time for cutting and removing it will be extended upon payment of a certain sum, this is not a leasehold interest but an estate in fee. Carolina Timber Co. v. Wells, 171 N. C. 262, 88 S. E. 327.

Art. 3. Summary Ejectment.

§ 42-26. Tenant holding over may be dispossessed in certain cases.—Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:

1. When a tenant in possession of real estate holds over after his term has expired.

2. When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.

3. When any tenant or lessee of lands or tenements, who is in arrear for rent or has agreed to cultivate the demised premises and to pay a a part of the crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated. (Rev., s. 2001; Code, ss. 1766, 1777; 4 Geo. II, c. 28; 1868-9, c. 156, s. 19; 1905, cc. 297, 299, 820; C. S. 2365.)

Local Modification.—Johnston: 1933, c. 390.

I. Application and Scope.
II. Holding Over.
III. Breach of a Provision of Lease.
IV. Rights of the Parties.
V. The Action.

I. APPLICATION AND SCOPE.

The basis and scope of summary ejectment in actions between landlord and tenant are established by this section. Warren v. Breedlove, 219 N. C. 383, 387, 14 S. E. (2d) 43.

Relation of Landlord and Tenant Necessary.—The summary remedy in ejectment provided by this section for the ousting of tenants who hold over after the expiration of the term is restricted to cases where the relation between the parties is that of landlord and tenant. Hauser v. Morrison, 146 N. C. 248, 59 S. E. 693; McCombs v. Wallace, 66 N. C. 481; Hughes v. Mason, 84 N. C. 473; McIver v Seaboard Airline R. Co., 163 N. C. 544, 545, 79 S. E. 1107.

This section applies only where the conventional relationship of landlord and tenant exists, and when title to the property is in issue, the jurisdiction of the justice of the peace is ousted, and the proceeding is properly dismissed as in case of nonsuit upon appeal to the Superior Court. Prudential Ins. Co. v. Totten, 203 N. C. 431, 166 S. E. 316.

Summary ejectment will lie only where the relationship of landlord and tenant existed between the parties under a lease contract, express or implied, and the tenant has held over after the expiration of the term, and while it is necessary that the tenant's entry should have been under a demise, it need not be for a definite term, a tenancy at will being sufficient. Simons v. Lebrun, 219 N. C. 42, 12 S. E. (2d) 644.

Not Coextensive with Doctrine of Estoppel.—The remedy by summary proceedings in ejectment given by this section, is not coextensive with the doctrine of estoppel arising where one enters and holds land under another, but is restricted to the case where the relation between the parties is simply that of landlord and tenant. McLaurin v. McIntyre, 167 N. C. 350, 352, 83 S. E. 627; Hauser v. Morrison, 146 N. C. 248, 249, 59 S. E. 693.

Some Contract or Lease Required.—This section was only intended to apply to a case in which the tenant entered into possession under some contract or lease, either actual or implied, with the supposed landlord, or with some person under whom the landlord claimed in privity, or where the tenant himself is in privity with some person who had so entered. McCombs v. Wallace, 66 N. C. 481.

Where Purchase Changed to Lease.—Where one unconditionally surrenders his rights under the contract of purchase, and enters into a contract of lease, he may be evicted by summary proceeding under this section; and it is not necessary that he should actually surrender the possession of the land and receive it again at the hands of the lessor. Riley v. Jordan, 75 N. C. 180.

Two Classes Excluded.—The construction of this section excludes from the operation of the act two classes, viz.: vendees in possession under a contract for title and vendors retaining possession after a sale, though such persons are certainly tenants at will or sufferance for some purposes, and frequently so styled. McCombs v. Wallace, 66 N. C. 481.

When Section Does Not Apply. — The remedy by summary ejectment before a justice of the peace, under this section et seq., is not available when there is a relation of mortgagor and mortgagee, or vendor and vendee. McLaurin v. McIntyre, 167 N. C. 350, 83 S. E. 627.

Where a controversy involved the disputed title to real property, out of which certain equities arose, this section does not apply. McLaurin v. McIntyre, 167 N. C. 350, 83 S. E. 627.

Where the adverse contentions of the parties, supported by evidence, put the title to the property in issue, the jurisdiction of the justice of the peace is ousted, and on appeal in the Superior Court the action is properly dismissed. Home Bldg., etc., Ass'n v. Moore, 207 N. C. 515, 177 S. E. 633.

Same—Bargainor in Deed of Trust.—A bargainor in a deed of trust containing a stipulation for the retention of the possession of the land conveyed until sold under the terms of the trust, and who holds possession after a sale of the premises by a trustee, is not such a tenant as comes within the purview of this section, and hence proceedings cannot be taken under that act to evict him. McCombs v. Wallace, 66 N. C. 481.

Same—Entry as Vendee.—Where a party entered land under a contract of purchase, while so possessed a justice of the peace has no jurisdiction to oust him under this section. McCombs v. Wallace, 66 N. C. 481; McMillan v. Love, 72 N. C. 18; Riley v. Jordan, 75 N. C. 180, 183.

Consideration of Equitable Defenses. — A justice of the peace has jurisdiction of a summary action in ejectment, and may determine the questions of tenancy and holding over, and while he has no equitable jurisdiction, he may consider equitable defenses set up in summary ejectment in so far as they relate to the issue of tenancy. Farmville Oil, etc., Co. v. Bowen, 204 N. C. 375, 168 S. E. 211.

Applied in Lassiter v. Stell, 214 N. C. 391, 199 S. E. 409.

II. HOLDING OVER.

Constitutional.—Paragraph one of this section, as to a tenant holding over was declared constitutional in Credle v. Gibbs, 65 N. C. 192, 193.

In General.—It is a principle fully recognized in this State, that when a tenant for a year or a longer time holds over and is recognized as tenant by the landlord, without further agreement or other qualifying facts or circumstances, he becomes tenant from year to year, and subject to the payment of the rent and other stipulations of the lease as far as the same may be applied to existent conditions. Holton v. Andrews, 151 N. C. 340, 66 S. E. 212; Harty v. Harris, 120 N. C. 408, 27 S. E. 90; Scheelky v. Koch, 119 N. C. 80, 25 S. E. 713; Stedman v. McIntosh, 26 N. C. 191; Murrill v. Palmer, 164 N. C. 50, 53, 80 S. E. 55.

But a mere acceptance of the rents by the landlord does not create a tenancy from year to year nor preclude the landlord from recovery of possession. In an action to recover the possession, as the plaintiff is entitled to damages for the occupation of the premises, the plaintiff can accept voluntary payments without thereby ratifying the tenant's possession. Mauney v. Norvell, 179 N. C. 628, 630, 103 S. E. 372; Vanderford v. Foreman, 129 N. C. 217, 39 S. E. 839.

Effect of Recognition.—The landlord may treat his tenant, who holds over, as a trespasser and eject him, or he may recognize him as tenant; but when such recognition has been made, a presumption arises of a tenancy from year to year, and as stated, under the terms and stipulations of the lease as far as the same may apply. Murrill v. Palmer, 164 N. C. 50, 54, 80 S. E. 55.

When Holding Over Allowed.—It seems that it is not a wrongful holding over when the tenant has been compelled to continue his occupation of necessity; for instance, when he has remained in possession solely by reason of the sickness of the tenant or some member of his family, and of such a character that removal could not be presently made without serious danger to the patient. Murrill v. Palmer, 164 N. C. 50, 54, 80 S. E. 55.

Issue as to Holding Over.—The only question the court can try under paragraph one in this proceeding is, "Was the defendant the tenant of the plaintiff, and does he hold over after the expiration of the tenancy?" McIver v. Seaboard Airline R. Co., 163 N. C. 544, 545, 79 S. E. 1107; McDonald v. Ingram, 124 N. C. 272, 274, 32 S. E. 677.

Applied in Stadiem v. Harvell, 208 N. C. 103, 179 S. E. 448.

Cited in Texas Co. v. Beaufort Oil & Fuel Co., 199 N. C. 492, 494, 154 S. E. 829.

III. BREACH OF A PROVISION OF LEASE.

Condition Must Be in Lease.—A summary proceeding in ejectment under the landlord and tenant act begun during the lessee's term can not be maintained where the contract of lease contained no condition, the breach of which would authorize a re-entry by the lessor. The mere failure to pay rent upon "a lease at ..... dollars a year, payable monthly," does not warrant such re-entry. Meroney v. Wright, 81 N. C. 390.

Suit for Rescission Cannot Be Substituted on Appeal. — Where a verbal lease does not provide for its termination or reserve the right of re-entry for breach by the tenant of stipulated conditions in regard to maintenance and operation of the property, breach of such conditions cannot be made the basis for summary ejectment, and issues of fraud in procuring the lease and wilful breach of the conditions are erroneously submitted in the Superior Court upon appeal in such action, it not being permissible for a party to substitute on appeal a suit for rescission. Dees v. Apple, 207 N. C. 763, 178 S. E. 557.

When Breach Waived.—After the breach of the tenant of his contract, acceptance of rent by the landlord which has accrued thereafter, will prevent the landlord from insisting on the forfeiture. Winder v. Martin, 183 N. C. 410, 111 S. E. 708.

Defense of Partial Eviction.—Where a defendant has been partially evicted in order for him, in a summary action of ejectment, to retain possession of the leased premises by paying relatively a reduction in the rental price fixed by his contract, he must prove that such eviction was caused by the plaintiff, or one acting under his authority, or one paramount in title, and upon failure of evidence of this character, his claim therefor is properly denied as a matter of law. Blomberg v. Evans, 194 N. C. 113, 138 S. E. 593.

IV. RIGHTS OF THE PARTIES.

Tenant May Dispute Assignment.—A tenant cannot dispute the title of his landlord but where an action of ejectment is brought by one claiming to be an assignee of the landlord, the tenant may dispute the assignment. Steadman v. Jones, 65 N. C. 388, 391.

Not Entitled to Renewal.—Tenant, in the absence of an agreement, has neither a legal nor an equitable right to a renewal of the lease. Barnes v. Saleeby, 177 N. C. 256, 98 S. E. 708.

Same—Consideration.—An option in the original lease to renew would not be without consideration, but landlord's agreement during the lease, and not constituting part of the lease, not to lease the property without first giving the tenant an opportunity to renew the lease was unenforcible, being without consideration. Barnes v. Saleeby, 177 N. C. 256, 98 S. E. 708.

Estoppel to Deny Landlord's Title.—It is an undoubted principle of law, fully recognized by the Federal Supreme Court, that a tenant cannot dispute the title of his landlord, either by setting up a title, in himself, or a third person, during the existence of the lease or tenancy. Rector v. Gibbon, 111 U. S. 276, 284, 4 S. Ct. 605, 28 L. Ed. 427. And the same rule is applied by the North Carolina courts. Lawrence v. Eller, 169 N. C. 211, 85 S. E. 291.

Neither the tenant of land nor any person claiming title by or through him can dispute the right of the landlord to recover the premises in ejectment, after the expiration of the lease, upon the ground of a defect of title in the landlord. Callender v. Sherman, 27 N. C. 711.

Where the relation of landlord and tenant is established, and the latter is in possession, the tenant will not be permitted to dispute the title of the landlord during the continuance of the lease. Hobby v. Freeman, 183 N. C. 240, 111 S. E. 1. Before disputing his landlord's title, the tenant must restore possession. Buckhorne Land, etc., Co. v. Yarbrough, 179 N. C. 335, 102 S. E. 630.

Same—Slave at Time of Entry.—See Wilson v. James, 79 N. C. 349, cited in notes in 7 L. R. A., N. S., 222, 52 L. R. A., N. S., 976, 977, 978.

Subtenant.—Not only the tenant but his sublessee is estopped to deny the title of his immediate landlord. Bonds v. Smith, 106 N. C. 553, 11 S. E. 322, cited in note in 7 L. R. A., N. S., 931.

V. THE ACTION.

Landlord Proper Party to Bring.—The landlord under whom a tenant has entered into the possession of the leased premises is the proper one to bring his summary action of ejectment (authorized by this section) to dispossess the tenant holding over after the expiration of his lease, upon proper notice to vacate, and the objection of the tenant that the landlord has again leased the premises to another to begin immediately upon the expiration of his term, and that the second lessee is the only one who can maintain the proceedings in ejectment, is untenable. Shelton v. Clinard, 187 N. C. 664, 122 S. E. 477.

A landlord may institute suit in the Superior Court to eject his tenant, the remedy of summary ejectment before a justice of the peace not being exclusive, and in such action the Superior Court acquires jurisdiction where the defendant denies plaintiff's title, controverts the allegations of tenancy, and pleads betterments. Bryan v. Street, 209 N. C. 284, 183 S. E. 366.

Third Party Let in.—When, in an action for the recovery of real estate, both the plaintiff and a third party claim to be the landlord of the defendant, the latter has a right, upon affidavit, to be let in as a party defendant to the action. Rollins v. Rollins, 76 N. C. 264.

Estoppel.—In a proceeding before a justice of the peace under this section, a defendant who does not deny having entered as the tenant of the plaintiff is estopped from setting up a superior title existing at the date of the lease or subsequently acquired from a third person. Heyer v. Beatty, 76 N. C. 28.

A suit to restrain execution on a judgment in summary ejectment by a justice of the peace, on the ground that the justice had no jurisdiction, is properly dismissed where it appears that plaintiff, formerly the mortgagor of the property, had leased the property and was estopped from attacking the foreclosure and setting up the relation of mortgagor and mortgagee. Shuford v. Greensboro Joint-Stock Land Bank, 207 N. C. 428, 177 S. E. 408.

Provision for Renewal as Defense.—While a provision of renewal of a lease is not itself a renewal so as to vest an estate, yet it gives an equity which may be set up as a defense in a summary proceeding in ejectment. While the court allows this equitable defense to the summary proceedings, the defendants must pay the accrued rent. McAdoo v. Callum Bro. & Co., 86 N. C. 419.

Burden of Proof.—In an action of ejectment, the burden of proving that the tenancy has terminated is on the plaintiff. Poindexter v. Call, 182 N. C. 366, 109 S. E. 26.

Evidence.—See Hargrove v. Cox, 180 N. C. 360, 104 S. E. 757.

§ 42-27. Local: Refusal to perform contract ground for dispossession.—When any tenant or cropper who enters into a contract for the rental of land for the current or ensuing year willfully neglects or refuses to perform the terms of his contract without just cause, he shall forfeit his right of possession to the premises. This section applies only to the following counties: Alleghany, Anson, Beaufort, Bertie, Bladen, Brunswick, Burke, Cabarrus, Camden, Carteret, Caswell, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Davidson, Duplin, Edgecombe, Franklin, Gaston, Gates, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Hyde, Jackson, Johnston, Jones, Lenoir, Martin, Mecklenburg, Montgomery, Nash, Northampton, Onslow, Pasquotank, Pender, Perquimans, Pitt, Polk, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Swain, Tyrrell, Union, Wake, Wayne, Washington, Wilson, Yadkin, Moore, Surry and Stokes. (Rev., s. 2001, subsec. 4; Code, ss. 1766, 1777; 4 Geo. II, c. 28; 1868-9, c. 156, s. 19; 1905, cc. 297, 299, 820; 1907, cc. 43, 153; 1909, cc. 40, 550; Pub. Loc. Ex. Sess. 1924, c. 66; 1931, cc. 50, 194, 446; 1933, cc. 86, 485; 1935, c. 39; 1943, cc. 69, 115, 459; C. S. 2366.)

Editor's Note.—The Acts of 1931 added Moore, Rutherford, Stokes and Surry Counties to this section.

Public Laws 1933, cc. 86, 485, added Pasquotank and Polk counties to this section, although Pasquotank had already been added by chapter 66 of the Public-Local Laws of the 1924 Extra Session.

Public Laws 1935, chapter 39 added Guilford to the list of counties to which the section is applicable.

The 1943 amendments made this section applicable to Hoke, Brunswick and Davidson counties.

§ 42-28. Summons issued by justice on verified complaint.—When the lessor or his assigns, or his or their agent or attorney, makes oath in writing, before any justice of the peace of the county in which the demised premises are situated, stating such facts as constitute one of the cases described in § 42-26 and § 42-27, and describing the premises and asking to be put in possession thereof, the justice shall issue a summons reciting the substance of the oath, and requiring the defendant to appear before him or some other justice of the county, at a certain place and time (not to exceed five days from the issuing of the summons, without the consent of the plaintiff or his agent or attorney), to answer the complaint. The plaintiff or his agent or attorney may in his oath claim rent in arrear, and damage for the occupation of the premises since the cessation of the estate of the lessee: Provided, the sum claimed shall not exceed two hundred dollars; but if he omits to make such claim, he shall not be thereby prejudiced in any other action for their recovery. (Rev., s. 2002; Code, s. 1767; 1868-9, c. 156, s. 20; 1869-70, c. 212; C. S. 2367.)

When Defendant Denies Tenancy.—In a proceeding before a justice of the peace under this section, where the defendant denies the alleged tenancy, it is the duty of the justice to proceed and try the issue of tenancy. Foster v. Penry, 77 N. C. 160.

Question of Jurisdiction.—The question of jurisdiction is not to be determined by matter set up in the answer, but the court should hear the evidence as to the issue of tenancy, and if the same be found for the landlord, an estoppel operates upon the tenant, and the title to the land is not drawn in controversy. Hahn v. Latham, 87 N. C. 172.

If the defense involved the title to real estate, a justice of the peace has no jurisdiction thereof, and should dismiss the proceeding. Forsythe v. Bullock, 74 N. C. 135.

Defense.—The tenant may set up in his answer any equi-

table defense which he may have to his landlord's claim. Forsythe v. Bullock, 74 N. C. 135.

Same—Effect of Failure to Set up Defense.—Where a defendant failed to set up the defense that he was not a tenant, but held under an agreement to purchase, and it was decided that he was a tenant he cannot be heard to question the validity of the judgment nor can he restrain its execution except in a direct proceeding to set it aside for fraud, etc. Isler v. Hart, 161 N. C. 499, 500, 77 S. E. 681.

Effect of Provision for Renewal.—A provision for renewal in a lease is not itself a renewal so as to vest an estate, yet it gives an equity which may be set up as a defense in a summary proceeding in ejectment. McAdoo v. Callum Bros. & Co., 86 N. C. 419.

Section Is Not an Exception to Requirement of § 1-57.—While this section clearly provides that the agent or attorney of the lessor may make the oath in writing required in actions in summary ejectment, it does not provide an exception to the requirement of § 1-57, that "every action must be prosecuted in the name of the real party in interest." Choate Rental Co. v. Justice, 211 N. C. 54, 55, 188 S. E. 609.

And the same applies to suits for the collection of rents. Home Real Estate, etc., Co. v. Locker, 214 N. C. 1, 2, 197 S. E. 555.

§ 42-29. Service of summons.—The officer receiving such summons shall immediately serve it by the delivery of a copy to the defendant or by leaving a copy at his usual or last place of residence, with some adult person, if any such be found there; or, if the defendant has no usual place of residence in the county and cannot be found therein, by fixing a copy on some conspicuous part of the premises claimed. (Rev., s. 2003; Code, s. 1768; 1868-9, c. 156, s. 21; C. S. 2368.)

§ 42-30. Judgment by default or confession.—The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if the defendant fails to appear, or admits the allegations of the complaint, the justice shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding two hundred dollars, be claimed in the oath of the plaintiff as due and unpaid, the justice shall inquire thereof, and give judgment as he may find the fact to be. (Rev., s. 2004; Code, s. 1769; 1868-9, c. 156, s. 22; C. S. 2369.)

Tenant May Hold after Adverse Judgment.—Where both plaintiff and an interpleading third party claim to be landlords of the defendant, if a judgment by default is taken against the tenant, no writ of possession can issue until the determination of the controversy between the plaintiff and the interpleading defendant. Rollins v. Rollins, 76 N. C. 264.

Same—When Evicted.—If in an action for the recovery of real estate in which a third person claiming as landlord of the defendant has been made a party defendant, judgment is taken against the tenant defendant and he is evicted, he is entitled to be restored to possession until the determination of the controversy between the plaintiff and the interpleading defendant. Rollins v. Bishop, 76 N. C. 268.

Same—Appeal.—Upon an appeal when the appeal is dismissed as to the tenant defendant, no writ of possession can issue from the justice's court until the determination of the controversy between the plaintiff and interpleading defendant. Rollins v. Henry, 76 N. C. 269.

§ 42-31. Trial by justice; jury trial; judgment; execution.—If the defendant by his answer denies any material allegation in the oath of the plaintiff, the justice shall hear the evidence and give judgment as he shall find the facts to be. If either party demands a trial by jury, it shall be granted under the rules prescribed by law for other trials by jury before a justice; and if the jury finds that the allegation in the plaintiff's oath, which entitles him to be put in possession, is true, the justice shall give judgment that the defendant be removed from and the plaintiff put in possession of the demised premises, and also for such rent and damages as shall have been assessed by the jury, and for costs; and shall issue his execution to carry the judgment into effect. (Rev., s. 2005; Code, s. 1770; 1868-9, c. 156, s. 23; C. S. 2370.)

Cross Reference.—As to jury trial in the court of a justice of the peace, see § 7-150 et seq.

Where Injunction Issues.—Where a person has been enjoined from bringing actions on each installment of rent as vexatious, such person is not precluded by such injunction from issuing execution on a judgment taken in a summary action in ejectment for the recovery of the property after the expiration of the lease. Featherstone v. Carr, 134 N. C. 66, 46 S. E. 15.

Effect of Judgment.—A judgment for a tenant in summary proceedings is not an estoppel on the landlord to the extent of precluding him from showing in a subsequent action advancements made prior to eviction to which he was entitled. Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47.

Same—Matter Is Res Judicata as to Tenancy.—Where in proceedings in summary ejectment on final judgment entered in the superior court it has been adjudicated that A was the tenant of B, which judgment was not appealed from, the matter is res judicata, and A cannot maintain a suit for an injunction to restrain the execution of the judgment in the former action, or that he be kept in possession, or for an accounting, his remedy being to vacate the judgment for recognized equitable reasons in direct proceedings. Isler v. Hart, 161 N. C. 499, 77 S. E. 681.

§ 42-32. Damages assessed to trial.—On appeal to the superior court, the jury trying the issue joined shall assess the damages of the plaintiff for the detention of his possession to the time of the trial in that court, and judgment for the rent in arrear and for the damages assessed may, on motion, be rendered against the sureties to the appeal. (Rev., s. 2006; Code, s. 1775; 1868-9, c. 156, s. 28; C. S. 2371.)

Damages upon Appeal.—Where there is an appeal from the justice of the peace in ejectment, the jury shall assess all damages of the plaintiff which he is entitled thereto from the time of the unlawful detention to the time of the trial in the superior court, and upon the defendant's tendering the amount sued for and the costs to the time, a judgment as of nonsuit is properly allowed. Ryan v. Reynolds, 190 N. C. 563, 130 S. E. 156.

Same—Surety Liable.—The surety on a bond to stay execution on appeal from judgment of a justice of the peace rendered in summary proceedings in ejectment is liable for such rents and profits to the plaintiff as may accrue to the date of the trial in the superior court. Dunn v. Patrick, 156 N. C. 248, 72 S. E. 220.

§ 42-33. Rent and costs tendered by tenant.—If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease. If the plaintiff further prosecutes his action, and the defendant pays into court for the use of the plaintiff a sum equal to that which shall be found to be due, and the costs, to the time of such payment, or to the time of a tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed. (Rev., s. 2007; Code, s. 1773; 4 Geo. II, c. 28, s. 4; 1868-9, c. 156, s. 26; C. S. 2372.)

To Protect Tenant.—This section was passed in the interest of the tenant. A landlord could bring an action after demand as required by the statute, when each installment of rent was due. The tenant had to pay the rent and cost

before judgment or get out. This section was to protect the tenant from hasty eviction, at the same time the landlord obtained his rent and costs. Ryan v. Reynolds, 190 N. C. 563, 566, 130 S. E. 156.

Only Rents Due Included.—Under the provisions of this section the lessee in summary ejectment is given the right to tender or pay into court the amount of rent due under the lease to the time of the beginning of the action, with interest and costs, and upon his so doing, the proceedings will be stayed; and the exception of the lessor that all rents, whether due under the terms of the contract or not, should be included to the time of the dismissal of the action, is untenable. Ryan v. Reynolds, 190 N. C. 563, 130 S. E. 156.

Same—Cannot Demand Other Debts.—Where a contract for the lease of land at a specified rent contains a provision giving to the lessee the right to take sand therefrom at a stated price, the lessor in ejectment cannot maintain the position that the lessee should tender or pay for the sand he may thus have used, under the provision of this section, as a part of the rental due by him, the contract being construed separately as to the two provisions. Ryan v. Reynolds, 190 N. C. 563, 130 S. E. 156.

Effect of Tender by Tenant.—A tender by the tenant of rent accrued after termination of the lease does not preclude the landlord from recovering possession. Vanderford v. Foreman, 129 N. C. 217, 39 S. E. 839.

Effect of Tender upon Proceedings for Forfeiture.—Where during the hearing and before judgment on a petition under § 42-3 for the forfeiture of a lease held by an insolvent corporation in the hands of a receiver, the receiver tendered to the petitioner all rents due, together with all costs lawfully incurred, as provided in this section, it was held that petition was properly denied. Coleman v. Carolina Theatres, 195 N. C. 607, 143 S. E. 7.

Effect of Acceptance of Rent.—Acceptance by the landlord of rent accruing after termination of lease, after suit for possession, does not create a tenancy from year to year, and does not preclude the landlord from recovery. Vanderford v. Foreman, 129 N. C. 217, 39 S. E. 839.

Where Tender of Rents Does Not Prevent Forfeiture.—Where the lease provides that the landlord shall have the option to declare the lease void upon failure of lessee to pay rent when due, and waives notice to vacate, lessee may not prevent forfeiture by tendering rents due upon the trial. Tucker v. Arrowood, 211 N. C. 118, 189 S. E. 180.

§ 42-34. Undertaking on appeal; when to be increased.—Either party may appeal from the judgment of the justice, as is prescribed in other cases of appeal from the judgment of a justice; upon appeal to the superior court either plaintiff or defendant may demand that the same shall be tried at the first term of said court after said appeal is docketed in said court, and said trial shall have precedence in the trial of all other cases, except the cases of exceptions to homesteads: Provided, that said appeal shall have been docketed at least ten days prior to the convening of said court: Provided, further, that the presiding judge, in his discretion, may take up for trial in advance any pending case in which the rights of the parties or the public require it; but no execution commanding the removal of a defendant from the possession of the demised premises shall be suspended until the defendant gives an undertaking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be approved by the justice, to be void if the defendant pays any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land. At any term of the superior court of the county in which such appeal is docketed after the lapse of one year from the date of the filing of the undertaking above mentioned, the tenant, after legal notice to that end has been duly executed on him, may be required to show cause why said undertaking should not be increased to an amount sufficient to cover rents and damages for such period as to the court may seem proper, and if such tenant fails to show proper cause and does not file such bond for rents and damages as the court may direct, or make affidavit that he is unable so to do and show merits, his appeal shall be dismissed and the judgment of the justice of the peace shall be affirmed. (Rev., s. 2008; Code, s. 1772; 1868-9, c. 156, s. 25; 1883, c. 316; 1921, c. 90; Ex. Sess., 1921, c. 17; 1933, c. 154; 1937, c. 294; C. S. 2373.)

Local Modification.—Burke: Pub. Loc. 1927, c. 57, Davie, Granville, Iredell, Mecklenburg, Swain, Watauga: C. S. 2373.

Justice Has Discretion as to Surety.—On an application to a justice of the peace for a suspension of execution after a recovery by a landlord against his tenant, the justice has a discretion as to the sufficiency of the surety, which a judge will not review, in the absence of any suggestion that the justice acted dishonestly or capriciously. Steadman v. Jones, 65 N. C. 388.

Power to Increase Bond.—If the bonds should become impaired or if the litigation should become protracted to such an extent as to require additional security to protect the plaintiffs in their rents, then under this section the superior court can require additional security. Featherstone v. Carr, 132 N. C. 800, 802, 44 S. E. 592.

Not only is it within the jurisdiction and power of the superior courts to have the bonds increased or strengthened, but under their general powers in equity, outside of that statute or any other statute, they would have the right to take such action. Featherstone v. Carr, 132 N. C. 800, 802, 44 S. E. 592.

Judgment Prior to Action on Bond.—A bond, with sureties, conditioned upon the payment of any judgment given in summary proceedings in ejectment, makes the obtaining of the judgment a condition precedent to a recovery thereon against the sureties; and the obtaining of such a judgment must be shown by proper averment and proof, or an action against the sureties willl be premature. Blackmore v. Winders, 144 N. C. 212, 56 S. E. 874.

Precedence in Trial.—An appeal from the judgment of a justice of the peace in a summary ejectment has precedence over all other cases except those involving exceptions to homesteads, and is properly called upon demand at the beginning of the term of the superior court commencing next after the docketing of the appeal. Roediger v. Sapos, 217 N. C. 95, 6 S. E. (2d) 801.

§ 42-35. Restitution of tenant, if case quashed, etc., on appeal.—If the proceedings before the justice are brought before a superior court and quashed, or judgment is given against the plaintiff, the superior or other court in which final judgment is given shall, if necessary, restore the defendant to the possession, and issue such writs as are proper for that purpose. (Rev., s. 2009; Code, s. 1774; 1868-9, c. 156, s. 27; C. S. 2374.)

In General.—The writ of restitution lies to restore a party to the possession of property of which he has been deprived by some erroneous process; but it will not be employed to put one in possession where he has not been ousted by the court, nor to take possession from one who has acquired it pending litigation, but not by virtue of any order, judgment or process therein. Durham, etc., R. Co. v. North Carolina R. C., 108 N. C. 304, 12 S. E. 983.

When Writ Given.—When a party is put out of possession of land, or compelled to pay money, under a judgment which is afterwards reversed or set aside, the court will restore the party to the possession of the land, and give him a remedy for the money thus paid. Lytle v. Lytle, 94 N. C. 522.

A Part of the Judgment.—Whenever a party is put out of possession by process of law, and the proceedings are adjudged void, an order for a writ of restitution is a part of the judgment. Perry v. Tupper, 70 N. C. 538; Meroney v. Wright, 84 N. C. 336, 339.

Where on trial of summary ejectment before a justice of peace, judgment was rendered for the plaintiff, who was put into possession and on appeal, the superior court decided against the plaintiff, upon the ground that the lease had not terminated, the defendant is entitled to a writ of restitution as a part of the judgment in his favor. Meroney v. Wright, 84 N. C. 336.

§ 42-36. Damages to tenant for dispossession, if proceedings quashed, etc.—If, by order of the justice, the plaintiff is put in possession, and the pro-

ceedings shall afterwards be quashed or reversed, the defendant may recover damages of the plaintiff for his removal. (Rev., s. 2010; Code, s. 1776; 1868-9, c. 156, s. 30; C. S. 2375.)

Sufficient Allegation.—A complaint in an action by a tenant for wrongful eviction by summary proceedings, alleging that by reason thereof the plaintiff was deprived of his house and garden for shelter and support of his family, and was distressed in body and mind and put to great mortification and shame and loss of employment, sufficiently alleges damages other than the loss of crops. Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47.

Assessment of Damages.—Under this section a tenant who secures the reversal of summary proceedings against him may have damages for eviction assessed in the original or in a separate action. Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47.

Recovery by Landlord.—Where a landlord wrongfully evicts a tenant he can recover for advancements to the tenant before the eviction but not for labor performed by himself after the eviction. Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47.

Art. 4. Forms.

§ 42-37. Forms sufficient.—The following forms, or substantially similar, shall be sufficient in all proceedings under this chapter:

Oath of Plaintiff

North Carolina, ... County.

A. B., plaintiff, against C. D., defendant. } Summary proceedings in ejectment.

The plaintiff (his agent or attorney) maketh oath that the defendant entered into the possession of a piece of land in said county (describe the land) as a lessee of the plaintiff (or as lessee of E. F., who, after the making of the lease, assigned his estate to the plaintiff, or otherwise, as the fact may be); that the term of the defendant expired on the....day of.....19.... (or that his estate has ceased by nonpayment of rent, or otherwise, as the fact may be); that the plaintiff has demanded the possession of the premises of the defendant, who refused to surrender it, but holds over; that the estate of the plaintiff is still subsisting, and the plaintiff asks to be put in possession of the premises.

The plaintiff claims.....dollars for rent of the premises from the.....day of ..... 19....to the.....day of.....19...., and also.....dollars for the occupation of the premises since the ..... day of ..... 19.... to the date hereof.

A. B., plaintiff.

Subscribed and sworn to before me, this..... day of .....19....

J. K., J. P.

Summons

North Carolina,.....County.

A. B., plaintiff, against C. D., defendant. } Summary proceedings in ejectment.

A. B. (his agent or attorney) having made and subscribed before me the oath, a copy of which is annexed, you are required to appear before me on the....day of.....,19...., at....., then and there to answer the complaint; otherwise judgment will be given that you be removed from the possession of the premises.

Witness my hand and seal this ..... day of....., 19.....

J. K., J. P. (Seal).

To C. D., defendant.

The justice attaches the oath of the plaintiff to the summons and delivers them, and a copy of both of them to the officer, and makes the following entry on his docket, or varies it according to the facts:

Docket Entries

A. B., plaintiff, against C. D., defendant. } Summary proceedings in ejectment for (describe the premises.)

Oath of plaintiff (his agent or attorney) filed on the....day of.....19....

Plaintiff claims.....dollars for rent from .....to....., and.....dollars for occupation from.....to.....

Summons issued the....day of....., 19...., to....., constable (or sheriff, as the case may be).

The officer serves the summons and returns it to the justice with the oath of the plaintiff, and with his return indorsed:

Return of Officer

On this day I served the within summons on the defendant, C. D., by delivering to him a copy thereof, and of the oath of A. B., annexed (or by leaving a copy thereof and of the oath of A. B., annexed, at the usual place of residence of the defendant, C. D., with an adult found there) (or the said C. D. not being found in my county, and having no usual or last place of residence therein) (or no adult person being found at his usual or last place of residence, by posting a copy of the summons and of the oath of A. B., annexed, on a conspicuous part of the premises claimed).

N. M., Constable.

The....day of ....., 19.....

Record to Be Entered on Docket

A. B., plaintiff, against C. D., defendant. } Summary proceedings in ejectment.

It appearing that the summons, with a copy of the oath of the plaintiff (his agent or attorney), was duly served on defendant,* and whereas the defendant fails to appear (or admits the allegations of the plaintiff), I adjudge that the defendant be removed from and the plaintiff put in possession of the premises described in the oath of the plaintiff. I also adjudge that the plaintiff recover of defendant.....dollars for rent from the ..... day of ....., 19.....to the .... day of....., 19...., and....., dollars for damages for occupation of the premises from the....day of....., 19...., to this day, and.....dollars for his costs; the....day of....., 19.....

If the defendant admits part of the allegations of plaintiff, but not all, the judgment must be varied accordingly; for example: follow the foregoing to the asterisk (*), and then proceed:

And whereas the defendant appears and admits the first and second allegations of the plaintiff, and denies the residue; and whereas both parties waived a trial by jury, I heard evidence upon the matters in issue, and find (here state the findings on the matters in issue separately).

Supposing the findings are for the plaintiff, the record would proceed:

I therefore adjudge that the defendant (and so

on from the asterisk (*). If either party demands a jury, the record will proceed from the asterisk (*) as follows:

And whereas the plaintiff (or defendant, as the case may be) demanded a trial of the issues joined by a jury, I caused a jury to be summoned, to wit: (here give the names of the jurors summoned) from whom the following jury was duly impaneled, to wit: (here state the names of the six jurors impaneled), who find (here state the verdict of the jury; if they find all the issues for the plaintiff, say so; if any particular issues, say so; also state the sums assessed by them for rent and for occupation to trial). Therefore, I adjudge, etc. (as in form No. 5, from asterisk (*).

If either party appeals, the justice will enter on his docket as follows, altering the entry according to the facts:

Record of Appeal

From the foregoing judgment the plaintiff (or defendant, as the case may be) prayed an appeal to the next superior court of said county, which is allowed.

Execution on Judgment for Plaintiff

A. B., plaintiff, against C. D., defendant. } ..... County.

The State of North Carolina, to any lawful officer of said county—Greeting:

You are hereby commanded to remove C. D. from, and put A. B. in, the possession of a certain piece of land (here describe it as in the oath of plaintiff). You shall also make out of the goods and chattels, lands and tenements, of said defendant ..... dollars, with interest from the ..... day of ....., 19....., to the day of payment, which the plaintiff lately recovered of the defendant as rent and damages, and the further sum of ..... dollars as costs, in said action. Return this writ, with a statement of your proceedings thereon, before me (state when and where according to general law respecting justices' executions).

Witness my hand and seal, this ..... day of ....., 19....

..... (Seal.)

Bond to Stay Execution

We, the undersigned, ... and ....., acknowledge ourselves indebted to ..... in the sum of ..... dollars:

Witness our hands and seals, this the ..... day of ....., A. D. 19....

Whereas on the .... day of ....., A. D. 19...., before ..... a justice of the peace for ..... county, A. B. recovered a judgment against C. D. for ..... and for..... dollars damages for the detention of said real estate from the ..... day of ....., A. D. 19...., to the ..... day of ....., A. D. 19....; and whereas the said ..... ha.... prayed an appeal to the superior court from said judgment, and also asks that execution on said judgment shall be suspended: Now, therefore, if the said ..... shall pay any judgment which, in this or in any other action, the said ..... may recover for the rent of said premises, and for damages for detention thereof, then this obligation shall be void; otherwise to remain in full force and virtue.

..... (Seal.)
..... (Seal.)
..... (Seal.)

Stay of Execution

The State of North Carolina, to any officer having an execution in favor of A. B., plaintiff,

v. C. D., defendant, in a summary proceeding in ejectment, signed by .....

The defendant having given bond to me, as required by law, on his appeal to the superior court of ..... county, in the above case, you will stay further proceedings upon said execution and immediately return the same to me, with a statement of your action under it.

Witness my hand and seal this .... day of ....., 19....

C. D., defendant ....., J. P. (Seal.)

Certificate on Return of Appeal

The annexed are the original oath, summons and other papers, and a copy of the record of the proceedings in the case of a summary proceeding in ejectment, A. B., plaintiff, v. C. D., defendant. ....., J. P. (Seal.)

(Here state all the costs, to whom paid or due, and by whom.)

(All the papers must be attached.) (Rev., s. 2011; Code, s. 1780; C. S. 2376.)

Chapter 43. Land Registration.

Art. 1. Nature of Proceeding.

§ 43-1. Jurisdiction in superior court.—For the purpose of enabling all persons owning real estate within this state to have the title thereto settled and registered, as prescribed by the provisions of this chapter, the superior court of the county in which the land lies in the state shall have exclusive original jurisdiction of all petitions and proceedings had thereupon, under the rules of practice and procedure prescribed for special proceedings except as herein otherwise provided. (1913, c. 90, s. 1; C. S. 2377.)

Editor's Note.—This chapter is known generally as the Torren's Law. The principle of the "Torrens System" is conveyance by registration and certificate instead of by deed, and assimilates the transfer of land to the transfer of stocks in corporations. For a discussion of the history and development of the Torrens system, see Cape Lookout Co. v. Gold, 167 N. C. 63, 83 S. E. 3 and "The Torrens System—After Thirty-Five Years," 10 N. C. L. Rev. 329.

Chapter to Be Liberally Construed.—This statute is not in derogation of common right, but is of a remedial character, and should be liberally construed according to its intent. Cape Lookout Co. v. Gold, 167 N. C. 63, 83 S. E. 3; Dillon v. Brocker, 178 N. C. 65, 100 S. E. 191; Perry v. Morgan, 219 N. C 377, 14 S. E. (2d) 46.

Amendment of Pleadings and Parties.—Under the provisions of this section, the judge of the superior court is given authority over the whole proceedings before the clerk, and may require reformation of the process, pleadings or decrees or entries, and therefore he has authority to allow parties defendant to be made and enlarge the time within which to file answers. Empire Mfg. Co. v. Spruill, 169 N. C. 618, 86 S. E. 522.

§ 43-2. Proceedings in rem; vests title. — The proceedings under any petition for the registration of land, and all proceedings in the court in relation to registered land, shall be proceedings in rem against the land, and the decrees of the court shall operate directly on the land, and vest and establish title thereto in accordance with the provisions of this chapter. (1913, c. 90, s. 2; C. S. 2378.)

See note under § 43-50.

Consolidation of Proceedings.—A proceeding for the purpose of registering title and an injunction to prevent trespass, involving the same land and the same parties may be consolidated. Blount v. Sawyer, 189 N. C. 210, 126 S. E. 512.

Cited in Brinson v. Lacy, 195 N. C. 394, 396, 142 S. E. 317.

§ 43-3. Rules of practice prescribed by attorney-general. — The attorney-general, with the approval of the supreme court, shall from time to time make, change, revise and revoke rules of practice in the superior court for the administration of this chapter. He shall in like manner prescribe forms for use in such court, and in the notation of the registry of titles of memorials, claims, liens, lis pendens, and all other involuntary charges upon and to such registered lands. Whenever a question shall arise in the administration of this chapter as to the proper method

of protecting or asserting any right or interest under the law, and the method of procedure is in doubt, it shall be the duty of the clerk or register of deeds to notify the attorney-general, who, with the approval of the supreme court, shall prescribe a rule covering such case. (1913, c. 90, s. 31; C. S. 2379.)

Art. 2. Officers and Fees.

§ 43-4. Examiners appointed by clerk. — The clerk of the superior court of each county shall appoint three or more examiners of titles, who shall be licensed attorneys at law, residing in the state of North Carolina. They shall qualify by taking oath before the clerk to faithfully discharge the duties of such office, which oath shall be filed in the office of the clerk. The term of office shall be two years. Examiners of titles shall have and exercise the jurisdiction and perform the duties hereinafter prescribed, and receive the fees herein provided. They shall not appear in or have any connection with any proceeding instituted under the provisions of this chapter, and they shall be subject to removal at will by such clerk or judge of the superior court. (1913, c. 90, s. 3; 1917, c. 63; C. S. 2380.)

§ 43-5. Fees of officers.—The fees to be allowed the clerks and sheriffs in this proceeding shall be the same as now allowed by law to clerks and sheriffs in other special proceedings. The examiner hereinbefore provided for shall receive, as may be allowed by the clerk, a minimum fee of five dollars for such examination of each title of property assessed upon the tax books at the amount of five thousand dollars or less; for each additional thousand dollars of assessed value of property so examined he shall receive fifty cents; for examination outside of the county he shall receive a reasonable allowance. There shall be allowed to the register of deeds for copying the plot upon registration of titles book one dollar; for issuing the certificate and new certificates under this chapter, fifty cents for each; for noting the entries or memorandum required and for the entries noting the cancellation of mortgages and all other entries, if any, herein provided for, a total of twenty-five cents for the entry or entries connected with one transaction. The county or other surveyor employed under the provisions of this chapter shall not be allowed to charge more than forty cents per hour for his time actually employed in making the survey and the map, except by agreement with the petitioner: Provided, however, that a minimum fee of two dollars in any case may be allowed.

There shall be no other fees allowed of any nature except as herein provided, and the bond of the register, clerk and sheriff shall be liable in case of any mistake, malfeasance, or misfeasance as to the duties imposed upon them by this chapter in as full a manner as such bond is now liable by law. (1913, c. 90, s. 30; C. S. 2381.)

Art. 3. Procedure for Registration.

§ 43-6. Who may institute proceedings.—Any person, being in the peaceable possession of land within the state and claiming an estate of inheritance therein, may prosecute a special proceeding in rem against all the world in the superior court for the county in which such land is situate, to establish his title thereto, to determine all adverse claims and have the title registered. Any number of the separate parcels of land claimed by the petitioner may be included in the same proceeding, and any one parcel may be established in several parts, each of which shall be clearly and accurately described and registered separately, and the decree therein shall operate directly upon the land and establish and vest an indefeasible title thereto. Any person in like possession of lands within the state, claiming an interest or estate less than the fee therein, may have his title thereto established under the provisions of this chapter, without the registration and transfer features herein provided. (1913, c. 90, s. 4; C. S. 2382.)

See note under § 43-50.

Cited in Brinson v. Lacy, 195 N. C. 394, 396, 142 S. E. 317.

§ 43-7. Land lying in two or more counties. —In every proceeding to register title, in which it is alleged in the petition or made to appear that the land therein described, whether in one or more parcels, is situated partly in one county and partly in another, or is situated in two or more counties, that is to say, when an entire tract, or two or more entire tracts, are situated in two or more counties (but not separate or several tracts situated in different counties) it shall be competent to institute the proceedings before the clerk of the superior court of any county in which any part of such tract lying in two or more counties is situated, and said clerk shall have jurisdiction both of the parties and of the subject-matter as fully as if said land was situated wholly in his county; but upon the entry of a final decree of registration of title, the clerk by or before whom the same was rendered shall certify a copy thereof to the register of deeds of every county in which said land or any part thereof is situated, and the same shall be there filed and recorded; and every such register of deeds, upon demand of the person entitled and payment of requisite fees therefor, shall issue and deliver a certificate of title for that part of said land situated in his county. This section shall apply and become effective in all cases or proceedings heretofore conducted before any clerk of the superior court of this state for registration of title, as in this chapter authorized, when the land described in the petition as an entire tract was situated in two or more counties, as aforesaid; and upon the filing and recording of a certified copy of the final decree or decree of registration therein, the register of deeds shall issue and deliver a certificate of title to the present owner or person entitled to the same, for that part of the land situated in his county, as aforesaid, upon payment or tender of proper fees therefor. (1919, c. 82, s. 1; C. S. 2383.)

§ 43-8. Petition filed; contents.—Suit for registration of title shall be begun by a petition to the court by the persons claiming, singly or collectively, to own or have the power of appointing or disposing of an estate in fee simple in any land, whether subject to liens or not. Infants and other persons under disability may sue by guardian or trustee, as the case may be, and corporations as in other cases now provided by law; but

the person in whose behalf the petition is made shall always be named as petitioner The petition shall be signed and sworn to by each petitioner, and shall contain a full description of the land to be registered as hereinafter provided, together with a plot of same by metes and bounds, corners to be marked by permanent markers of iron, stone or cement; it shall show when, how and from whom it was acquired, and whether or not it is now occupied, and if so, by whom; and it shall give an account of all known liens, interests, equities and claims, adverse or otherwise, vested or contingent, upon such land. Full names and addresses, if known, of all persons who may be interested by marriage or otherwise, including adjoining owners and occupants, shall be given. If any person shall be unable to state the metes and bounds, the clerk may order a preliminary survey. (1913, c. 90, s. 5; C. S. 2384.)

See note under § 43-50.

Attaching Proceedings under Torrens Act Because Clerk Did Not Sign Jurat.—Where the petitioner, to have his title to land registered under the provisions of the Torrens Act has signed an oath reciting that he has been duly sworn, he may not contend that the oath lacked validity under the requirement of this section upon the ground that the clerk of the court had not signed the jurat, and that in consequence the proceedings which followed were absolutely void, and thereafter, upon his own motion have them set aside. Morgan v. Beaufort, etc., R. Co., 197 N. C. 568, 150 S. E. 30.

Cited in Brinson v. Lacy, 195 N. C. 394, 396, 142 S. E. 317.

§ 43-9. Summons issued and served; disclaimer.—The clerk of the court shall issue a summons directed to the sheriff of every county in which persons named as interested may reside, such persons being made defendants, and the summons shall be returnable as in other cases of special proceedings, except that the return shall be at least sixty days from the date of the summons. The summons shall be served at least ten days before the return thereof and the return recorded in the same manner as in other special proceedings; and all parties under disabilities shall be represented by guardian, either general or ad litem. If the persons named as interested are not residents of the state of North Carolina, and their residence is known, which must appear by affidavit, the summons must be served on such nonresidents as is now prescribed by law for service of summons on nonresidents.

Any party defendant to such proceeding may file a disclaimer of any claim or interest in the land described in the petition, which shall be deemed an admission of the allegations of the petition, and the decree shall bar such party and all persons thereafter claiming under him, and such party shall not be liable for any costs or expenses of the proceeding except such as may have been incurred by reason of his delay in pleading. (1913, c. 90, s. 6; C. S. 2385.)

Cited in Cape Lookout Co. v. Gold, 167 N. C. 63, 83 S. E. 3.

§ 43-10. Notice of petition published.—In addition to the summons issued, prescribed in the foregoing section, the clerk of the court shall, at the time of issuing such summons, publish a notice of the filing thereof containing the names of the petitioners, the names of all persons named in the petition, together with a short but accurate description of the land and the relief demanded, in some secular newspaper published in the county wherein the land is situate, and having general circulation in the county; and if there be no such paper, then in a newspaper in the county nearest thereto and having general circulation in the county wherein the land lies, once a week for eight issues of such paper. The notice shall set forth the title of the cause and in legible or conspicuous type the words "To whom it may concern," and shall give notice to all persons of the relief demanded and the return day of the summons: Provided, that no final order or judgment shall be entered in the cause until there is proof and adjudication of publication as in other cases of publication of notice of summons. The provisions of this section, in respect to the issuing and service of summons and the publication of the notice, shall be mandatory and essential to the jurisdiction of the court to proceed in the cause: Provided, that the recital of the service of summons and publication in the decree or in the final judgment in the cause, and in the certificate issued to the petitioner as hereinafter provided, shall be conclusive evidence thereof. The clerk of the court shall also record a copy of said notice in the lis pendens docket of his office and cross-index same as other notices of lis pendens and shall also certify a copy thereof to the Superior Court of each county in which any part of said land lies, and the clerk thereof shall record and cross index same in the lis pendens records of his office as other notices of lis pendens are recorded and cross-indexed. (1913, c. 90, s. 7; 1915, c. 128, s. 1; 1919, c. 82, s. 2; 1925, c. 287; C. S. 2386.)

See note under § 43-50.

Editor's Note.—The last sentence of the section was added by the Public Laws of 1925, ch. 287.

Sufficiency of Publication.—Where the summons in proceedings to register lands has been issued and served under the provisions of section 43-9, it is not requisite to the validity of the proceedings that the publication of notice of filing should have been made on exactly the day the summons was issued, if the publication has been made in the designated paper once a week for four successive weeks, as directed by this section. Cape Lookout Co. v. Gold, 167 N. C. 63, 83 S. E. 3.

Waiver of Objection to Publication. — In proceedings to register a title to lands, a party claiming an interest in the lands waives his rights to object on the grounds of the irregularity in the publication of notice by appearing and answering the petition. Cape Lookout Co. v. Gold, 167 N. C. 63, 83 S. E. 3.

Cited in Brinson v. Lacy, 195 N. C. 394, 396, 142 S. E. 317.

§ 43-11. Hearing and decree.—1. Referred to Examiner.—Upon the return day of the summons the petition shall be set down for hearing upon the pleadings and exhibits filed. If any person claiming an interest in the land described in the petition, or any lien thereon, shall file an answer, the petition and answer, together with all exhibits filed, shall be referred to the examiner of titles, who shall proceed, after notice to the petitioner and the persons who have filed answer or answered, to hear the cause upon such parol or documentary evidence as may be offered or called for and taken by him, and in addition thereto make such independent examination of the title as may be necessary. Upon his request the clerk shall issue a commission under the seal of the court for taking such testimony as shall be beyond the jurisdiction of such examiner.

2. Examiner's Report.—The examiner shall, within thirty days after such hearing, unless for

good cause the time shall be extended, file with the clerk a report of his conclusions of law and fact, setting forth the state of such title, any liens or encumbrances thereon, by whom held, amount due thereon, together with an abstract of title to the lands and any other information in regard thereto affecting its validity.

3. Exceptions to Report.—Any of the parties to the proceeding may, within twenty days after such report is filed, file exceptions, either to the conclusions of law or fact. Whereupon the clerk shall transmit the record to the judge of the superior court for his determination thereof; such judge may on his own motion certify any issue of fact arising upon any such exceptions to the superior court of the county in which the proceeding is pending, for a trial of such issue by jury, and he shall so certify such issue of fact for trial by jury upon the demand of any party to the proceeding. If, upon consideration of such record, or the record and verdict of issues to be certified and tried by jury, the title be found in the petitioner, the judge shall enter a decree to that effect, ascertaining all limitations, liens, etc., declaring the land entitled to registration accordingly, and the same, together with the record, shall be docketed by the clerk of the court as in other cases, and a copy of the decree certified to the register of deeds of the county for registration as hereinafter provided. Any of the parties may appeal from such judgment to the supreme court, as in other special proceedings.

4. No Judgment by Default.—No judgment in any proceeding under this chapter shall be given by default, but the court must require an examination of the title in every instance except as respects the rights of parties who, by proper pleadings, admit the petitioner's claim. If, upon the return day of the summons and the day upon which the petition is set down for hearing, no answer be filed, the clerk shall refer the same to the examiner of titles, who shall, after notice to the petitioner, proceed to examine the title, together with all liens or encumbrances set forth or referred to in the petition and exhibits, and shall examine the registry of deeds, mortgages, wills, judgments, mechanic liens and other records of the county, and upon such examination he shall, as hereinbefore provided, report to the clerk the condition of the title, with a notice of liens or encumbrances thereon. The examiner shall have power to take and call for evidence in such case as fully as if the application were being contested. If the title shall be found to be in the petitioner, the clerk shall enter a decree to that effect and declaring the land entitled to registration, with entry of any limitations, liens, etc., and shall certify the same for registration, as hereinbefore provided, after approval by the judge of the superior court. (1913, c. 90, s. 8; C. S. 2387.)

Evidence Sufficient for Jury.—Defendant's evidence of claim under a prior state grant and parol evidence in explanation of a latent ambiguity as to the location of the land embraced in the grant, was sufficient to raise an issue of fact as to the location of the land claimed by defendants for the determination of the jury, and defendants' exception to the refusal of the court to submit an issue to the jury as to whether petitioners were the owners of the land and entitled to have title thereto registered was properly sustained. Perry v. Morgan, 219 N. C. 377, 14 S. E. (2d) 46.

§ 43-12. Effect of decree; approval of judge.—Every decree rendered as hereinbefore provided shall bind the land and bar all persons and corporations claiming title thereto or interest therein; quiet the title thereto, and shall be forever binding and conclusive upon and against all persons and corporations, whether mentioned by name in the order of publication, or included under the general description, "to whom it may concern"; and every such decree so rendered, or a duly certified copy thereof, as also the certificate of title issued thereon to the person or corporation therein named as owner, or to any subsequent transferee or purchaser, shall be conclusive evidence that such person or corporation is the owner of the land therein described, and no other evidence shall be required in any court of this state of his or its right or title thereto. It shall not be an exception to such conclusiveness that the person is an infant, lunatic or is under any disability, but such person may have recourse upon the indemnity fund hereinafter provided for, for any loss he may suffer by reason of being so concluded. Such decrees shall not be binding on and include the State of North Carolina or the State Board of Education unless notice of said proceeding and copy of petition, etc., as provided in this chapter, are served on the Governor and on the State Board of Education severally and personally. Such decree shall, in addition to being signed by the clerk of the court, be approved by the judge of the superior court, who shall review the whole proceeding and have power to require any reformation of the process, pleading, decrees or entries. (1913, c. 90, s. 9; 1919, c. 82, s. 3; 1925, c. 263; C. S. 2388.)

See note under § 43-50.

Editor's Note.—The provision of this section requiring service of notice on the Governor and the Board of Education was added by the Public Laws of 1925, ch. 263.

Cited in Brinson v. Lacy, 195 N. C. 394, 396, 142 S. E. 317.

Art. 4. Registration and Effect.

§ 43-13. Manner of registration.—The county commissioners of each county shall provide for the register of deeds in the county a book, to be called Registration of Titles, in which the register shall enroll, register and index, as hereinafter provided, the decree of title before mentioned and the copy of the plot contained in the petition, and all subsequent transfers of title, and note all voluntary and involuntary transactions in any wise affecting the title to the land, authorized to be entered thereon. If the title be subject to trust, condition, encumbrance or the like, the words "in trust," "upon condition," "subject to encumbrance," or like appropriate insertion shall indicate the fact and fix any person dealing with such certificate with notice of the particulars of such limitations upon the title as appears upon the registry. No erasure, alteration, or amendment shall be made upon the registry after entry and issuance of a certificate of title except by order of a court of competent jurisdiction. (1913, c. 90, s. 10; 1919, c. 236, s. 1; C. S. 2389.)

§ 43-14. Cross-indexing of lands by registers of deeds. — Where any land is brought into the Torrens' System and under said system is registered in the public records of the register's office,

said register shall cross-index the registration in the general cross-index for deeds in his office. (1931, c. 286, s. 2.)

§ 43-15. Certificate issued. — Upon the registration of such decree the register of deeds shall issue an owner's certificate of title, under the seal of his office, which shall be delivered to the owner or his agent duly authorized, and shall be substantially as follows:

State of North Carolina—County of .....

The certificate of .....

I hereby certify that the title is registered in the name of ..... to and situate in said county and state, described as follows: (Here describe land as in decree.)

Estate ..... (here name the estate and any limitation or encumbrance thereon, as fee simple, upon condition, in trust, subject to incumbrance, and the like).

Under decree of the land court of ..... county, entitled .....

Registered No. ...., Book No. ....., page .....

Witness my hand and seal, at office at ....., this ..... day of ....., A. D. 19..... (Seal) ..... Register of Deeds. (1913, c. 90, s. 10; C. S. 2390.)

§ 43-16. Certificates numbered; entries thereon.—All certificates of title to land in the county shall be numbered consecutively, which number shall be retained as long as the boundaries of the land remain unchanged, and a separate page or more, with appropriate space for subsequent entries, shall be devoted to each title in the registration of titles book for the county. Every entry made upon any certificate of title in such book or upon the owner's certificate, under any of the provisions of this chapter, shall be signed by the register of deeds and minutely dated in conformity with the dates shown by the entry book. (1913, c. 90, s. 11; C. S. 2391.)

§ 43-17. New certificate issued, if original lost. —Whenever an owner's certificate of title is lost or destroyed, the owner or his personal representative may petition the court for the issuance of a new certificate. Notice of such petition shall be published once a week for four successive weeks, under the direction of the court, in some convenient newspaper, and noted upon the registry of titles, and upon satisfactory proof having been exhibited before it that the certificate has been lost or destroyed the court may direct the issuance of a new certificate, which shall be appropriately designated and take the place of the original, but at least thirty full days shall elapse between the filing of the petition and making the decree for such new certificate. (1913, c. 90, s. 24; C. S. 2392.)

§ 43-17.1. Issuance of certificate upon death of registered owner; petition and contents.—Upon the death of any person who is the registered owner of any estate or interest in land which has been brought under this chapter, a petition may be filed with the clerk of the superior court of the county in which the title to such land is registered by anyone having any estate or interest in the land, or any part thereof, the title to which has been registered under the terms of this chapter, attaching thereto the registered certificate of title issued to the deceased holder and setting forth the nature and character of the interest or estate of such petitioner in said land, the manner in which such interest or estate was acquired by the petitioner from the deceased person —whether by descent, by will, or otherwise, and setting forth the names and addresses of any and all other persons, firms or corporations which may have any interest or estate therein, or any part thereof, and the names and addresses of all persons known to have any claims or liens against the said land; and setting forth the changes which are necessary to be made in the registered certificate of title to land in order to show the true owner or owners thereof occasioned by the death of the registered owner of said certificate. Such petition shall contain all such other information as is necessary to fully inform the court as to the status of the title and the condition as to all liens and encumbrances against said land existing at the time the petition is filed, and shall contain a prayer for such relief as the petitioner may be entitled to under the provisions hereof. Such petition shall be duly verified. (1943, c. 466, s. 1.)

§ 43-17.2. Publication of notice; service of process.—Upon the filing of such duly verified petition, the petitioner shall cause to be published once a week for four weeks, in some newspaper having a general circulation in the county in which the land is situated, a notice signed by the clerk of the superior court, setting forth in substance the nature of the petition, a description of the land affected thereby, and the relief therein prayed for, and notifying all persons having or claiming any interest or estate in the land to appear at a time therein specified, which shall be at least thirty days after the first publication of said notice, to show cause, if any exists, why the relief prayed for in the petition should not be granted. An affidavit shall be filed by the publisher with the clerk of the court, showing a full compliance of this requirement. Upon a filing of said petition, the petitioner shall cause the summons, with a copy of the petition, to be served upon all persons, firms or corporations known to have any interest or estate in the lands referred to in the petition, and the personal representative, the devisees, if any, and all heirs at law of the deceased registered owner of said land. In the event any of the persons upon whom service of summons is to be made are nonresidents of the state of North Carolina, service may be made by publication in the manner prescribed by law for the service of summons in special proceedings. (1943, c. 466, s. 1.)

§ 43-17.3. Answer by person claiming interest. —Any person asserting a claim or any interest in such registered land may, at any time prior to the hearing provided for in section 43-17.4, file such answer or other pleadings as may be proper, asserting his rights or claims to the property referred to in the petition. (1943, c. 466, s. 1.)

§ 43-17.4. Hearing by clerk of superior court; orders and decrees; cancellation of old certificate and issuance of new certificate.—The clerk of the superior court shall hear and deter-

mine all matters presented upon the petition and such pleadings as may be filed in this proceeding, and shall make such orders and decrees therein as may be found to be proper from the facts as ascertained and determined by the court. The court is authorized and empowered to order and direct that the outstanding registered certificate of title to the land shall be surrendered and cancelled in the office of the register of deeds, and that a new certificate of title shall be issued, showing therein the owner or owners of the land described in the original certificate and the nature and character of such ownership: Provided, the clerk of the superior court shall not authorize the issuance of the new certificate of title until the fees provided in § 43-49 have been paid. Upon the surrender and cancellation by the register of deeds of the outstanding certificate of title, the new certificate of title shall be registered and cross indexed in the same manner provided for the registration of the original certificate, and the register of deeds shall issue a new certificate of title in the same manner and form as provided for the original certificate. The said new certificate shall have the same force and effect as the original certificate of title and shall be subject to the same provisions of law with reference thereto. (1943, c. 466, s. 1.)

§ 43-17.5. Issuance of new certificate validated.—Whenever heretofore any registered certificate of title has been surrendered by the heirs or devisees of any deceased registered owner of any registered title and the registered certificate of title of such deceased owner has been surrendered and cancelled and a new certificate of title issued to a purchaser or to such heirs or devisees, the same is hereby validated and confirmed and made effectual to the same extent as though such new certificate had been issued in compliance with the provisions of this chapter. (1943, c. 466, s. 1.)

§ 43-18. Registered owner's estate free from adverse claims; exceptions.—Every registered owner of any estate or interest in land bought under this chapter shall, except in cases of fraud to which he is a party or in which he is a privy, without valuable consideration paid in good faith, and except when any registration has been procured through forgery, hold the land free from any and all adverse claims, rights or encumbrances not noted on the certificate of title, except (1) liens, claims or rights arising or existing under the laws or constitution of the United States which the statutes of this state cannot require to appear of record under registry laws; (2) taxes and assessments thereon due the state or any county, city or town therein, but not delinquent; (3) any lease for a term not exceeding three years, under which the land is actually occupied. (1913, c. 90, s. 25; C. S. 2393.)

§ 43-19. Adverse claims existing at initial registry; affidavit; limitation of action.—Any person making any claim to or asserting any lien or charge upon registered land, existing at the initial registry of the same and not shown upon the register or adverse to the title of the registered owner, and for which no other provision is herein made for asserting the same in the registry of titles, may make an affidavit thereof setting forth his interest, right, title, lien or demand, and how and under whom derived, and the character and nature thereof. The affidavit shall state his place of residence and designate a place at which all notices relating thereto may be served. Upon the filing of such affidavit in the office of the clerk of the superior court, the clerk shall order a note thereof as in the case of charges or encumbrances, and the same shall be entered by the register of deeds. Action shall be brought upon such claim within six months after the entry of such note, unless for cause shown the clerk shall extend the time. Upon failure to commence such action within the time prescribed therefor, the clerk shall order a cancellation of such note. If any person shall wantonly or maliciously or without reasonable cause procure such notation to be entered upon the registry of titles, having the effect of a cloud upon the registered owner's title, he shall be liable for all damages the owner may suffer thereby. (1913, c. 90, s. 25; C. S. 2394.)

§ 43-20. Decree and registration run with the land.—The obtaining of a decree of registration and the entry of a certificate of title shall be construed as an agreement running with the land, and the same shall ever remain registered land, subject to the provisions of this chapter and all amendments thereof. (1913, c. 90, s. 26; C. S. 2395.)

§ 43-21. No right by adverse possession.—No title to nor right or interest in registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession. (1913, c. 90, s. 27; C. S. 2396.)

§ 43-22. Jurisdiction of courts; registered land affected only by registration.—Except as otherwise specially provided by this chapter, registered land and ownership therein shall be subject to the jurisdiction of the courts in the same manner as if it had not been registered; but the registration shall be the only operative act to transfer or affect the title to registered land, and shall date from the time the writing, instrument or record to be registered is duly filed in the office of the register of deeds, subject to the provisions of this chapter; no voluntary or involuntary transaction shall affect the title to registered lands until registered in accordance with the provisions of this chapter: Provided, that all mortgages, deeds, surrendered and canceled certificates, when new certificates are issued for the land so deeded, the other paper-writings, if any, pertaining to and affecting the registered estate or estates herein referred to, shall be filed by the register of deeds for reference and information, but the registration of titles book shall be and constitute sole and conclusive legal evidence of title, except in cases of mistake and fraud, which shall be corrected in the methods now provided for the correction of papers authorized to be registered. (1913, c. 90, s. 28; C. S. 2397.)

No Distinction between Original Parties and Purchasers.—The statute draws no distinction between the original parties to deeds or contracts affecting title of lands registered under its provisions and creditors or purchasers, and in respect to such registration they stand upon the same footing. Dillon v. Brooker, 178 N. C. 65, 100 S. E. 191.

§ 43-23. Priority of right.—In case of conflicting claims between the registered owners the right, title or estate derived from or held under the older certificate of title shall prevail. (1913, c. 90, s. 29; C. S. 2398.)

§ 43-24. Compliance with this chapter due registration. — When the provisions of this chapter have been complied with, all conveyances, deeds, contracts to convey or leases shall be considered duly registered, as against creditors and purchasers, in the same manner and as fully as if the same had been registered in the manner heretofore provided by law for the registration of conveyances. (1913, c. 90, s. 32; C. S. 2399.)

§ 43-25. Release from registration.—Whenever the record owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of this chapter, desires to have such estate released from the provisions of said chapter in so far as said chapter relates to the form of conveyance, so that such estate may ever thereafter be conveyed, either absolutely or upon condition or trust, by the use of any desired form of conveyance other than the certificate of title prescribed by said chapter, such owner may present his owner's certificate of title to such registered estate to the register of deeds of the county wherein such land lies, with a memorandum or statement written by him on the margin thereof in the words following, or words of similar import, to wit: "I (or we), ..., being the owner (or owners) of the registered estate evidenced by this certificate of title, do hereby release said estate from the provisions of chapter forty-three of the General Statutes of North Carolina in so far as said chapter relates to the form of conveyance, so that hereafter the said estate may, and shall be forever until again hereafter registered in accordance with the provisions of said chapter and acts amendatory thereof, conveyed, either absolutely or upon condition or trust, by any form of conveyance other than the certificate of title prescribed by said chapter, and in the same manner as if said estate had never been registered." Which said memorandum or statement shall further state that it is made pursuant to the provisions of this section, and shall be signed by such record owner and attested by the register of deeds under his hand and official seal, and a like memorandum or statement so entered, signed and attested upon the margin of the record of the said owner's certificate of title in the registration of titles book in said register's office, with the further notation made and signed by the register of deeds on the margin of the certificate of title in the registration of titles book showing that such entry has been made upon the owner's certificate of title; and thereafter any conveyance of such registered estate, or any part thereof, by such owner, his heirs or assigns, by means of any desired form of conveyance other than such certificate of title shall be as valid and effectual to pass such estate of the owner according to the tenor and purport of such conveyance in the same manner and to the same extent as if such estate had never been so registered. (Ex. Sess. 1924, c. 40.)

Editor's Note.—The effect of this section is summarized in 3 N. C. Law Rev. 19.

Art. 5. Adverse Claims and Corrections after Registration.

§ 43-26. Limitations. — No decree of registration heretofore entered, and no certificate of title heretofore issued pursuant thereto, shall be adjudged invalid, revoked, or set aside, unless the action or proceeding in which the validity of such decree of registration or certificate of title issued pursuant thereto is attacked or called in question be commenced or the defense alleging the invalidity thereof be interposed within twelve months from March 10, 1919.

No decree of registration hereafter entered and no certificate of title hereafter issued pursuant thereto shall be adjudged invalid or revoked or set aside, unless the action or proceeding in which the validity of such decree or of the certificate of title issued pursuant thereto is attacked or called in question be commenced or the defense alleging the invalidity thereof be interposed within twelve months from the date of such decree.

No action or proceeding for the recovery of any right, title, interest, or estate in registered land adverse to the title established and adjudicated by any decree of registration heretofore entered shall be maintained unless such action or proceeding be commenced within twelve months from the date last mentioned; and no action or proceeding for the recovery of any right, title, interest, estate in registered land, adverse to the right established by any decree of registration hereafter shall be maintained unless such action or proceeding be commenced within twelve months from the date of such decree.

No action or proceeding for the enforcement or foreclosure of any lien upon or charge against registered land which existed at the date when any decree of registration was heretofore entered, and which was not recognized or established by such decree, shall be maintained, unless such action or proceeding be commenced within twelve months from the date above mentioned; and no action or proceeding for the enforcement or foreclosure of any lien upon or charge against registered land in existence at the date of any decree of registration hereafter entered, and which is not recognized and established by such decree, shall be maintained, unless such action or proceeding be commenced within twelve months from the date of such decree. (1919, c. 236, s. 1; C. S. 2400.)

§ 43-27. Adverse claim subsequent to registry; affidavit of claim prerequisite to enforcement; limitation. — Any person claiming any right, title, or interest in registered land adverse to the registered owner thereof, arising subsequent to the date of the original decree of registration, may, if no other provision is made for registering the same, file with the register of deeds of the county in which such decree was rendered or certificate of title thereon was issued, a verified statement in writing, setting forth fully the right, title, or interest so claimed, how or from whom it was acquired, and a reference to the number, book, and page of the certificate of title of the registered owner, together with a description of the land by metes and bounds, the adverse claimant's place of residence and his post-office address, and, if a nonresident, he shall designate or appoint the said register of deeds to

receive all notices directed to or to be served upon such adverse claimant in connection with the claim by him made, and such statement shall be noted and filed by said register of deeds as an adverse claim; but no action or proceeding to enforce such adverse claim shall be maintained unless the same be commenced within six months of the filing of the statement thereof. (1919, c. 236, s. 1; C. S. 2401.)

§ 43-28. Suit to enforce adverse claim; summons and notice necessary. — Upon the institution of any action or proceeding to enforce such adverse claim, notice thereof shall be served upon the register of deeds, who shall enter upon the registry a memorandum that suit has been brought or proceeding instituted to determine the validity of such adverse claim; and summons or notice shall be served upon the holder or claimant of the registered title or certificate or other person against whom such adverse claim is alleged, as provided by law for the institution of suits or proceedings in the courts of this state.

If no notice of the institution of an action or proceeding to enforce an adverse claim be served upon the register of deeds and upon the holder of the registered title or certificate, or other person, as aforesaid, within seven months from the date of filing the statement of adverse claim, the register of deeds shall cancel upon the registry the adverse claim so filed and make a memorandum setting out that no notice of suit or proceeding to enforce the same had been served upon him within seven months as herein required, and that such adverse claim was therefore canceled; and thereafter no action or proceeding shall be begun or maintained to enforce such adverse claim in any of the courts of this state. (1919, c. 236, s. 1; C. S. 2402.)

§ 43-29. Judgment in suit to enforce adverse claim; register to file. — The court shall certify its judgment to the register of deeds; if such adverse claim be held valid, the register of deeds shall make such entry upon the registry and upon the owner's certificate of title as may be directed by the court, or he may file and record a certified copy of the judgment or order of the court thereon; if such adverse claim be held invalid the register of deeds shall cancel such adverse claim upon the registry, noting thereon that the same was done by order or judgment of the court, or he may file and record a certified copy of the judgment or order of the court thereon. (1919, c. 236, s. 1; C. S. 2403.)

§ 43-30. Correction of registered title; limitation of adverse claims. — Any registered owner or other claimant under the registered title may at any time apply to the court in which the original decree was entered, by petition, setting out that registered interests of any description, whether vested, contingent, expectant or inchoate, have terminated and ceased, or that new interests have arisen or been created which do not appear upon the certificate, or that any error or omission was made in entering or issuing the certificate or any duplicate thereof, or that the name of any person on the certificate has been changed, or that the registered owner had married or, if registered as married, that the marriage has been terminated, or that a corporation which owned registered lands has been dissolved, without conveying the same or transferring its certificate within three years after the dissolution, or any other reasonable and proper ground of correction or relief; and such court may hear and determine the petition after notice to all parties in interest, and may make such order or decree as may be appropriate and lawful in the premises; but nothing in this section shall be construed to authorize any such court to open any original decree of registration which was entered more than twelve months prior to the filing of such petition, and nothing shall be done or ordered by the court to divest or impair the title or other interest of a purchaser who holds a transfer or certificate of title for value and in good faith. No action or proceeding shall be commenced or maintained to set up or establish any right, claim, interest or estate adverse to the order or decree or certificate of title issued thereon made or entered upon any petition or other proceeding authorized by this section, unless the same shall be brought and instituted within six months from the date of such order or decree authorized by this section. (1919, c. 236, s. 1; C. S. 2404.)

Art. 6. Method of Transfer.

§ 43-31. When whole of land conveyed.—Whenever the whole of any registered estate is transferred or conveyed the same shall be done by a transfer or conveyance upon or attached to the certificate substantially as follows:

A B and wife (giving the names of the parties owning land described in the certificate and their wives) hereby, in consideration of ..... dollars, sell and convey to C D (giving name of purchaser) the lot or tract of land, as the case may be, described in the certificate of title hereto attached.

The same shall be signed and properly acknowledged by the parties and their wives and shall have the full force and effect of a deed in fee simple: Provided, that if the sale shall be in trust, upon condition, with power to sell or other unusual form of conveyance, the same shall be set out in the deed, and shall be entered upon the registration of titles book as hereinafter provided; that upon presentation of the transfer, together with the certificate of title, to the register of deeds, the transaction shall be duly noted and registered in accordance with the provisions of this chapter, and certificate of title so presented shall be cancelled and a new certificate with the same number issued to the purchaser thereof, which new certificate shall fully refer by number and also by name of holder to former certificate just canceled. (1913, c. 90, s. 12; C. S. 2405.)

Necessity of Affidavit and Notation.—A contract to convey lands where the owner has registered it, under the Torrens Law, cannot be specifically enforced until the complainant has filed an affidavit and had notation made on the books as required by this section. Dillon v. Broeker, 178 N. C. 65, 100 S. E. 191.

§ 43-32. Conveyance of part of registered land. —The transfer of any part of a registered estate, either of an undivided interest therein or of a separate lot or parcel thereof, shall be made by an instrument of the transfer or conveyance similar in form to that herein provided for the

transfer of the whole of any registered estate, to which shall be attached the certificate of title of such registered estate. In case of the transfer of an undivided interest in a registered estate, such instrument or transfer or conveyance shall accurately specify and describe the extent and amount of the interest transferred and of the interest retained, respectively. In case of a transfer of a separate lot or parcel of a registered estate, such instrument of transfer or conveyance shall describe the lot or parcel transferred either by metes and bounds or by reference to the map or plat attached thereto, and shall in every case be accompanied by a map or plat having clearly indicated thereon the boundaries of the whole of the registered estate and of the lot or parcel to be transferred. (1919, c. 82, s. 4; C. S. 2406.)

§ 43-33. Duty of register of deeds upon part conveyance. — Upon presentation to the register of deeds of an instrument of transfer or conveyance of an undivided interest in a registered estate, in proper form as above prescribed, it shall be his duty to cancel the certificate of title attached thereto and to issue to each owner a new certificate of title, each bearing the same number as the original certificate of title and accurately specifying and describing the extent and the amount of the interest retained or of the interest transferred, as the case may be. Upon presentation to the register of deeds of an instrument of transfer or conveyance of a separate lot or parcel of a registered estate, in proper form as above prescribed, it shall be his duty to cancel the certificate of the title attached thereto and to issue to each owner a new certificate of title bearing a new number and describing the separate lot or parcel retained or transferred, as the case may be, either by metes and bounds or by reference to a map or plat thereto attached. (1919, c. 82, s. 4; C. S. 2407.)

§ 43-34. Subdivision of registered estate.—Any owner of a registered estate who may desire to subdivide the same may make application in writing to the register of deeds for the issuance of a new certificate of title for each subdivision, to which application shall be attached a map or plat having clearly indicated thereon the boundaries of the whole of the registered estate in question and of each lot or parcel for which he desires a new certificate of title. Thereupon it shall be the duty of the register of deeds, upon payment by such applicant of necessary surveyor's fees, if any are required, and of the amount herein provided for issuing the certificates of title and recording the map, to cancel the certificate of title attached to said application and to issue to such owner new certificates of title, each bearing a new number, for each lot or parcel shown upon the said map, describing such lot or parcel in such certificates either by metes and bounds or by reference to a map or plat attached thereto. (1919, c. 82, s. 4; C. S. 2408.)

§ 43-35. References and cross-references entered on register. — In all cases the register of deeds shall place upon the registry of title books and upon the certificate of title of such registered estate therein, references and cross-references to the new certificates issued as above provided, in accordance with the provisions of this article, and the new certificates issued shall fully refer by number and by name of the holder to the canceled certificate in place of which they are issued. (1919, c. 82, s. 4; C. S. 2409.)

§ 43-36. When land conveyed as security. — 1. Whole land conveyed. Whenever the owner of any registered estate shall desire to convey same as security for debt, it may be done in the following manner, by a short form of transfer, substantially as follows, to wit:

A B and wife (giving names of all owners or holders of certificates and their wives) hereby transfer to C. D. the tract or lot of land described as No. ..... in registration of titles book for ..... county, a certificate for the title for same being hereto attached, to secure a debt of ..... dollars, due to ....., of ..... county and state, on the .... day of ....., 19...., evidenced by bond (or otherwise as the case may be) dated the .... day of ....., 19..... In case of default in payment of said debt with accrued interest, ... days notice of sale required.

The same shall be signed and properly acknowledged by the parties making same, and shall be presented, together with the owner's certificate, to the register of deeds, whose duty it shall be to note upon the owner's certificate and upon the certificate of title in the registration of titles book the name of the trustee, the amount of debt, and the date of maturity of same.

2. Part of land conveyed. When a part of the registered estate shall be so conveyed, the register of deeds shall note upon the book and owner's certificate the part so conveyed, and if the same be required and the proper fee paid by the trustee, shall issue what shall be known as a partial certificate, over his hand and seal, setting out the portion so conveyed.

3. Effect of transfer. All transfers by such short form shall convey the power of sale upon due advertisement at the county courthouse and in some newspaper published in the county, or adjourning county, in the same manner and as fully as is now provided by law in the case of mortgages and deeds of trust and default therein.

4. Other encumbrances noted. All registered encumbrances, rights or adverse claims affecting the estate represented thereby shall continue to be noted, not only upon the certificate of title in the registration book, but also upon the owner's certificate, until same shall have been released or discharged. And in the event of second or other subsequent voluntary encumbrances the holder of the certificate may be required to produce such certificate for the entry thereon or attachment thereto of the note of such subsequent charge or encumbrance as provided in this article.

5. Other forms of conveyance may be used. Nothing in this section nor this chapter shall be construed to prevent the owner from conveying such land, or any part of the same, as security for a debt by deed of trust or mortgage in any form which may be agreed upon between the parties thereto, and having such deed of trust or mortgage recorded in the office of the register of deeds as other deeds of trust and mortgages are

recorded: Provided, that the book and page of the record at which such deed of trust or mortgage is recorded shall be entered by the register of deeds upon the owner's certificate and also on the registration of titles book.

6. Sale under lien; new certification. Upon foreclosure of such deed of trust or mortgage, or sale under execution for taxes or other lien on the land, the fact of such foreclosure or sale shall be reported by the trustee, mortgagee or other person authorized to make the same, to the register of deeds of the county in which the land lies, and, upon satisfactory evidence thereof, it shall be his duty to call in and cancel the outstanding certificate of title for the land so sold, and to issue a new certificate in its place to the purchaser or other person entitled thereto; and the production of such outstanding certificate and its surrender by the holder thereof may be compelled, upon notice to him, by motion before and order of the clerk of the superior court in the original proceeding or the clerk of the superior court of the county in which the land lies; but the right of appeal from such order may be exercised and shall be allowed as in other special proceedings, and pending any such appeal the rights of all parties shall be preserved. (1913, c. 90, s. 14; 1915, c. 245; 1919, c. 82, s. 5; C. S. 2410.)

§ 43-37. Owner's certificate presented with transfer. — In voluntary transactions the owner's certificate of title must be presented along with the writing or instrument conveying or effecting the sale, and thereupon and not otherwise the register shall be authorized to register the conveyance or other transaction upon proof of payment of all delinquent taxes or liens, if any, or if such payment be not shown the entry and new certificate shall note such taxes or liens as having priority thereto. (1913, c. 90, s. 15; C. S. 2411.)

§ 43-38. Transfers probated; partitions; contracts. — All transfers of registered land shall be duly executed and probated as required by law upon like conveyances of other lands, and in all cases of change in boundary by partition, subtraction or addition of land there shall be an accurate survey and permanent marking of boundaries and accurate plots, showing the courses, distances and markings of every portion thereof, which shall be duly proved and registered as upon the initial registration. Such transfers shall be presented to the register of deeds for entry upon the registration of titles book and upon the owner's certificate within thirty days from the date thereof, or become subject to any rights which may accrue to any other person by a prior registration. All leases or contracts affecting land for a period exceeding three years shall be in writing, duly proved before the clerk of the superior court, recorded in the register's office, and noted upon the registry and upon the owner's certificate. (1913, c. 90, ss. 15, 32; C. S. 2412.)

§ 43-39. Certified copy of order of court noted. —In voluntary transactions a certificate from the proper state, county or court officer, or certified copy of the order, decree or judgment of any court of competent jurisdiction shall be authority for him to order a proper notation thereof upon the registration of titles book, and for the register of deeds to note the transaction under the direction of the court. (1913, c. 90, s. 16; C. S. 2413.)

§ 43-40. Production of owner's certificate required. — Whenever owner's certificate is not presented to the register along with any writing, instrument or record filed for registration under this chapter, he shall forthwith send notice by registered mail to the owner of such certificate, requesting him to produce the same in order that a memorial of the transaction may be made thereon; and such production may be required by subpœna duces tecum or by other process of the court, if necessary. (1913, c. 90, s. 17; C. S. 2414.)

§ 43-41. Registration notice to all persons. — Every voluntary or involuntary transaction, which if recorded, filed or entered in any clerk's office would affect unregistered land, shall, if duly registered in the office of the proper register as the case may be, and not otherwise, be notice to all persons from the time of such registration, and operate, in accordance with law and the provisions of this chapter, upon any registered land in the county of such registration. (1913, c. 90, s. 18; C. S. 2415.)

§ 43-42. Conveyance of registered land in trust. —Whenever a writing, instrument or record is filed for the purpose of transferring registered land in trust, or upon any equitable condition or limitation expressed therein, or for the purpose of creating or declaring a trust or other equitable interest in such land, the particulars of the trust, condition, limitation or other equitable interest shall not be entered on the certificate, but it shall be sufficient to enter in the book and upon the certificates a memorial thereof by the terms "in trust" or "upon condition" or in other apt words, and to refer by number to the writing, instrument or record authorizing or creating the same. And if express power is given to sell, encumber or deal with the land in any manner, such power shall be noted upon the certificates by the term "with power to sell" or "with power to encumber," or by other apt words. (1913, c. 90, s. 19; C. S. 2416.)

§ 43-43. Authorized transfer of equitable interests registered. — No writing or instrument for the purpose of transferring, encumbering or otherwise dealing with equitable interests in registered land shall be registered unless the power thereto enabling has been expressly conferred by or has been reserved in the writing or instrument creating such equitable instrument, or has been declared to exist by the decree of some court of competent jurisdiction, which decree must also be registered. (1913, c. 90, s. 20; C. S. 2417.)

§ 43-44. Validating conveyance by entry on margin of certificate. — In all cases where the owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of this chapter, has before August 21, 1924, and subsequent to such registration made any conveyance of such estate, or any portion thereof, by any form of conveyance sufficient in law to pass the title thereto if the title

to said lands had not been so registered, the record owner and holder of the certificate of title covering such registered estate may enter upon the margin of his certificate of title in the registration of titles book a memorandum showing that such registered estate, or a portion thereof, has been so conveyed, and further showing the name of the grantee or grantees and the number of the book and the page thereof where such conveyance is recorded in the office of the register of deeds, and make a like entry upon the owner's certificate of title held by him, both of such entries to be signed by him and witnessed by the register of deeds, and attested by the seal of office of the register of deeds upon said owner's certificate, with the further notation made and signed by the register of deeds on the margin of the certificate of title in the registration of titles book showing that such entry has been made upon the owner's certificate of title, and thereupon such conveyance shall become and be as valid and effectual to pass such estate of the owner according to the tenor and purport of such conveyance as if the title to said lands had never been so registered, whether such conveyance be in form absolute or upon condition of trust; and in all cases where such conveyance has been made before August 21, 1924, upon the making of the entries herein authorized by the record owner and holder of such owner's certificate of title, the grantee and his heirs and assigns shall thereafter have the same right to convey the said estate or any part of the same in all respects as if the title to said lands had never been so registered. (Ex. Sess. 1924, c. 41.)

Editor's Note.—The effect of this section is summarized in 3 N. C. Law Rev. 19.

Art. 7. Liens upon Registered Lands.

§ 43-45. Docketed judgments.—Whenever any judgment of the superior court of the county in which the registered estate is situated shall be duly docketed in the office of the clerk of the superior court, it shall be the duty of the clerk to certify the same to the register of deeds. The register of deeds shall thereupon enter the certificate of title, the date, and the amount of the judgment, and the same shall be a lien upon such land as fully as such docketed judgment would be a lien upon unregistered lands of the judgment debtor. (1913, c. 90, s. 22; C. S. 2418.)

Cited in In re Wallace, 212 N. C. 490, 193 S. E. 819.

§ 43-46. Notice of delinquent taxes filed. — It shall be the duty of the sheriff or other collector of taxes or assessments of each county and town, not later than the first day of March in each year, to file an exact memorandum of the delinquency, if any, of any registered land for the nonpayment of the taxes or assessments thereon, including the penalty therefor, in the office of the register of deeds for registration; and if such officer fails to perform such duty, and there shall be subsequent to such day a transfer of the land as hereinbefore provided, the grantee shall acquire a good title free from any lien for such taxes and assessments, and such sheriff or other collector of taxes and his sureties shall be liable for the payment of the taxes and assessments with the penalty and interest thereon. (1913, c. 90, s. 21; C. S. 2419.)

§ 43-47. Sale of land for taxes; redemption.— Whenever any sale of registered land is made for delinquent taxes or levies, it shall be the duty of the sheriff or other officer making such sale to file forthwith a memorandum thereof for registration in the office of the register of deeds; and thereupon the registered owner shall be required to produce his certificate for cancellation, and a new owner's certificate shall be issued in favor of the purchaser, and the land shall be transferred on the land books to the name of such purchaser, unless such delinquent charges and all penalties and interest thereon be paid in full within ninety days after date of such sale; but a note shall be entered upon the certificate of title and also upon any such new owner's certificate, reserving the privilege of redemption in accordance with the law. In case of any redemption under this section of land sold for taxes, a note of the fact shall be duly registered, and if an owner's certificate has been issued to any purchaser, the same shall be canceled and a new one shall be issued to the person who has redeemed. (1913, c. 90, ss. 22, 23; C. S. 2420.)

§ 43-48. Sale of unredeemed land; application of proceeds. — If there be no redemption of land under the preceding section, in accordance with the law, it shall be the duty of the sheriff or other collector of taxes in the county or town in which the land lies to sell the same at public auction for cash, first giving such notice of the time and place of sale as is prescribed for execution sales, and the proceeds of sale shall be applied, first, to the payment of all taxes and assessments then due to the state, county and town, with interest, penalty and costs; second, to the payment of all sums paid by any person who purchased at the former tax sale, with interest and the additional sum of five dollars; third, to the payment of a commission to the officer making the sale of five per centum on the first three hundred dollars and two per centum on the residue of the proceeds; fourth, to the satisfaction of any liens other than the taxes and assessments registered against the land in the order of their priorities; fifth, and the surplus, if any, to the person in whose name the land was previous to sale for taxes, subject to redemption as provided herein, his heirs, personal representatives or assigns. A note of the sale under this section shall be duly registered, and a certificate shall be entered and an owner's certificate issued in favor of the purchaser in whom title shall be thereby vested as registered owner, in accordance with the provisions of this chapter. Nothing in this section shall be so construed as to affect or divert the title of a tenant in reversion or remainder to any real estate which has been returned delinquent and sold on account of the default of the tenant for life in paying the taxes or assessments thereon. (1913, c. 90, s. 23; C. S. 2421.)

Art. 8. Assurance Fund.

§ 43-49. Assurance fund provided; investment. —Upon the original registration of land and also upon the entry of certificate showing the title as registered owners in heirs or devisees, there shall be paid to the clerk of the court one-tenth of one per cent of the assessed value of the land for

taxes, as an assurance fund, which shall be paid over to the state treasurer, who shall be liable therefor upon his official bond as for other moneys received by him in his official capacity. He shall keep all the principal and interest of such fund invested, except as required for the payment of indemnities, in bonds and securities of the United States, of this state, or of counties and other municipalities within the state. Such investment shall be made upon the advice and concurrence of the governor and council of state, and he shall make report of such funds and the investment thereof to the general assembly biennially. (1913, c. 90, s. 33; C. S. 2422.)

Cross Reference.—As to investment by state treasurer in bonds issued or guaranteed by the United States, see § 53-44.

§ 43-50. Action for indemnity.—Any person who, without negligence on his part, sustains loss or damage or is deprived of land, or of any estate or interest therein, through fraud or negligence or in consequence of any error, omission, mistake, misfeasance, or misdescription in any certificate of title or in any entry or memorandum in the registration book, and who, by the provisions of this chapter, is barred or in any way precluded from bringing an action for the recovery of such land or interest or estate therein or claim upon same, may bring an action in the superior court of the county in which the land is situate for the recovery of compensation for such loss or damage from the assurance fund. Such action shall be against the state treasurer and all other persons who may be liable for the fraud, negligence, omission, mistake or misfeasance; but if such claimant has the right of action or other remedy for the recovery of the land, or of the estate or interest therein, or of the claim upon same, he shall exhaust such remedy before resorting to the assurance fund. (1913, c. 90, s. 34; C. S. 2423.)

Negligence of Plaintiff Barring Recovery.—A Torrens proceeding under this chapter duly commenced prior to the enactment of Public Laws 1919, c. 31 (§ 1-117 and § 1-118), constituted a "lis pendens." So such proceedings while pending was notice to a mortgagee of the land without the necessity of the filing of a formal lis pendens, and where the mortgagee failed to protect himself under the provisions of the statute, and the title to the land was assured by the State, and a holder thereof by proper transfer acquired the title, the negligence of the mortgagee was a complete defense in the mortgagee's action to recover damages against the State thereunder. Brinson v. Lacy, 195 N. C. 394, 142 S. E. 317.

§ 43-51. Satisfaction by third person or by treasurer.—If there are defendants other than the state treasurer, and judgment is rendered in favor of the plaintiff and against the treasurer and some or all of the other defendants, execution shall first be issued against the other defendants, and if such execution is returned unsatisfied in whole or in part, and the officer returning the same shall certify that it cannot be collected from the property and effects of the other defendants, or if the judgment be against the treasurer only, the clerk of the court shall certify the amount due on the execution to the state auditor, who shall issue his warrant therefor upon the state treasurer, and the same shall be paid. In all such cases the treasurer may employ counsel who shall receive reasonable compensation for his services from the assurance fund. (1913, c. 90, s. 35; C. S. 2424.)

§ 43-52. Payment by treasurer, if assurance fund insufficient.—If the assurance fund shall be insufficient at any time to meet the amount called for by any such certificate, the treasurer shall pay the same from any funds in the treasury not otherwise appropriated; and in such case any amount thereafter received by the treasurer on account of the assurance fund shall be transferred to the general funds of the treasury until the amount advanced shall have been paid. (1913, c. 90, s. 36; C. S. 2425.)

§ 43-53. Treasurer subrogated to right of claimant.—In every case of payment by the treasurer from the assurance funds under the provisions of this chapter the treasurer shall be subrogated to all the rights of the plaintiff against all and every other person or property or securities to a trustee, or by the improper exercise of any power of sale in benefit of the assurance fund. (1913, c. 90, s. 37; C. S. 2426.)

§ 43-54. Assurance fund not liable for breach of trust; limit of recovery.—The assurance fund shall not be liable to pay any loss, damage or deprivation occasioned by a breach of trust, whether expressed, constructive or implied, by any registered owner who is a trustee, or by the improper exercise of any power of sale in a mortgage or deed of trust. Nor shall any plaintiff recover as compensation under the provisions of this chapter more than the fair market value of the land at the time when he suffered the loss, damage or deprivation thereof. (1913, c. 90, s. 38; C. S. 2427.)

§ 43-55. Statute of limitation as to assurance fund.—Action for compensation from the assurance fund shall be begun within three years from the time the cause of action accrued. In cases of infancy or other disability now recognized by law, persons under such disability shall have one year after the removal of such disability within which to begin the action. (1913, c. 90, s. 39; C. S. 2428.)

Art. 9. Removal of Land from Operation of Torrens Law.

§ 43-56. Proceedings.—Any land brought under the provisions and operation of this chapter before April 16, 1931, may be removed and excluded therefrom by a motion in writing filed in the original cause wherein said land was brought under the provisions and operation of said chapter, and upon the filing of a petition therein showing the names of all persons owning an interest in said land and of all lien holders, mortgagees and trustees of record, and the description of said land. Upon the filing of said petition the Clerk of the Superior Court shall issue a citation to all parties interested and named in the petition, and upon the return date of said citation and upon the hearing of said motion, the said Clerk of the Superior Court may enter a decree in said cause removing and excluding said land from the provisions and operation of this chapter, and transfer and conveyance of said land may be made thereafter as other common law conveyances. (1931, c. 286, s. 1.)

Editor's Note.—No procedure is provided for in case the petition should be contested. And while the legislature rather loosely provides that the clerk, upon rendering his decree excluding the land, also may decree that subsequent

transfers of said land may be made "as other common law conveyances," it obviously means that such transfers should be effectuated by deeds duly probated and registered under our present laws. The amendment makes no specific provision for the recordation of the Clerk's decree as notice that the particular tract of land is no longer registered under the Torrens Act.

The Torrens system of land registration, though highly desirable from many points of view, has never been extensively used in North Carolina. Since 1913, when the Act was passed, scarcely five hundred titles have been registered under it. The present amendment now makes possible the "unregistering" of these titles. 9 N. C. Law Rev. 392.

§ 43-57. Existing liens unaffected.—Nothing in § 43-56 shall be construed to impair or remove any lien or encumbrance existing against said land. (1931, c. 286, s. 3.)

Chapter 44. Liens.

Art. 1. Mechanics', Laborers' and Materialmen's Liens.

§ 44-1. On buildings and property, real and personal.—Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished. (Rev., 2016; Code, s. 1781; 1901, c. 617; 1869-70, c. 206, s. 1; C. S. 2433.)

I. GENERAL CONSIDERATIONS.

In General.—The Constitution requires the General Assembly to "provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor." Art. 14, sec. 4. And the statute gives the lien "for the payment of all debts contracted for work done on the same or material furnished." In the construction of this section it is declared, in Wilkie v. Bray, 71 N. C. 205, that "in order to create the lien, the circumstances must be such as first to create the relation of debtor and creditor; and then it is for the debt that he has the lien." The effect of this ruling, which makes the statutory lien an incident to and the offspring of the contract out of which the indebtedness springs, and confines it to the party to the contract, was followed by the enactment of article 2 of this chapter which was not intended to supersede the lien of the contractor for it in direct terms gives the lien in favor of subcontractors, laborers and materialmen a preference over "the mechanics' lien now provided by law," and provides that when notice is given, the aggregate of such liens shall not exceed the amount then due the original contractor. Lester v. Houston, 101 N. C. 605, 609, 8 S. E. 366.

The debt contracted becomes a lien, a charge upon the land, and that land may, if need be, be sold, or in some appropriate way applied to the payment of the debt secured by and constituting the ground of the lien. It makes no difference as to the ownership of the land if the debt for such considerations was lawfully contracted, because the land is benefited by the labor so done on or about it, or by the materials furnished. The intention is that the land shall be charged by a lien with the costs of the benefits so extended to it, whether the benefits arise from labor done in building or repairing houses, in cultivating the land, building fences, ditching, felling trees, or the like, or from the erection of mills of any kind on it, or from supplying machinery, fixtures or any "material furnished" for such purpose. This is a just and reasonable interpretation of the statute. McNeal Pipe, etc., Co. v. Howland, etc., Water Co., 111 N. C. 615, 619, 16 S. E. 857.

This and the following sections under the topic of liens are remedial, and their clear purpose is to give contractors, subcontractors and laborers liens upon property as therein prescribed and provided, to secure the payment of money due for labor done or material supplied on or about the same. To that end its language, phraseology, and scope are broad and comprehensive. There are few, if any, express exceptive provisions in it, and, in the absence of them, exceptions and limitations affecting such liens cannot be allowed unless by necessary implication. The object is to give a lien on particular property deriving particular benefit in favor of classes of persons whose claims are supposed to have particular merit. Chadbourn v. Williams, 71 N. C. 444; Wooten v. Hill, 98 N. C. 48, 3 S. E. 846; Burr v. Maultsby, 99 N. C. 263, 6 S. E. 108; McNeal Pipe, etc., Co. v. Howland, etc., Co., 111 N. C. 615, 617, 16 S. E. 857.

A mechanic's lien may be defined to be a claim created by law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings erected thereon. Van Stone v. Stillwell, etc., Mfg. Co., 142 U. S. 128, 136, 12 S. Ct. 181, 35 L. Ed. 961.

Origin of Lien.—Mechanics' liens were unknown in common law and equity jurisprudence both of England and of this country. They were clearly defined and regulated in the civil law. Where they exist in this country they are creatures of local legislation. Canal Co. v. Gordon, 6 Wall 561, 571, 18 L. Ed. 894.

Priority of the Lien.—The lien created by this section is preferred to every other lien or encumbrance, which attaches upon the property subsequent to the time at which the work was commenced, or the materials were furnished. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 660, 14 S. E. 35.

"Mechanics'" and "Laborers'" Liens Distinguished.—When the contractor undertakes to put up a building and complete the same, the contract is indivisible and his "mechanic's lien" embraces the entire outlay, whether in labor or material, being for "work done on the premises," i. e., for betterments on it. The "laborer's lien" is solely for labor performed. The mechanic's lien is broader and includes the "work done," i. e., the "building built" or superstructure placed on the premises. Broyhill v. Gaither, 119 N. C. 443, 445, 26 S. E. 31.

Contractor Need Not Himself Perform the Labor.—The constitutional provision for giving to mechanics and laborers liens for their work, and the statutes enacted in pursuance thereof, and also giving liens for materials furnished, extend to and embrace contractors, who do not themselves perform the labor or furnish the materials used, but procure it to be done through the agency of others. Lester v. Houston, 101 N. C. 605, 8 S. E. 366.

Mere Knowledge Not Sufficient.—"Mere knowledge that work is being done or materials furnished on one's property does not enable the person furnishing the labor or materials to obtain a lien, since there is no privity between the owner and the person furnishing the labor or materials." 3 N. C. Law Rev. 65.

Property Subject to the Lien Must Be Sold First.—The property to which the lien attaches is specially devoted to the satisfaction of the plaintiff's claim, and hence it must be sold before other property may be resorted to. McNeal Pipe, etc., Co. v. Howland, etc., Water Co., 111 N. C. 615, 621, 16 S. E. 857.

When Itemized Statement Unnecessary.—Where a materialman's lien under this section, is for a complete contract for a gross sum, it is not necessary that the statement be itemized as required in the case of divisible contracts for goods or labor. King v. Elliott, 197 N. C. 93, 147 S. E. 701.

Sufficiency of Itemized Statement.—Where the claimant has attached and made a part of his lien an itemized statement of his account for labor and material which he has furnished the owner of the building upon which he claims his lien under this section, showing on several specific dates "money advanced for payroll," "furnace contract, etc.," each in stated amounts, it is held a sufficient itemization of his claims as required by the statute. King v. Elliott, 197 N. C. 93, 147 S. E. 701.

Statement Presumed Correct.—Where a lien filed under the provisions of this section gives the date to each item of labor or material furnished in relation to the building upon which the lien is sought, it will be presumed, nothing else appearing, that the dates given in the statement are correct. King v. Elliott, 197 N. C. 93, 147 S. E. 701.

Affidavit.—An affidavit to a lien filed under this section that the "foregoing statement of account showing the goods sold, delivered, installed, and work done," etc., for a "furnace contract": Held, sufficient to show a complete

contract for the furnace at the price itemized in the statement. King v. Elliott, 197 N. C. 93, 147 S. E. 701.

Priority of the Lien.—The lien for labor and material furnished to the owner of a building under the provisions of this section and notice filed as required by § 44-38, and § 44-39, where furnished under an entire or complete contract for the various items as a whole, relates back to the time of the first delivery and work done under the contract, and is superior to a mortgage lien subsequently given and properly recorded. King v. Elliott, 197 N. C. 93, 147 S. E. 701.

Jurisdiction.—Where materials of a value in excess of two hundred dollars are furnished under an entire and indivisible contract, and the material furnisher institutes suit in a justice's court to recover for part of the materials furnished and also institutes suit in the superior court on the same cause of action, defendant's motion to dismiss the action instituted in the justice's court for want of jurisdiction should be allowed, since plaintiff may not split up his cause of action for jurisdictional purposes and try it piecemeal in both courts. Allison v. Steele, 220 N. C. 318, 17 S. E. (2d) 339.

Finding that Contract Entire.—Where it has been agreed by the parties that the trial judge find the facts upon the trial of the question of the sufficiency of a lien filed for material and labor furnished for a building his finding that the contract was "to do certain work and furnish certain materials for a stated amount" under the evidence in the case is interpreted to mean that the contract referred to was entire. King v. Elliott, 197 N. C. 93, 147 S. E. 701.

Estoppel.—By electing to assert a lien as a subcontractor under § 44-6, plaintiff is estopped from thereafter asserting a lien as a contractor or material furnisher under this section and plaintiff is entitled to recover of defendant only the amount due the contractor by the owner on the date notice was given as a subcontracter or material furnisher. Doggett Lbr. Co. v. Perry, 212 N. C. 713, 194 S. E. 475.

When plaintiff is estopped by its election in asserting a lien under § 44-6, from asserting a lien under this section, and its action brought solely under this section is dismissed as of nonsuit because of such election, plaintiff's remedy is by instituting another action to recover for materials furnished the contractor and used in the construction of the building under § 44-6. Doggett Lbr. Co. v. Perry, 213 N. C. 533, 196 S. E. 831.

Cited in Atlas Supply Co. v. McCurry, 199 N. C. 799, 156 S. E. 91; First, etc., Nat. Bank v. Sawyer, 218 N. C. 142, 10 S. E. (2d) 656.

II. MATERIALS AND SERVICES CONTRACTED.

Meaning of "Materials Furnished."—The lien arises in favor of and to secure the payment of "any and all debts contracted for work done on the same or materials furnished." By the term "materials furnished," is meant something furnished to be appropriated, used and pertinently applied on the land, devoted to some purpose no matter what, so that the purpose be lawful. The purpose is to secure the debt contracted for materials furnished on or about or connected with the land in connection with the purpose to which it is devoted in whole or in part. McNeal Pipe, etc., Co. v. Howland, etc., Water Co., 111 N. C. 615, 619, 16 S. E. 857.

Plans and specifications of the architect are not "material" within the meaning of this section. Stephens v. Hicks, 156 N. C. 239, 72 S. E. 313.

No Lien upon the Materials as Distinct from the Building.—Several of the states have lien laws very similar in phraseology to this section, and the construction put upon them has not been uniform. In some of them it has been held that there is a lien on the building, etc., for materials furnished for the purpose or with the understanding that they were to be used in the erection or repairing of a building, whether so used or not; in others, that the materialman had a lien for the materials furnished, with the understanding that they were to be used in the construction of a building, although they were not used for such a purpose; and in others, with lien laws more resembling our own, that no lien can be acquired upon materials furnished for a building, etc., as distinct from the building, but only upon the building, etc., in the construction or repairing of which they are used. The latter is the proper construction of this section. Lanier v. Bell, 81 N. C. 337, 338.

But in the case of construction of a municipal building, in order for the subcontractor or materialman to have a claim against the bond of the contractor, it is not necessary that the materials furnished should have been actually used in such building; it is sufficient if they were contracted for that purpose. See Annotations to sec. 44-14.

Under this section the "material furnished," must be such material as enters into and becomes a part of the property and adds to its value. Pocahontas Coal Co. v. Henderson Elect. Light, etc., Co., 118 N. C. 232, 235, 24 S. E. 22.

Service or Materials Must Have Bettered the Property.—This section is construed in Tedder v. Wilmington, etc., R. Co., 124 N. C. 342, 32 S. E. 714, as meaning that the "Legislature has provided a lien only when the service or labor is for the betterment of property on which it is bestowed, leaving the laborer in all other cases to secure himself as at common law"—i. e., by retaining in his possession any property on which he makes repairs until paid for the same. Glazener v. Gloucester Lumber Co., 167 N. C. 676, 679, 83 S. E. 696.

Meaning of Term "Contracted."—The lien is given for the amount due upon debts contracted. But in this connection it is permissible to give the term "contracted" the larger meaning—agreed to be paid—thereby giving a highly remedial statute an operation commensurate with its purpose. Ball v. Paquin, 140 N. C. 83, 95, 52 S. E. 410.

The existence of a debt arising out of contract, due by the owner of the property, is a necessary predicate to the existence of a lien for labor and materials. Brown v. Ward, 221 N. C. 344, 20 S. E. (2d) 324.

III. PERSONS ENTITLED TO LIEN.

Lien to "Laborers and Mechanics," Excusive.—In Whitaker v. Smith, 81 N. C. 340, it was held that this section gave a lien to "Mechanics and Laborers" exclusively, and that an "overseer" was not a laborer, and reference was made to 8 Pa. St. 168, where it is held that an engineer is not a laborer. Tommey v. Spartanburg, etc., R. Co., 7 Fed. 429, 433.

Whatever may be the law, as declared in other jurisdictions, it is the settled principal in this State, that a mechanic or laborer, within the meaning of the lien laws, is one who performs manual labor—one regularly employed at some hard work, or one who does work that requires little skill, as distinguished from an artisan. Whitaker v. Smith, 81 N. C. 340; Stephens v. Hicks, 156 N. C. 239, 240, 72 S. E. 313.

The provision of the Constitution requiring the General Assembly to provide liens for mechanics and laborers, and the acts passed to carry it into effect, were intended to give protection to that class of persons who were totally dependent upon their manual toil for subsistence. The law was designed exclusively for mechanics and laborers. Whitaker v. Smith, 81 N. C. 340, 341. See Lester v. Houston, 101 N. C. 605, 8 S. E. 366, where it is held that the contractor or materialmen need not themselves furnish the labor or the materials.

In Whitaker v. Smith, 81 N. C. 340, it was held that an overseer is not a mechanic or laborer under the lien law, and is not entitled to a lien on the building and premises, where his work is done or labor performed, for the price or value of his services. The case of Cook v. Ross, 117 N. C. 193, 23 S. E. 252, is also to the same effect. There it was held that one who, under a contract, assists the owner of a mill in purchasing machinery and superintends the installation of the same and the repairing of the mill, so as to put it in proper condition for the manufacture of yarns, was in no view justified by our statute, a mechanic or laborer. Stephens v. Hicks, 156 N. C. 239, 241, 72 S. E. 313.

Architect Not a Laborer or Mechanic.—An architect who furnishes plans and specifications for a building is not a mechanic or laborer within the meaning of this article and he has no lien thereon for the same. Stephens v. Hicks, 156 N. C. 239, 72 S. E. 313.

IV. PROPERTY COVERED.

Any Real Property.—The phraseology of this section and the purpose of it are comprehensive. The lien prescribed attaches, in the case provided for, to any real property, whether it be denominated "a lot or farm," or a storehouse site, a mill site, a water reservoir site, or the like. McNeal Pipe, etc., Co. v. Howland, etc., Water Co., 111 N. C. 615, 619, 16 S. E. 857.

House and Lot.—Where a house is built by a contractor for the owner upon an undivided tract of 80 acres in the country, the mechanic's lien attaches to the whole tract, especially where it appears that the house alone, apart from the tract of land, would be of comparatively little value. The fact that a house and improvements, built by a contractor upon a tract of 80 acres belonging to the owner, are enclosed by a fence including about three acres is not a segregation or division of the house from the tract so as to confine the mechanic's lien to the enclosure. In such case, though the lien is upon the whole tract, it should be divided, if practicable and desired by the defendant, in making the sale, and the parts sold in such order as he may elect, so that, if possible, the lien may be

discharged without exhausting the entire tract. Broyhill v. Gaither, 119 N. C. 443, 26 S. E. 31.

Lien on Personalty Is Dependent upon Possession.—While this section provides for a lien not only upon buildings and lots, but also upon "any kind of property, real or personal," other sections of the lien law provide the conditions upon which the lien is to come into existence and continue; and in case of personal property the lien is dependent upon possession and cannot be obtained by the filing of notice. Elk Creek Lbr. Co. v. Hamby, 84 F. (2d) 144, 147.

V. APPLICATION TO PUBLIC CONSTRUCTIONS.

Not Applicable to Public Buildings, etc.—The lien laws were not intended to be so construed as to embarrass property devoted, by the very terms of the contract, to a public purpose, and to be used by the sovereign State of any public or quasi public corporation in the exercise of its delegated sovereign powers. McNeal Pipe, etc., Co. v. Howland, etc., Water Co., 111 N. C. 615, 627, 16 S. E. 857.

The rights of laborers and materialmen to acquire liens against the property of the owner for work done upon it and for material furnished to the contractor in the erection of his building, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed for its enforcement; and where the property is not subject to this lien, such as public buildings, etc., no duty or obligation is imposed upon the owner in respect to such claimants. Noland Co. v. Board, 190 N. C. 250, 129 S. E. 577.

Same—Courthouse.—A courthouse cannot be made subject to any lien for labor materials. Snow v. Board, 112 N. C. 335, 17 S. E. 176; Pratt Lumber Co. v. Gill Co., 278 Fed. 783, 787.

Same—Schools.—A building used for graded school purposes is a public building upon which no lien can be acquired, except with legislative sanction. Gastonia v. McEntie-Peterson, etc., Co., 131 N. C. 363, 42 S. E. 858; Snow v. Board, 112 N. C. 335, 17 S. E. 176; Morgantown Hardware Co. v. Morgantown Graded Schools, 151 N. C. 507, 66 S. E. 583.

Same—Highways.—One contracting to construct a highway has, under this section, no lien on the highway; nor have the subcontractors, laborers or materialmen. Pratt Lumber Co. v. Gill Co., 278 Fed. 783.

Same—Reason of the Rule.—The reason upon which the courts hold that the statutory lien given contractors, subcontractors, materialmen, and laborers upon buildings or other improvements upon real property for work, material, and labor does not extend or apply to public buildings is that such buildings, being held for public governmental purposes, cannot be sold under execution or other final process, and this reason applies with peculiar force to materials furnished or labor performed in the construction or repair of Public highways. Pratt Lumber Co. v. Gill Co., 278 Fed. 783, 788.

VI. APPLICATION TO RAILROADS.

Not Applicable to Railroads.—This section does not apply to railroads. Tommey v. Spartanburg, etc., R. Co., 7 Fed. 429, 433. This conclusion is supported by the intimation of the Supreme Court in Whitaker v. Smith, 81 N. C. 340. Id. But see Dunavant v. Caldwell, etc., R. Co., 122 N. C. 999, 29 S. E. 837, where it was held that where a contractor, who does work or furnishes materials for the construction of a railroad, is entitled to file a lien on the property of the company. See also sec. 44-13 as to the remedy of a laborer for a railroad contractor.

The Supreme Court of Iowa in Nelson v. R. R. Co. * * * construing a statute which resembles this section held that a railway was not a building within the meaning of their mechanic's lien law. Tommey v. Spartanburg, etc., R. Co., 7 Fed. 429, 433.

VII. WAIVER OF LIEN, HOMESTEAD, AND MISCELLANEOUS MATTERS.

Waiver of the Lien.—In an action brought to subject a vessel to a lien for materials furnished in its construction, it was found that, at or before the filing of the notice of lien, the plaintiff assented to a sale which was made to third parties and agreed to accept three notes secured by a second mortgage on the vessel as security. It was held that such agreement was a waiver of the lien, and the lienor was estopped to enforce his demand against the purchaser. Kornegay v. Styron, 105 N. C. 14, 11 S. E. 153.

As to whether one furnishing coal to a corporation used in the manufacture of its cotton products can claim his lien on the facts of this case, under the provisions of this section is a quaere, But his failure to enforce his asserted lien under the provisions of sec. 44-43, deprives him of whatever right thereto he may have had. Norfleet v. Tarboro Cotton Factory, 172 N. C. 833, 89 S. E. 785.

The homestead right is not affected by a lien for materials furnished and used in improvements upon land covered by homestead, and a statute which gives such lien is unconstitutional. Cumming v. Bloodworth, 87 N. C. 83. See also, Broyhill v. Gaither, 119 N. C. 443, 26 S. E. 31.

Priority of Homestead over Material Lien.—The "material lien" is by virtue of the statute only, and does not come under the constitutional priority given to the "mechanic's lien for work done on the premises" over the homestead exemption. Cumming v. Bloodworth, 87 N. C. 83; Broyhill v. Gaither, 119 N. C. 443, 445, 26 S. E. 31.

Contractor Agent of Owner—Rights of Materialman.—Where one has furnished the owner at the request of the contractor materials to be used in his building, and by the terms of the written contract the contractor is the agent of the owner for that purpose, the one so furnishing the material may acquire and enforce his lien upon the building, under the provisions of this section and secs. 44-38 and 44-39. North Carolina Lumber Co. v. Spear Motor Co., 192 N. C. 377, 135 S. E. 115.

Supervision by an architect of work done upon a building is not the character of work which falls within the intent of this section. Stephens v. Hicks, 156 N. C. 239, 72 S. E. 313.

Work Done, Materials Furnished under the Same Contract.—Where the work done on a house and furnishing the material were all in the same contract, which was entire and indivisible, the contractor is entitled to a lien for the whole amount. Isler v. Dixon, 140 N. C. 529, 53 S. E. 348.

Claim of Contractor to Proceeds of Insurance Policy.—The holder of a mechanic's lien has no claim on the proceeds of insurance policies taken out by the owner and payable to himself or to a mortgagee. Healey Ice Mach. Co. v. Green, 181 Fed. 890.

Fraudulent Misrepresentation that All Bills Paid.—In a prosecution for obtaining a mortgage loan by misrepresenting that bills for all labor and materials for the renovation of the building on the premises had been paid, such misrepresentation is material in view of the statutory liens of laborers and materials furnishers, and the fact that the mortgagee had the property appraised and obtained an attorney's certificate of title does not show that the mortgagee did not rely upon the misrepresentation, there being no notice of any unpaid bills for labor and materials on file of public record and there being testimony of the president of the mortgagee that it relied upon the misrepresentation. State v. Hawley, 220 N. C. 113, 16 S. E. (2d) 705.

§ 44-2. On personal property repaired. — Any mechanic or artisan who makes, alters or repairs any article of personal property at the request of the owner or legal possessor of such property has a lien on such property so made, altered or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges are paid; and if not paid for within thirty days, if it does not exceed fifty dollars, or within ninety days if over fifty dollars, after the work was done, such mechanic or artisan may proceed to sell the property so made, altered or repaired at public auction, by giving two weeks public notice of such sale by advertising in some newspaper in the county in which the work may have been done, or if there is no such newspaper, then by posting up notice of such sale in three of the most public places in the county, town or city in which the work was done, and the proceeds of the said sale shall be applied first to the discharge of the said lien and the expenses and costs of keeping and selling such property, and the remainder, if any, shall be paid over to the owner thereof. (Rev., s. 2017; Code, s. 1783; 1869-70, c. 206, s. 3; C. S. 2435.)

Cross Reference.—As to requirement that the Commissioner of revenue be given thirty days' notice of sale of a motor vehicle under a mechanic's or storage lien, see §§ 20-77, subsec. (c) and 20-114, subsec. (c).

In General.—This section is within the police power of the

State and in addition to the common-law lien given artisans on personal property repaired by them, while in their possession, for the reasonable value of the repairs, provides for its enforcement by foreclosure in accordance with its stated terms. Johnson v. Yates, 183 N. C. 24, 110 S. E. 603.

To Whom Section Applies.—The requirement of this section, that the lien in favor of the artisan making repairs on personal property shall attach under the provisions of the statute, only where such repairs are made at the instance of the owner "or the legal possessor of the property," includes within its terms all persons whose authorized possession is of such character as to make reasonable repairs necessary to the proper use of the property, and which were evidently in the contemplation of the parties. Johnson v. Yates, 183 N. C. 24, 110 S. E. 603.

Same—Vendee of Car with Mortgage to Vendor.—Where the vendor of an automobile takes a purchase-money mortgage and transfers the possession to the vendee for an indefinite period, it is with the implied authority in the vendee that he may use the machine and keep it in such reasonable and just repair as the use will require; and where, at the vendee's instance, a mechanic has repaired the same, his reasonable charge for such repairs creates a lien on the automobile, retained in his possession, superior to that of the vendor's mortgage. Johnson v. Yates, 183 N. C. 24, 110 S. E. 630.

Retention of Possession Essential—At Common Law.—At common law where a laborer repaired a wagon and surrendered it to the owner before payment, the laborer has no lien. Possession is absolutely necessary to the existence of the lien. Tedder v. Wilmington, etc., R. Co., 124 N. C. 342, 32 S. E. 714; McDougall v. Crapon, 95 N. C. 292.

Same—Under this Section.—The lien on personal property given by this section applies when possession is retained by the mechanic. Glazener v. Gloucester Lumber Co., 167 N. C. 676, 83 S. E. 696. If the mechanic or artisan surrenders possession of the property, he loses his lien. Tedder v. Wilmington, etc., R. Co., 124 N. C. 342, 344, 32 S. E. 714; Block v. Dowd, 120 N. C. 402, 27 S. E. 129; McDougall v. Crapon, 95 N. C. 292. Glazener v. Gloucester Lumber Co., 167 N. C. 676, 678, 83 S. E. 696; Elk Creek Lbr. Co. v. Hamby, 84 F. (2d) 144, 147.

Thus where a wagon was repaired by a laborer, who surrendered it to the owner before payment was made, it was held that the laborer had no lien on the wagon, either at common law or under the statute for his work done and materials furnished in making the repairs. McDougall v. Crapon, 95 N. C. 292.

The mechanic or artisan may exercise his common law right to retain the property, and this section, recognizing the right, authorizes him to advertise and sell and pay himself, after the specified period of possession. It is a necessary consequence that the lien is lost when possession is given up to the owner, as well as the statutory method of enforcing it, since these rights are incident to and dependent on possession, both at common law and under the provisions of this section. "The pledgee," in the words of a recent author, "certainly loses the benefit of his security, whenever, by a complete out and out delivering back to the pledgor, he voluntarily places the property beyond his own reach." Schou. Pers. Prop., 515; McDougall v. Crapon, 95 N. C. 292, 296.

Where a mechanic repairs certain personal property at the request of the lessee, and without request or knowledge on the part of the owner, and the mechanic never has possession of the property, but possession is returned to the owner by the lessee upon the termination of the lease, the mechanic may not hold the owner liable for the reasonable value of the repairs, this section being applicable only where the mechanic retains possession of the property. Broadfoot Iron Works v. Bugg, 208 N. C. 284, 180 S. E. 62.

Where the purchaser of an automobile gives the seller a title-retaining contract to secure the balance of the purchase price, and thereafter gives a second lien on the car to another, and later the second lienor takes possession from the purchaser without legal process and has the car repaired, the second lienor is not the owner or legal possessor of the car within the intent and meaning of this section, and the one making the repairs obtains no lien therefor under the statute and is not entitled to possession as against the first lienor. Willis v. Taylor, 201 N. C. 467, 160 S. E. 487.

Possession of Automobile Obtained from Mechanic by Fraudulent Representations.—Under the common law and the provisions of this section, one who repairs personal property loses his lien thereon by voluntarily surrendering possession to the owner, but where an automobile has been repaired and the artisan or mechanic is induced to part with possession upon false and fraudulent representations made by the owner that his check for the payment of the repairs was good and that he had sufficient funds in the bank for its payment, and the mechanic relies thereon and surrenders possession of the car, he does not do so voluntarily and unconditionally within the intent and meaning of the statute, and the mechanic does not lose his lien for the value of the repairs done by him. Reich v. Triplett, 199 N. C. 678, 155 S. E. 573.

Filing Notice Not Required.—This section is a self-executing enactment, conferring upon the mechanic artisan the means of making his debt out of the property by his own act, in selling after thirty days' retention without the intervention of judicial proceeding, either in the superior court or that of a justice of the peace; and section 44-39, which, for the preservation of the lien, requires notice of it to be filed within six months after completing the labor, cannot have been intended for a case in which as under this section a resort to any court is unnecessary, and a complete and efficient measure of relief is committed to, and may be obtained by, the party's own act. McDougall v. Crapon, 95 N. C. 292, 295.

The enactments as to filing notice must have been intended for cases where possession is not in the mechanic or artisan, and where an action is necessary for his relief. Id.

Lien on Timber Manufactured into Lumber, etc.—Under this section, one who cuts timber and manufactures it into lumber for a corporation before a receiver is appointed therefor has the right to retain the possession of such lumber until his lien is discharged by payment. Huntsman Bros. & Co. v. Linville River Lumber Co., 122 N. C. 583, 29 S. E. 838. See next section.

One who enters into a contract to cut, haul and raft logs after the standing timber upon lands has been felled for the purpose, has, while the logs are in his possession, a lien thereon for the services thus performed, under the provisions of this section, the timber after its severance from the land being regarded as personalty. Thomas v. Merrill, 169 N. C. 623, 86 S. E. 593. See next section.

Sale Restrained Where Mechanic's Claim Controverted.—Where one, who has the right under this section to retain possession of and to sell personal property for the purpose of defraying his charges, is made a party to an action in the nature of a creditor's bill against the owner in which the nature and amount of claimant's debt are in dispute, he will be restrained from making a sale of the property until such contentions are settled. Huntsman Bros. & Co. v. Linville River Lumber Co., 122 N. C. 583, 29 S. E. 838.

Priority of Lien.—The lien created by this section is superior to a vendor's lien, or to a mortgage lien. Johnson v. Yates, 183 N. C. 24, 110 S. E. 603.

A mechanic's lien is given preference under this section to a mortgage lien though the latter be prior in point of time. Johnson v. Yates, 183 N. C. 24, 110 S. E. 603. For a note upon this case, see 1 N. C. Law Rev. 127 where the reasons of holding are discussed.

This conclusion arrived at by the court is analogous to liens in admiralty where every hypothecation of the vessel which is effected to preserve it from deterioration or loss is held to be superior to other liens prior in point of time, on the theory that except for such preservation the prior lien would be worthless. Ed. Note.

Cited in Goodrich Silvertown Stores v. Caesar, 214 N. C. 85, 197 S. E. 698.

§ 44-3. Laborer's lien on lumber and its products.—Every person doing the work of logging or of cutting or sawing logs into lumber, or of getting out wood pulp, acid wood or tan bark, has a lien upon the said logs or lumber for the amount of wages due him, and the said lien shall have priority over all other claims or liens upon said lumber, except as against a purchaser for full value and without notice thereof: Provided, any such laborer whose wages for thirty or less number of days performed are due and unpaid shall file notice of such claim before the nearest justice of the peace in the county in which said work has been done, stating the number of days of labor performed, the price per day, and the place where the lumber is situate, and the person for whom said labor was performed, which said statement shall be signed by the said laborer or his attorney and the said laborer shall also give to the owner thereof, within five days after the lien has been filed with the justice of the peace, as aforesaid, a copy of said notice as filed with

the said justice of the peace. If the owner cannot be located, then notice shall be given by attaching said notice on the logs or lumber, wood pulp, acid wood or tan bark upon which the labor sued for was performed, and any person buying said lumber or logs, wood pulp, acid wood or tan bark after such notice has been filed with the nearest justice of the peace, shall be deemed to have bought the same with notice thereof, but no action shall be maintained against the owner of said logs or lumber, wood pulp, acid wood or tan bark or the purchaser thereof under the provisions of this section unless same is commenced within thirty days after notice is filed with the justice of the peace by such laborer, as above provided. (1913, c. 150, s. 6; 1929, c. 69; C. S. 2436.)

Local Modification.—Avery, Mitchell, Yancey: 1941, c. 129.

Editor's Note.—The Act of 1929 added the word "logging" in the second line and "logs" in the third line of this section.

Under the provision of this section, prior to the amendment of 1929, persons who cut and logged timber to a mill under a contract to do so at a fixed price were not entitled to a lien for such services, this interpretation of this section being strengthened by the fact that the amendment of 1929 included within the meaning of the statute those who were engaged in logging to the mill. Graves v. Dockery, 200 N. C. 317, 156 S. E. 506.

Reason for Enactment of Section.—It was because a lien could not be obtained for labor performed in the manufacture of lumber unless the party claiming it retained possession, that the Legislature enacted this section. Elk Creek Lbr. Co. v. Hamby, 84 F. (2d) 144, 147.

Work Done Directly by Claimant and in Betterment of Property.—Under this section the work must have been done directly by the claimant in betterment of the property upon which the lien is alleged to rest, thus one who aided in making the lumber by taking the boards from the saw as they were cut, is entitled to a lien, but one who is employed in the blacksmith shop as repairer of cars used as part of the plant, and one, who worked on the car track and repaired the bridges are not so entitled. Thomas v. Merrill, 169 N. C. 623, 627, 86 S. E. 593.

Compliance with Statutory Requirements Necessary. — In an action to establish a laborer's lien upon manufactured lumber, under the provisions of this section, the plaintiff must show compliance with the various statutory requisites; and a charge as to notice that the jury should return a verdict for the plaintiff should they find that he attached "the notice to the lumber" on the defendant's yard, is deficient and erroneous in leaving out the question as to whether the defendant had been served with a copy of the claim within five days after filing the lien with the justice of the peace, or that he could not be found. Bryson v. Gennett Lumber Co., 171 N. C. 700, 89 S. E. 26.

Laborer Has No Lien unless He Complies with Section or Retains Possession.—A laborer who engages in the manufacture of lumber has a lien thereon under section 44-2, for his just and reasonable charges so long as he retains possession of the lumber. A laborer, even though he does not retain possession, is entitled to a lien for wages for not exceeding thirty days if he gives the notice required by this section. But he obtains no lien unless he complies with this section or unless he retains possession so that he may assert a lien under § 44-2. Elk Creek Lbr. Co. v. Hamby, 84 F. (2d) 144, 147.

Preferred Lien Only When Section Strictly Complied with.—This section gives to laborers engaged in logging, sawing, etc., a lien on the lumber of their manufacture, which is superior to all other claims thereon, except that of a purchaser for value without notice. It gives this preferred lien, however, only for the wages of not exceeding thirty days labor, and only on condition that the provisions of this section be strictly complied with. Elk Creek Lbr. Co. v. Hamby, 84 F. (2d) 144, 146.

Right of Employee of Contractor against the Owner. — Where a laborer in the manufacture of lumber employs another laborer to assist him in his work, and the latter seeks to enforce the lien given by this section, for the value of the work he has done, it must be made to appear that the owner owed his own contractor, for the lien claimed can only be enforced to that extent, the object of the statute being to protect the laborer against any transfer of the lumber by the owner, who while indebted to his contractor, and insolvent, might otherwise pass the title to a bona fide purchaser for value, without notice of the lien. Bryson v. Gennett Lumber Co., 171 N. C. 700, 89 S. E. 26.

Repairing Railroad Track or Equipment. — Under contract, one of the defendants agreed to operate a large lumber plant, including a railroad equipment for handling the logs owned by the other defendant, and assumed the payment of all employees, several of whom filed liens against logs and lumber sawed, in a justice's court, for the nonpayment of wages. It was held that work done in repairing the track, equipment, etc., was not in contemplation of this section, so as to give those performing these services a lien on the logs and lumber used or manufactured by the plant; nor was a lien upon the plant held, for the material had not been used in its construction as betterments. Glazener v. Gloucester Lumber Co., 167 N. C. 676, 83 S. E. 696.

Priority of Lien.—The lien given to the person "doing the work of cutting or sawing logs into lumber," etc., by this section is superior to the lien given to the contractor therefor, or any other person. Glazener v. Gloucester Lumber Co., 167 N. C. 676, 83 S. E. 696.

§ 44-4. Lien for processing certain goods. — All persons, firms, partnerships and corporations engaged in the business of finishing, bleaching, mercerizing, manufacturing, dyeing, weighing and printing or otherwise processing cotton, wool, silk, artificial silk or goods of which cotton, wool, silk, or artificial silk forms a component part, shall be entitled to a lien upon the property and goods of others, which may come into their possession for work, labor, and materials furnished in any of said processing and said lien shall extend to any unpaid balance on account for work, labor and materials furnished in the course of any of said processing in respect to any of said goods of the same owner whereof the lienor's possession is terminated. The word "owner", as used in this and the following sections shall include a factor, consignee, or other agent entrusted with the possession of the goods held under said lien or with the bill of lading consigning the same to him with authority to sell the same or to deliver them to the lienor for the purpose of being processed. (1931, c. 48, s. 1.)

§ 44-5. Sale of goods at public auction. — If any part of the amount for which goods are held under said lien remains unpaid for a period of sixty days after the earliest item of said amount became due and payable the lienor may sell such goods at public auction first publishing a notice of the time and place of said sale once in each of two successive weeks in a newspaper published in the town, if any, otherwise in the county, in which the said goods are situated, or if no newspaper is published in said county, then in a newspaper published in an adjoining county and having general circulation in the county where the sale is to take place, and at the court house door, the last publication not to be less than five days prior to the sale, and also giving five days' notice of said sale by posting in five or more public places in said county, one whereof shall be in the town or city ward in which said goods are situated, and, if the residence or past address of owner of said goods is known or can be established, sending by registered mail a copy of said notice to said owner at said address at least five days before the date of sale: Provided, that if said goods are readily divisible no more thereof shall be so sold than is necessary to discharge the underlying indebtedness and to cover the expenses of the sale. The

proceeds of sale shall be applied to payment of said indebtedness and said expenses, and the balance, if any, shall be paid to the owner or person entitled thereto. The remedy herein provided to enforce said lien shall be in addition to any other provided by law. (1931, c. 48, s. 2; 1943, c. 543.)

Cross Reference.—As to advertisement for judicial sale of personal property generally, see § 1-336.

Editor's Note.—The 1943 amendment inserted the provision as to a newspaper published in an adjoining county.

Art. 2. Subcontractors', etc., Liens and Rights against Owners.

§ 44-6. Lien given subcontractors, etc., on real estate.—All subcontractors and laborers who are employed to furnish or who do furnish labor or material for the building, repairing or altering any house or other improvement on real estate, have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanics' lien now provided by law, when notice thereof shall be given as hereinafter provided, which may be enforced as other liens in this chapter, except where it is otherwise provided; but the sum total of all the liens due subcontractors and material men shall not exceed the amount due the original contractor at the time of notice given. (Rev., s. 2019; Code, ss. 1801, 1803; 1880, c. 44, ss. 1, 3; C. S. 2437.)

In General.—Soon after the enactment of section 44-1 et seq., it was held by the Supreme Court that no right to a lien was conferred by the statute unless there was a contract, express or implied, with the owner, creating the relation of creditor and debtor (Wilkie v. Bray, 71 N. C. 205), and as a result, subcontractors were excluded from its benefits, because they had no express contract with the owner, and none could be implied from the use of the materials as they were furnished to the contractor, and under the express contract between him and the owner. This led to the enactment of this and the following sections relative to the subcontractor's lien. Morganton Mfg. etc., Co. v. Andrews, 165 N. C. 285, 292, 81 S. E. 418.

The injustice of permitting the labor and material of one man to be used to enhance the value of the property of another without compensation, and also that the owner ought not to be required to pay the contractor and then have to pay for labor and material when he had not agreed to do so, led to the enactment of this and the following sections in an effort to adjust the rights of the parties along lines that would be just to both. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 706, 90 S. E. 923.

Definition of Subcontractor. — Mr. Phillips in his book on Mechanics' Liens, sec. 44, describes a subcontractor: "One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance." And Mr. Kalland in his book on the same subject, sec. 3, uses language of similar import, and says: "Although the original contractor may sublet his entire contract, and neither himself performs labor or furnishes materials in a literal sense, yet he will be entitled to a lien, for each subcontractor is an agent for the performance of a portion of the entire contract, and the act of the agent is in law the act of his principal." Lester v. Houston, 101 N. C. 605, 611, 8 S. E. 366.

Persons employed by an agent of the principal contractor to perform certain work on the premises may not under this section recover of the owner for the value of such labor merely upon a showing that they performed the work and that the owner received the benefit thereof. Price v. Asheville Gas Co., 207 N. C. 796, 178 S. E. 567.

Contractor's Lien Though Subordinated, Not Lost. — It is quite manifest that our statute gives to the contractor, under whom his employees and agents work, the lien provided in section 44-1 and though subordinated to the lien of the latter under this section, and only displaced when its enforcement would be prejudicial to them, when these are paid the contractor's lien becomes absolute and unconditional. Lester v. Houston, 101 N. C. 605, 610, 8 S. E. 366.

Contractor's Lien Not Superseded.—The lien given by this section was not intended to supersede the lien of the contractor, for it in direct terms gives the lien in favor of subcontractors, laborers, and materialmen a preference, "the mechanic's lien now provided by law," and provides that when notice is given, the aggregate of such liens shall not exceed the amount then due the original contractor. The legislation is intended to extend the remedy to those who work or furnish materials from which the owner derives a benefit in the improvement of his property, even where there are no contract relations between them and the owner, and enables them to secure the payment of what is due them, indebtedness due from the debtor to the contractor. Morganton Mfg., etc., Co. v. Andrews, 165 N. C. 285, 293, 81 S. E. 418; Lester v. Houston, 101 N. C. 605, 8 S. E. 366.

Relation of Debtor and Creditor between the Owner and the Subcontractor.—It is declared in many cases that the basis for mechanics' liens is the relation of creditor and debtor between the owner and sub-contractor and materialmen, Boone v. Chatfield, 118 N. C. 916, 24 S. E. 745; Weathers v. Borders, 124 N. C. 610, 32 S. E. 881; Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 90 S. E. 923, and that the general principle of the lien laws is that the relation of debtor and creditor must exist and that there can be no lien without a debt.

It is evident that the statute does not in express terms create this relation between these parties and that such a relation must be inferred by implication. The basis of such implication may be traced to the fact that the contractor is obliged or intended to deal with the subcontractor and materialmen in doing work and securing materials, and that the principal contractor is an agent of the owner for the purpose of creating valid debts. 3 N. C. Law Rev. 64.

Whatever may be the basis of the inference that there exists the relation of debtor and creditor between the owner and the subcontractor, it is apparent that this section does not, even by implication, create a relationship of debtor and creditor except as to the extent of liens acquired in accordance with its provisions. Morganton Hdw. Co. v. Morganton Graded Schools, 151 N. C. 507, 66 S. E. 583. Ed. Note.

No privity of contract between the owner and the subcontractor is established by this section, so as to enable the former to sue the latter for a debt; but it merely confers upon the materialman a lien upon the property, if the property is subject to lien, but not if he fails to acquire a lien by the laches of himself or of the contractor, whose negligence will be imputed to him when he fails to protect his own interests in the way prescribed by the statute. Morganton Hdw. Co. v. Morganton Graded Schools, 151 N. C. 507, 511, 66 S. E. 583.

Statute Furnishes Double Security. — The statute (this section and section 44-11) furnishes a double security to those furnishing material, etc., to the contractor and who give the statutory notice to the owner in giving them a lien upon the property if enforced by suit within six months, and, also, an interest in the trust funds in the hands of the owner and due to the contractor, which funds are to be distributed pro rata among the claimants thereto entitled, the latter security not being in strictness a lien, but a right to have an accounting in an ordinary civil action and judgment for the amount due by the owner to the contractor. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 90 S. E. 923.

Subcontractor Substituted to the Rights of Contractor. — Where the lien arises under the provisions of this section, it does so by substituting the claimant to the rights of the contractor, enforcible against any and all sums which may be due from the owner at the time of notice given or which are subsequently earned under the terms and stipulations of the contract. In well-considered cases it is said to amount to an assignment pro tanto of the amount due or to become due from the owner to the principal contractor, and this regardless of the state of the account between the principal contractor and the subcontractor, who may be the debtor of the claimant. Atlas Powder Co. v. Denton, 176 N. C. 426, 432, 97 S. E. 372.

Lien Enforceable though Principal Contractors' Contract Not Completed.—A subcontractor may enforce his lien for labor or materials, as prescribed by this and the following sections, against the owner of the property though the contract with the principal contractor has not been completed, or even if it has been abandoned. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 14 S. E. 35.

Where the furnisher of material to a subcontractor has notified the owner and perfected his lien as required by this section and section 44-7 and it appears by admission in the pleadings in an action to enforce the lien that the owner of the building is still indebted, to the principal contractor in a sufficient sum, this sum is applicable to the plaintiff's de-

mand regardless of the state of accounts between the contractor and the subcontractor. Borden Brick, etc., Co. v. Pulley, 168 N. C. 371, 84 S. E. 513; Powell v. King Lumber Co., 168 N. C. 632, 84 S. E. 1032.

Time and How Subcontractors' Right Determined.—The right of one, who furnishes materials to a subcontractor, to a lien upon the building does not depend upon the state of the account between the contractor and the subcontractor, but upon the amount due the contractor by the owner at the time of the proper filing of the notice in the manner and form required. Atlas Powder Co. v. Denton, 176 N. C. 426, 97 S. E. 372.

Amount Due from Owner a Trust Fund for Subcontractor.—The amount due the contractor and subject to the claims of materialmen who have filed their statutory notice is not a debt due by the owner to the materialmen in the ordinary sense, but a fund held in trust for them strictly arising from the operation of the statute, in conformity with its terms; and the statute imposes no duty upon the owner when the materialmen have not filed the required notice or acquired their lien accordingly. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 90 S. E. 923.

Priority over Subsequent Liens.—The lien of the subcontractor, when duly filed, has precedence over all other liens attaching to the property subsequent to the time the work was commenced or the material furnished. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 14 S. E. 35.

Elements Essential to Recovery.—To recover under this section, plaintiff must prove: (1) his subcontract; (2) work done and labor performed in fulfillment thereof; (3) a balance due; (4) notice to the owner as required by statute prior to payment of the contract price to the principal contractor; and (5) a balance due the contractor. Upon such showing the law requires the owner to apply the unexpended contract price due the contractor to the payment of amounts due subcontractors and materialmen of whose claims the owner has received notice, pro rata if necessary. Schnepp v. Richardson, 222 N. C. 228, 22 S. E. (2d) 555.

The principal contractor is a necessary party to an action to enforce the lien of a subcontractor, but a trustee in a conveyance subject to the lien is not an essential party. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 14 S. E. 35.

No Lien on Public Buildings.—Neither by the enforcement of a lien, nor by anything in the nature of an equitable proceeding, nor directly by sale under execution, was it the intent of the Legislature to subject one of its public corporations, organized as necessary to the administration of its governmental affairs, to the privation or loss of its buildings for public school purposes. Morganton Hdw. Co. v. Morganton Graded Schools, 151 N. C. 507, 66 S. E. 583.

No Lien on Highway.—Under this section subcontractors and materialmen have no lien upon a highway they have constructed. Pratt Lumber Co. v. Gill Co., 278 Fed. 783.

Liability of Municipality—No Lien against It.—Though no lien can be filed against a municipality, yet it will be liable to laborers and materialmen, and for labor done and material furnished to the extent of any balance due the contractor and unpaid at the time of the notice. Scheflow v. Pierce, 176 N. C. 91, 93, 97 S. E. 167. See section 44-14.

Estoppel to Assert Lien under Section 44-1.—By electing to assert a lien as a subcontractor under this section, plaintiff is estopped from thereafter asserting a lien as a contractor or material furnisher under § 44-1, and plaintiff is entitled to recover of defendant only the amount due the contractor by the owner on the date notice was given as a subcontractor or material furnisher. Doggett Lbr. Co. v. Perry, 212 N. C. 713, 194 S. E. 475.

When plaintiff is estopped by its election in asserting a lien under this section, from asserting a lien under § 44-1, and its action brought solely under § 44-1 is dismissed as of nonsuit because of such election, plaintiff's remedy is by instituting another action to recover for materials furnished the contractor and used in the construction of the building under this section. Doggett Lbr. Co. v. Perry, 213 N. C. 533, 196 S. E. 831.

Cited in Piedmont Electric Co. v. Vance, etc., Electric Co., 197 N. C. 495, 149 S. E. 858.

§ 44-7: Repealed by Session Laws 1943, c. 543.

Editor's Note.—The provisions of this section are now included in § 44-9.

§ 44-8. Statement of contractor's indebtedness to be furnished to owner; effect. — When any contractor, architect or other person makes a contract for building, altering or repairing any building or vessel, or for the construction or repair of a railroad, with the owner thereof, it is his duty to furnish to the owner or his agent, before receiving any part of the contract price, as it may become due, an itemized statement of the amount owing to any laborer, mechanic or artisan employed by such contractor, architect or other person, or to any person for materials furnished, and upon delivery to the owner or his agent of the itemized statement aforesaid, it is the duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for, which will be sufficient to pay such laborer, artisan or mechanic for labor done, or such person for material furnished, which said amount the owner shall pay directly to the laborer, mechanic, artisan or person furnishing materials. The owner may retain in his hands until the contract is completed such sum as may have been agreed on between him and the contractor, architect or other person employing laborers, as a guaranty for the faithful performance of the contract by such contractor. When such contract has been performed by the contractor such fund reserved as a guaranty shall be liable to the payment of the sum due the laborer, mechanic or artisan for labor done, or the person furnishing the materials as hereinbefore provided. (Rev., s. 2021; 1887, c. 67; 1891, c. 203; 1899, c. 335; 1903, c. 478; C. S. 2439.)

Purpose of Section—Owner Cannot Force Contractor to Supply Statement.—The purpose of the section is to compel the contractor to supply the itemized statement, so that the laborer may be benefited, have his right facilitated, and the owner of the property may be reasonably protected. There is no liability created on the part of the owner if the itemized statement is not supplied to him; he cannot compel the contractor to furnish him with it, nor is he presumed to know that he has not paid the laborer or mechanic, or that he owes him any particular sum. Pinkston v. Young, 104 N. C. 102, 106, 10 S. E. 133.

For Whose Benefit Section Enacted.—This section while enacted primarily for the benefit or protection of the workmen and materialmen, is also for the protection of the owner and the surety on the contractor's bond. Guilford Lumber Mfg. Co. v. Holladay, 178 N. C. 417, 100 S. E. 597.

Statement of Contractor Issues to Benefit of Materialmen, etc.—When the contractor furnishes the owner with statements of the amounts due the materialmen, according to this section, a direct obligation of the owner to the materialmen may be created, upon which the latter may sue in their own names. Perry v. Swanner, 150 N. C. 141, 63 S. E. 611. See annotations to § 44-9.

Owner Liable for Paying Contractor after Receipt of Latter's Statement.—Where the owner voluntarily pays to the contractor, after the completion and acceptance of his building, the full balance of the contract price, having received the contractor's statement of persons and materials still owed by him thereon, his conduct in so doing is wrongful to the materialmen, of which he will not be permitted to take advantage to the loss of the surety on the contractor's indemnifying bond, in his action to recover thereon. Guilford Lumber Mfg. Co. v. Holladay, 178 N. C. 417, 100 S. E. 597.

In order for a material furnisher to hold the owner liable he must show that the owner was notified by him or by the contractor of his claim before the owner completed payment to the contractor. Economy Pumps v. F. W. Woolworth Co., 220 N. C. 499, 17 S. E. (2d) 639.

Personal Action by Materialmen against Owner.—A personal action against the debtor for not retaining a sum to pay the subcontractor, when the contractor has furnished him a statement of indebtedness, can be maintained against the owner, where the lien acquired has been lost by delay to enforce it. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 707, 90 S. E. 923.

Duty of Owner to Reserve Funds to Pay Materialmen, etc.—The requirement of this section that the contractor furnish the owner of the building a statement of the persons and amounts he owes for materials, when complied with, makes it the duty of the owner to retain from the amount then due the contractor, so far as it extends, the

amounts due by the latter to the materialmen, and pay it to them, and under section 44-9, no payment to the contractor after such notice shall be a credit on or discharge of the lien provided for the materialmen. Guilford Lumber Mfg. Co. v. Holladay, 178 N. C. 417, 100 S. E. 597.

Remedy of Subcontractors.—The subcontractor and material furnisher having given the owner an itemized statement of material furnished by them, acquire a lien for the payment of their claims and may maintain a civil action thereon against the owner under the provisions of this section and §§ 44-9 and 44-10 without being required to file their liens within six months, etc., under the provisions of § 44-39 or bring suit within six months thereafter, under those of § 44-43. Campbell v. Hall, 187 N. C. 464, 121 S. E. 761.

Section Not Repealed by Later Act Nor in Conflict with § 44-13.—This and the following two sections are not repealed by c. 150, Laws 1913, the later act expressly purporting to be an amendment, and there is no conflict between the two acts that will fall within the repealing clause of that act; nor is there conflict between this section, and section 44-13 as amended; it is the legislative intent to extend their provisions to those who furnish materials to the subcontractors of railroads, and, construing the above sections in connection with section 44-39 as amended, the furnisher of materials to the contractor on an entire contract may file his itemized statement with the railroad company within six months after its completion, and maintain his action to enforce his lien, when commenced within six months thereafter. Atlas Powder Co. v. Denton, 176 N. C. 426, 97 S. E. 372.

Effect of Mortgages Subsequent to Notice.—Where the owner has been given the statutory notice of the subcontractor's claim upon the building, or the contractor filed his lien in accordance with the statute before the justice of the peace or clerk, as the case may be, the right to the money still due by the owner to the contractor relates back to the time of the furnishing of the material and the work under his contract; and where he has established this right by his action, those who have acquired liens by mortgage, etc., subsequent to the time of the notice take cum onere, and subject to the contractor's or subcontractor's lien so acquired. Porter v. Case, 187 N. C. 629, 122 S. E. 483.

Cited in Piedmont Electric Co. v. Vance, etc., Electric Co., 197 N. C. 495, 149 S. E. 858; Schnepp v. Richardson, 222 N. C. 228, 22 S. E. (2d) 555.

§ 44-9. Subcontractors, laborers and materialmen may notify owner of claim; effect.—Any subcontractor, laborer, mechanic, artisan, or person furnishing materials, who claims the lien provided for in this article for labor on, or materials furnished for, any building, vessel, railroad, or real estate, may give notice to the owner, agent or lessee who makes the contract for the labor or materials, of the amount due by the contractor to such claimant. The notice shall be in the form of an itemized statement of the amount due, except where the contract is entire for a gross sum and cannot be itemized. Upon the delivery of the notice to the owner, agent, or lessee, the claimant is entitled to all the liens and benefits conferred by law in as full a manner as though the statement were furnished by the contractor. If the said owner, agent or lessee refuses or neglects to retain, out of the amount due the contractor under the contract, a sum not exceeding the price contracted for which will be sufficient to pay such claimant, then the claimant may proceed to enforce his lien, and after such notice is given no payment to the contractor shall be a credit on or a discharge of the lien herein provided for. (Rev., s. 2021; 1891, c. 203; 1899, c. 335; 1903, c. 478; 1913, c. 150, s. 4; 1943, c. 543; C. S. 2440.)

The 1943 amendment rewrote this section, incorporating in it the provisions formerly contained in § 44-7 (C. S. 2438), and made the section applicable to subcontractors.

The annotation **"Notice to Be Given before Settlement with Contractor"** and those following it formerly appeared under § 44-7, and should be read with that fact in mind.

Construction with Other Sections.—A letter to the owner setting forth the amount of the account for materials furnished the contractor and stating that other items were being purchased on the account, and offering to furnish an itemized statement upon request is not a sufficient notice upon which to base a materialman's lien. Such notice or itemized statement must show substantial compliance with the statute. However, if it is an entire contract for a gross sum the particularity otherwise required is not essential. Manifestly, § 44-7 through § 44-11 must be construed together. Huske Hardware House v. Percival, 203 N. C. 6, 164 S. E. 334. See Editor's Note, supra.

There is no lien until and unless the statutory notice either under this or under the preceding section has been given. Economy Pumps v. F. W. Woolworth Co., 220 N. C. 499, 17 S. E. (2d) 639.

Effect of Statement.—If the contractor shall furnish the itemized statement, the laborer's lien will arise and be effectual. If he fails to do so, then the laborer may give the owner of the property notice, and thus create the lien in his favor. Pinkston v. Young, 104 N. C. 102, 10 S. E. 133; Norfolk Bldg. Supplies Co. v. Elizabeth City Hospital Co., 176 N. C. 87, 97 S. E. 146.

For Whose Benefit Section Enacted.—This section while enacted primarily for the benefit or protection of the workmen and materialmen, is also for the protection of the owner and the surety on the contractor's bond. Guilford Lumber Mfg. Co. v. Holladay, 178 N. C. 417, 100 S. E. 597.

Assignment of Lien.—The statutory lien of a laborer or materialman under the provisions of this section, is assignable as in case of ordinary business contracts. Horne-Wilson v. Wiggins Bros., 203 N. C. 85, 164 S. E. 365.

Notice to Be Given before Settlement with Contractor.—It is necessary, to enforce a lien on a building for materials furnished the contractor, that the materialman file with the owner an itemized statement of the amounts due for materials, or that he give notice to the owner of the amount due him before the owner settles with the contractor, but the lien exists only to the extent of the amount then due. Orinoco Supply Co. v. Masonic, etc., Home, 163 N. C. 513, 79 S. E. 964; Schnepp v. Richardson, 222 N. C. 228, 22 S. E. (2d) 555.

Same—Rule Not Affected by § 44-8. — This rule is not affected by section 44-8. That section is directed against the contractor, and is intended to compel him to furnish to the owner of the premises the statement necessary to give notice of claims of subcontractors and others. But if the contractor shall furnish the itemized statement, the laborer's lien will arise and be effectual. Pinkston v. Young, 104 N. C. 102, 106, 10 S. E. 133.

Same—Otherwise No Lien Attaches.—When the required notice has not been given before the last payment has been made to the contractor, who fails to complete the building, and the owner in completing the building has paid out the balance of the contract price, no lien attaches. Orinoco Supply Co. v. Masonic, etc., Home, 163 N. C. 513, 79 S. E. 964. And the owner is justified in making payment to the contractor. Clark v. Edwards, 119 N. C. 115, 25 S. E. 794.

Same—Even Though Payment in Full Is Made in Advance.—In Rose v. Davis, 188 N. C. 355, 124 S. E. 576, it was held that a furnisher of material, used in the building by a contractor, acquired no lien on the building, under former § 44-7, by notice to the owner filed after the owner had paid to the contractor the full contract price; and that it was immaterial that payment in full had been made in advance, in accordance with the contract between the owner and contractor. North Carolina Lumber Co. v. Spear Motor Co., 192 N. C. 377, 383, 135 S. E. 115.

Same—Right Statutory and Dependent upon Notice. — To share in the fund due by the owner to the contractor and to have that fund distributed pro rata among the claimants is a statutory right, and is dependent upon acquiring a lien on the property by giving the notice to the owner. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 707, 90 S. E. 923.

The liens given the furnisher of material on the building of the owner to the contractor, etc., are strictly statutory and no lien can be acquired therefor unless notice has been given, nor is it contemplated or provided by the statute that this will be altered by reason of the owner paying the contractor by agreement in advance of his work. Rose v. Davis, 188 N. C. 355, 124 S. E. 576.

Purpose of Notice—Liability of Owner for Disregarding It.—The notice required by § 44-7 was intended to charge the owner or lessee of the land to withhold so much of the money due to the contractor as would pay the subcontractor's claim. If he failed to do so, he could not avoid his liability by paying the contractor. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 661, 14 S. E. 35.

Where the owner of a building being erected pays according to the contract his contractor a sum of money in excess of the amount due a materialman after he has re-

ceived notice, and later the contractor abandons his contract and the owner finishes the building at his loss, the materialman's lien attaches to the building as an obligation of the owner. Blue Pearl Granite Co. v. Merchants' Bank, 172 N. C. 354, 90 S. E. 312, cited and applied; Piedmont Electric Co. v. Vance, etc., Electric Co., 197 N. C. 495, 149 S. E. 858, cited and distinguished. Beeson Hardware Co. v. Burtner, 199 N. C. 743, 155 S. E. 733.

That Laborers Are Working on Building Is Not of Itself Notice.—The mere fact that laborers and subcontractors are working on a building is not notice to the owner not to pay out to the contractor until it is ascertained how much is due by the latter to each and every subcontractor, laborer, materialman, etc. Clark v. Edwards, 119 N. C. 115, 25 S. E. 794.

Mere knowledge of the owner that certain laborers are at work on his building, or that certain persons or firms have supplied materials, is insufficient as notice to him, under this section, of any claim of lien thereon. Norfolk Bldg., etc., Co. v. Elizabeth City Hospital Co., 176 N. C. 87, 97 S. E. 146.

Unpaid Balance at Time of Notice Subject to Lien.—Where the owner of the building has paid his contractor to the time of filing the statutory claim for material furnished, the moneys thereafter becoming due the contractor, under the same contract, are subject to the lien. Blue Pearl Granite Co. v. Merchants' Bank, 172 N. C. 354, 90 S. E. 312.

Lien Only to the Extent of Unpaid Balance at Date of Notice. — A subcontractor can enforce his right of lien against the owner of property only to the extent of any unpaid sums due the contractor at the date of giving notice to the owner of his, the subscontractor's, claim. Clark v. Edwards, 119 N. C. 115, 25 S. E. 794.

Notice of Lien to Justice or Clerk Not Necessary. — The lien of the subcontractor is acquired by notice to the owner, and a filing of the notice of the lien with a justice or a clerk is not necessary, this being expressly provided by section 44-10. Morganton Mfg., etc., Co. v. Andrews, 165 N. C. 285, 294, 81 S. E. 418; Porter v. Case, 187 N. C. 629, 639, 122 S. E. 483; Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 706, 90 S. E. 823.

Notice to Owner's Architects Not Notice to the Owner.—The object of the notice required by the statute to be given the owner, and upon which the statutory lien for labor, material, etc., depends, is to apprize the owner of the amounts then due to those who have done labor upon or furnished materials for the building; and a statement of the materials used in the building, given by the contractor to the architect upon which the former is to be allowed a payment of a certain per cent. under the terms of the contract as the building progresses, does not meet the statutory requirements, and is insufficient to create the lien. Norfolk Bldg., etc., Co. v. Elizabeth City Hospital Co., 176 N. C. 87, 97 S. E. 146.

Cited in Dixon v. Ipock, 212 N. C. 363, 193 S. E. 392; Schnepp v. Richardson, 222 N. C. 228, 22 S. E. (2d) 555.

§ 44-10. Sums due by statement to constitute lien. — The sums due to the laborer, mechanic or artisan for labor done, or due the person furnishing materials, as shown in the itemized statement rendered to the owner, shall be a lien on the building, vessel or railroad built, altered or repaired, without any lien being filed before a justice of the peace or the superior court. (Rev., s. 2022; 1887, c. 67, s. 2; C. S. 2441.)

Acquisition of Lien without Filing Notice.—By virtue of section 44-39, the lien of a contractor must be filed in six months, but by this section, the lien of the laborer, mechanic or artisan can be acquired without filing if a statement of the amount due is rendered the owner. [See annotations to § 44-7.] However acquired, the lien is lost under section 44-43 if action thereon is not begun in six months. Hildebrand v. Vanderbilt, 147 N. C. 639, 641, 61 S. E. 620.

Same—Personal Action When Lien Lost.—But when the lien acquired is lost by not bringing suit within six months, an action can be maintained against the owner personally for his failure in his "duty to retain from the money due the contractor a sum not exceeding the price contracted for," etc. Hildebrand v. Vanderbilt, 147 N. C. 639, 61 S. E. 620.

Cited in Schnepp v. Richardson, 222 N. C. 228, 22 S. E. (2d) 555.

§ 44-11. Where sums due contractor from owner insufficient; payment pro rata. — If the amount due the contractor by the owner is insufficient to pay in full the laborer, mechanic or artisan, for his labor, and the person furnishing materials, for materials furnished, it is the duty of the owner to distribute the amount pro rata among the several claimants, as shown by the itemized statement furnished the owner, or of which notice has been given the owner by the claimant. (Rev., s. 2023; 1887, c. 67, s. 3; 1913, c. 150, s. 5; C. S. 2442.)

Provisions of Section 44-40 Do Not Affect Distribution under This Section.—Where the owner of a building erected under contract has not sufficient funds in his hands to pay all the lienors thereon for material furnished, the amount due the contractor, subject to the liens, shall be distributed by the owner among the several claimants under the provisions of this section; and construing this section with other relevant sections of the code, it is held that it does not conflict with section 44-40 requiring that liens shall be paid and settled according to priority of the notice of the lien filed with the justices or the clerk, for this latter section relates to liens filed with the proper officers, and does not affect the provisions as to subcontractors who acquire a lien by notice to the owner. Morganton Mfg., etc., Co. v. Andrews, 165 N. C. 285, 81 S. E. 418.

Remedy by Accounting.—A right to have an accounting in an ordinary civil action and judgment for the amount due by the owner to the contractor, are incidents of the rights given the subcontractor by the provisions of this section. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 90 S. E. 923.

Priority of Claims.—One who has furnished material to a contractor, and who, with others, has given the statutory notice to the owner by enforcing his lien by action within the six months, acquires no superior right in the pro rata distribution of the trust funds, but only the additional security of his lien. Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 90 S. E. 923.

Cited in Piedmont Electric Co. v. Vance, etc., Electric Co., 197 N. C. 495, 149 S. E. 858; Dixon v. Ipock, 212 N. C. 363, 193 S. E. 392; Schnepp v. Richardson, 222 N. C. 228, 22 S. E. (2d) 555.

§ 44-12. Contractor failing to furnish statement, or not applying owner's payments to laborer's claims, misdemeanor. — If any contractor or architect shall fail to furnish to the owner an itemized statement of the sums due to every one of the laborers, mechanics or artisans employed by him, or the amount due for materials, before receiving any part of the contract price, he shall be guilty of a misdemeanor. If any contractor shall fail to apply the contract price paid him by the owner or his agent to the payment of bills for labor and material, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3663; 1887, c. 67, s. 4; 1913, c. 150, s. 8; C. S. 2443.)

§ 44-13. Laborer for railroad contractor may sue company; conditions of action. — As often as any contractor for the construction of any part of a railroad which is in progress of construction is indebted to any laborer for thirty or less number of days labor performed in constructing said road, or is indebted for more than thirty days to any person furnishing material for the construction of said road, such laborer or material man may give notice of such indebtedness to said company in a manner herein provided, and said company shall thereupon become liable to pay such laborer or material man the amount so due for labor or material, and action may be maintained against said company therefor. Such notice shall be given by said laborer to said company within twenty days after the performance of the number of days labor for which the claim is made, and such notice shall be given by the material man to said company within thirty days after the materials have been furnished. Such

notice to be given by the laborer shall be in writing and shall state the amount and the number of days labor and the time when the labor was performed for which the claim is made, and the name of the contractor from whom due, and shall be signed by such laborer or his attorney; and such notice of the material man shall be in writing and shall state the amount of material furnished and when furnished, and the name of the contractor to whom furnished and by whom due, and shall be signed by such material man or his attorney. The notice shall be served on an engineer, agent or superintendent employed by said company having charge of the section of road on which such labor was performed or material furnished, personally or by leaving the same at the office or usual place of business of said engineer, agent, or superintendent, with some person of suitable age. But no action shall be maintained against any company under the provisions of this section unless the same is commenced within ninety days after notice is given to the company by such laborer or material man as above provided. (Rev., s. 2018; Code, s. 1942; 1871-2, c. 138, s. 12; 1913, c. 150, s. 1; C. S. 2444.)

No Conflict betwetn This and Section 44-8.—There is no conflict between section 44-8 and this section as amended; it is the legislative intent to extend the provisions of law relative to materialmen and subcontractors of railroads. Atlas Powder Co. v. Denton, 176 N. C. 426, 97 S. E. 372.

Application to Laborers Constructing Railroads. — This section applies only to laborers "constructing railroads." Glazener v. Gloucester Lumber Co., 167 N. C. 676, 678, 83 S. E. 696.

A Logging Railroad within This Section.—A logging road operated by the use of steam is a railroad within the meaning of this section, and by following the requirements of the section a lien may be obtained for work done in its construction, though done under an independent contractor. Carter v. Coharie Lumber Co., 160 N. C. 8, 75 S. E. 1074.

Substantial Compliance with Statute Necessary. — The right to look beyond the contract of employment to an artificial responsibility that may be thrust upon the company under the provisions of this section is a creature of the statute, and one who claims the benefit of it must, like a mechanic seeking to enforce a lien, and upon the same principle, show a substantial compliance with the requirements of this section. Wray v. Harris, 77 N. C. 77; Cook v. Cobb, 101 N. C. 68, 7 S. E. 700; Moore v. Cape Fear, etc., R. Co., 112 N. C. 236, 17 S. E. 152.

Where, in an action by the assignee of a number of claims due laborers by the contractors, the complaint and exhibits failed to show affirmatively that each of the laborers not only claimed a specific sum, but had substantially complied with the statute in respect to notice, etc., previous to the assignment of his account, it was held that a demurrer to the complaint was properly sustained. Moore v. Cape Fear, etc., R. Co., 112 N. C. 236, 17 S. E. 152.

Assignment of Claim after Compliance with Statute. — After complying with the requirements of this section a laborer can assign his claim as a debt either against his employer or the railroad company dealing with him under a direct agreement or as subcontractor, and the assignee can sue upon such claim and other similar ones in one action, and recover the sum total of all such claims due for labor. Moore v. Cape Fear, etc., R. Co., 112 N. C. 236, 17 S. E. 152.

Time of Filing Lien and Its Precedence.—A contractor or subcontractor who does work or furnishes material for the construction of a railroad is entitled to file a lien on the property of the company within six months from the time of doing such work or furnishing materials, and when filed the lien has precedence over a mortgage registered after the work has been commenced. Dunavant v. Caldwell, etc., R. Co., 122 N. C. 999, 29 S. E. 837.

Misjoinder of Parties Not Fatal.—Where there were intermediate contractors for the construction of a railroad, and the assignee of claims due by the last of such contractors to laborers brought his action against the railroad company and the first contractor, it was held, that conceding that the plaintiff could in no event recover from any but the railroad company itself, under this section, yet the addition of the first contractor as a party would not be a fatal misjoinder. Moore v. Cape Fear, etc., R. Co., 112 N. C. 236, 17 S. E. 152.

§ 44-14. Contractor on municipal building to give bond; action on bond. — Every county, city, town or other municipal corporation which lets a contract for the building, repairing or altering any building, public road, or street, shall require the contractor for such work (when the contract price exceeds five hundred dollars) to execute bond with one or more solvent sureties before beginning any work under said contract, payable to said county, city, town or other municipal corporation, and conditioned for the payment of all labor done on and material and supplies furnished for the said work under a contract or agreement made directly with the principal contractor or subcontractor. The amount of the said bond to be given by said contractor shall be equal to the contract price up to two thousand dollars, and when the contract price is between two and ten thousand dollars the amount of said bond shall be two thousand dollars plus thirty-five per cent of the excess of the contract price over two thousand dollars and under ten thousand; when the contract is over ten thousand dollars, the amount of the said bond shall be two thousand dollars plus twenty-five per cent of the excess of the contract price over the sum of two thousand dollars. If the official of the said county, city, town or other municipal corporation, whose duty it is to take said bond, fails to require the said bond herein provided to be given, he is guilty of a misdemeanor. Any laborer doing work on said building and material man furnishing material therefor and used therein, under a contract or agreement between said laborer or material man and the principal contractor or subcontractor has the right to sue on said bond, the principal and sureties thereof, in the courts of this state having jurisdiction of the amount of said bond, and any number of laborers or material men whose claims are unpaid for work done and material furnished in said building have the right to join in one suit upon said bond for the recovery of the amounts due them respectively. Every bond given by any contractor to any county, city, town or other municipal corporation for the building, repairing or altering of any building, public road or street, as required by this section, shall be conclusively presumed to have been given in accordance therewith, whether such bond be so drawn as to conform to the statute or not, and this statute shall be conclusively presumed to have been written into every such bond so given. Only one action or suit may be brought upon such bond, which said suit or action shall be brought in the county in which the building, road, or street is located, and not elsewhere. In all suits instituted under the provisions of this statute, the plaintiff or plaintiffs shall give notice to all persons, informing them of the pendency of the suit, the name of the parties, with a brief recital of the purposes of the action, which said notice shall be published at least once a week for four successive weeks in some newspaper published and circulating in the county in which the action is brought, and if there be no newspaper, then by posting at the courthouse door and three other public places in such county for thirty

days. Proof of such service shall be made by affidavit as provided in case of the service of summons by publication. All persons entitled to bring and prosecute an action on the bond shall have the right to intervene in said action, set up their respective claims, provided that such intervention shall be made within six months from the bringing of the action, and not later. If the recovery on the bond shall be inadequate to pay the amounts found due to all of the claimants, judgment shall be given to each claimant pro rata of the amount of the recovery. The surety on such bond may pay into court for distribution among the claimants the full amount of his liability, to wit, the penalty named in the bond, and upon so doing, such surety shall be relieved from further liability. (1913, c. 150, s 2; 1915, c. 191, s. 1; 1923, c. 100; 1927, c. 151; 1935, c. 55; C. S. 2445.)

See 13 N. C. Law Rev. 99, for relation of this section to the law of contracts.

See 13 N. C. Law Rev. 368, for an analysis of the 1935 amendment to this section.

Editor's Note.—The policy underlying this section is the manifestation of that settled principle of law which aims to protect governmental agencies from undue interferences which tend to mitigate the efficient operation of the governmental mechanism. Should such agencies be subject to the general provision of law relating to mechanics' liens, public purposes would be defeated for private claims. But as the remuneration of those who bestow their labor and money upon public buildings is also an important consideration, this section adopts a middle ground by requiring that a bond be taken of the contractor conditioned for the payment of subcontractors', materialmen's and laborers' claims.

Public Laws 1923, c. 100 added that portion of this section including and following the sentence beginning "Every bond given by any contractor," etc. As to the effect of this amendment, see 1 N. C. Law Rev. 270. Public Laws 1927, c. 151 inserted the phrase "under a contract or agreement made directly with the principal contractor or sub-contractor" at the end of the first sentence, and the phrase "under a contract or agreement between said laborer or materialman and the principal contractor or sub-contractor" near the middle of the fourth sentence. Public Laws 1935, c. 55 changed "twelve" in the third from the last sentence to "six".

No Lien on Public School—Bond in Lieu of Lien.—Laborers and material furnishers can acquire no liens upon a public school building erected by a municipal corporation, and the contractor's bond, given under the provisions of this section is given for their benefit in lieu of the right to acquire a lien thereon. Robinson Mfg. Co. v. Blaylock, 192 N. C. 407, 135 S. E. 136.

A material furnisher to a subcontractor, who has used the material in the construction of a public school building, can acquire no lien on the building, and where the contractor has been found by the verdict of the jury not to be liable, the materialman cannot recover the amount withheld by the schoolboard in settlement with the contractor on account of the pendency of the litigation, on the ground that the material was so used. Griffin Mfg. Co. v. Bray, 193 N. C. 350, 137 S. E. 151.

Not Applicable to Highway Commission.—This section does not apply to the State Highway Commission. John L. Roper Lumber Co. v. Lawson, 195 N. C. 840, 844, 143 S. E. 847.

Not Applicable to East Carolina Teachers' College. — While the board of trustees of the East Carolina Teachers' College is made a body corporate, it is not a municipal corporation within the meaning of this section. Hunt Mfg. Co. v. Hudson, 200 N. C. 541, 542, 157 S. E. 799.

Section Not Applicable to Bonds Given to State Highway Commission.—This section providing that only one action shall be brought on bonds required by said statute, and that such action shall be brought in the county in which the building, road or street is located and not elsewhere, does not apply to a bond given by a contractor to the State Highway Commission. It applies only to bonds given to a county, city, town or other municipal corporation, as required therein. Independence Trust Co. v. Porter, 190 N. C. 680, 683, 130 S. E. 547.

Purpose of 1923 Amendment.—The amendment of this section by the act of 1923 was enacted so as to protect laborers and materialmen, where the bond does not make provisions to pay them. Standard Supply Co. v. Vance Plumbing, etc., Co., 195 N. C. 629, 635, 143 S. E. 248.

Civil Liability of Municipal Officers. — No civil liability will attach to municipal and county officers in their official capacity for failure to take the bond required by this section. Warner v. Halyburton, 187 N. C. 414, 416, 121 S. E. 756.

Same—In Their Official or Individual Capacity.—A civil action for damages will not lie against special road supervisors of a county, either as an obligation of the county or against the supervisors individually, for failing to take the bond required for material furnishers or laborers under this section, the remedy prescribed being by indictment of the latter in their individual capacity. Hunter v. Allman, 192 N. C. 483, 135 S. E. 291; Noland Co. v. Board, 190 N. C. 250, 129 S. E. 577; Fore v. Feimster, 171 N. C. 551, 88 S. E. 977, L. R. A. 1916F, 481.

Whether Materials Were Actually Used or Not Immaterial.—The materialmen have a claim against the surety on the bond required by this section, whether the materials were actually used in the building or not; for otherwise the materialmen would be compelled to stand over and compel the contractor to incorporate them in the work, and the result of such a ruling would destroy business confidence and security. Standard Land, etc., Co. v. Fidelity, etc., Co., 191 N. C. 313, 131 S. E. 754. See Moore v. Builders Material Co., 192 N. C. 418, 420, 135 S. E. 113.

Municipality May Not Withhold Funds of Contractor.—Unlike the provisions of law governing the subcontractors' and materialmen's liens on private buildings, etc., this section, passed as a partial substitute for the lien statutes in an effort to place public construction somewhat on a parity with private work of a similar kind, does not contain any provision whereby the owner may withhold funds belonging to the contractor upon notice from a laborer or materialman that the work done or material furnished by him to the contractor has not been paid for; nor would the owner be justified in withholding funds due the contractor upon receipt of such notice. The contract of the laborer or materialman is with the contractor, and in the absence of agreement or statutory provision allowing it, the owner would not be relieved, even pro tanto, of its obligation to the contractor by paying one or more of those who work for or furnish materials to the contractor. An obiter suggestion to the contrary, made in Scheflow v. Pierce, 176 N. C. 91, 97 S. E. 167, was disapproved in Noland Co. v. Board, 190 N. C. 250, 253, 129 S. E. 577; Robinson Mfg. Co. v. Blaylock, 192 N. C 407, 412, 135 S. E. 136.

Bond Held Void.—In Maryland Casualty Co. v. Fowler, 31 Fed. (2d) 881, affirming 27 Fed. (2d) 421 it was held that under this section a school building contractor's bond, which provided that no right of action thereon should accrue to any person other than the obligee, was void in so far as it affected the claims of laborers and materialmen protected by the bond.

Liability of Sureties.—Under this section the sureties on a contractor's bond for the erection of a municipal building are liable for the payment of those who furnish material used in the construction, and those doing labor therein, irrespective of the terms of the contract of indemnity, except the surety is not liable for an amount in excess of the penalty of the bond, and a judgment against the surety for an amount in excess of the penalty of the bond given is erroneous, and the surety may relieve himself from liability by paying the amount for which he is legally liable into the court for distribution. Standard Supply Co. v. Vance Plumbing, etc., Co., 195 N. C. 629, 143 S. E. 248.

Money Loaned to Contractors.—A bank loaning money to a contractor to build a public highway may not recover against the surety on the contractor's bond on the ground that the money was used for the payment of laborers and materialmen furnishing labor and materials used upon the highway, without having thereupon procured assignments to it of their claims, nothing appearing in the note given the bank by the contractor showing that the loan was for this purpose. Snelson v. Hill, 196 N. C. 494, 146 S. E. 135.

And money advanced by a foreman to the "petty cash account" of the contractor to build a public highway, and used in making repairs to the machinery from time to time, purchasing materials, and paying freight thereon, where the foreman took no assignments for the purchase made from said account, were held not covered by the contractor's bond. Snelson v. Hill, 196 N. C. 494, 146 S. E. 135.

The compensation for the services of a foreman necessary to the construction of a county highway is recoverable by him against the surety of the contractor's bond where the bond is given in conformity with the statute. Snelton v. Hill, 196 N. C. 494, 146 S. E. 135.

Extent of Surety's Liability.—The surety on the contract-

or's bond for the erection of a public building is only liable for the amount of the penalty of the bond. Robinson Mfg. Co. v. Blaylock, 192 N. C. 407, 135 S. E. 136.

Same—Determined in the Light of Contract and Bond.—To determine the liability of the surety upon its bond given to a municipality for the contractor's performance of his contract to erect a public school building, the contract and the bond for which it is given must be construed together to effectuate its intent and purpose. Robinson Mfg. Co. v. Blaylock, 192 N. C. 407, 135 S. E. 136.

Bond Covers Claims of Materialmen under Subcontractor.—When according to the terms of its undertaking the surety on a contractor's bond for the erection of a municipal building is liable to those doing labor thereon or furnishing material therefor, this liability not only extends to such as may have furnished the material directly to the original contractor, but to those who have done so to his subcontractors. Standard Elect. Time Co. v. Fidelity, etc., Co., 191 N. C. 653, 132 S. E. 808.

Liability of Bond to Materialmen, etc., Conclusive Regardless of Its Express Conditions.—A surety bond given under this section since the amendment of 1923 is liable to those doing labor thereon or furnishing material therefor, whether such condition is written into the obligation of the bond itself or otherwise. Standard Elect. Time Co. v. Fidelity, etc., Co., 191 N. C. 653, 132 S. E. 808.

Same—Prior to the Amendment Contrary Rule Prevailed.—Where the contractor's bond for the erection of a public building does not create a liability on the surety to pay for the materials furnished for the erection of the building, but only imposes the duty to prevent loss to the municipality, there is no presumption that the bond which was executed prior to the amendment of this section by Acts of 1923, Chapter 100, incorporated this provision, and no liability to the surety will be thereunder created. Page Trust Co. v. Carolina Const. Co., 191 N. C. 664, 132 S. E. 804.

This section before its amendment by Laws of 1923, imposed no liability upon the surety in favor of those furnishing material, etc., unless that could be construed from the terms expressed in the bond, and in the building contract to which the bond referred. Ideal Brick Co. v. Gentry, 191 N. C. 636, 132 S. E. 800.

Conditions Taking Away Right of Indemnification Void as Contrary to Public Policy.—The policy of law with respect to mechanics' and laborers' liens, as evidenced by this section and decisions thereon, is to give protection to creditors of this class by expressly providing for laborers and materialmen a right of action against the surety on the contractor's bond for the erection of a municipal building; and hence any provision incorporated in bonds of this character that takes away this right is contrary to our public policy and the express provisions of this section and void. Ingold v. Hickory, 178 N. C. 614, 101 S. E. 525. "A person may lawfully waive by agreement the benefit of a statutory provision. But there is an imputed exception to this general rule in the case of a statutory provision, whose waiver would violate public policy expressed therein, or where rights of third parties, which the statute was intended to protect, are involved." 9 Cyc., 480, quoted with approval in Guilford Lumber Mfg. Co. v. Johnson, 177 N. C. 44, 49, 97 S. E. 732.

Application of Section to Existing Suits.—The provisions of this section that its requirements as to the liability of the contractor's bond for the construction of a county highway shall not affect existing suits, applies to the remedy, and does not relate to those who have furnished material for the constructing of the highway before the enactment of the statute but have no action pending at that time. Chappell v. National Surety Co., 191 N. C. 703, 133 S. E. 21.

Effect of Taking Note of Contractor.—The bond required by this section inures to the benefit of a materialman, even though he took the note of the contractor for the materials he furnished. Moore v. Builders Material Co., 192 N. C. 418, 135 S. E. 113; Standard Elec. Time Co. v. Fidelity, etc., Co., 191 N. C. 653, 132 S. E. 808.

Sureties Right of Subrogation to Moneys Reserved by Municipality.—Where the municipality has in hand a certain per cent. reserve of the cost of construction, and the surety bond, given in accordance with this section construed together with the contract, provides that the principal surety will be subrogated to the rights of the principal in the event of the contractor's default, the surety is entitled to the money thus reserved as against the laborers and materialmen, whose claims remain unpaid after the pro rata distribution of the money to the extent of the penalty of the bond which the surety has paid into court under the statutory provision. Robinson Mfg. Co. v. Blaylock, 192 N. C. 407, 135 S. E. 136.

Limitation of Action upon the Bond.—Under this section the legislative intent was not to bar the rights of materialmen after three years from the time the materials were furnished, but from the time of the completion of the entire contract, and the principle, that suit upon the surety bond (under seal) is limited as to its commencement by the limitation of the right of action against the principal, does not apply. Chappell v. National Surety Co., 191 N. C. 703, 133 S. E. 21.

Provision That Action Must Be within Reasonable Time.—Under this section the provision in a bond for public construction that action thereon should be brought within reasonable time is valid. Horne-Wilson v. National Surety Co., 202 N. C. 73, 161 S. E. 726.

Feed for Teams as Materials Furnished.—Feed for teams working on a public highway come within the contemplation of this section as material furnished, making a surety upon the contractor's bond for the building of a county highway liable. Chappell v. National Surety Co., 191 N. C. 703, 133 S. E. 21.

Payments for Machinery Parts Used to Replace Borrowed Parts.—Where certain parts of a steam shovel used in connection with the construction of a county highway are replaced by other parts borrowed for the purpose, and are necessary in the construction, the surety on the contractor's bond is not liable under the statute for the payment of other like parts purchased to replace the borrowed parts which have thus been paid for. Snelson v. Hill, 196 N. C. 494, 146 S. E. 135.

Misdemeanor Provision Still Applicable.—The provision of this section that any of the public agencies mentioned that fails to require the bond as fixed by the statute, is still applicable notwithstanding the amendment of 1923. Standard Supply Co. v. Vance Plumbing, etc., Co., 195 N. C. 629, 143 S. E. 248.

Local Law Requiring Provision of Section Be Read in Bonds.—A local statute providing that the provisions of this section should be read into private construction bonds is invalid. Plott Co. v. Ferguson Co., 202 N. C. 446, 163 S. E. 688.

Not Applicable When Surety Takes over Contract.—A surety company on a contractor's bond for the erection of municipal buildings in taking over for its own protection the completion thereof, and dealing directly with the materialmen upon its own credit changes its liability as a surety on the bond, and this section is not applicable. Hunt Mfg. Co. v. Hudson, 200 N. C. 541, 157 S. E. 799.

Cited in Asheville Supply & Foundry Co. v. Catawba Construction Co., 198 N. C. 177, 178, 151 S. E. 93; Becker, etc., Supply Co. v. Board of Education, 199 N. C. 575, 155 S. E. 252.

Art. 3. Liens on Vessels.

§ 44-15. For towage and for supplies at home port. — Every vessel, boat, scow, lighter, flat, raft or other water craft is subject to a lien for the payment of towage done by any steamboat or tugboat; and every vessel and boat is subject to a lien for debts due for materials and supplies furnished to such vessel or boat in her home port. These liens shall be filed and enforced as is provided for other liens. (Rev., s. 2040; 1893, c. 357; 1909, c. 147; C. S. 2446.)

Engine as "Material Furnished." — Under this section, which gives a lien on a vessel for all debts contracted for work done on the same or material furnished, one who furnished an engine to be installed in a gas boat, relying on the credit of the vessel, is entitled to a lien therefor as "material," on compliance with the statute as to recording; and it is immaterial that by the contract it reserved title to the engine until paid for. The Pearl, 189 Fed. 540.

§ 44-16. For labor in loading and unloading.— Every vessel, her tackle, apparel and furniture, is subject to a lien for all labor done by contractors or others in loading or discharging the cargo of such vessel, and also for all labor done by any subcontractor or laborer employed in discharging or loading any such vessel, when such labor is done under contract with a contractor or stevedore who may be employed by the master, agent or owner of such vessel. (Rev., s. 2041; Code, s. 1804; 1881, c. 356, s. 1; C. S. 2447.)

§ 44-17. Filing lien; laborer's notice to master.—The liens provided for in the preceding sections shall be filed as is provided for other liens.

The subcontractor or laborer may give notice to the master, agent or owner of such vessel, that the contractor or stevedore is or will become indebted to him. It shall then be the duty of such master, agent or owner of such vessel to retain out of the amount due to such contractor or stevedore under his contract as much as is due or claimed by the person giving the notice, and after such notice is given no payment to the contractor or stevedore shall be a credit on or a discharge of the lien herein provided. (Rev., s. 2042; Code, s. 1805; 1881, c. 356, s. 2; C. S. 2448.)

§ 44-18. Enforcement of lien. — The enforcement of such lien shall be by summons against the contractor or stevedore, and also against the master, agent or owner of such vessel, who made the contract with such contractor or stevedore, if over two hundred dollars, to be issued by the clerk of the superior court, and if under two hundred dollars, by a justice of the peace. (Rev., s. 2043; Code, s. 1806; 1881, c. 356, s. 3; C. S. 2449.)

Enforcement of Lien in Court of Admiralty.—A lien given by a state statute for materials or supplies furnished to a vessel in her home port in the state is enforceable by suit in rem in a court of admiralty. The Pearl, 189 Fed. 540.

§ 44-19. Judgment against contractor binds master and vessel. — The judgment against the contractor or stevedore shall also be a judgment against the master, agent or owner of such vessel, and also against such vessel itself, her tackle, apparel and furniture, which shall be seized, held and sold under execution for the satisfaction of such judgment. (Rev., s. 2044; Code, s. 1807; 1881, c. 356, s. 4; C. S. 2450.)

§ 44-20. Liens not to exceed amount due contractor. — The sum total of all the liens due to different subcontractors and laborers, performed for any contractor or stevedore under any contract with any master, agent or owner of any vessel, shall not exceed the amount due to the contractor or stevedore at the time of notice given to the owner, agent or master, or the amount due to the contractor or stevedore at the time of the service of summons upon the master, agent or owner, when no notice has been given. (Rev., s. 2045; Code, s. 1808; 1881, c. 356, s. 5; C. S. 2451.)

§ 44-21. Owner to see laborers paid. — In all cases where steamships or vessels of any kind are loaded or unloaded or where any work is done in or about the same by the contractors to do the same known as stevedores or "boss stevedores," who in doing the same employ laborers to assist or do the work by the hour, day, week or month, it is the duty of the owner or agent of the vessel to see that the laborers employed in or about the same by the stevedore, contractor or "boss stevedore" are fully paid the wages that may be due such laborer before he makes final settlement with the contractor, stevedore or "boss stevedore." (Rev., s. 2046; 1887, c. 145, s. 1; C. S. 2452.)

§ 44-22. Owner may refuse to settle with contractor till laborers paid.—Any owner or agent referred to in the preceding section may refuse final settlement with the "boss stevedore" or contractor until he or they satisfy the said owner or agent, by written oath if necessary, that the same has been done. (Rev., s. 2047; 1887, c. 145, s. 2; C. S. 2453.)

§ 44-23. Owner may pay orders for wages.—It is lawful for the owner or agent of such vessel to pay off from time to time such orders for wages as may be due and given therefor in favor of the laborers by the contractor or stevedore, which on final settlement may be deducted from the contract price. (Rev., s. 2048; 1887, c. 145, s. 3; C. S. 2454.)

§ 44-24. Laborer's right of action against owner. —Any owner or agent of such vessel who neglects or refuses to comply with the preceding provisions is liable to such laborer in a civil action for the amount of the wages so due him by the contractor, stevedore or "boss stevedore." (Rev., s. 2049; 1887, c. 145, s. 4; C. S. 2455.)

§ 44-25. Stevedore's false oath punishable as perjury.—If any contractor, stevedore or boss stevedore shall make any false oath or false representation with intent to wrong, cheat or defraud any laborer in violation of the four preceding sections, he shall be guilty of a felony and on conviction thereof shall be punished as is now prescribed by law for perjury. (Rev., s. 3613; 1887, c. 145, s. 5; 1943, c. 543; C. S. 2456.)

Cross Reference.—As to punishment for perjury, see § 14-209.

Editor's Note.—The 1943 amendment substituted the word "felony" for the word "misdemeanor" in line five.

§ 44-26. Stevedores to be licensed; omission misdemeanor.—No person shall engage in the business of loading or unloading vessels upon contract, nor shall any person solicit or make any contract for himself or for any other person to load or unload any vessel either by day's work or by the job, without having previously obtained a license therefor, in the manner provided by law for other licenses for trades and occupations. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court. (Rev., ss. 2050, 3791; 1891, c. 450; 1899, c. 595; C. S. 2457.)

§ 44-27. Tax and bond on procuring license.—Before the sheriff shall issue the said license the applicant shall pay to the sheriff an annual tax of fifty dollars, and shall execute a bond with two or more approved sureties in the sum of two thousand dollars, payable to the state of North Carolina, and conditioned for the faithful performance of his duties and the due and lawful payment of all sums due to laborers assisting in the work of loading or unloading any vessels upon which the applicant may be engaged. And every bond so taken shall be renewed annually, and shall be filed with and preserved by the register of deeds in trust for every person that shall be injured by the breach of his contracts, who may severally bring suit thereon for the damages by each one sustained. (Rev., s. 2051; 1891, c. 450; C. S. 2458.)

Art. 4. Warehouse Storage Liens.

§ 44-28. Liens on goods stored for charges.—Every person, firm or corporation who furnishes storage room for furniture, tobacco, goods, wares or merchandise and makes a charge for storing

the same, has the right to retain possession of and a lien upon all furniture, tobacco, goods, wares or merchandise until such storage charges are paid. (1913, c. 192, s. 1; 1915, c. 190, s. 1; C. S. 2459.)

Cross Reference.—As to effective period for lien on leaf tobacco, see section 44-64.1.

Application of Section.—This section applies to such persons, firms or corporations as operate warehouses as a business for compensation, and not to an isolated instance in which goods or chattels are left in a store or building of the claimant. Champion Shoe Machinery Co. v. Sellers, 197 N. C. 30, 147 S. E. 674.

§ 44-29. Enforcement by public sale.—If such charges are not paid within ten days after they become due, then such person, firm or corporation is authorized to sell said furniture, tobacco, goods, wares or merchandise at the county courthouse door, after first advertising such sale for ten days at said courthouse door and three other public places in said county, or in some newspaper published in said county where the goods or tobacco are stored, and out of the proceeds of such sale to pay the costs and expenses of sale and all costs and charges due for storage, and the surplus, if any, pay to the owner of such furniture, tobacco, goods, wares or merchandise. (1913, c. 192, s. 2; 1915, c. 190, s. 2; C. S. 2460.)

Cross Reference.—As to requirement that the commissioner of revenue be given thirty days' notice of sale of a motor vehicle under a mechanic's or storage lien, see §§ 20-77, subsec. (c) and 20-114, subsec. (c).

Cited in Champion Shoe Machinery Co. v. Sellers, 197 N. C. 30, 32, 147 S. E. 674.

Art. 5. Liens of Hotel, Boarding and Lodging-House Keeper.

§ 44-30. Lien on baggage.—Every hotel, boarding-house keeper and lodging-house keeper who furnishes board, bed or room to any person has the right to retain possession of and a lien upon all baggage or other property of such person that may have been brought to such hotel, boarding-house or lodging-house, until all reasonable charges for such room, bed and board are paid. (Rev., s. 2037; 1899, c. 645, s. 1; 1917, c. 26, s. 1; C. S. 2461.)

Cross Reference.—As to hotels, inns, etc., generally, see § 72-1 et seq.

Upon Property of a Third Party Stranger.—An innkeeper has a lien even upon the goods of a third person held by the guest and brought to the inn, with the qualification however, that if he knew that they belonged to such third person he has no lien upon them. Covington v. Newberger, 99 N. C. 523, 6 S. E. 205.

A hotel keeper's lien for charges, under this section, will not attach to a chattel belonging to a third person which is brought to the hotel by the guest under given circumstances. Pate Hotel Co. v. Blair, 207 N. C. 464, 177 S. E. 330.

Occasional Entertainment of Strangers Not Innkeeping.—One who entertains strangers only occasionally, although he receives compensation for it, is not an innkeeper. State v. Mathews, 19 N. C. 424.

The principles of the law of bailment, as they apply to an action for negligent breach of duty arising under the implied contract of bailment, are not affected by the statutory lien given by this section. Wells v. West, 212 N. C. 656, 194 S. E. 313.

A proprietor of a lodging house is not a bailee of personal property left in the room rented by the owner of the personalty, even though the proprietor has access to the room for janitor and maid service, there being no such delivery of possession of the personalty necessary to establish the relationship, and this result is not affected by the statutory lien given by this section. Id.

§ 44-31. Baggage may be sold.—If such charges are not paid within ten days after they become due, then the hotel, boarding-house or lodging-house keeper is authorized to sell said baggage or other property at the courthouse door, or in front of any public building in the town in which the lien attaches, after first advertising such sale for ten days at said courthouse door and three other public places in the county, and out of the proceeds of sale to pay the costs and expenses of sale and all costs and charges due for said board, bed or room, and the surplus, if any, pay to the owner of said baggage or other property. (Rev., s. 2038; 1899, c. 645, s. 2; 1917, c. 26, s. 2; 1935, c. 364; C. S. 2462.)

Editor's Note.—The amendment of 1935 adds the provision permitting sale in the front of any public building.

§ 44-32. Notice of sale.—Written notice of such sale shall be served on the owner of such baggage or other property ten days before such sale, if he is a resident of the state; but if he is a nonresident of the state, or if his residence is unknown, the publication of such notice for ten days at the courthouse door and three other public places in the county shall be sufficient service of the same. (Rev., s. 2039; 1887, c. 645, s. 3; C. S. 2463.)

Art. 6. Liens of Livery-Stable Keepers.

§ 44-33. Lien for ninety days keep on animals in possession. — Every keeper of livery, sale, or boarding stables has a lien upon and the right to retain the possession of every horse, mule, or other animal belonging to the owner or person contracting for the board and keep of any horse, mule, or other animal, for any and all unpaid amounts due for board of any horse, mule, or other animal. This lien shall not attach for amounts accruing for a longer period than ninety days from the reception of such property or from the last full settlement; nor does this lien apply if the property is removed from the possession of said keeper of said livery, sale, or boarding stable (1911, c. 141, s. 1; C. S. 2464.)

§ 44-34. Enforcement by public sale.—If such charges are not paid within fifteen days after they become due and demand is made for the same, then the keeper of such livery, sale or boarding stable is authorized to sell the property at the county courthouse door, after first advertising said sale for ten days at the county courthouse door and three other public places in said county, and out of the proceeds of such sale to pay the costs and charges due for the board and keep of said horse, mule, or other animal, including the charges for keeping said animal until said sale, and the surplus, if any, pay to the owner of said animal. (1911, c. 141, s. 2; C. S. 2465.)

§ 44-35. Notice of sale to owner.—Written notice of such sale shall be served on the owner of such horse, mule, or other animal ten days before such sale, if he is a resident of the state; but if he be a nonresident of the state, or if his residence is unknown, the publication of such notice for ten days at the county courthouse door and three other public places in the county shall be sufficient service of the same. (1911, c. 141, s. 3; C. S. 2466.)

Art. 7. Liens on Colts, Calves and Pigs.

§ 44-36. Season of sire a lien.—In all cases where the owner, or any agent for or employee of

the owner, of any mare, jennet, cow or sow, turns the same to a studhorse, jack, bull, or boar, for the purpose of raising colts, calves, or pigs, the price charged for the season of the studhorse, jack, bull, or boar constitutes a lien on the colt, calf, or pigs until the price so charged for the season is paid. (Rev., s. 2024; Code, s. 1797; 1885, c. 72; 1887, c. 14; 1872-3, c. 94, s. 1; 1915, c. 18, s. 1; C. S. 2467.)

§ 44-37. Colts, etc., not exempt from execution for season price.—The colt, calf, or pigs shall not be exempt from execution for the payment of said season price by reason of the operation of the personal property exemption: Provided, the person claiming such lien institutes action to enforce the same within twelve months from the foaling of the colt, dropping the calf, or farrowing of the pigs. (Rev., s. 2025; Code, s. 1798; 1885, c. 72; 1872-3, c. 94, s. 2; 1879, c. 47; 1915, c. 18; 1917, c. 229; C. S. 2468.)

Cross Reference.—As to personal property exemption, appraisal, see § 1-378.

Art. 8. Perfecting, Enforcing and Discharging Liens.

§ 44-38. Claim of lien to be filed; place of filing.—All claims against personal property, of two hundred dollars and under, may be filed in the office of the nearest justice of the peace; if over two hundred dollars or against any real estate or interest therein, in the office of the superior court clerk in any county where the labor has been performed or the materials furnished; but all claims shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof. If the parties interested make a special contract for such labor performed, or if such material and labor are specified in writing, in such cases it shall be decided agreeably to the terms of the contract, provided the terms of such contract do not affect the lien for such labor performed or materials furnished. (Rev., s. 2026; Code, s. 1784; 1869-70, c. 206, s. 4; 1876-7, c. 53, s. 1; C. S. 2469.)

Cross References.—As to duty of clerk to keep a lien docket, see § 2-42, paragraph 23.

As to when statement constitutes a lien without filing, see § 44-10.

See note under § 44-1.

The purpose of filing mechanics', etc., claims for liens, under this section, is to give public notice of the claims, the amount, the material supplied or the labor done, and when done, on what property, specified with such details as will give reasonable notice to all persons of the character of the claims and the property on which the lien attached. Fulp v. Kernersville Light, etc., Co., 157 N. C. 157, 72 S. E. 867.

Where to Be Filed.—The notice of a lien required to be filed, since the Act of 1869-70, chap. 206, sec. 4, should be filed in the office of the clerk of the superior court, although the materials began to be furnished before that Act went into effect when the law of 1868-69 was in force. Chadbourn v. Williams, 71 N. C. 444.

Same.—Prior to the Act of 1869-70, the notice required by this section was to be filed with the register of deeds. Chadbourn v. Williams, 71 N. C. 444, 448.

Particularity of Claim Filed.—A claim of lien, filed under the provisions of the section must comply with the requirements of the statute. Therefore, when the plaintiff's claim failed to specify in detail the material furnished and labor performed, or the time when the material was furnished and the labor performed, it was irregular and void. Wray v. Harris, 77 N. C. 77.

The obvious purpose of this requirement is to give public notice, in the offices designated, of the plaintiff's "claim," his debt, the amount of it, the materials supplied or the labor done, and when done, on what property, on what farm or crop, and when, specified with such detail and certainty as will give reasonable notice to all persons of the character of the "claim," and the property to which the lien, on account of the same, attaches, and of the lien thereby established. It is to give the laborer an important advantage as to his debt due on account of his labor done on the property to which the lien attaches over the ordinary creditor, but to obtain that advantage, he must comply strictly, certainly substantially, in all material respects, with the requirement of the statute, and it is but reasonable and just that he should do so. Cook v. Cobb, 101 N. C. 68, 70, 7 S. E. 700.

While a substantial compliance with this section is necessary to the validity of a lien filed for material, etc., furnished in the erection of a building, it is not required that the claimant file his itemized statement of the material used in a building which he had contracted to complete for the owner for one sum; but the time of the completion of the work must be stated. Jefferson & Bros. v. Bryant, 161 N. C. 404, 77 S. E. 341.

Where suit is brought by a contractor to enforce a lien on a building which was to have been paid for in a single sum, and when the claim as filed is defective, as filed with the clerk, in not stating the time the house was completed, as required by this section, it cannot be cured by amendment allowed in the superior court at the trial. Jefferson & Bros. v. Bryant, 161 N. C. 404, 77 S. E. 341.

Same—Instances of Sufficiency.—When a lienor's schedule for material contains a full itemized statement in detail of the material furnished, and the clerk has entered on his docket the names of the lienor and lienee, the amount claimed by each lienor, a description of the property by metes and bounds, the dates between which the materials were furnished, referring to the schedule of prices and materials attached to the notice, asking that it "be taken as a part of the notice of lien," it is a sufficient compliance with this section. Fulp v. Kernersville Light, etc., Co., 157 N. C. 157, 72 S. E. 867.

Under this section requiring the claim for a laborer's lien to be filed in detail, specifying the labor performed and the time thereof, the plaintiff filed his claim as follows before a justice of the peace: "J. S. C., owner and possessor, to D. A. C., 22 October, 1894. To 122½ days of labor as sawyer at his sawmill, on Jumping Run Creek, from 1 October, 1893, to 31 August, 1894, $127.24. (Signed) D. A. C., claimant," which was sworn to; it was held that the claim as filed was a reasonable and substantial compliance with the statute. Cameron v. Consolidated Lumber Co., 118 N. C. 266, 24 S. E. 7.

The lien of a plaintiff who furnished materials for a building is not avoided because in the notice thereof filed with the clerk it is made to attach on two distinct lots separated by a street. Chadbourn v. Williams, 71 N. C. 444.

In this case claim, or notice of lien, was not made out in sufficient detail, "specifying the . . . labor performed, and the time thereof," the wages he was to receive, how and when payable, etc. And further, it was not made to appear that said purported notice of claim was filed "in the office of the nearest justice of peace" as required by this section. Gainey v. Gainey, 203 N. C. 190, 191, 165 S. E. 547.

§ 44-39. Time of filing notice.—Notice of lien shall be filed as hereinbefore provided, except in those cases where a shorter time is prescribed, at any time within six months after the completion of the labor or the final furnishing of the materials, or the gathering of the crops. (Rev., s. 2028; Code, s. 1789; 1868-9, c. 117, s. 4; 1876-7, c. 53, s. 2; 1881, c. 65; 1883, c. 101; 1909, c. 32; 1913, c. 150, s. 7; C. S. 2470.)

Lien Relates Back.—When the notice is filed the lien is at once established, and relates back to and is effective from the time at which the work was commenced, or the materials were furnished. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 661, 14 S. E. 35.

Where the material furnisher for a building files notice of claim under this section, the lien against the building of the owner relates back to the time the delivery was completed, and action must be commenced within six months after the filing of the above notice, and in that event the lien is preserved from the furnishing of the material and is superior to a deed of trust registered since that time, and where the evidence is conflicting the question is for the jury under proper instructions from the court. Atlas Supply Co. v. McCurry, 199 N. C. 799, 156 S. E. 91. See also note under § 44-1.

Same—Otherwise Statutes Would Be Defeated.—It must be clear that unless the claim when filed has relation back to the commencement of the furnishing of the materials, the object of the act would be liable to be defeated at the pleasure of the vendee of the materials, by his selling or mortgaging his estate. The act would be idle and inefficacious against the very mischief it was intended to cause [prevent]. By allowing the notice to be filed after the whole has been delivered, it has put on a purchaser while the delivery is in progress the duty of informing himself whether the materials have been delivered or not, and under what sort of contract. Chadbourn v. Williams, 71 N. C. 444, 449.

Same—But Lien Good Only for the Amount Due.—While, under this section, a mechanic's or laborer's lien, or lien for material, when filed, relates back and takes priority over all liens attaching, or purchases for value made subsequent to the beginning of the work or of furnishing the first material, yet it is good only for the amount due the contractor, laborer or materialman. Clark v. Edwards, 119 N. C. 115, 25 S. E. 794.

Lien Attaches from What Time.—A lien attaches from the time the materials began to be furnished, and the notice relates back to that time. Chadbourn v. Williams, 71 N. C. 444.

The certain purpose is to protect the subcontractor or laborer as to his claim against the owner of the property and all liens of whatever character that may attach to the property subsequently, not simply subsequently to the filing of the notice of claim in the office of the superior court clerk, but as well subsequently to the time when the work was commenced or the materials were furnished. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 661, 14 S. E. 35.

And this is so, although the subsequent incumbrancer had no notice of the lien thus relating back. McNeal Pipe, etc., Co. v. Howland, etc., Co., 111 N. C. 615, 618, 16 S. E. 857.

Where the claim is filed within the time and in the manner prescribed the lien relates back to the time of the beginning of the work or furnishing of the materials, and is effective against any subsequent incumbrances or purchasers. Bankers' Trust Co. v. Gillespie Co., 181 Fed. 448.

Filing in Six Months after Moneys Are Due.—In Porter v. Case, 187 N. C. 629, 122 S. E. 483, it was held that the notice must be filed within six months from the time moneys are due the contractor, under the terms of the contract.

Question for Jury.—Whether the notice of claim of a lien was filed within the time prescribed by this section is a question for the jury where it appears from the evidence that later work was done under the original contract. Beaman v. Elizabeth City Hotel Corp., 202 N. C. 418, 163 S. E. 117.

Taking Note Not a Waiver.—One furnishing material used in the construction of a building does not waive his right of lien by accepting a note for the amount due him therefor, when the note matured before the expiration of the statutory time wherein he is required to file notice of his lien, and he has perfected his right as the statutes require. Raeford Lumber Co. v. Rockfish Trading Co., 163 N. C. 314, 79 N. C. 627.

The "shorter time" herein referred to evidently refers to the notice required to be given by section 44-13, was intended to provide for a longer time within which to give notice, that is, six months, where the transaction has been completed by the "final furnishing" of the materials. Atlas Powder Co. v. Denton, 176 N. C. 426, 431, 97 S. E. 372.

Filing of Claim against Railroad Company.—Under this section a contractor or subcontractor who does work on or furnishes material for the construction of a railroad, is entitled to file a lien on the property of the company within one year, (now six months) from the time of doing such work or furnishing such material and, when filed, the lien has precedence over a mortgage registered after the work has been commenced. Dunavant v. Caldwell, etc., R. Co., 122 N. C. 999, 29 S. E. 837.

Validity of Section.—In McNeal Pipe, etc., Co. v. Howland, etc., Co., 111 N. C. 615, 623, 16 S. E. 857, this section was held to be valid.

Cited in White v. Riddle, 198 N. C. 511, 152 S. E. 501; State v. Howley, 220 N. C. 113, 16 S. E. (2d) 705.

§ 44-40. Date of filing fixes priority.—The liens created and established by this chapter shall be paid and settled according to the priority of the notice of the lien filed with the justice or the clerk. (Rev., s. 2035; Code, s. 1792; 1868-9, c. 117, s. 11; C. S. 2471.)

In General.—Liens of materialmen and laborers are statutory, and by the clear provisions of this section and § 44-42 the liens of parties furnishing labor and material under direct contract with the owner have priority in accordance with the time of filing notice of lien with the justice of the peace or clerk. The right of pro rata payment on liens of subcontractors is distinguished on the basis of the statutory provisions, § 44-11, no notice of lien being required to be filed with the justice of the peace or clerk in the case of subcontractors, notice to the owner being sufficient under the statute. Boykin v. Logan, 203 N. C. 196, 165 S. E. 680.

Application of Section to Liens of Subcontractors, etc.—This section relates to the lien filed with the proper officers, and does not affect the provisions as to subcontractors who acquire a lien by notice to the owner. This is not only in accordance with law, but also with justice and equity, for when persons have put their money and labor in a building, and the balance due is insufficient to pay all, it is not right for one to have the whole fund, in the absence of negligence, because he gets to the clerk's office first. Morganton Mfg., etc., Co. v. Andrews, 165 N. C. 285, 295, 81 S. E. 418. See also White v. Riddle, 198 N. C. 511, 514, 152 S. E. 501.

§ 44-41. Laborer's crop lien dates from work begun.—The lien for work on crops given by this chapter shall be preferred to every other lien or encumbrance which attached to the crops subsequent to the time at which the work was commenced. (Rev., s. 2034; Code, s. 1782; 1869-70, c. 206, s. 2; C. S. 2472.)

Cross Reference.—As to landlord's lien on crops for rents, advances, etc., see § 42-15 et seq.

Lien Prior to Other Subsequent Lien.—The lien created by this section is preferred to every other lien or encumbrance, which attaches upon the property subsequent to the time at which the work was commenced, or the materials were furnished. Lookout Lumber Co. v. Mansion Hotel, etc., R. Co., 109 N. C. 658, 660, 14 S. E. 35.

Breach of Contract—Lien for Claim.—The liens provided for by this section arise out of the simple relation of debtor and creditor for labor done or materials furnished, and where there is no other security than the personal obligation of the debtor. Therefore, where the plaintiff, having abandoned a contract made with the defendant to cultivate a crop upon shares, upon the ground that the defendant had failed to furnish the necessary stock, etc., as agreed, and attempted to assert a lien for the labor he had bestowed upon the crop, it was held that the statute did not embrace his case. Grissom v. Pickett, 98 N. C. 54, 3 S. E. 921.

Cited in White v. Riddle, 198 N. C. 511, 152 S. E. 501.

§ 44-42. Duly filed claims of prior creditors not affected.—Nothing in this chapter shall be construed to affect the rights of any person to whom any debt may be due for any work done for which priority of claim is filed with the proper officer. (Rev., s. 2036; Code, s. 1786; 1869-70, c. 206, s. 6; C. S. 2473.)

Cross Reference.—As to priority of claims for labor over mortgages of a corporation, see § 55-44.

§ 44-43. Action to enforce lien.—Action to enforce the lien created must be commenced in the court of a justice of the peace, and in the superior court, according to the jurisdiction thereof, within six months from the date of filing the notice of the lien. But if the debt is not due within six months, but becomes due within twelve months, suit may be brought or other proceedings instituted to enforce the lien in thirty days after it is due. (Rev., s. 2027; Code, ss. 1785, 1790; 1868-9, c. 117, s. 7; 1869-70, c. 206, s. 5; 1876-7, c. 250; 1876-7, c. 251; C. S. 2474.)

When Section Not Applicable.—This section cannot have been intended for a case in which a resort to any court is unnecessary, and a complete and efficient measure of relief is committed to and may be obtained by the parties' own act. McDougall v. Crapon, 95 N. C. 292, 293, 295.

Jurisdiction of Circuit Court of U. S.—While this section gives a right of action at law, for the enforcement of a mechanic's lien, a circuit court of the United States sitting in equity has jurisdiction to entertain a bill for that purpose,

especially where there are conflicting liens to be adjusted. Healey Ice Mach. Co. v. Green, 181 Fed. 890.

Jurisdiction of Justice—Jurisdictional Amounts.—A proceeding under this section to establish a claim against a feme covert, and to have a lien declared for materials furnished, and work and labor done, in erecting a house on her land, must be brought before a justice of the peace, if the amount claimed is under two hundred dollars. Smaw v. Cohen, 95 N. C. 85.

Same—Against Married Woman.—An action against a married woman for less than $200 for materials used in building a house must be brought before a justice of the peace. Finger v. Hunter, 130 N. C. 529, 41 S. E. 890.

Loss of Lien by Delay to Enforce—Personal Action under Section 44-9.—If the plaintiff does not begin his action within the time prescribed by this section after giving the statement of his claim to the owner, he loses his lien; but having acquired and lost the lien he can maintain an action against the owner, personally, under sec. 44-9, which makes it the "duty of the owner to retain from the money then due the contractor a sum not exceeding the price contracted for," to be paid to the laborer, mechanic, or materialman whenever an itemized statement of the amount due him is furnished by either of such parties or the contractor. Hildebrand v. Vanderbilt, 147 N. C. 639, 641, 61 S. E. 620; Charlotte Pipe, etc., Co. v. Southern Aluminum Co., 172 N. C. 704, 707, 90 S. E. 923.

Owners Liability Pro Rata to the Extent of Sum Due.—The laborer or matcrialman can only recover of the owner his pro rata part of that sum which the owner is required to "retain from the contractor then due." This pro rata share is to be determined after consideration by the court below of all the claims of laborers, etc., against the contractor—their priorities, validity, etc., and a judgment fixing the owner with a liability greater than that demanded for the satisfaction of the plaintiff's claim, without making the other like claimants parties, must be remanded and reformed. Hildebrand v. Vanderbilt, 147 N. C. 639, 61 S. E. 620.

Possession by Justice of the Notice of Lien.—It is not necessary that the justice before whom application is made to enforce the lien should be in possession of the original notice of the lien; a copy from the magistrate with whom it was filed must be sufficient. There can be no reason why a copy of a notice properly filed with the clerk will not also suffice. The only reason why the justice who is to enforce the lien must have a copy of the notice is because he is required to state in his judgment the date of the lien and also what property it binds. Boyle v. Robbins, 71 N. C. 130, 133.

Limitation of Actions Pleaded by Owner for Contractor.—When the owner is sued by a laborer or materialman in time, and subsequently, after the statute had run in favor of the contractor, he was made a party and filed no answer, the owner cannot plead the statute of limitation for the contractor in his own behalf, the plea being personal to the contractor. Hildebrand v. Vanderbilt, 147 N. C. 639, 61 S. E. 620.

Waiver of Lien by Failure to Enforce.—Failure to enforce the lien under this section within the time prescribed constitutes a waiver of the lien. Norfleet v. Tarboro Cotton Factory, 172 N. C. 833, 89 S. E. 785.

Defects in Claim Filed Not Cured by Pleading.—It is not sufficient to allege in the pleadings the time of the labor, and that it was done on a particular crop which the plaintiff seeks to charge with a lien. This must appear substantially in some way in the claim filed. Cook v. Cobb, 101 N. C. 68, 71, 7 S. E. 700.

Cited in Atlas Supply Co. v. McCurry, 199 N. C. 799, 800, 156 S. E. 91.

§ 44-44. When attachment available to plaintiff.—In all cases where the owner or employer attempts to remove the crop, houses or appurtenances from the premises, without the permission, or with the intent to defraud the lienor of his lien, the claimant may have a remedy by attachment. (Rev., s. 2031; Code, s. 1795; 1868-9, c. 117, s. 14; C. S. 2475.)

Sufficiency of Affidavit for Attachment.—Under this section, giving a remedy by attachment to enforce a laborer's lien, an affidavit that the defendant has removed and is removing and disposing of the cotton crop without regard to the lien, is insufficient to justify the issuing of the warrant, in the absence or allegation that the removal is with the intent to defraud the laborer. Brogden v. Privett, 67 N. C. 45. To this effect Mr. Justice Reade in the opinion of that case says: "The affidavit for the attachment in this case sets forth that the defendant 'has removed and is removing and disposing of the cotton crop,' etc., 'without regard to the lien,' etc. There is no allegation that the removal is 'with the intent to defraud the laborer,' and therefore, in view of the fact that the usual way for a farmer to raise money to pay for laborers is by selling his crop, it ought not to be presumed, but must be averred, that the removal is with a fraudulent intent. It is insisted, however, that the words of the statute are in the alternative, 'without his permission, or, with intent to defraud.' That is true, but still it is not necessary for us to decide whether 'or' ought not to be construed 'and,' because the affidavit does not use either alternative in the language of the statute, but substitutes his own language, 'without regard to the lien,' etc. We are not informed why the plaintiff evaded the language of the statute; and we are of opinion that to favor his experiment would be an inconvenient and dangerous construction of the statute."

Note that the syllabus of the case expresses a rule just the opposite of that established by the opinion of the case. Ed. Note.

§ 44-45. Defendant entitled to counterclaim.—The defendant in any suit to enforce the lien is entitled to any set off arising between the contractors during the performance of the contract, or counterclaim allowed by law. (Rev., s. 2032; Code, s. 1788; 1869-70, c. 206, s. 8; C. S. 2476.)

§ 44-46. Execution.—Upon judgment rendered in favor of the claimant, an execution for the collection and enforcement thereof shall issue in the same manner as upon other judgments in actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title and interest which the owner had in the premises or the crops thereon, at the time of filing notice of the lien, before such execution shall extend to the general property of the defendant. (Rev., s. 2029; Code, s. 1791; 1868-9, c. 117, s. 9; C. S. 2477.)

Descriptions in the Judgment.—In Boyle v. Robbins, 71 N. C. 130, 133, this section was construed to require, at least by implication, that the justice of the peace should set forth in the judgment the date of the lien, and that it should also embody a general description of the property which the plaintiff seeks to subject to primary liability under it. If only personal property be bound by the lien, the justice must insert in his execution a requirement that the specific property, subject to the lien, shall be first sold before seizing other goods or chattels, while, if the property described in the notice be land, the justice's judgment must be docketed in the superior court, and the clerk must incorporate in the execution similar direction as to the order of selling. So the judgment cannot be enforced in strict compliance with the law unless the officer, whose duty it is to issue execution, has gotten such information from the record in his court as will satisfy him that some property, described with reasonable certainty, is subject to the lien and consequently to a primary liability for the debt. The most convenient method of recording the date of the lien and the description of the property bound by it, is to embody it in the judgment, which will constitute a part of the record in either court, no matter which officer may find it necessary to insert the date and description in the execution. McMillan v. Williams, 109 N. C. 252, 255, 13 S. E. 764.

A judgment to enforce a mechanic's lien upon specific property for its satisfaction, must contain a general description of such property, and an execution thereon must direct that such property shall first be sold to satisfy the judgment. Id.

§ 44-47. No justice's execution against land.—No execution issued by a justice of the peace, under this chapter, shall be enforced against real estate or any interest therein, but justices' judgments may be docketed on the judgment docket of superior court for the purpose of selling such estate or any interest therein. (Rev., s. 2030; Code, s. 1794; 1868-9, c. 117, s. 13; C. S. 2478.)

§ 44-48. Discharge of liens.—All liens created by this chapter may be discharged as follows:

1. By filing with the justice or clerk a receipt or acknowledgment, signed by the claimant, that the lien has been paid or discharged.

2. By depositing with the justice or clerk money equal to the amount of the claim, which money shall be held by said officer for the benefit of the claimant.

3. By an entry in the lien docket that the action on the part of the claimant to enforce the lien has been dismissed, or a judgment rendered against the claimant in such action.

4. By a failure of the claimant to commence an action for the enforcement of the lien within six months from the notice of lien filed. (Rev., s. 2033; Code, s. 1793; 1868-9, c. 117, s. 12; C. S. 2479.)

Failure to Enforce as Discharge.—Failure of claimant to enforce his lien within six months as prescribed by section 44-43 operates as a discharge of the lien. Norfleet v. Tarboro Cotton Factory, 172 N. C. 833, 89 S. E. 785.

Art. 9. Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ 44-49. Lien created; applicable to persons non sui juris.—From and after March 26, 1935, there is hereby created a lien upon any sums recovered as damages for personal injury in any civil action in this State, the said lien in favor of any person or corporation to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for drugs, medical supplies, and medical services rendered by any physician, dentist, trained nurse, or hospitalization, or hospital attention and/or services rendered in connection with the injury in compensation for which the said damages have been recovered. Where damages are recovered for and in behalf of minors or persons non compos mentis, such liens shall attach to the sum recovered as fully and effectively as if the said person were sui juris. (1935, c. 121, s. 1.)

§ 44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.—A like lien shall attach to all funds paid to any person in compensation for or settlement of the said injuries, whether in litigation or otherwise; and it shall be the duty of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, and medical attention and/or hospital service, after having received and accepted notice thereof: Provided, that evidence as to the amount of such charges shall be competent in the trial of any such action: Provided further, that nothing herein contained shall be construed so as to interfere with any amount due for attorney's services: Provided, further, that the lien hereinbefore provided for shall in no case, exclusive of attorneys' fees, exceed fifty per cent of the amount of damages recovered. (1935, c. 121, s. 2.)

§ 44-51. Disputed claims to be settled before payments.—Whenever the sum or amount or amounts demanded for medical services or hospital fees shall be in dispute, nothing in this article shall have any effect of compelling payment thereof until the claim is fully established and determined, in the manner provided by law: Provided, however, that when any such sums are in dispute the amount of the lien shall in no case exceed the amount of the bills in dispute. (1935, c. 121, s. 3; 1943, c. 543.)

Editor's Note.—The 1943 amendment rewrote the proviso.

Art. 10. Agricultural Liens for Advances.

§ 44-52. Lien on crops for advances.—If any person makes any advance either in money or supplies to any person who is engaged in or about to engage in the cultivation of the soil, the person making the advances is entitled to a lien on the crops made within one year from the date of the agreement in writing herein required upon the land in the cultivation of which the advance has been expended, in preference to all other liens, except laborer's and landlord's liens, to the extent of such advances. Before any advance is made an agreement in writing for the advance shall be entered into, specifying the amount to be advanced, or fixing a limit beyond which the advance, if made from time to time during the year, shall not go; and this agreement shall be registered in the office of the register of the county or counties where the land is situated on which the crops of the person advanced are to be grown. Provided, that where a county line divides a farm the crop lien may be recorded in the county where the owner of said farm resides; Provided, he resides on said farm; Provided, that the lien shall continue to be good and effective as to any crop or crops which may be harvested after the end of the said year, and referred to in the said lien. (Rev., s. 2052; Code, s. 1799; 1893, c. 9; 1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; C. S. 2480.)

Local Modification.—Bertie: Pub. Loc. 1927, c. 173.

I. In General.
II. Priority of Liens.
III. The Written Agreement.
  A. Form and Execution.
  B. Registration.
IV. Description of Land.
V. Evidence.

Cross References.

As to landlord's lien on crops for rents, advances, etc., see § 42-15.

As to laborer's lien, see § 44-1 et seq. and § 44-41. As to effective period for lien on leaf tobacco sold in auction warehouse, see § 44-69.

I. IN GENERAL.

Editor's Note.—This section was amended in 1925, whereby the phrase "within one year from the date of the agreement in writing herein required" was substituted for the phrase "during the year," and the proviso appearing at the end of the section was added. Prior to the amendment the registration of the writing was required to be effected within thirty days after date.

As to the effect of the amendment of 1925 upon this section, and upon the various aspects of its doctrine as interpreted by adjudicated cases, see 4 N. C. Law Rev. 4.

In lieu of the clause "where the person advanced resides" the amendment of 1935 inserts the clause "or counties where the land is situated on which the crops of the person advanced are to be grown" and the two provisos which immediately follow this clause.

For a discussion of liens given by members of the coöperative marketing association, see 2 N. C. Law Rev. 191.

Prerequisites of the Lien Enumerated.—From this section it is clear, (1) that the advances must be in money or supplies; (2) to the person engaged or about to engage in the cultivation of the soil; (3) after the agreement is made; (4) to be expended in the cultivation of the crop made during that year; (5) and the lien must be on the crop of that year, made by reason of the advances so made. Clark v. Farrar, 74 N. C. 686, 690.

Conditions to Render the Lien Effectual—Registration Unnecessary between Parties.—The prescribed conditions

upon which the lien of this section becomes effectual are the previous reduction of the contract for it to writing, setting out its terms, and registration; these provisions are manifestly for the security of creditors and others who may have dealings with the debtor and otherwise might not know of the encumbrances upon the crop. And so it has been held that registration is not essential to the validity of the instrument as between the parties to it. Gay v. Nash, 78 N. C. 100; Reese & Co. v. Cole, 93 N. C. 87, 89.

Compliance with Requirements Prerequisite. — The lien can only be by force of the statute and by a compliance with its requirements. Where the section has not been followed, to sustain the agreement as an agricultural lien would utterly defeat the letter and the public policy embraced by the statute. Clark v. Farrar, 74 N. C. 686, 690.

Strict Construction—Lienor Not Bound to See Materials Are Used on the Land.—This section was not intended simply to permit a person to give a lien upon his crop for advances; but also to give such a lien a preference to all other liens existing or otherwise to the extent of such advance. Therefore, it should be strictly construed when the rights of other creditors intervene. Even where such claims do exist, it has been held that the lienee must determine his own needs in conducting his farm, and that his acceptance must be deemed conclusive between the parties, and not less so upon the claim of a subsequently derived title, and that the lienor was not bound to see that the property was used on the farm, his duty is discharged by furnishing it. Womble v. Leach, 83 N. C. 84; Nichols & Bros. v. Speller, 120 N. C. 75, 78, 26 S. E. 632; Collins v. Bass, 198 N. C. 99, 102, 150 S. E. 706.

An instrument which gives a lien on a crop for supplies to be furnished in making a crop and also conveys personal property as additional security, with the ordinary powers of sale, is valid both as a chattel mortgage and an agricultural lien, and, as between the parties, in the absence of fraud and compulsion, the lien attaches for dry goods, shoes, tobacco, powders, snuff and candy, without a showing that such articles were actually used in making the crop. Nichols & Bros. v. Speller, 120 N. C. 75, 26 S. E. 632.

Not Retroactive.—This section has no retroactive effect so as to impair laborers' liens under section 44-41. Warren v. Woodard, 70 N. C. 382.

Estopped to Deny Articles Received as "Supplies."—One who gives a lien on a crop to obtain supplies, under the provisions of this section, is estopped from asserting that articles which he receives as a compliance with the contract are not "supplies" within the meaning of the statute; and a second mortgagee, who acquires an interest in the crop after such advances are made, stands in no better plight, and is likewise bound by such admission. Womble v. Leach, 83 N. C. 84.

Crops Covered by Lien.—The operations of a mortgage or agricultural lien in respect to crops are confined to crops then or about to be planted, and will not be extended further than those planted next after the execution of the instrument. Wooten v. Hill, 98 N. C. 48, 3 S. E. 846.

Power of Sale in Instrument Does Not Invalidate It. — A power of sale upon default in paying advances, inserted in an instrument giving a lien upon crops, does not invalidate the instrument, though prescribing a different remedy from that allowed by the statute. Crinkley v. Egerton, 113 N. C. 142, 18 S. E. 341.

Mortgage on Crops as Agricultural Lien.—A mortgagee, under a mortgage on a crop not expressed to be for advances to be made and not recorded after its execution, has no rights as an agricultural lienor by virtue of this section. Cooper v. Kimball, 123 N. C. 120, 31 S. E. 346.

Cited in Brooks v. Garrett, 195 N. C. 452, 142 S. E. 486. White v. Riddle, 198 N. C. 511, 152 S. E. 501.

II. PRIORITY OF LIENS.

Lien Preferred to All Others Save the Executions Specified.—An agricultural lien, given by this section, for the purpose of enabling the cultivation of the soil to raise a crop, is preferred by this section to all others, the only exception being that in favor of the landlord or laborer contained in section 44-60, when it is in proper form and duly registered; and it is preferred to liens of other kinds existing by mortgage or deed of trust on the same crop, to the extent of the amount advanced thereunder. Williams v. Davis, 183 N. C. 90, 110 S. E. 577.

Same—Not Subordinate to Marketing Agreement.—In view of the policy of the State as manifested in the statutes to favor agricultural liens, such a lien for advances will not be held subordinate to a marketing agreement. Tobacco Growers' Co-Op. Ass'n v. Harvey & Son Co., 189 N. C. 494, 127 S. E. 545.

Precedence Over a Prior Mortgage Lien.—An agricultural lien duly executed and registered takes precedence over a mortgage of prior date and registration upon the "crops" therein subjected to the extent of the advances made. Wooten v. Hill, 98 N. C. 48, 3 S. E. 846. Killebrew v. Hines, 104 N. C. 182, 193, 10 S. E. 159, 251.

But see Brewer v. Chappell, 101 N. C. 251, 7 S. E. 670, where it was held that an agricultural lien, created to secure advances made to one who is in possession of the land as mortgagor, in the absence of any agreement to the contrary with the mortgagee, is subject to the mortgage, and the mortgagee who purchased the owner's equity of redemption and then leased the land to him, may take the crops to the exclusion of the holder of the lien.

A statutory agricultural lien for supplies and advancements during the current crop year, conforming to the requirements of this section both as to context and registration, is superior to a prior registered chattel mortgage given to secure an antecedent debt, the chattel mortgage not being in the required form to constitute a crop lien for supplies as contemplated by the section. Eastern Cotton Oil Co. v. Powell, 201 N. C. 351, 160 S. E. 292.

Priority of the Lien of Landlord.—The lien of the landlord for rents and advancements is the lien first preferred above all others. Brewer v. Chappell, 101 N. C. 251, 254, 7 S. E. 670.

Where a mortgagor has surrendered his land to the mortgagee, but continues thereon as tenant of the mortgagee in making the crop, and a third person makes advancements, holding a lien therefor, under this section, and the lienor knows of the surrender at the time he had made the advancements, his lien is secondary to that of the landlord's for rent, and a paperwriting of the agreement of surrender between the landlord and tenant was not necessary. Section 44-53 is not applicable to such case. Montague v. Thorpe, 196 N. C. 163, 144 S. E. 691. See note under § 42-15.

Same—Extent of Priority. — Although under this section the lien of a landlord for rent and advances is superior to that of a third party making advances to the tenant, yet such priority exists only for rent accruing or advances made during the year in which the crops are grown, and not for a balance due for an antecedent year. Ballard & Co. v. Johnson, 114 N. C. 141, 19 S. E. 98.

III. THE WRITTEN AGREEMENT.

A. Form and Execution.

No Particular Form of Agreement Required.—To create an agricultural lien under this section no particular form of agreement is required. If the requisites prescribed by the statutes are embodied in the agreement, and the intent of the parties to create the lien is apparent, the agreement will be upheld as a valid agricultural lien though it be in the form of a chattel mortgage. Meekins v. Walker, 119 N. C. 46, 25 S. E. 706.

Furnishing Supplies and Executing the Instruments Contemporaneously.—When furnishing the supplies and making the securing instruments are contemporaneous, constituting one transaction of which these acts are parts, it is not material which precedes in actual time, for in contemplation of law both are done at one and the same time. This view is suggested in the opinion in Womble v. Leach, 83 N. C. 84, as a reasonable construction which accomplishes the substantial purposes intended. Reese & Co. v. Cole, 93 N. C. 87, 91.

Same—It is Immaterial Which Act is Done First.—The agreement is a single transaction between the parties, executed by one in making the advances, and by the other in providing the statutory security for their payment. In such a case it is indifferent which act is first done, if both are done at the same time and in execution of their contract and understanding. The purpose is to enable the former to obtain the means of making his crop by creating a lien upon it when made, and the requirement for writing and registration is for the protection of others who may deal with him. Reese & Co. v. Cole, 93 N. C. 87, 90.

B. Registration.

Registration Not Necessary Inter Partes.—A crop lien to secure agricultural advances executed under this section is valid inter partes, although not registered within thirty days, as required by the section. Gay v. Nash, 78 N. C. 100.

Time of Registration Subsequent to Amendment—Effect.—In 4 N. C. Law Rev. 5, it is said: "The statute as amended fails to require registration within any specified time before the harvesting of the crop. What would be the effect of two persons making advances on the same crop, when the latter advance, in point of time, was the first registered? It has been held that a mortgage on a crop, not expressed to be for advances, and not registered within 30 days after execution, has no rights as an agricultural lien under sec.

44-52. Cooper v. Kimball, 123 N. C. 120, 31 S. E. 346. This would hardly give a basis for a decision in the case put above, as the thirty day provision is omitted by the present law, but the first lien registered should prevail. It would be a race for the register's office."

IV. DESCRIPTION OF LAND.

Identification of the Land by Sufficient Description.—The land on which the crops are to be grown must be sufficiently identified at the time the lien is executed. Within this ruling land is sufficiently identified when described as "a field or farm in possession of the mortgagor or seller." Weil v. Flowers, 109 N. C. 212, 13 S. E. 761; Gwathney v. Etheridge, 99 N. C. 571, 6 S. E. 411.

An instrument giving a lien upon crops raised "upon Opossum Quarter tract of land in Warren County, known as the tract M. W. is buying from Egerton, or any other lands he may cultivate during the present year," sufficiently described the lands upon which the crops were to be raised, and was effective as to the crops raised on the land described, but void as to those raised on "any other lands." Crinkley v. Egerton, 113 N. C. 142, 18 S. E. 341.

V. EVIDENCE.

Extraneous Evidence to Show Time of Furnishing Materials.—Where an instrument intended to operate as an agricultural lien contains, on its face, the statutory requisites, except that it does not show that the money or supplies were furnished after the agreement, it is competent to show, dehors such instrument, that the supplies were furnished after the making of the agreement. Meekins v. Walker, 119 N. C. 46, 25 S. E. 706. Such evidence would not contradict the written instrument. Id.

§ 44-53. Contract for advances to mortgagor in possession. — The preceding section shall apply to all contracts made for the advancement of money and supplies, or either, for the purposes herein specified by mortgagors or trustors, their tenants, lessees or croppers, who may be in possession of the lands mortgaged or conveyed in trust at the time of the making of the contract for such advancement of money or supplies, either in case the debts secured in said mortgage or deed of trust be due or not. (Rev., s. 2053; 1889, c. 476; 1931, c. 173, ss. 2, 3; C. S. 2481.)

See annotations to the preceding section.

Editor's Note.—This section, which gives a lien for advances to mortgagors or trustors in possession, was amended by Public Laws 1931, c. 173 so as to give a lien when advances are made to "their tenants, lessees or croppers." The 1931 act, which excepted pending litigation, became effective March 23, 1931.

Cited in Slade Rhodes & Co. v. James, 194 N. C. 240, 139 S. E. 240.

§ 44-54. Price to be charged for articles advanced limited. — In order to be entitled to the benefits of the lien on crops in favor of landlords and other persons advancing supplies under the article, Agricultural Tenancies, of the chapter, Landlord and Tenant, and under the present article, or on a chattel mortgage on crops, such landlord or person shall charge for such supplies a price or prices of not more than ten per cent over the retail cash price or prices of the article or articles advanced, and the said ten per cent shall be in lieu of interest on the debt for such advances: Provided, however, that coupon books and trade checks commonly used by time merchants shall be considered as supplies advanced, when sold by merchants to customers, and charged for in the same manner. If more than ten per cent over the retail cash price is charged on any advances made under the lien or mortgage given on the crop, then the lien or mortgage shall be null and void as to the article or articles upon which such overcharge is made. At the time of each sale there shall be delivered to the purchaser a memorandum showing the cash prices of the articles advanced. (1917, c. 134, s. 1; 1921, c. 89; C. S. 2482.)

Local Modification.—Columbus and Scotland: 1931, c. 95; Greene: 1941, c. 210; Lenoir: 1929, c. 262; Robeson: 1929, c. 20.

Editor's Note.—The proviso to the first sentence of this section was added by the amendment of 1921.

Evidence Insufficient to Sustain Finding as to Price Charged.—In an action to recover the balance due from a cropper for advancements made for the cultivation of the crop and to establish the lien provided by § 44-52, the referee found as a fact, that the advancements were in money, merchandise and fertilizer, that the plaintiffs had charged more than 10 per cent above the retail cash price for fertilizer of the same kind, and declared the statutory lien void under the provisions of this section: Held, the action of the trial judge in confirming the report of the referee was erroneous, in the absence of evidence that such advance price had been charged for the fertilizer, and that even if it were proved that an advance price was charged for the fertilizer, the lien would not be void as to the other merchandise sold. Slade Rhodes & Co. v. James, 194 N. C. 240, 139 S. E. 240.

§ 44-55. "Cash prices" defined and determined. —In the case of retail merchants, the retail cash price or prices shall be the regular cash price or prices charged by the same merchant to cash customers for the same article or articles in like quantities at the same time. In the case of advances of supplies by landlords or other persons not engaged in business as retail merchants, or by retail merchants who have no regular cash prices, if the prices charged are called into question by the purchaser the retail cash price or prices of the supplies advanced may be determined by taking the average between the cash price or prices for the same class or classes of goods of two neighboring merchants, one selected by the landlord or other person making the advance and the other by the one to whom the advance is made. (1917, c. 134, s. 2; C. S. 2483.)

Local Modification.—Columbus and Scotland: 1931, c. 95; Greene: 1941, c. 210; Lenoir: 1929, c. 262; Robeson: 1929, c. 20.

§ 44-56. Person advanced not estopped by agreement. — No agreement or understanding between the parties as to the price or prices to be charged shall work an estoppel against the person to whom supplies have been advanced from showing that the price or prices charged were in fact more than ten per cent over the average retail cash price or prices in that locality at the time the advance or advances were made. If the price or prices charged by the merchants or landlord were in fact more than ten per cent, then the lien shall be null and void as to the article or articles upon which such overcharge is made. (1917, c. 134, s. 2; C. S. 2484.)

Local Modification.—Columbus and Scotland 1931, c. 95; Greene: 1941, c. 210; Lenoir: 1929, c. 262; Robeson: 1929, c. 20.

§ 44-57. Commission in lieu of interest, where advance in money.—Any person, firm, or corporation, including any bank or credit union, making any advancement in money to any person for the purpose of enabling such person to cultivate a crop, and taking as sole security for the advance so made a lien or mortgage on the crops to be cultivated and the personal property of the person to whom the advances are made, may charge, in lieu of interest, a commission of not more than ten per cent of the amount of money actually advanced: Provided, that money

advanced under the provisions of this section shall be advanced in installments agreed upon at the time of the contract, and the ten per cent commission herein allowed shall not be deducted, but shall be added to the amount of money agreed to be advanced. (1917, c. 134, s. 3; C. S. 2485.)

Local Modification.—Lenoir: 1929, c. 262; Robeson: 1929, c. 20.

Applied in Ransom v. Eastern Cotton Oil Co., 203 N. C. 193, 165 S. E. 350.

§ 44-58. Disposition of commission, where advanced by credit union.—In case the money is advanced by a credit union, the funds derived from the ten per cent commission allowed in the preceding section shall be used to pay such interest as the union may pay for the money borrowed by it for the benefit of its members, and to cover losses sustained by the union on account of loans made to members, and to further cover any reasonable expenses incurred by the union in connection with the loans made to members, and the balance of said fund shall be returned to the borrowers at the end of each year. (1917, c. 134, s. 4; C. S. 2486.)

Local Modification.—Lenoir: 1929, c. 262; Robeson: 1929, c. 20.

§ 44-59. Purchasers for value protected. — All liens or mortgages made under the provisions of this article shall be valid for their face value in the hands of purchasers for value and before maturity, even though the charges made are in excess of those allowed herein; but in such cases the party to whom the advances are made has the right to recover from the party making the advances any sum he may be compelled to pay a third party in excess of the charges allowed by this article. (1917, c. 134, ss. 5, 6; C. S. 2487.)

Local Modification.—Lenoir: 1929, c. 262; Robeson: 1929, c. 20.

§ 44-60. Crop seized and sold to preserve lien.—If the person making such advances makes an affidavit before the clerk of the superior court of the county in which such crops are, that the amount secured by said lien for such advances, or any part thereof, is due and unpaid, that the person to whom such advances have been made, or any other person having the said crop in his possession, is about to sell or dispose of his crop, or in any other way is about to defeat the lien hereinbefore provided for, accompanied with a statement of the amount then due, it is lawful for him to issue his warrant, directed to any of the sheriffs of this state, requiring them to seize the said crop, and, after due notice, sell the same for cash and pay over the net proceeds thereof, or so much thereof as may be necessary in the extinguishment of the amount then due. This proceeding shall not affect the rights of landlords or laborers. (Rev., s. 2054; Code, s. 1800; 1893, c. 9; 1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88; C. S. 2488.)

Purpose of Section—Remedy of Cultivator.—The purpose of the section is to give a summary remedy, where there is reason to believe that the cultivator is attempting to commit a fraud upon the lien of the party who has made the advances. It is clear from a perusal of the statute that in order to prevent an attempted fraud it was the intent of the law-making power to dispense with a summons to the next term of the superior court, and to allow the crop or so much thereof as was necessary to satisfy the debt, which is required to be set out in the affidavit, to be seized and sold by summary process, leaving the cultivator to his remedy by civil action in case he was not in default, and also by indictment against the party who makes the affidavit in case it be false in regard to the fraud charged or in regard to the amount alleged to be due. Thomas v. Campbell, 74 N. C. 787, 789.

Procedure in General.—The remedy given under this section is summary and prompt, and as a special proceeding has for its object the appropriation of the encumbered crops to the satisfaction of the debt created in making them. When this appropriation has been made the proceeding is exhausted and comes to an end. If the debt is disputed, and notice thereof given to the officer, accompanied with the defendant's affidavit denying the indebtedness claimed, he is required to hold the proceeds of sale until the issue of the controverted indebtedness can be tried in the superior court. If the warrant is revoked, the goods or the proceeds of sale must be returned, as must be the excess when they are more than sufficient to meet the plaintiff's demand and costs, as stated by himself, or as reduced by the verdict of the jury. The statute in direct terms makes no other provision for the intervention of the debtor to stop the progress of the proceeding. Gay v. Nash, 84 N. C. 334; Cottingham & Bros. v. McKay, 86 N. C. 241, 243.

No Summons to Defendant Is Necessary.—It is not necessary to the regularity of a summary proceeding for the enforcement of an agricultural lien under this section that a summons should be issued to the defendant. Thomas v. Campbell, 74 N. C. 787.

Effect of Verdict Failing to Assess Damages.—Where in a proceeding to enforce an agricultural lien under this section the crop was sold by the sheriff, and on trial before a jury the defendant admitted the execution of the lien, but denied that anything was due for advances thereunder, there was a general verdict for the plaintiff, and the court refused judgment because the jury failed to assess the damages. It was held error; the verdict established the "lien debt" in excess of the proceeds of sale, entitling the plaintiff to judgment. Gay v. Nash, 84 N. C. 334.

Return of Moneys in Court's Custody to Defendant.—Where in a proceeding under this section, the money arising from the sale of the crop has been paid into court and the proceeding dismissed, the court has the power to order a return of the money to the defendant, although the plaintiff has instituted another action and files an affidavit that the defendant is insolvent. Cottingham & Bro. v. McKay, 86 N. C. 241.

Revocation of Warrant by Clerk.—There can be no question of the reserved power in the clerk to revoke and supersede a warrant which he may have improvidently issued under this section. Cottingham & Bro. v. McKay, 86 N. C. 241, 243.

Priorities.—An agricultural lien for advances, when in writing, takes priority over all other liens except the laborer's and landlord's liens, to the extent of advances made thereunder. Rhodes v. Smith-Douglass Fertilizer Co., 220 N. C. 21, 16 S. E. (2d) 408.

Cited in White v. Riddle, 198 N. C. 511, 152 S. E. 501.

§ 44-61. Lienor's claim disputed; proceeds of sale held; issue made for trial. — If the person to whom the advances have been made, or who claims an interest in the crops, within thirty days after such sale has been made, gives notice in writing to the sheriff, accompanied with an affidavit, to the effect that the amount claimed is not justly due, it is the duty of the sheriff to hold the proceeds of such sale subject to the decision of the court upon an issue which shall be made up and set for trial at the next succeeding term of the superior court for the county in which the person to whom such advances have been made resides. (Rev., s. 2054; Code, s. 1800; 1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88; 1893, c. 9; C. S. 2489.)

§ 44-62. Local: Short form of liens.—For the purpose of creating a valid agricultural lien under the preceding sections for supplies to be advanced, and also to constitute a valid chattel mortgage as additional security thereto, and to secure a pre-existing debt, the following or a substantially similar form shall be deemed sufficient, and for those purposes legally effective, in the counties of Alamance, Alleghany, Anson,

Ashe, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Carteret, Caswell, Catawba, Chowan, Columbus, Craven, Cumberland, Davie, Davidson, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Gates, Granville, Halifax, Harnett, Hertford, Hyde, Iredell, Jones, Lenoir, Lincoln, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Northampton, Onslow, Pender, Pamlico, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Transylvania, Tyrell, Union, Vance, Wake, Watauga, Washington, Wayne and Wilson: North Carolina, ... County.

Whereas, ... ha .... agreed to make advances to ..... for the purpose of enabling said ..... to cultivate the lands hereinafter described during the year 19.., the amount of said advances not to exceed ..... dollars; and,

Whereas, said ..... is indebted to said ..... in the further sum of ..... dollars now due; now, therefore, in order to secure the payment of the same the said ..... do ..... hereby convey to said ..... all the crops of every description which may be raised during the year 19.. on the following lands in ..... County, North Carolina, ... Township, adjoining the lands of ..... and also the following other property, viz.: .... And if by the ..... day of ....., 19.., said ..... fail ..... to pay said indebtedness, then said ..... may foreclose this lien as provided in § 44-60 of the North Carolina Code or otherwise, and may sell said crops and other property after ten days' notice posted at the courthouse door and three other public places in said county, and apply the proceeds to the payment of said indebtedness and all costs and expenses of executing this conveyance, and pay the surplus to said ....., and the said ..... hereby represents that said crops and other property are the absolute property of ..... and free from encumbrance .....

Witness ..... hand ..... and seal, ... this the ..... day of ....., 19...

Witness: .....

....., owner of the lands described in the foregoing instrument, in consideration of the advances to be made, as therein provided, do ..... hereby agree to waive and release my lien as landlord upon said crops to the extent of said advances made to said .....

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

Witness: .....

..... (Seal.)

North Carolina, ... County.

The due execution of the foregoing instrument was this day proven before me by the oath and examination of ....., the subscribing witness thereto.

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

..... (Seal.)

North Carolina, ... County.

The foregoing certificate of ....., a ..... of ..... County, is adjudged to be correct. Let the instrument with the certificate be registered.

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

....., Clerk Superior Court.

(Rev., s. 2055; 1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; 1907, c. 843; 1909, c. 532; P. L. 1913, c. 49; 1925, c. 285, s. 1; 1931, c. 196; 1933, c. 101, s. 6; C. S. 2490.)

Local Modification.—Beaufort: 1933, c. 101; Johnston: 1943, c. 653.

Editor's Note.—By the amendments of 1925 and 1931 Randolph and Franklin Counties were brought within the scope of this section.

No Particular Form Required.—This section requires no particular form for the written instrument creating a valid agricultural lien but that it be substantially according to that therein prescribed, and the courts in construing it will look to the substance rather than the form and regard the entire writing with the view of ascertaining and effectuating the intention of the parties; and an instrument expressing itself to be an agricultural lien, and given in consideration of money or goods to be advanced for the purpose of making crops on certain land for the current year, with certain other property pledged as additional security, is sufficient without further designation, it appearing that the parties intended it to be one. Jones-Phillips Co. v. McCormick, 174 N. C. 82, 93 S. E. 449.

§ 44-63. Local: Rights on lienee's failure to cultivate. — If any person in the counties mentioned in the preceding section, after executing a lien as aforesaid for advances, fails to cultivate the lands described therein, or does any other act calculated to impair the security therein given, then the person to whom the lien was executed is relieved from any further obligation to furnish supplies, and the debts and advances theretofore made become due and collectible at once, and the person to whom the instrument was executed may proceed to take possession of, cultivate and harvest said crops, and to sell the other property described therein. It is not necessary to incorporate such power in the instrument, but this section is sufficient authority for the same. The sale of any property described in any instrument executed under the provisions of this chapter may be made at any place in the county where such property is situated after ten days notice published at the courthouse door and three other public places in said county. (Rev., s. 2056; 1899, c. 17, s. 3; 1901, c. 329, s. 3; C. S. 2491.)

§ 44-64. Local: Commissioners to furnish blank records.—The board of commissioners of the said counties shall have record books made with the aforesaid forms printed therein, and the cost of said books and of the printing of said forms, and of such other said books as may be hereafter required, shall be paid by the respective counties, and furnished to the register of deeds. (Rev., s. 2057; 1899, c. 17, s. 4; 1901, c. 329, s. 4; C. S. 2492.)

Art. 11. Liens for Internal Revenue.

§ 44-65. Filing notice of lien.—Notices of liens for internal revenue taxes payable to the United States of America and certificates discharging such liens may be filed in the office of the register of deeds of the county or counties within which the property subject to such lien is situated. (Ex. Sess. 1924, c. 44, s. 1.)

§ 44-66. Duty of register of deeds.—When a notice of such tax lien is filed, the register of deeds shall forthwith enter the same in alphabetical Federal lien tax index to be provided by the board of county commissioners, showing on one line the name and residence of the taxpayer named in such notice, the collector's serial number of such notice, the date and hour of filing, and the amount of tax and penalty assessed. He shall file and keep all original notices so filed in numer-

ical order in a file or files to be provided by the board of county commissioners and designated Federal tax lien notices. This service shall be performed without fee. (Ex. Sess. 1924, c. 44, s. 2.)

§ 44-67. Certificate of discharge.—When a certificate of discharge of any tax lien, issued by the collector of internal revenue or other proper officer, is filed in the office of the register of deeds where the original notice of lien is filed, said register of deeds shall enter the same with date of filing in said Federal tax lien index on the line where the notice of the lien so discharged is entered, and permanently attach the original certificate of discharge to the original notice of lien. This service shall be performed without fee. (Ex. Sess. 1924, c. 44, s. 3.)

§ 44-68. Purpose of article. — This article is passed for the purpose of authorizing the filing of notices of liens in accordance with the provisions of section three thousand one hundred eighty-six of the Revised Statutes of the United States, as amended by the act of March fourth, one thousand nine hundred thirteen, thirty-seven Statutes at Large, page one thousand sixteen. (Ex. Sess. 1924, c. 44, s. 4.)

Art. 12. Liens on Leaf Tobacco.

§ 44-69. Effective period for lien on leaf tobacco sold in auction warehouse.—No chattel mortgage, agricultural lien, or other lien of any nature upon leaf tobacco shall be effective for any purpose for a longer period than six months after the sale of such tobacco at a regular sale in an auction tobacco warehouse during the regular season for auction sales of tobacco in such warehouse. This section shall not absolve any person from prosecution and punishment for crime. (1943, c. 642, s. 1.)

Chapter 45. Mortgages and Deeds of Trust.

Art. 1. Chattel Mortgages: Form and Sufficiency.

Art. 2. Right to Foreclose or Sell under Power.

Art. 3. Mortgage Sales.

Art. 4. Discharge and Release.

Art. 1. Chattel Mortgages: Form and Sufficiency.

§ 45-1. Form of chattel mortgage.—Any person indebted to another in a sum to be secured may execute a chattel mortgage in form substantially as follows:

I, ..., of the county of ..... in the state of North Carolina, am indebted to ....., of ..... county, in said state, in the sum of ..... dollars, for which he holds my note to be due the .... of ....., A. D. 19...., and to secure the payment of the same, I do hereby convey to him these articles of personal property, to wit: ..... but on this special trust, that if I fail to pay said debt and interest on or before the .... day of ....., A. D. 19...., then he may sell said property, or so much thereof as may be necessary, by public auction for cash, first giving twenty days notice at three public places, and apply the proceeds of such sale to the discharge of said debt and interest on the same, and pay any surplus to me.

Given under my hand and seal this .... day of ....., A. D. 19.....

..... (Seal).

(Rev., s. 1039; Code, s. 1273; 1870-1, c. 277; 1911, c. 69, s. 1; C. S. 2575.)

Essential Elements.—No particular form is essential to the validity of a chattel mortgage; mere informality will not vitiate it. No seal is necessary. It is sufficient if the words employed express in terms or by just implication the purpose of the parties to transfer the property to the mortgagee, to be revested in the mortgagor upon the performance of the condition agreed upon, however informally expressed. A power of sale is not essential. Comron v. Standland, 103 N. C. 207, 9 S. E. 317.

While no particular form is necessary to constitute a mortgage, yet the words must "clearly indicate the creation of a lien, specify the debts to secure which it is given, and upon the satisfaction of which the lien is to be discharged and the property upon which it is to take effect." The statement that the creditor is to have a lien, and that on default he may take possession and sell, * * * sufficiently discloses the intent. Harris v. Jones, 83 N. C. 318; Britt v. Harrell, 105 N. C. 10, 12, 10 S. E. 902.

If a security for money is intended, that security is a mortgage though not having on its face the form of a mortgage. McCoy v. Lassiter, 95 N. C. 88, 92.

§ 45-2. Registration. — Chattel mortgages substantially in the form provided in § 45-1 are good to all intents and purposes when the same are duly registered according to law. (Rev., s. 1040; Code, ss. 1273, 1274; 1870-1, c. 277, ss. 1, 2; C. S. 2576.)

Cross References.—As to place of registration, see § 47-20. As to fee to register of deeds for registering chattel mortgage, etc., see § 161-10. As to offense of disposing of mortgaged or otherwise incumbered property and punishment therefor, see § 14-114.

In General.—The lien of the chattel mortgage is created by registering the original instrument, and such registration is notice to the world of the existence of the lien. It is not material to the public whether the debt and property were transferred by the mortgagee. The purpose of the Legislature in passing the statute in reference to registration was to prevent the creation of secret liens which embarrass trade and tend to encourage fraud. Hodges v. Wilkinson, 111 N. C. 56, 65, 15 S. E. 941.

Necessity of Registration Between the Parties.—Registration is not essential between the parties to the mortgage. Thomas v. Cooksey, 130 N. C. 148, 151, 41 S. E. 2; William v. Jones, 95 N. C. 504.

Registration Prior Attachment Gives Priority.—The registration of a mortgage prior to attachments issued by creditor makes it superior to the creditor's lien, but only on property situated in the county where the mortgage was registered. Williamson v. Bitting, 159 N. C. 321, 74 S. E. 808.

No Special Statutory Mode of Registration.—There is no special statutory mode presented for the registration of a chattel mortgage. If it is actually registered and indexed, that is sufficient. This section does not determine the mode. Williamson v. Bitting, 159 N. C. 321, 322, 74 S. E. 808.

Assignment of Mortgage Not Required to Be Registered.—There is no provision which requires assignments of chattel mortgages or the debts secured by them to be proven or registered; nor is there any good reason for enacting such a law, though it has been done in other states. The mortgage is declared "good to all intents and purposes" when registered according to law. No matter how often it be assigned, it is still good to protect the interest of the holder of the debt. Hodges v. Atkinson, 111 N. C. 56, 65, 15 S. E. 941.

Delivery to Register in His Office Necessary.—It is required for a valid filing of a mortgage that it be delivered at the office of the register of deeds, and until then it can acquire no priority over one theretofore executed; and where two mortgages given to different persons on the same subject-matter are delivered to the register of deeds out of his official office, carried by him to that place and marked by him filed at the same time, the filing and registration are regarded as being simultaneous, and the mortgage first executed will have priority of lien. McHan v. Dorsey, 173 N. C. 694, 92 S. E. 598.

Registry after Death of Mortgagor.—A mortgage both of land and personal property may be registered after the death of the mortgagor. William v. Jones, 95 N. C. 504.

§ 45-3. Mortgage of household and kitchen furniture. — All conveyances of household and kitchen furniture by a married man, made to secure the payment of money or other things of value, are void, unless the wife joins therein and her privy examination is taken in the manner prescribed by law in conveyances of real estate, except when said mortgage or conveyance is executed for the purchase money thereof. (Rev., s. 1041; 1891, c. 91; 1931, c. 211; C. S. 2577.)

Cross References.—As to conveyance of home site, see § 30-8. As to forms of acknowledgment, see §§ 47-38, 47-39, 47-40.

Editor's Note.—The Act of 1931 added the exception as to purchase money mortgage. The amendment does not contravene the policy of the law designed for the protection of the home. Kelly v. Fleming, 113 N. C. 133, 18 S. E. 81; Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028. It is also consistent with the law which permits the husband to execute a purchase money mortgage or deed of trust on his real estate that will be valid as against his wife without her joinder in the instrument. See § 39-13. 9 N. C. Law Rev. 392.

Provisions within Police Power of State.—The provisions of the section are in exercise of the police power of a State and promotive of its economic welfare and public convenience and comfor, and designed for the protection of the home, and is a constitutional and valid enactment. Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028.

Doctrine of Section Public Policy.—The requirements that the wife must join in the conveyance of the husband's realty, in the conveyance of his allotted homestead, and in a mortgage of his household and kitchen furniture, and that the husband must give his written assent to the conveyance by the wife of her realty, are all of a piece as a declaration of public policy. Thomas v. Sanderlin, 173 N. C. 329, 336, 91 S. E. 1028.

Section Applies to Liens Conferred by Writing—Property of Wife and Husband.—This section could not apply to those methods of conveyance of personal property by sale and delivery where no writing was used, for then the privy examination of the wife would have been impracticable. Nor to the sale by the husband of the personal property of which he was the sole owner, because, in this instance it was not necessary that the wife should join. But it was intended to prevent the conveyance by chattel mortgage, or in any other way by which a lien could be fixed thereon, of the property named, as by deed of trust or conditional sale, without a writing signed by husband and wife, and the privy examination of the wife, as in sale of real estate; and this may be applicable to such property whether it belong to the husband or to the wife. Kelly v. Fleming, 113 N. C. 133, 139, 18 S. E. 81.

The word "convey," in its broadest significance, might embrace any transmission of possession, but we are restrained to its legal meaning, which, ordinarily speaking, is the transfer of property from one person to another by means of a written instrument and other formalities. Rapalje & Lawrence Law Dict., "Convey, Conveyance." According to Webster a conveyance is "an instrument in writing by which property or the title to property is conveyed or transmitted from one person to another." The meaning of this word being well understood at common law, it must be understood in the same sense when used in a statute. Smithdeal v. Wilkerson, 100 N. C. 52, 6 S. E. 71; Kelly v. Fleming, 113 N. C. 133, 138, 18 S. E. 81.

Applies Only to Conveyances of Furniture by Husband—Privy Examination.—This section applies only to conveyances by the husband of the household and kitchen furniture, and the requirement of the privy examination of the wife in giving her assent thereto is within the power of the General Assembly and is in line with the same requirement in the Constitution, as to the joinder of the wife in the conveyance of the allotted homestead—the only instance in which the Constitution recognizes such a requirement. Thomas v. Sanderlin, 173 N. C. 329, 337, 91 S. E. 1028.

Mischief Sought to Be Overcome.—The evident mischief sought to be overcome by this section is the facility with which these necessary articles for the comfort and convenience of every household, however humble—the household and kitchen furniture—may be conveyed away, notwithstanding the protection which the law throws around them by the personal property exemption, at least, during the life of the husband, by the chattel mortgage, or other lien, now almost the only basis of credit for the poor man. Kelly v. Fleming, 113 N. C. 133, 139, 18 S. E. 81.

Liberal Construction—Goods for Sale in Shop Not Covered.—The words "household and kitchen furniture" may comprise not only that species of property which is in actual use, but also that which is on sale in shops, yet no one will contend that this statute should be construed so literally as to embrace articles of this kind of the latter class. Kelly v. Fleming, 113 N. C. 133, 138, 18 S. E. 81.

Distinguished from § 30-8—Constitutionality.—A distinction between this section and § 30-8 should be noted. In this section the conveyance without the joinder of the wife is declared to be void; while in the latter statute, such conveyance is declared to be invalid only for certain purposes. The owner of household and kitchen furniture is deprived absolutely of the right to convey said property by mortgage, without the consent of his wife, whereas the owner of a home site is deprived of such right only to a limited extent. If the former statute is constitutional, as held by this Court, it seems that there can be no question as to the constitutionality of § 30-8. Boyd v. Brooks, 197 N. C. 644, 652, 150 S. E. 178.

Husband's Own Property before Passage of Section.—Whether the provisions of the act could be made to apply in case of a chattel mortgage, etc., by a husband, of his own household and kitchen furniture, at any rate, of such as was owned by him before the passage of the act, quaere. Kelly v. Fleming, 113 N. C. 133, 18 S. E. 81.

Phrase "Household Furniture" Covers a Piano.—A piano owned by the husband and placed in his home for the use of his wife and daughters, and so used by them, is included under the statutory terms "Household and kitchen furniture" as used in this section, and a chattel mortgage thereof by the husband is invalid unless the wife signs as directed by the statute. Thomas v. Sanderlin, 173 N. C. 329, 91 S. E. 1028.

Application to Joint Note of H. and W. to Bind Separate Estate.—This section requiring a private examination of a married woman to a chattel mortgage on household and kitchen furniture, does not apply to a note signed by husband and wife binding her separate personal estate. Harvey v. Johnson, 133 N. C. 352, 45 S. E. 644.

Art. 2. Right to Foreclose or Sell under Power.

§ 45-4. Representative succeeds on death of mortgagee or trustee in deeds of trust; parties to action.—When the mortgagee in a mortgage, or the trustee in a deed in trust, executed for the purpose of securing a debt, containing a power of sale, dies before the payment of the debt secured in such mortgage or deed in trust, all the title, rights, powers and duties of such mortgagee or trustee pass to and devolve upon the executor or administrator or collector of such mortgagee or trustee, including the right to bring an action of foreclosure in any of the courts of this state as prescribed for trustees or mortgagees, and in such action it is unnecessary to make the heirs at law of such deceased mortgagee or trustee parties thereto. (Rev., s. 1031; 1901, c. 186; 1887, c. 147; 1895, c. 431; 1905, c. 425; 1933, c. 199; C. S. 2578.)

Editor's Note.—Public Laws of 1933, c. 199, inserted the words "or collector" following the words "executor or administrator."

Power of Sale Vests in Executor of Mortgagee.—When a power of sale in a mortgage is given to the mortgagee, "his executors," etc., upon default, and the mortgagee dies leaving a will under which his executors qualify, the power of sale vests in the executors by virtue of this section and the contract in the mortgage. Scott v. Blades Lumber Co., 144 N. C. 44, 56 S. E. 548.

Same—Even in the Absence of Stipulation to That Effect.—The executor of a mortgagee may exercise the power of sale contained in the mortgage, when the deed in terms confers such power upon the mortgagee and his executors. This section was intended to confer the power of sale upon executors and administrators when such power is not given in the deed. Yount v. Morrison, 109 N. C. 520, 13 S. E. 892.

Cited in Allred v. Trexler Lumber Co., 194 N. C. 547, 548, 140 S. E. 157; Nall v. McConnell, 211 N. C. 258, 190 S. E. 210.

§ 45-5. Foreclosures by representatives validated. — In all actions which were brought or prosecuted prior to the fourth day of March, one thousand nine hundred and five, for the foreclosure of any mortgage or deed in trust by any executor or administrator of any deceased mortgagee or trustee where the heirs of the mortgagee were duly made parties and regular and orderly decrees of foreclosure entered by the court and sale had by a commissioner appointed by the court for that purpose and deed made after confirmation, the title so conveyed to purchaser at such judicial sale shall be deemed and held to be vested in such purchaser, whether the heir of such deceased mortgagee or trustee was a party to such foreclosure proceeding or not, and such heir of any deceased mortgagee is estopped to bring or prosecute any further action against such purchaser for the recovery of such property or foreclosure of such mortgage or deed in trust. (Rev., s. 1032; 1905, c. 425, s. 2; C. S. 2579.)

§ 45-6. Renunciation by representative; clerk appoints trustee.—The executor or administrator of any deceased mortgagee or trustee in any mortgage or deed of trust heretofore or hereafter executed may renounce in writing, before the clerk of the superior court before whom he qualifies, the trust under the mortgage or deed of trust at the time he qualifies as executor or administrator, or at any time thereafter before he intermeddles with or exercises any of the duties under said mortgage or deed of trust, except to preserve the property until a trustee can be appointed. In every such case of renunciation the clerk of the

superior court of any county wherein the said mortgage or deed of trust is registered has power and authority, upon proper proceedings instituted before him, as in other cases of special proceedings, to appoint some person to act as trustee and execute said mortgage or deed of trust. The clerk, in addition to recording his proceedings in his book of orders and decrees, shall enter the name of the substituted trustee or mortgagee on the margin of the deed in trust or the mortgage in the book of the office of the register of deeds of said county. (Rev., s. 1038; 1905, c. 128; C. S. 2580.)

Cross Reference.—As to appointment of successor to trustee, etc., see § 36-17.

See section 45-9 and annotations thereunder.

Cited in Spain v. Hines, 214 N. C. 432, 200 S. E. 25.

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

Recitals in Deed Prima Facie Correct.—Recitals in a trustee's deed that the trustee made the sale in pursuance of the power contained in the deed of trust are taken as prima facie correct. Hayes v. Ferguson, 206 N. C. 414, 174 S. E. 121.

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

Editor's Note.—See 13 N. C. Law Rev. 93.

Execution of Power by Survivor Trustee in Mortgage.—Where one of two trustees in a power of sale mortgage dies, the survivor may execute the trust, this being a trust coupled with an interest. Cawfield v. Owens, 129 N. C. 286, 40 S. E. 62.

§ 45-9. Clerk appoints successor to incompetent trustee.—When the sole or last surviving trustee named in a will or deed of trust dies, removes from the county where the will was probated or deed executed and/or recorded and from the state, or in any way becomes incompetent to execute the said trust, or is a nonresident of this state, or has disappeared from the community of his residence and his whereabouts remains unknown in such community for a period of three months and cannot, after diligent inquiry be ascertained, the clerk of the superior court of the county wherein the will was probated or deed of trust was executed and/or recorded is authorized and empowered, in proceedings to which all persons interested shall be made parties, to appoint some discreet and competent person to act as trustee and execute the trust according to its true intent and meaning, and as fully as if originally appointed: Provided, that in all actions or proceedings had under this section prior to January first, one thousand nine hundred, before the clerks of the superior court in which any trustee was appointed to execute a deed of trust where any trustee of a deed of trust has died, removed from the county where the deed was executed and from the state, or in any way become incompetent to execute the said trust, whether such appointment of such trustee by order or decree, or otherwise, was made upon the application or petition of any person or persons ex parte, or whether made in proceedings where all the proper parties were made, are in all things confirmed and made valid so far as regards the parties to said actions and proceedings to the same extent as if all proper parties had originally been made in such actions or proceedings (Rev., s. 1037; Code, s. 1276; 1869-70, c. 188; 1873-4, c. 126; 1901, c. 576; 1933, c. 493; C. S. 2583.)

Editor's Note. — Public Laws 1933, c. 493, inserted the words "and/or recorded" following the word "executed." It also inserted the clause relating to instances where the trustee has disappeared.

Appointment of New Trustee upon the Death of the Old.—Upon the death of a trustee, the clerk of the superior court may appoint another under this section who may proceed to execute the trust according to the terms of the deed. Wright v. Fort, 126 N. C. 615, 36 S. E. 113.

Appointment of Trustee upon the Death of the Last Survivor.—Upon the death of the last survivor of a board of trustees named in a deed for property to be used as a "Baptist church and for the education of the youths of the colored race," it was held that their successors will be appointed under this section, by the clerk of the court. Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

Appointment upon Appeal.—Where clerk of superior court, for want of jurisdiction, dismisses a proceeding for the appointment of a trustee, on appeal the judge of the superior court may make such appointment. Roseman v. Roseman, 127 N. C. 494, 37 S. E. 518.

Petition for Appointment of New Trustee—Title of New Trustee.—Under this section, when a trustee dies, all of the parties in interest may join in a petition to the superior court to have a new trustee appointed, and upon the passing of the decree the substituted trustee holds the legal title upon the same trusts as the original trustee, so far as it is competent for the court to confer them. McAfee v. Green, 143 N. C. 411, 55 S. E. 828.

Bond for Substituted Trustee Unnecessary.—It is not necessary in substituting one trustee for another in pursuance of this section, to require a bond of the substituted trustee. Strayhorn v. Green, 92 N. C. 119.

Personal Powers of Old Trustee Cannot Be Transferred upon the New.—Where the powers to be exercised by the original trustee are of a personal nature depending upon his discretion, such powers cannot be conferred upon the appointed trustee. See Young v. Young, 97 N. C. 132, 2 S. E. 78.

Administrator C. T. A. Taking Place of Executor Trustee.—Where an executor named in a will is thereby also appointed a trustee and renounces or dies, the administrator cum testamento annexo appointed in his stead succeeds to the trusteeship, and hence an appointment by the clerk of the court, under this section, of a trustee in place of the executor is void and clothes the appointee with no power. State v. Peebles, 120 N. C. 31, 26 S. E. 924.

All Persons Interested Must Be Made Parties.—The appointment of a trustee in cases where the former trustee has died, removed from the county, or become incompetent cannot be done on an ex parte motion or petition. The application for such appointment is in the nature of a civil action, and all persons interested must be made parties, and have full time and opportunity to set up their respective claims. Guion v. Melvin, 69 N. C. 242.

Section Not Applicable.—Where the terms as to foreclosure in a deed of trust on lands to secure borrowed money have been complied with as to the substitution of the trustee, the method expressed for this purpose is contractual and does not arise under this section requiring certain proceedings to be taken in the courts; and a deed made by a substituted trustee in accordance with the agreement passes

the title to the purchaser at the foreclosure sale. Raleigh Real Estate, etc., Co. v. Padgett, 194 N. C. 727, 140 S. E. 714.

The provisions of this section may not be held applicable to an active express trust. Cheshire v. First Presbyterian Church, 221 N. C. 205, 19 S. E. (2d) 855.

Cited in New York Life Ins. Co. v. Lassiter, 209 N. C. 156, 183 S. E. 616; Nall v. McConnell, 211 N. C. 258, 190 S. E. 210; Cheshire v. First Presbyterian Church, 222 N. C. 280, 22 S. E. (2d) 566.

§ 45-10. Substitution of trustees in mortgages and deeds of trust.—In addition to the rights and remedies now provided by law, the holders or owners of a majority in amount of the indebtedness, notes, bonds, or other instruments evidencing a promise or promises to pay money and secured by mortgages, deeds of trust, or other instruments conveying real or personal property, or creating a lien thereon, may substitute a trustee whether the trustee then named in the instrument is the original or a substituted trustee, by the execution of a paper writing whenever it appears:

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

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

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

Editor's Note.—The 1943 amendment rewrote this section. See 9 N. C. Law Rev. 402.

Section Becomes Part of Contract.—Where a deed of trust is executed after the effective date of this section the provisions of the section enter into and become a part of the contract, and a later statute providing a more economical and expeditious procedure for such substitution, so long as the rights of the parties, especially those of the cestui que trust, are not injuriously affected, does not violate the constitutional provisions. Bateman v. Sterrett, 201 N. C. 59, 159 S. E. 14.

A substituted trustee succeeds to all the rights, titles and duties of the original trustee, and has the power to foreclose the instrument according to its terms upon default. Pearce v. Watkins, 219 N. C. 636, 14 S. E. (2d) 653.

A sale of the property by the substituted trustee in accordance with the terms of the instrument is valid, the appointment of a substitute trustee not being a conveyance of any interest in land. North Carolina Mtg. Corp. v. Morgan, 208 N. C. 743, 182 S. E. 450.

Substitute Trustee May Execute Deed to Purchaser.—A trustee, duly substituted for the original trustee under the provisions of the deed of trust and the statute, may execute deed to the purchaser at a sale duly conducted by the original trustee. Pendergrast v. Home Mtg. Co., 211 N. C. 126, 189 S. E. 118; Pearce v. Watkins, 219 N. C. 636, 642, 14 S. E. (2d) 653.

Cited in New York Life Ins. Co. v. Lassiter, 209 N. C. 156, 183 S. E. 616.

§ 45-11. Appointment of substitute trustee upon application of subsequent or prior lienholders; effect of substitution.—When any person, firm, corporation, county, city or town holding a lien on real or personal property upon which there is a subsequent or prior lien created by a mortgage, deed of trust or other instrument, the mortgagee or trustee therein named being dead or having otherwise become incompetent to act, files a written application with the clerk of the superior court of the county in which said property is located, setting forth the facts showing that said mortgagee or trustee is then dead or has become incompetent to act, the said clerk of the superior court, upon a proper finding of fact that said mortgagee or trustee is dead or has become incompetent to act, shall enter an order appointing some suitable and competent person, firm or corporation as substitute trustee upon whom service of process may be made, and said substitute trustee shall thereupon be vested with full power and authority to defend any action instituted to foreclose said property as fully as if he had been the original mortgagee or trustee named; but the substitute trustee shall have no power to cancel said mortgage or deed of trust without the joinder of the holder of the notes secured thereby. Said application shall not be made prior to the expiration of thirty days from the date the original mortgagee or trustee becomes incompetent to act. (1941, c. 115, s. 1.)

Editor's Note.—For comment on the 1941 enactment, see 19 N. C. Law Rev. 507.

§ 45-12. Certificate by clerk of superior court.—Whenever the powers set out in § 45-10 shall be exercised the clerk of the superior court shall certify that the instrument has been executed by the owner or owners of a majority in amount of the indebtedness, notes, bonds or other instruments secured therein, have executed the same, and that it has been made to appear to him that the cause of substitution as set forth therein is true and that the substituted trustee is a fit and proper person or corporation to perform the duties of said trust, and unless such certificate is attached to said instrument before registration and registered therewith the same shall be invalid and of no effect. (1931, c. 78, s. 3.)

§ 45-13. Right of appeal by any person interested; judge to review findings of clerk de novo.—Whenever the power contained in § 45-10 or in § 45-11 is exercised in respect to any deed of trust, mortgage or other instrument creating the lien which was executed prior to March 4,

1931, then, at any time within twelve months from the registration of the instrument designating the new trustee but within thirty days from actual knowledge of the same, any person interested therein may appeal from the findings of the clerk of the superior court pursuant to § 45-12, and such appeal shall be duly constituted when a written notice signed by, or on behalf of such person, shall have been served in any of the methods of service of summons provided by law on all other parties interested therein, including the said substituted trustee. The notice shall state that a motion will be made before the judge of the superior court of the county of the clerk who made such certificate at the next regular term of such superior court beginning more than ten days after the service of said notice on all interested parties, and the docketing of such notices on the civil issue docket of said county. On the hearing of said motion it shall be open to all parties to contest and defend the findings of said clerk, and the judge shall review said findings de novo and make such findings in respect thereof as shall appear to him from the evidence to be true, and if the said substituted trustee shall be removed at said hearing another trustee shall be substituted in his stead by the court upon a finding that he or it is a proper person or corporation to perform the functions of said trusteeship, but only one such appeal shall be allowed as to each appointment. (1931, c. 78, s. 4; 1941, c. 115, s. 2.)

Editor's Note.—The 1941 amendment inserted the reference to § 45-11.

§ 45-14. Acts of trustee prior to removal not invalidated. — If any such trustee who has been substituted as provided in § 45-10 or in § 45-11 shall have performed any functions as such trustee and shall thereafter be removed as provided in §§ 45-10 to 45-17, such removal shall not invalidate or affect the validity of such acts in so far as any purchaser or third person shall be affected or interested, and any conveyances made by such trustee before removal if otherwise valid, shall be and remain valid and effectual to all intents and purposes, but if any trustee upon such hearing is declared to have been wrongfully removed, he shall have his right of action against the substituted trustee for any compensation that he would have received in case he had not been wrongfully removed from such trust. (1931, c. 78, s. 5; 1941, c. 115, s. 3.)

Editor's Note.—The 1941 amendment inserted the reference to § 45-11.

§ 45-15. Registration of substitution constructive notice.—The registration of such paper writing designating a new trustee under § 45-10 or under § 45-11 shall be from and after registration, constructive notice to all persons, and no appeal or other proceedings shall be instituted to contest the same after one year from and after such registration. (1931, c. 78, s. 6; 1941, c. 115, s. 4.)

Editor's Note.—The 1941 amendment inserted the reference to § 45-11.

§ 45-16. Register of deeds to make marginal entry of substituted trustee.—Whenever any substituted trustee shall be appointed as provided in §§ 45-10 to 45-17 and such designation of such substituted trustee shall have been registered, together with the certificates required in §§ 45-10 to 45-17, then it shall be the duty of the register of deeds to make an appropriate notation on the margin of the registration of the said mortgage, deed of trust, or other instrument securing the payment of money, indicating the place of registration of such appointment of a substituted trustee, and this shall be done as many times as a trustee may be substituted as provided for in §§ 45-10 to 45-17. It shall be competent for the holder of such deed of trust, or deeds of trust, mortgage or mortgages, wherein the same trustee is named, to execute one instrument applying to all such deeds of trust or mortgages, in the substitution of a trustee for any of the causes set forth in § 45-10, and in said instrument to recite and name the mortgages and/or deeds of trust affected by giving the names of the grantors, the trustee and, if registered, the book and page of such registration. This may be done as many times as a trustee may be substituted as provided for in §§ 45-10 to 45-17, and in which cases the register of deeds shall make, as to each recited instrument, mortgage or deed of trust, the notation provided for in this section. (1931, c. 78, s. 7.)

§ 45-17. Substitution made as often as justifiable.—The powers set out in § 45-10 and in § 45-11 may be exercised as often and as many times as the right to make such substitution may arise under the terms of such section, and all the privileges and requirements and rights to contest the same as set out in §§ 45-10 to 45-17 shall apply to each deed of trust or mortgage and to each substitution. (1931, c. 78, s. 8; 1941, c. 115, s. 5.)

Editor's Note.—The 1941 amendment inserted the reference to § 45-11.

§ 45-18. Validation of certain acts of substituted trustees.—Whenever before February 3, 1939, a trustee has been substituted in a deed of trust in the manner provided by §§ 45-10 to 45-17, but the instrument executed by the holder and/or owners of all or a majority in amount of the indebtedness, notes, bonds, or other instruments secured by said deed of trust, and the certificate of the clerk of the superior court executed in connec tion therewith under the provisions of § 45-12, have not been registered as provided by said sections until after the substituted trustee has exercised some or all of the powers conferred by said deed of trust upon the trustee therein, including the advertising of the property conveyed by said deed of trust for sale, the sale thereof, and the execution of a deed by such substituted trustee to the purchaser at such sale, all such acts of said substituted trustee shall be deemed valid and effective in the same manner and to the same extent as if said instrument substituting said trustee, and the clerk's certificate thereon had been registered prior to the performance by said substituted trustee of any one or more of said acts, or other acts authorized by such deed of trust. (1939, c. 13.)

Pending Litigation Not Affected.—This section shall not be construed to affect any litigation pending February 3, 1939, nor to divest vested rights. Public Laws, 1939, c. 13, s. 2.

§ 45-19. Mortgage to guardian; powers pass to succeeding guardian.—When a guardian to whom a mortgage has been executed dies or is removed or resigns before the payment of the debt secured in such mortgage, all the rights, powers and duties of such mortgagee shall devolve upon the

succeeding guardian. (Rev., s. 1034; 1905, c. 433; C. S. 2584.)

§ 45-20. Sales by mortgagees and trustees confirmed.—All sales of real property made prior to February tenth, nineteen hundred and five, by mortgagees and trustees under powers of sale contained in any mortgage or deed of trust in compliance with the powers, terms, conditions and advertisement set forth and required in any such mortgage or deed of trust, are hereby in all respects ratified and confirmed. (Ex. Sess. 1920, c. 27; C. S. 2584(a).)

§ 45-20.1. Validation of trustees' deeds where seals omitted.—All deeds executed prior to the first day of January, one thousand nine hundred and forty, by any trustee in the exercise of the power of sale vested in him under any deed, deed of trust, mortgage, will, or other instrument in which the trustee has ommitted to affix his seal after his signature, shall be good and valid: Provided, however, that this section shall not apply to actions instituted and pending prior to the fifteenth day of May, one thousand nine hundred and forty-three. (1943, c. 171.)

§ 45-21. Validation of appointment of and conveyances to corporations as trustees.—In all deeds of trust made prior to March 15, 1941, wherein property has been conveyed to corporations as trustees to secure indebtedness, the appointment of said corporations as trustees, the conveyances to said corporate trustees, and the action taken under the powers of such deeds of trust by said corporate trustees are hereby confirmed and validated to the same extent as if such corporate trustees had been individual trustees. (1941, c. 245, s. 1.)

Editor's Note.—This section, which became effective March 15, 1941, did not apply to or affect pending litigation.

For comment on this enactment, see 19 N. C. Law Rev. 507.

Art. 3. Mortgage Sales.

§ 45-22. Limitation of time for attacking certain foreclosures on ground trustee was agent, etc., of owner of debt.—1. No action or proceeding shall be brought or defense or counterclaim pleaded later than one year after March 14, 1941 in which a foreclosure sale which occurred prior to January 1, 1941, under a deed of trust conveying real estate as security for a debt is attacked or otherwise questioned upon the ground that the trustee was an officer, director, attorney, agent or employee of the owner of the whole or any part of the debt secured thereby, or upon the ground that the trustee and the owner of the debt or any part thereof have common officers, directors, attorneys, agents or employees.

2. This section shall not be construed to give or create any cause of action where none existed before March 14, 1941, nor shall the limitation provided in subsection one hereof have the effect of barring any cause of action based upon grounds other than those mentioned in said section, unless the grounds set out in subsection one are an essential part thereof.

3. This section shall not be construed to enlarge the time in which to bring any action or proceeding or to plead any defense or counterclaim; and the limitation hereby created is in addition to all other limitations now existing. (1941, c. 202.)

§ 45-23. Personal property; notice and place of sale.—All personal property sold under the terms of any mortgage or other contract, expressed or implied, whether advertised in some newspaper or otherwise, shall be advertised by posting a notice at some conspicuous place at the courthouse door in the county where the property is situated, such notice to be posted for at least twenty days before the sale, unless a shorter time be expressed in the contract. (Rev., s. 1042; 1889, c. 70; 1909, c. 49, s. 1; C. S. 2585.)

Cross Reference.—As to advertisement for sale under execution of personal property, see § 1-336.

Strict Compliance with Statute.—In foreclosure proceedings under a power of sale contained in a mortgage, the requirements of the statute and the contract stipulations of the instrument, not inconsistent with the statute in respect to notice and other terms on which the power may be exercised, shall be strictly complied with; and when such has not been done, no title can pass under the sale in respect to the immediate parties thereto. Ferebee v. Sawyer, 167 N. C. 199, 83 S. E. 17.

Same—Notice of Postponement.—But this does not apply when a postponement is had by reason of the sale being enjoined or for other reasonable purposes, for in the absence of statutory or contract provisions to the contrary, a notice of postponement made in good faith, and reasonably calculated to give proper publicity of the time and place, is held sufficient. Ferebee v. Sawyer, 167 N. C. 199, 83 S. E. 17.

Place of Sale Not Affected by This Section.—The place of sale designated in the mortgage controls at what place the sale is to be effected. This rule is not affected by this section which merely provides for the place of notice, and makes no mention of the place of sale. Palmer v. Latham, 173 N. C. 60, 61, 91 S. E. 525.

Section 1-325 Does Not Affect Mortgages under This Section.—Section 1-325 requiring notice under mortgage, etc., for thirty days is, by express terms, prospective in effect and is amended by the Laws of 1909, ch. 705, prescribing publication in a newspaper "once a week for four weeks"; therefore it does not affect mortgages made prior thereto, coming under the provisions of this section requiring that whether advertised in a newspaper or otherwise, the sale "shall be advertised by posting a notice at some conspicuous place at the courthouse door," etc., for twenty days, etc. Jenkins v. Griffin, 175 N. C. 184, 95 S. E. 166.

Presumption of Regularity.—While powers of sale under mortgage are closely scrutinized by the courts and held to the letter of the contract, the law presumes the regularity of the sale in the execution of such powers and places the burden of proof on the party claiming a failure of proper notice or advertisement to show it. Jenkins v. Griffin, 175 N. C. 184, 95 S. E. 166; Cowfield v. Owens, 129 N. C. 286, 288, 40 S. E. 62.

§ 45-24. Foreclosure of conditional sales.—In all sales of personal property wherein the title is retained by the seller to secure the purchase money, or any part thereof, and no power of sale is conferred, and default is made in the payment of said obligation by the purchaser, then in all such cases it is lawful for the owner of such debt thereby secured, without an order of court, to sell such property, or so much thereof as may be necessary to pay off said indebtedness, at public auction for cash, after first giving twenty days notice at three or more public places in the county wherein the sale is to be made, and apply the proceeds of such sale to the discharge of said debt, interest on the same, and costs of foreclosure, and pay any surplus to the person legally entitled thereto. Before making any such sale, in addition to the advertisement above required, the owner of said debt shall, at least ten days before the day of sale, mail a copy of the notice of sale to the last known postoffice address of the original purchaser or his assigns. (1913, c. 60, s. 1; C. S. 2587.)

Cross References.—As to registration of conditional sales

of personal property, see §§ 47-23, 47-24. As to conditional sales contracts of corporations, see § 55-43.

A contract for the sale of personal property, retaining title in the vendor until the purchase price has been paid, without express power of sale therein, comes under the provisions of this section, as if written in the contract, and gives to the vendor the right to sell the property in default of payment of the purchase price, or part thereof, without the consent of court, upon certain advertisement specified in the statute; and it is reversible error for the court to charge the jury that the vendor could not sell the property without the consent of the purchaser. House v. Parker, 181 N. C. 40, 106 S. E. 137.

§ 45-25. Real property; notice of sale must describe premises.—In sales of real estate under deeds of trust or mortgages it is the duty of the trustee or mortgagee making such sale to fully describe the premises in the notice required by law substantially as the same is described in the deed of authority under which said trustee or mortgagee makes such sale. (Rev., s. 1043; 1895, c. 294; C. S. 2588.)

Cross Reference.—As to requirements for advertisement in execution and judicial sales, see § 1-325 et seq.

The purpose and intent of this section was to give complete and full notice to the public of the land to be sold, so that the public generally would know and understand from the advertisement the exact property offered for sale. Douglas v. Rhodes, 188 N. C. 580, 583, 125 S. E. 261.

The Word "Substantially."—In Douglas v. Rhodes, 188 N. C. 580, 583, 125 S. E. 261, the court said: "If the Legislature had intended that the real estate (set forth by metes and bounds in the deed of trust in the present case) in a deed of trust or mortgage should be described by metes and bounds when advertised for sale under the terms of the deed of trust or mortgage, it could have easily said so in the statute, but on the contrary it used the word 'substantially.' The word 'substantially,' Webster defines to mean: 'In a substantial manner, in substance, essentially.' It does not mean an accurate or exact copy."

In notices for the sale of realty under mortgages or deeds of trust, the identical description of the land, as contained in the instrument, is not required by this section and a description "substantially" as in the conveyance is sufficient. Peedin v. Oliver, 222 N. C. 665, 24 S. E. (2d) 519.

Same—Sufficient Description. — Advertisements for the sale of land under foreclosure of mortgage or deed of trust are required by this section to describe the lands "substantially" as in the conveyance thereof; and while it may be more advisable to give the exact description, the deed made in pursuance thereof is not necessarily void for lack of such description, as where the land is designated as a well-known and certain tract, or place of business, or manufacturing plant, with reference to the book in the office of the register of deeds where the description is given, with number of page, etc., for a more particular description, it is a sufficient description of the land and will convey the title if the notice of such has been published in accordance with the terms of a mortgage or deed in trust. Douglas v. Rhodes, 188 N. C. 580, 125 S. E. 261. See Blount v. Basnight, 209 N. C. 268, 183 S. E. 405.

Applicable to Deed of Trust or Mortgage.—Under a fair construction of this section, it is applicable to a sale under the power in a deed of trust or mortgage. The notice required by law under the statute would be the notice in the deed of trust or mortgage. Douglas v. Rhodes, 188 N. C. 580, 582, 125 S. E. 261.

§ 45-26. Real property; power of sale barred when foreclosure barred.—The power of sale of real property contained in any mortgage or deed of trust for the benefit of creditors shall become inoperative, and no person shall execute any such power, when an action to foreclose such mortgage or deed of trust for the benefit of creditors would be barred by the statute of limitations: Provided, if a sale of real property is made under a power of sale in a deed of trust or mortgage within the time allowed by the statute of limitations for the commencement of an action to foreclose such mortgage or deed of trust, regardless of whether there is or is not a resale after the filing of a raised or increased bid or bids, this section shall not operate to prevent the execution and delivery of a deed in consummation of such sale pursuant to power of sale after the expiration of the time provided by said statute of limitations. (Rev., s. 1044; 1943, c. 16, s. 1; C. S. 2589.)

Cross Reference.—As to statute of limitations on foreclosure, see § 1-47, paragraph 3.

Editor's Note.—The 1943 amendment added the proviso.

This section is not a mere statute of limitation, and need not be pleaded by a party whose rights may be affected. It simply destroys, by direct prohibition, the authority of any power of sale made in the mortgage contract or conveyance. Spain v. Hines, 214 N. C. 432, 434, 200 S. E. 25. For note on this case, see 17 N. C. L. Rev. 448.

Construction.—This section must be construed in the light of its purpose, which appears to be to give as complete relief against foreclosure by power of sale as has been given against foreclosure by action, in § 1-47. Spain v. Hines, 214 N. C. 432, 435, 200 S. E. 25.

Where reasonable doubt exists as to the interpretation of this section, it should be strictly construed against the exercise of the power of foreclosure and the doubt resolved in favor of the holder of the equitable title. Id.

Applicable to Contracts in Existence at Enactment.—This section is applicable to those contracts which existed at the time of its becoming operative; but, as to those, it only affected an existing remedy, which does not impair the obligations of the contract, when a reasonable time has elapsed thereafter within which the action could have been instituted. Graves v. Howard, 159 N. C. 594, 75 S. E. 998.

Subject to Ten-Year Limitation.—While formerly there was no bar to the execution of a power of sale contained in a mortgage of lands, mortgages then executed are made subject to the ten-year statute, by this section. Jenkins v. Griffin, 175 N. C. 184, 95 S. E. 166.

The power of sale may be exercised at any time within ten years after maturity of any note secured. E. H. & J. A. Meadows Co. v. Bryan, 195 N. C. 398, 142 S. E. 487.

The provisions of § 1-47, par. 3, relating to the bar of actions to foreclose must be read into this section and it appears that a power of sale contained in a mortgage becomes inoperative and unenforceable when not exercised within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same "where the mortgagor or grantor has been in possession of the property." Ownbey v. Parkway Properties, 222 N. C. 54, 55, 21 S. E. (2d) 900.

Where notes secured by a mortgage are barred by the statute of limitations, and the power of sale contained in the instrument is barred by the lapse of over ten years from the date of the last payment on the notes, the trustee's contention that the mortgagor would have to pay the amount of the notes in order to be entitled to the equitable relief of restraining the foreclosure on the principle that he who seeks equity must do equity, is unavailing. Serls v. Gibbs, 205 N. C. 246, 171 S. E. 56.

Where notes are given in series, secured by a mortgage on lands providing that upon the nonpayment at maturity of each as they became due all of them were to become due and payable, it is at the option of the mortgagee to enforce the sale upon the happening of the event specified, and when the mortgagee has not exercised his option, the statute of limitations would apply as from the due date of each note in the series, as if the provision for the acceleration of the payment had not been incorporated in the mortgage. And where more than ten years had elapsed since the maturity of some of the notes recovery therein was barred under this section and § 1-47, subsection 3. E. H. & J. A. Meadows Co. v. Bryan, 195 N. C. 398, 142 S. E. 487.

When it does not appear that the mortgagee in a mortgage on lands securing the payment of notes in series has exercised his option to foreclose under a provision making all the notes payable upon the failure of the maker to pay any of them at maturity, the presumption is that he has waived his right to do so, but it will not be held, on that account, that his right to foreclose under the power of sale therein contained is barred. E. H. & J. A. Meadows Co. v. Bryan, 195 N. C. 398, 142 S. E. 487.

Running of Statute on Installment Debts.—Where a debt is made payable in two installments, maturing at different times, the creditor may elect to wait to sue till the second installment is due, and the statute of limitations will not begin to run until that time. Cone v. Hyatt, 132 N. C. 810, 44 S. E. 678.

Limitation When Power of Sale for Default of Interest Optional.—The statute of limitations does not begin to run upon default in payment of annual interest upon the prin-

cipal, when the power of sale contained in the mortgage is optional with the mortgagee upon default of either interest or principal of the debt. Scott v. Blades Lumber Co., 144 N. C. 44, 56 S. E. 548.

Statute Does Not Commence Running until Debt Due.— The statute of limitations does not begin to run against the principal of a mortgage of lands until it is due, and the power of sale contained in the mortgage may be exercised within ten years after the maturity of the principal. Scott v. Blades Lumber Co., 144 N. C. 44, 56 S. E. 548.

Doctrine of Cone v. Hyatt, Changed by Section. — The holding in Cone v. Hyatt, 132 N. C. 810, 44 S. E. 678, that the power of sale in a deed of trust or mortgage is not barred by the statute of limitation, though an action for foreclosure thereon is barred, is changed by this secton. See also Lester Piano Co. v. Loven, 207 N. C. 96, 101, 176 S. E. 290.

Prohibition of Section Not Deferred by Partial Exercise. —The power of sale referred to in this section, and the power upon which the section operates, is not merely the power to effect the executory contract or sale by advertising and "selling" at public auction, but the power to transfer the property to the purchaser by observance of the legal steps provided by law, and the prohibition of the section is not deferred by its partial exercise. Spain v. Hines, 214 N. C. 432, 436, 200 S. E. 25. It should be noted that this case was decided before the 1943 amendment.

Forclosure Deed Is Voidable Merely.—A foreclosure deed executed pursuant to a sale held after the power of sale is barred by this section is voidable and not void. Edwards v. Hair, 215 N. C. 662, 2 S. E. (2d) 859.

Burden of Proof.—An instruction that the burden was on defendant, the purchaser at the sale, to prove that the power of sale was not barred at the time of foreclosure, is error, the burden being upon plaintiff to prove that the foreclosure deed, attacked by her, was inoperative. Edwards v. Hair, 215 N. C. 662, 2 S. E. (2d) 859.

Applied in In re Gibbs, 205 N. C. 312, 171 S. E. 55.

Stated in Demai v. Tart, 221 N. C. 106, 19 S. E. (2d) 130.

Cited in Ownbey v. Parkway Properties, 221 N. C. 27, 18 S. E. (2d) 710.

§ 45-26.1. Real property; validation of deeds made after expiration of statute of limitations where sales made prior thereto.—In all cases where sales of real property have been made under powers of sale contained in mortgages or deeds of trust and such sales have been made within the times which would have been allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deeds of trust, and the execution and delivery of deeds in consummation of such sales have been delayed until after the expiration of the period which would have been allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deeds of trust as a result of the filing of raised or increased bids, such deeds in the exercise of the power of sale are hereby validated and are declared to have the same effect as if they had been executed and delivered within the period allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deeds of trust. (1943, c. 16, s. 2.)

§ 45-27. Land lying in two or more counties; place of sale.—When a mortgage or deed in trust conveying lands lying partly in two or more counties confers upon the mortgagee or mortgagees, trustee or trustees, therein named, any power for the sale of such lands, without naming the place of sale, or conferring upon such mortgagee or mortgagees, trustee or trustees, the right to select the same, in the exercise of such power, any sale thereunder may be made at the courthouse door of any one of the counties in which such lands are situate, and at no other place except as hereinafter provided; but when such lands consist of two or more detached parcels, lying wholly within the limits of different counties, the sale of each and every one of such parcels shall be made at the courthouse door of the county in which the same is situate. (1911, c. 165, s. 1; C. S. 2590.)

§ 45-28. Reopening judicial sales, etc., on advanced bid.—In the foreclosure of mortgages or deeds of trust on real estate, or by order of court in foreclosure proceedings either in the superior court or in actions at law, or in the case of the public sale of real estate by an executor, administrator, or administrator with the will annexed, or by any person by virtue of the power contained in a will or sale under execution duly issued, the sale shall not be deemed to be closed under ten days. A report of such sale shall be filed in the office of the clerk of the superior court within five days from the date thereof: Provided, that failure to file such report prescribed shall not invalidate said sale. If in ten days from the date of the sale, the sale price is increased ten per cent where the price does not exceed five hundred dollars, and five per cent where the price exceeds five hundred dollars, and the same is paid to the clerk of the superior court, the mortgagee, trustee, executor, or person offering the real estate for sale shall reopen the sale of said property and advertise the same in the same manner as in the first instance. It shall only be necessary to give fifteen days' notice of a resale. The clerk may, in his discretion, require the person making such advance bid to execute a good and sufficient bond in a sufficient amount to guarantee compliance with the terms of sale should the person offering the advance bid be declared the purchaser at the resale. Where the bid or offer is raised as prescribed herein, and the amount paid to the clerk, he shall issue an order to the mortgagee or other person and require him to advertise and resell said real estate. Resales may be had as often as the bid may be raised in compliance with this section. Upon the final sale of the real estate, the clerk shall issue his order to the mortgagee or other person, and require him to make title to the purchaser. If upon any resale the person making an advance bid or his agent shall become the last and highest bidder at such resale and upon confirmation of his bid shall fail to comply therewith within ten days, the clerk shall order a resale of the property; and in such event the deposit made with the clerk of said court shall be forfeited as damages for failure to comply with the bid at such resale and shall be applied, under order of the clerk, first to the payment of all costs and expenses in advertising and conducting the resale, and the balance of said deposit, if any, shall be applied as a credit on the indebtedness on account of which the sale was authorized: Provided, however, that no such forfeiture shall be allowed if, at the resale ordered because of such failure to comply, the property shall sell for an amount equal to or more than said advance bid so offered but not complied with, plus the costs of such resale. The clerk shall make all such orders as may be just and necessary to safeguard the interest of all parties, and he shall keep a record which will show in detail the amount of each bid, the purchase price, and the final settlement between parties. This section shall not apply to the foreclosure of mortgages or deeds of trust executed prior to April first, nine-

teen hundred and fifteen. (1915, c. 146; 1917, c. 127, ss. 3, 4; 1919, c. 124; 1929, c. 16; 1931, c. 69; 1933, c. 482; 1939, cc. 36, 397; C. S. 2591.)

Cross Reference.—See §§ 28-92 and 28-93 for application of this section in sales of realty in connection with the administration of estates.

Editor's Note.—The meaning of the 1931 amendment is not entirely clear. The act of 1929 inserted the words "or by order of court in foreclosure proceedings in the Superior Court." The 1931 amendment repeals the former and inserts the words "or by order of court in foreclosure proceedings either in the Superior Court or in actions at law." While a proceeding for foreclosure must be in the Superior Court and is an equitable remedy under the former practice, the distinction between actions at law and suits in equity is abolished, and the remedy is by a civil action.

Until 1933, there was no provision in § 45-28 for the raising of a bid in an execution sale. The 1927 amendment to § 1-326, dealing with advertisement for resales, refers to sales under execution. However, the court apparently did not regard this reference as sufficient, in the absence of an express provision in § 45-28, to authorize raised bids in execution sales. See Weir v. Weir, 196 N. C. 268, 145 S. E. 281. By Public Laws 1933, c. 482, execution sales were expressly added to the classes of sales in which upset bids are authorized under § 45-28.

The first 1939 amendment inserted the second sentence. The second 1939 amendment inserted the ninth sentence.

See 13 N. C. Law Rev. 15, 300.

Liberal Construction—Time of Making Deposit on Advanced Bid.—While the clerk of the Superior Court is without authority to order a resale of lands foreclosed under mortgage without an increase bid filed with him under the provisions of this section, and the payment of the deposit required, the provisions of the statute relating thereto are to be liberally construed to effectuate its intent to protect the mortgagor, and when within the statutory time limit the offerer has communicated with the clerk of the court by phone and offered to come from an adjacent town and make a sufficient deposit, and is informed by the clerk that it would be sufficient to send a cashier's check by mail on that day, and a good cashier's check is accordingly mailed, a substantial compliance with the statute has been made, though the check was received by the clerk after the expiration of the time limit of the statute. Clayton Banking Co. v. Green, 197 N. C. 534, 149 S. E. 689.

Deposit to Secure Bid within Court's Discretion.—In a suit to foreclose a mortgage an order of the trial court that the bidder at the sale or resales be required to secure his bid before acceptance of the same, is within the sound discretion of the trial court, and is not affected by this section. Koonce v. Fort, 205 N. C. 413, 171 S. E. 367.

Purpose of Deposit on Advanced Bid.—The deposit required by this section is to guarantee against loss in a resale of land under foreclosure sale of a mortgage, and where the clerk of the Superior Court has required of a person placing an advance bid a deposit representing a five per cent increase bid, and in addition a deposit to guarantee compliance with the bid, under the statute, and the lands are resold and bought in by the one making the advance bid, and he refuses to pay the amount because of threatened litigation, and the lands are again resold and bring a surplus over that of the prior resale, there has been no loss occasioned by the first resale, and the person making the deposit therefor is entitled to receive it back as against the claim therefor of one holding a note secured by a junior mortgage on the same property. Harris v. American Bank & Trust Co., 198 N. C. 605, 152 S. E. 802.

Estoppel to Set up Irregularities in Foreclosure Proceedings.—Where the trustee in a deed of trust proceeds to advertise and foreclose the land under the terms of the instrument, and upon request of the trustor, continues the sale from day to day for about a month in order to give the trustor time in which to raise the money to pay off the lien, and the trustor is present at the time of the first continuance of the sale and at the time of the actual sale, and made no objection thereto, and failed to raise the bid within ten days, and thereafter the purchaser at the sale transfers to a bona fide purchaser without notice, the trustor is estopped as against the bona fide purchaser without notice to set up his claim to the land on the grounds of alleged irregularity in the foreclosure proceedings. Phipps v. Wyatt, 199 N. C. 727, 155 S. E. 721.

Confirmation of Sale Not Subject to Collateral Attack.—In an action to recover the balance due on mortgage notes after foreclosure, confirmation of the sale by the clerk, under this section, and application of the proceeds to the notes, cannot be collaterally attacked in plaintiff's action to recover the deficiency after foreclosure. First Carolina's Joint-Stock Land Bank v. Stewart, 208 N. C. 139, 179 S. E. 463.

Authority of Clerk—Exception to Distribution or Proceeds.—The only authority conferred by this section on the clerk is to order a resale of the property where the bid has been raised as therein prescribed, and where there are a first and second mortgage upon such lands, foreclosed under the second, an exception to the distribution of the proceeds is untenable, the remedy, if any, being by independent action. In re Bauguess, 196 N. C. 278, 145 S. E. 395.

Same—Amount of Commission Allowed.—Where lands have been sold under a power of sale in a deed of trust, and under this section the amount it brought at the sale has been raised, it is within the authority of the clerk of the court to allow the commission provided for in the deed to the extent of the advanced price, when reasonable, against the claim of subsequent lienors or claimants. In re Hollowell Land, 194 N. C. 222, 139 S. E. 769.

Power and Authority of Clerk.—This section does not require that the sale of land under mortgage or deed in trust be reported to the clerk of the court until an advanced bid has been properly made. Pringle v. Building, etc., Ass'n, 182 N. C. 316, 108 S. E. 914. See also In re Sermon's Land, 182 N. C. 122, 128, 108 S. E. 497; Dillingham v. Gardner, 219 N. C. 227, 13 S. E. (2d) 478; Peedin v. Oliver, 222 N. C. 665, 24 S. E. (2d) 519.

While under the provisions of this section, it is required that the clerk order title to be conveyed to the purchaser at the final resale, semble, this order is merely ministerial when the resale has been made in accordance with the statute in other respects, and the omission may be supplied by the clerk making the order nunc pro tunc, and the deed accordingly made will convey the title to the purchaser. Lawrence v. Beck, 185 N. C. 196, 116 S. E. 424.

The supervisory powers invested in the clerk of the court over sales under a mortgage, deed of trust, etc., are not those of general control as exercised by the courts in case of an ordinary judicial sale, but confined by the statute to sales, and resales under the power of sale contained in the instruments, and in accordance with the directions of the statute. Lawrence v. Beck, 185 N. C. 196, 116 S. E. 424.

The supervisory powers given the clerks of the Superior Courts by this section apply to sales and resales under the power of sale contained in mortgages and deeds of trust and not to ordinary judicial sales, and the statute must be strictly complied with. Redfern v. McGrady, 199 N. C. 128, 154 S. E. 3.

Notwithstanding ten days have elapsed from the date of the sale, at the time the increased bid was made, the clerk has the power, in his discretion, to order a resale, without waiting for the expiration of twenty days within which parties to the proceeding might file exceptions to the sale Vance v. Vance, 203 N. C. 667, 668, 166 S. E. 901.

The order of the clerk to deliver title required by this section is, however, merely ministerial in its nature, and its omission, when in fact the trustee has, after complying with all the terms of the power of sale contained in the deed of trust, made title to the purchaser, does not invalidate the foreclosure, or render the title acquired by the purchaser as grantee in the deed of the trustee void, solely, for that reason. Cheek v. Squires, 200 N. C. 661, 668, 158 S. E. 198.

By this section, the clerk has the power to make an allowance to the mortgagee or trustee for his services in making the sale, to be retained by him from the proceeds of the sale. From an order making such allowance, a party interested in the land or in the proceeds of the sale, may appeal to the judge, who upon such appeal may affirm, reverse or modify the order of the clerk; in the absence of such appeal, the order of the clerk is final and conclusive. Tidewater Brokerage Co. v. Southern Trust Co., 203 N. C. 182, 183, 165 S. E. 353.

Same—Effect of Cash Stipulated at First Sale.—Under the provisions of this section, the clerk of the court has no jurisdiction, except to order a resale of land sold under the power of sale of a mortgage, when, within the ten days required by the statute, the bid at the sale has been raised; and a mere statement made at the foreclosure sale that the purchase price be paid in cash upon confirmation, implies only that the cash would be required if the bid should not be raised in the amount and time prescribed by law. In re Mortgage Sale of Ware Property, 178 N. C. 693, 122 S. E. 660.

Same—Where Property Injured within Ten Day Period.—This section controls as to ordering a resale of lands sold under a power of sale contained in a mortgage or deed of trust, and confers no power on the clerk to make such order, unless within the ten days allowed there shall be an increased bid, etc., and does not extend to instances wherein a material loss has been sustained by destruction of a house

on the lands, within the stated period. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Where the mortgaged premises has been materially diminished in value by the loss by fire of a house thereon, which has been sold under a power contained in the instrument, the bidder at such sale having no title or right of possession, or control over the property for its preservation or protection, within ten days provided by this section, the loss occurring within that time falls on the owner, and the preferred bidder is not chargeable therewith, or required by law to take the property at the price he had bid therefor. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Same—When Supervisory Power Begins. — The clerk of the court acquires supervisory power of the sale of land under power contained in a mortgage or deed of trust from the time of an advanced bid paid into his hands, under the provisions of this section, which continues until after the final sale under foreclosure. Lawrence v. Beck, 185 N. C. 196, 116 S. E. 424.

Same—Order Accepting Mortgagor's Deed.—Where a resale of lands under mortgage has been made under the provisions of this section, the clerk may enter an order accepting the mortgagor's deed nunc pro tunc as to the time it should have been tendered, when otherwise the observance of the statute had been made. Briggs v. Asheville Developers, 191 N. C. 784, 133 S. E. 3.

Section Incorporated in Mortgages and Deeds of Trust.—The provisions of this section, concerning the sale of land under a power thereof contained in a mortgage or deed of trust, enter into and control the sale under such instruments. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Status Under Section of Mortgage and Deeds of Trust Sales.—Under this section a sale of land under the power in a mortgage or deed of trust is given the same status as if made under a judgment or decree of court. Pringle v. Building, etc., Ass'n, 182 N. C. 316, 108 S. E. 914.

Purpose of Section as to Mortgagors.—This section was intended for the protection of mortgagors where sales are made under a power of sale without a decree of foreclosure by the court. In the latter cases there was always an equity to decree a resale when a substantial raise in the bid, usually 10 per cent., had been deposited in court. There being no such protection as to mortgages with power of sale, this statute was passed to extend to mortgagors, whose property had been sold under power of sale without a decree of foreclosure, the same opportunity of a resale when there has been an increased bill of 10 per cent. when the bid at the first sale did not exceed $500, and of 5 per cent. when the bid of the first sale was more than $500. Pringle v. Building, etc., Ass'n, 182 N. C. 316, 317, 108 S. E. 914.

Irregularity in Conveyance—Time to Keep Sale Open. — Where a trust deed to secure money loaned on lands has been foreclosed, this section requires the sale to be kept open for ten days for the tender of increased bids, etc., but where it appears that an irregularity in conveying the land before the expiration of the statutory time could not have prejudiced any of the parties, they are concluded by the judgment upholding the validity of the transaction. Wise v. Short, 181 N. C. 320, 107 S. E. 134.

No Specific Performance When Sale Reopened.—The principle upon which specific performance of a binding contract to convey lands is enforceable, has no application to the successful bidder at a sale under the power contained in a mortgage or deed of trust of lands, during the ten days allowed by this section, for, within that time, there is no binding contract of purchase, and the bargain is incomplete. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Title of the Bidder.—Under the provisions of this section, the bidder at the sale during the period of ten days acquires no interest in the property itself, but only a position similar to a bidder at a judicial sale, before confirmation. He is only considered as a preferred bidder, his right depending upon whether there is an increased bid and a resale of the land ordered under the provisions of the statute. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497. See Richmond County v. Simmons, 209 N. C. 250, 183 S. E. 282.

When in special proceeding to sell real property to create assets with which to pay debts of a decedent an order for private sale is made by any superior court, whether the bid be raised under authority of this section as therein prescribed, or motion be made by party interested in the proceeds for an order of resale under § 28-93, it clearly appears that a private sale is open to either course for ten days from the date and report of sale. During that period the bidder acquires no right of possession or title. He is merely a preferred bidder. Howard v. Ray, 222 N. C. 710, 24 S. E. (2d) 529.

Sale Not Consummated until Expiration of Ten Days.—A last and highest bidder at a foreclosure sale is but a proposed purchaser or preferred bidder during the ten days allowed by statute for an increase in the bid, and the sale cannot be consummated until after the expiration of ten days after the public auction. Shelby Bldg., etc., Ass'n v. Black, 215 N. C. 400, 2 S. E. (2d) 6.

Rights of Highest Bidder—Payment of Mortgage within Ten Days Period.—The last highest bidder at a foreclosure sale of a mortgage on lands is but a proposed purchaser under this section acquiring no right until the statutory provision of ten days has expired, and the payment of the full mortgage indebtedness to the mortgagee within that time cancels the instrument and all rights arising thereunder. In such case no recovery of damages can be had by the bidder against the mortgagor or a purchase from him to whom the equity of redemption has been conveyed. Cherry v. Gilliam, 195 N. C. 233, 141 S. E. 594.

The one who is the last and highest bidder at the foreclosure of a mortgage or deed of trust on lands is but a proposed purchaser within the ten days before confirmation, and where the mortgagee has become such purchaser and within ten days allowed by statute for an increase bid a third person pays the mortgage debt and has the notes and mortgage assigned to him, such person has the right of lien and foreclosure under the terms of the mortgage securing the note. Davis v. Central Life Ins. Co., 197 N. C. 617, 150 S. E. 120.

Same—Revocation of Order for Deed.—Under this section it is the duty of the clerk of the Superior Court to readvertise and resell the mortgaged property as often as the statute is complied with, and the last and highest bidder at a prior sale acquires no rights in the property until his bid has finally been accepted and the order made for the deed to be made to him; and such order having been made by the clerk prematurely, it is proper for him to make an entry revoking it and order a resale, and an injunction will not lie to restrain the resale where the order has been thus revoked and the statute complied with. Hanna v. Carolina Mortgage Co., 197 N. C. 184, 148 S. E. 31.

Assignment of Bid.—While the last and highest bidder at a sale under a mortgage acquires no title until the expiration of the ten-day period, he is a preferred bidder and may assign his bid, but his assignee takes only such interest as he had. Creech v. Wilder, 212 N. C. 162, 193 S. E. 281.

Rights of Owner of Equity of Redemption.—Where lands have been many times resold under this section and the owner of the equity of redemption has not protected himself at the sales, he may not have the deed at the final foreclosure sale set aside for irregularity when the last purchaser is an innocent purchaser for value in good faith. Brown v. Sheets, 197 N. C. 268, 148 S. E. 233.

Deposit of Advanced Bid with Clerk.—Under the facts of this case presenting the question of a valid resale of mortgaged land under the provisions of this section, objection that only two per cent. of the proposed advanced bid was deposited with the clerk was untenable. Briggs v. Asheville Developers, 191 N. C. 784, 133 S. E. 3.

Keeping Open for Ten Days—Purchasers Title.—Under the provisions of this section as to resale of mortgaged lands upon a raised bid, it is required that the matter be kept open by the clerk for ten days thereafter, in order that the purchaser thereof may acquire title. Briggs v. Asheville Developers, 191 N. C. 784, 133 S. E. 3.

Recitals in Deed as to Compliance with Section Prima Facie.—Where the question in controversy in a suit for specific performance against the purchaser, is whether there has been a compliance with this section as to a resale under a mortgage upon the raise of a bid at a prior sale, the recitals relating thereto in the deed tendered by the mortgagor are only prima facie evidence of such facts, and alone are insufficient to sustain the judgment. Briggs v. Asheville Developers, 191 N. C. 784, 133 S. E. 3.

Where a resale is ordered the bidder at the first sale is released from any and all obligation by reason of his bid. Richmond County v. Simmons, 209 N. C. 250, 251, 183 S. E. 282.

Striking Out Order for Resale.—Where, on account of an upset bid, an order for a resale has been entered, it is error, eleven days thereafter to strike out such order and declare the sale final in prejudice of further rights of mortgagors. Va. Trust Co. v. Powell, 189 N. C. 372, 127 S. E. 242.

There is nothing in the statute which deprives the court of its power to prescribe the terms upon which land or other property shall be sold under its orders, judgments or decrees. Koonce v. Fort, 204 N. C. 426, 430, 168 S. E. 672.

Deposit When No Upset Bid Is Made.—Under the provisions of this section the last and highest bidder at a foreclosure sale obtains no interest in the land until the elapse of the ten-day period for the filing of an increased bid, and although the mortgagee or trustee may, in fixing the terms of the sale, require a reasonable cash deposit to cover

the cost of the sale and insure completion of the sale by the purchaser if no upset bid is made, the reasonableness of such deposit may be determined by analogy to the deposit required for an upset bid, and a demand for a cash deposit at the sale amounting to twenty-five per cent of the bid is unreasonable. Alexander v. Boyd, 204 N. C. 103, 167 S. E. 462.

Recovery of Deposit.—Where the last and highest bidder at a sale of lands under decree of foreclosure has been required under order of court to deposit a certain per cent of his bid in cash to show his good faith, he is entitled to receive his deposit back upon the entering of an order of resale by the clerk under the provisions of this section, upon the placing of an advanced bid and cash deposit by another. Koonce v. Fort, 204 N. C. 426, 168 S. E. 672.

Commissions Allowed.—Upon the ordering by the clerk of a resale pursuant to this section, the original sale, under the power, becomes a nullity, and that part of the instrument providing a certain per cent as selling commission to the mortgagee or trustee is inoperative; and in lieu thereof he is entitled only to the costs and expenses of the sale and such sum to compensate him for his services actually rendered as may be approved by the clerk, subject to review on appeal, or by the court direct where a restraining order has issued. Pringle v. Building, etc., Ass'n, 182 N. C. 316, 108 S. E. 914.

Jurisdiction of Judge on Appeal.—The discretion vested in the superior court judge on appeal from the clerk, sec. 1-276, to hear and determine the matter in controversy, unless it appear to him that justice would be more cheaply or speedily administered by remanding it to the clerk, can not confer jurisdiction on the judge to pass upon the reasonableness of the price of land sold under the power of sale in a mortgage, wherein the clerk has no authority under this section, to further pass thereon in the absence of an increased bid. In re Mortgage Sale of Ware Property, 187 N. C. 693, 122 S. E. 660.

Cited in Hayes v. Ferguson, 206 N. C. 414, 416, 174 S. E. 121; Miller v. Shore, 206 N. C. 732, 733, 175 S. E. 133; Dennis v. Dixon, 209 N. C. 199, 183 S. E. 360.

§ 45-29. Surplus after sale to be paid to clerk, in certain cases.—It is competent for any trustee or mortgagee who sells any real, personal or mixed property under the power of sale contained in any deed of trust or mortgage of any kind and who has in his hands any surplus money, after paying the debt or debts secured by such deed of trust or mortgage and costs and expenses of such sale, to pay into the office of the clerk of the superior court of the county where the sale was had, any surplus moneys in his hands as aforesaid in all cases where the grantor in such deed of trust or mortgage is dead and there is no executor or administrator of his estate, and in all other cases where such trustee or mortgage is, for any cause, in doubt as to who is the proper party or parties to whom to pay such surplus moneys. Such payment to the clerk shall have the effect to discharge such trustee or mortgagee from all liability to the extent of the amount so paid. The clerk shall receive such money from such trustee or mortgagee and execute a receipt for the same under the seal of his office. The failure of any clerk, however, to place his seal upon such receipt shall not invalidate the receipt if it bears the genuine signature of the clerk. The official bond of such clerk shall be responsible for the safe keeping of such moneys until the same shall be paid to the party or parties entitled thereto, or be paid out under the order of a court of competent jurisdiction. (1913, c. 15, ss. 1, 2; C. S. 2592.)

See note under § 45-28.

Alternatives of Mortgagee.—Where the owner of lands has mortgaged the same during his life as tracts numbered 1 and 2, and has later conveyed tract No. 2 to a purchaser in fee simple, and has devised tract No. 1 for life with remainder over, it was held, that the mortgagee should hold the proceeds of the sale after the satisfaction of his mortgage for the life tenant and remaindermen, who may determine whether the surplus be invested in accordance with their equities, or the interest of the life tenant be paid in cash under the provisions of sec. 8-47, or the mortgagee may relieve himself of liability by paying the fund into court pursuant to this section. Brown v. Jennings, 188 N. C. 155, 124 S. E. 150.

Statute of Limitations Need Not Be Pleaded.—Section 1-15 applies to actions wherein formal pleadings are required to be filed and not to proceedings in the nature of a controversy without action upon an agreed statement of facts for the distribution of funds arising from a foreclosure sale under this section and § 45-30, the rights of the parties being determined in accordance with the admitted facts. In re Gibbs, 205 N. C. 312, 171 S. E. 55.

Cited in Edwards v. Nunn, 194 N. C. 492, 493, 140 S. E. 84; American Agricultural Chemical Co. v. Brock, 198 N. C. 342, 344, 151 S. E. 869.

§ 45-30. Special proceedings to determine ownership of surplus.—Special proceedings may be instituted before the clerk of the superior court to determine who is the rightful party to whom any fund paid into his office under § 45-29 shall be paid. All persons claiming an interest in such funds shall be made parties, and if an answer is filed raising issues as to the ownership of said moneys, the case shall be transferred to the civil issue docket of the superior court for trial. Any party in interest may appeal to the judge of the superior court from any order made by the clerk. The clerk may require bond of parties when action is transferred to civil issue docket, as in other civil actions. The court may, in its discretion, order the costs and a reasonable attorney's fee to be paid out of the funds in controversy. (1913, c. 15, s. 3; 1919, c. 111, ss. 1, 2; C. S. 2593.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

See notes under §§ 45-28 and 45-29.

Cited in Edwards v. Nunn, 194 N. C. 492, 493, 140 S. E. 84; Am. Agr. Chemical Co. v. Brock, 198 N. C. 342, 151 S. E. 869.

§ 45-31. Orders signed on days other than first and third Mondays validated; force and effect of deeds.—In all actions for the foreclosure of any mortgage or deed of trust which has heretofore been instituted and prosecuted before the clerk of the superior court of any county in North Carolina, wherein the judgment confirming the sale made by the commissioner appointed in said action, and ordering the said commissioner to execute a deed to the purchaser, was signed by such clerk on a day other than the first or third Monday of a month, such judgment of confirmation shall be and is hereby declared to be valid and of the same force and effect as though signed and docketed on the first or third Monday of any month, and any deed made by any commissioner or commissioners in any such action where the confirmation of sale was made on a day other than a first or third Monday of the month shall be and is hereby declared to have the same force and effect as if the same were executed and delivered pursuant to a judgment of confirmation properly signed and docketed by the clerk of the superior court on a first or third Monday of the month. (1923, c. 53, s. 1; C. S. 2593(a).)

§ 45-32. Injunction of mortgage sales on equitable grounds.—Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the confirmation of any sale of such real estate by a mortgagee, trustee, commissioner or other person authorized

to sell the same, to enjoin such sale or the confirmation thereof, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient: Provided, that the court or judge enjoining such sale or the confirmation thereof, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plaintiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mortgagee, trustee, cestui que trust, or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction: Provided further, that in other respects the procedure shall be as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the supreme court from any such order or injunction. (1933, c. 275, s. 1.)

Editor's Note.—See 11 N. C. Law Rev. 240, for review of this section.

Constitutionality.—This section does not violate any provision of the Constitution of the United States or of the State of North Carolina, by which limitations are imposed upon the legislative power of the General Assembly of this State. It does not impair the obligation of the contract entered into by and between the parties to a mortgage or deed of trust; it does not deprive either party of property without due process of law; nor does it confer upon mortgagors or grantors in deeds of trust any exclusive privilege. Woltz v. Asheville Safe Deposit Co., 206 N. C. 239, 242, 173 S. E. 587.

This section is constitutional and valid. Hopkins v. Swain, 206 N. C. 439, 174 S. E. 409.

This section is remedial only, and is valid for that purpose. Woltz v. Asheville Safe Deposit Co., 206 N. C. 239, 242, 173 S. E. 587.

Retroactive Effect.—This section is applicable to a sale made since its enactment, although the sale was made under the power of sale contained in a mortgage or deed of trust executed prior to its enactment. Woltz v. Asheville Safe Deposit Co., 206 N. C. 239, 242, 173 S. E. 587.

Requiring Bond within Court's Discretion.—The condition that plaintiff file bond to indemnify defendant against any loss by reason of the delay is within the court's discretionary equitable power, the provisions of this section being constitutional and valid. Whitaker v. Chase, 206 N. C. 335, 174 S. E. 225. Little v. Wachovia Bank, etc., Co., 208 N. C. 726, 182 S. E. 491.

Where the mortgagee or cestui que trust is not satisfied with the bond given by the mortgagor or trustor, as provided by this section, his remedy is by motion that plaintiffs be required to increase the penal sum of the bond and give additional sureties, and he may not attack the validity of the order restraining the consummation of the sale upon the ground that the bond is inadequate. Woltz v. Asheville Safe Deposit Co., 206 N. C. 239, 173 S. E. 587.

Where the parties expressly waive a jury trial, and the trial court finds that the amount bid at the sale represented the fair market value of the lands, and that there was no assurance that a larger sum would be offered if the lands were resold, the findings support his judgment dissolving the temporary order restraining the consummation of the sale. Barringer v. Wilmington Sav., etc., Co., 207 N. C. 505, 177 S. E. 795.

When Foreclosure May Not Be Restrained.—An executor may not restrain the foreclosure of a deed of trust executed by his testator prior to his death upon the executor's petition for sale of the lands to make assets, when by the terms of the deed of trust the trustee is authorized to advertise and sell the lands, the right of the trustee to sell the lands being contractual, and the sale by the trustee being subject to the provisions of this and the following sections. Miller v. Shore, 206 N. C. 732, 175 S. E. 133.

This and following sections have no application after a foreclosure sale under power contained in the instrument has been confirmed. Whitford v. North Carolina Joint-Stock Land Bank, 207 N. C. 229, 230, 176 S. E. 740.

Granting Resale after Action for Specific Performance.—Where the last and highest bidder at the sale instituted action for specific performance, and the personal representative of the deceased mortgagee gave notice in apt time that he would make application to the resident judge of the district out of term and out of the county for an order restraining the consummation of the sale made by him under the mortgage on the grounds of inadequacy of the bid, and for an order for a resale, the court had authority to hear the motion. Hopkins v. Swain, 206 N. C. 439, 440, 174 S. E. 409.

Where It Is Error for Court to Grant Motion to Nonsuit.—Where plaintiffs, trustors in a deed of trust, seek to enjoin the consummation of a foreclosure sale had under the power contained in the instrument, and alleged that the price bid at the sale was grossly inadequate, which allegation is denied in the answer, it is error for the court to grant defendants' motion to nonsuit, plaintiffs being entitled to a hearing and a determination of the issue under the provisions of this section. Smith v. Bryant, 209 N. C. 213, 183 S. E. 276.

Injunction Held to Be Properly Continued to Hearing upon Court's Finding.—Where a mortgagor or trustor institutes suit to enjoin the consummation of a foreclosure sale had under the terms of the instrument, and files bond to indemnify the mortgagee or cestui que trust against loss, the temporary injunction granted in the cause is properly continued to the hearing upon the court's finding that serious controversy exists between the parties and that plaintiff is entitled to a jury trial upon the issues of fact raised by the pleadings. Little v. Wachovia Bank, etc., Co., 208 N. C. 726, 182 S. E. 491.

Where Court Determines Whether Bid Was Grossly Inadequate.—Where, in a suit to enjoin the consummation of a foreclosure sale the issue of whether the bid at the sale was grossly inadequate is raised by the pleadings, the parties are not entitled as a matter of law to have the issue determined by a jury, but the court may hear evidence and determine the issue, and should dismiss the action if it finds that the amount of the bid is the fair value of the land, or should enjoin the consummation of the sale if it finds that the bid is grossly inadequate. Smith v. Bryant, 209 N. C. 213, 183 S. E. 276.

Stated in Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 300 U. S. 124, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886.

Cited in Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 185 S. E. 482.

§ 45-33. Ordering resales before confirmation; receivers for property; tax payments.—The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, any sale is confirmed to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the same in such manner and upon such terms as may be just and equitable: Provided, the rights of all parties in interest, or who may be affected thereby, shall be preserved and protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the property or the rents and proceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal to the supreme court in all cases. (1933, c. 275, s. 2.)

See annotations under § 45-32.

Stated in Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 300 U. S. 124, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886.

Cited in Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 185 S. E. 482.

§ 45-34. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.—When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as afore-

said, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and off-set, but not by way of counter-claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or off-set any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale made and confirmed prior to April 18, 1933. (1933, c. 275, s. 3.)

Editor's Note.—See 12 N. C. Law Rev. 366, for note on "Relief During the Depression."

This section is constitutional and valid. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 185 S. E. 482.

This section has merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent with that in equity. This does not impair the obligation of the contract. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 300 U. S. 124, 131, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886.

It applies only to foreclosure under powers of sale and not to actions to foreclose, and only to instances where the creditor bids in the property, directly or indirectly, and not to instances where the property is bid in by independent third persons. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 185 S. E. 482. See also, Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 300 U. S. 124, 130, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886.

It alters and modifies one of the existing remedies for realization of the value of the security, but cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its full enforcement but limits that right so as to prevent his obtaining more than his due. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 300 U. S. 124, 130, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886.

It is not "emergency legislation," nor is its purpose to provide a "moratorium" for debtors during a temporary period of depression. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 34, 185 S. E. 482.

Amount Bid Is Not Conclusive as to Value.—The amount bid by the creditor at the sale, and applied by him as a payment on the debt, is not conclusive as to the value of the property. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 34, 185 S. E. 482.

This section recognizes the obligation of a debtor who has secured the payment of his debt by a mortgage or deed of trust to pay his debt in accordance with his contract, and does not impair such obligation. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 34, 185 S. E. 482.

And it recognizes the validity of powers of sale contained in mortgages or deeds of trust, but regulates the exercise of such powers by the application of well settled principles of equity. It provides for judicial supervision of sales made and conducted by creditors whose debts are secured by mortgages or deeds of trust, and thereby provides protection for debtors whose property has been sold and purchased by their creditors for a sum which was not a fair value of the property at the time of the sale. Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 210 N. C. 29, 35, 185 S. E. 482.

It is Not Applicable to Sales under Order of Court.—Where the maker of a note assigned a judgment in its favor to the payee as security and the judgment was sold under order of court and purchased by the payee who thereafter realized upon the judgment an amount in excess of the sale price, it was held that the note was properly credited with the sale price and not the amount realized by the payee upon the judgment, and that since the bidding at the sale was open to all and the sale was under order of court, the endorser on the note could not assert this section as a defense to his liability, the statute, by the express language of its proviso, not being applicable. Biggs v. Lassiter, 220 N. C. 761, 18 S. E. (2d) 419.

Cited in Thompson v. Angel, 214 N. C. 3, 197 S. E. 618; Virginia Trust Co. v. Dunlop, 214 N. C. 196, 198 S. E. 645.

§ 45-35. Sections 45-32 to 45-35 not applicable to tax suits.—All laws and clauses of laws in conflict with §§ 45-32 to 45-35, to the extent of such conflict only, are hereby repealed, but said sections shall not apply to tax foreclosure suits or tax sales. (1933, c. 275, s. 4.)

Cited in Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 300 U. S. 124, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886.

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

Cross Reference.—As to provision that wife need not join in purchase-money mortgage, see § 39-13.

Editor's Note.—The effect of this section is to limit the creditor to the property conveyed, when the mortgage is for the purchase money, changing in that respect section 1-123. See 11 N. C. Law Rev. 219.

Foreign Executed Mortgage on Foreign Realty.—This section operates to deprive our courts of jurisdiction to enter the deficiency judgments proscribed, and the section applies to all such deficiency judgments, including those predicated upon notes secured by mortgages or deeds of trust executed in another state upon realty lying therein. Bullington v. Angel, 220 N. C. 18, 16 S. E. (2d) 411, 136 A. L. R. 1054.

Sale under First Mortgage.—This section is not available as a defense to an action on a purchase money note secured by a second mortgage when the land has been sold under the first mortgage for a sum sufficient to pay only the notes secured by the first mortgage, assumed by the purchaser as a part of the purchase price. Brown v. Kirkpatrick, 217 N. C. 486, 8 S. E. (2d) 601.

Cited in footnote to Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. Ed. 1593, 55 S. Ct. 854, 97 A. L. R. 1106; Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co., 300 U. S. 124, 57 S. Ct. 338, 81 L. Ed. 552, 108 A. L. R. 886; Jones v. Casstevens, 222 N. C. 411, 23 S. E. (2d) 303.

Art. 4. Discharge and Release.

§ 45-37. Discharge of record of mortgages and deeds of trust.—Any deed of trust or mortgage

registered as required by law may be discharged and released in the following manner.

1. The trustee or mortgagee or his or her legal representative, or the duly authorized agent or attorney of such trustee, mortagee or legal representative, may, in the presence of the register of deeds or his deputy, acknowledge the satisfaction of the provisions of such deed of trust or mortgage, whereupon the register or his deputy shall forthwith make upon the margin of the record of such deed of trust or mortgage an entry of such acknowledgment of satisfaction, which shall be signed by the trustee, mortgagee, legal representative or attorney, and witnessed by the register or his deputy, who shall also affix his name thereto.

2. Upon the exhibition of any mortgage, deed of trust or other instrument intended to secure the payment of money, accompanied with the bond or note, to the register of deeds or his deputy, where the same is registered, with the endorsement of payment and satisfaction appearing thereon by the payee, mortgagee, trustee, or assignee of the same, or by any chartered active banking institution in the state of North Carolina, when so endorsed in the name of the bank by an officer thereof, the register or his deputy shall cancel the mortgage or other instrument by entry of "satisfaction" on the margin of the record; and the person so claiming to have satisfied the debt may retain possession of the bond or mortgage or other instrument: Provided, that if such mortgage or deed of trust provides in itself for the payment of money and does not call for or recite any note secured by it, then the exhibition of such mortgage or deed of trust alone to the register of deeds or his deputy, with endorsement of payment and satisfaction, shall be sufficient. But if the register or his deputy requires it, he shall file a receipt to him showing by whose authority the mortgage or other instrument was canceled.

3. Upon the exhibition of any mortgage, deed of trust, or other instrument intended to secure the payment of money by the grantor or mortgagor, his agent or attorney, together with the notes or bonds secured thereby, to the register of deeds or his deputy of the county where the same is registered, the deed of trust, mortgage, notes or bonds being at the time of said exhibition more than ten years old, counting from the date of maturity of the last note or bond, the register or his deputy shall make proper entry of cancellation and satisfaction of said instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not.

4. Upon the presentation of any deed of trust given to secure the bearer or holder of any negotiable instruments transferable by delivery, together with all the evidences of indebtedness secured thereby, marked paid and satisfied in full and signed by the bearer or holder thereof, to the register of deeds or his deputy of the county in which same is recorded, the said register or his deputy shall cancel such deed of trust by entry of satisfaction upon the record and such entry of satisfaction shall be valid and binding upon all persons: Provided that prior to such presentation and cancellation, any person rightfully entitled to any such deed of trust, or evidences of indebtedness, which have been lost or stolen, may notify the register of deeds, or his deputy, in writing of such loss or theft, and said register, or his deputy, shall make a marginal entry in writing thereof, together with the date such notice is given, upon the record of the deed of trust concerned, and thereafter same shall not be cancelled as above provided until the ownership of said instruments shall have been lawfully determined: Provided that nothing herein shall be construed so as to impair the negotiability of any instrument otherwise properly negotiable, nor to impair the rights of any innocent purchaser for value thereof.

5. The conditions of every mortgage, deed of trust, or other instrument securing the payment of money shall be conclusively presumed to have been complied with or the debts secured thereby paid as against creditors or purchasers for a valuable consideration from the trustor, mortgagor, or grantor, from and after the expiration of fifteen years from the date when the conditions of such instrument by the terms thereof are due to have been complied with, or the maturity of the last installment of debt or interest secured thereby, unless the holder of the indebtedness secured by such instrument or party secured by any provision thereof shall file an affidavit with the register of deeds of the county where such instrument is registered, in which shall be specifically stated the amount of debt unpaid, which is secured by said instrument, or in what respect any other condition thereof shall not have been complied with, whereupon the register of deeds shall record such affidavit and refer on the margin of the record of the instrument referred to therein the fact of the filing of such affidavit, and a reference to the book and page where it is recorded. Or in lieu of such affidavit the holder may enter on the margin of the record any payments that have been made on the indebtedness secured by such instrument, and shall in such entry state the amount still due thereunder. This entry must be signed by the holder and witnessed by the register of deeds. Provided, however, that this subsection shall not apply to any deed, mortgage, deed of trust or other instrument made or given by any railroad company, or to any agreement of conditional sale, equipment trust agreement, lease, chattel mortgage or other instrument relating to the sale, purchase or lease of railroad equipment on rolling stock, or of other personal property.

Every such entry thus made by the register of deeds or his deputy, and every such entry thus acknowledged and witnessed, shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded. (Rev., s. 1046; Code, s. 1271; 1870-1, c. 217; 1891, c. 180; 1893, c. 36; 1901, c. 46; 1917, c. 49, s. 1; 1917, c. 50, s. 1; 1923, c. 192, s. 1; 1923, c. 195; 1935, c. 47; C. S. 2594.)

Cross Reference.—As to requirement of registration for mortgages and deeds of trust, see § 47-20.

Editor's Note.—The proviso contained in the second clause of this section, and the entire fifth clause were added by the amendments of 1923.

Subsection 4 was added by the amendment of 1935.

Modes of Release.—A mortgage can only be released so as to affect purchasers at a sale under the mortgage by a

cancellation on the margin of the registration thereof under this section, or by a reconveyance of the mortgaged property duly recorded. Barber v. Wadsworth, 115 N. C. 29, 32, 20 S. E. 178.

Construed as a Whole.—This section will be construed to effectuate the legislative intent as gathered from its language, and by harmonizing its various parts when this can reasonably be done. Richmond Guano Co. v. Walston, 187 N. C. 667, 122 S. E. 663.

Not Retroactive.—This section has no application to a mortgage given prior to the passage of the section nor does it wipe out a valid debt existing at the time the statute took effect. Dixie Grocery Co. v. Hoyle, 204 N. C. 109, 113, 167 S. E. 469. And it is not a ground for setting aside a foreclosure of a mortgage given before the passage of the act in an action by a subsequent mortgagee. Roberson v. Matthews, 200 N. C. 241, 156 S. E. 496.

Procedure of Cancellation and Effect.—Regularly, the mortgagee acknowledges the satisfaction and discharge of the mortgage in the presence of the register of deeds, and he enters satisfaction on the margin of the record of the mortgage, and this entry is signed by the mortgagee; and this, done as required by this section, will operate as a deed of release, or reconveyance of the land, embraced by the mortgage. Otherwise the mortgagee must reconvey the land by proper deed. Walker v. Mebane, 90 N. C. 259, 266.

Application Only to Deeds of Trust and Mortgages.—This section giving to the marginal entry of satisfaction the effect of reconveyance applies only to discharge of trust deeds and mortgages. Smith v. King, 107 N. C. 273, 277, 12 S. E. 57.

Subsection 2—Applies to Deeds of Trust.—Subsection 2, of this section does not exclude from the intent and meaning of the statute a deed of trust given for the purpose of securing a loan of money. Richmond Guano Co. v. Walston, 187 N. C. 667, 122 S. E. 663. It was contended in this case that the omission of words "deed of trust" from the provision near the end of the subsection, namely, "that the register or his deputy shall cancel the mortgage or other instrument," conclusively shows that a register is not given power to cancel a deed of trust. However, the court did not assent to this rather ingenious argument, the gist of their conclusions being as follows: Considering this section as a whole the natural and reasonable interpretation of the language must refer the words "mortgage or other instrument" in the clause quoted above to the words of the first line of the subsection "mortgage, deed of trust or other instrument."

Marginal Satisfaction Not Necessary as Between Parties.—When a mortgage debt has been discharged, the mortgage is no longer operative, between the parties, though not marked "satisfied of record." Blake v. Broughton, 107 N. C. 220, 12 S. E. 127.

Form and Validity of Cancellation.—This section must be strictly complied with in order to secure the grantee in a subsequent conveyance of the locus in quo against the prior encumbrance, and where this is done upon exhibit of the canceled conveyance and notes marked paid, the entry should recite correctly the name of the beneficiary and payment of the note, notes or bonds, as the case may be, by the payee thereof. Mills v. Kemp, 196 N. C. 309, 145 S. E. 577.

Same—Notice to Subsequent Mortgagee.—Where an entry of cancellation is made of record by the register of deeds in canceling a mortgage under this section reciting another name as mortgagee, trustee or cestui que trust than that appearing in the registration of the instrument, and that the "bond" was marked paid, when the instrument recited four bonds maturing in series, it is sufficient to set a later grantee or mortgagee upon inquiry as to whether the register of deeds has made a mistake in cancelling the mortgage, and fix him with notice of all facts a reasonable inquiry would have revealed. Mills v. Kemp, 196 N. C. 309, 145 S. E. 557.

Mortgagee Alone May Cancel.—Only the mortgagee, or his duly authorized agent or representative, is entitled to have his mortgage canceled on the book in the office of the register of deeds by subsection 1, of this section; and when the mortgagee cancels the instrument in person, under subsec. 1, it is a complete release and discharge of the mortgage, for in such case the statute does not require the exhibition of the mortgage and the note it secures. First Nat. Bank v. Sauls, 183 N. C. 165, 110 S. E. 865.

Where a note, secured by a mortgage, is assigned and pledged as collateral by the mortgagee to his own note, without an assignment of the mortgage conveying title for the purpose of the security, but only with the surrender of the instrument to the payee of his note, the legal title to the lands remains in the mortgagee, who alone is authorized to cancel the mortgage. First Nat. Bank v. Sauls, 183 N. C. 165, 110 S. E. 865.

Under this section, subsection 2, there is no authority given to the register of deeds to enter cancellation of record upon the cancellation thereof by the mortgagor. Faircloth v. Johnson, 198 N. C. 429, 127 S. E. 346.

Authority of Trustee.—Possession of the papers by the trustee raises a presumption of his authority to cancel the deed of trust of record. Williams v. Williams, 220 N. C. 806, 18 S. E. (2d) 364.

Effect of Forged Cancellation.—When the attorney for the owner of the land agreed to have a mortgage canceled of record, and thereafter surreptitiously obtained the cancellation stamp of the register of deeds and forged his signature so that apparently the mortgage was canceled under the provisions of this section, subsection 2, and relying thereon the proposed purchaser accepted the deed and paid the consideration: It was held that the supposed cancellation of the mortgage was void as against the mortgagee who had no notice thereof until immediately before bringing his action to have the supposed cancellation declared void. Union Central Life Ins. Co. v. Cates, 193 N. C. 456, 137 S. E. 324.

Same—Upon Rights of Third Mortgagee.—As against the mortgagee of a third mortgage given on the same lands, the wrongful cancellation by a forged entry on the margin in the registration book is a nullity, and the lien continues until the payment of the debt it secures, as prior to that of the third mortgage, when the second mortgage lien has lawfully been canceled of record. Swindell v. Stephens, 193 N. C. 474, 137 S. E. 420.

Effect of Prior Fraud.—Where the register of deeds has entered "satisfaction" of a deed of trust, and thereupon subsequent mortgagees, etc., have acted in good faith, the prior fraud or collusion of the parties to the canceled instrument will not affect their rights when they were unaware thereof or had not participated in the fraud. Richmond Guano Co. v. Walston, 187 N. C. 667, 122 S. E. 663.

Cancellation by Attorney—Ratification Thereof.—While an attorney at law has no power to cancel or discharge a deed of mortgage, without authority conferred by his client, yet where such attorney informs his client that he is unable to complete an arrangement agreed upon with the debtor for obtaining a new mortgage and the sale of a stock of goods, upon which the creditor has a lien, unless a cancellation of an old mortgage was made, and that he would cancel the old mortgage by a day named, unless directed not to do so, the attorney receiving no such direction, cancelled the old mortgage, and forwarded to his client the new mortgage and power of sale, and the new mortgage was returned without objection to be registered: It was held to be a ratification by the client of the act of cancellation of the old mortgage. Christian v. Yarborough, 124 N. C. 72, 32 S. E. 383.

Authority of Trustee to Release Part of Property without Satisfaction.—This section only empowers the trustee to "acknowledge satisfaction of the provisions of such trust, etc.," the entry operating as a reconveyance. As was said in Browne v. Davis, 109 N. C. 23, 13 S. E. 703: "It was never contemplated that the trustee could by this means release from an unsatisfied trust specified parts of the land." We do not mean to say however that the creditor might not be estopped, under certain circumstances, from enforcing his claim against that part of the land undertaken to be released by the trustee if done with the creditor's consent and authority properly shown. Woodcock v. Merrimon, 122 N. C. 731, 736, 30 S. E. 321.

Even if an attempted release is under seal it is ineffectual, as the statute authorizing such mode of release confers no power upon a trustee to release specific parts of the property conveyed, and especially where the secured debt remained unsatisfied. Browne v. Davis, 109 N. C. 23, 13 S. E. 703.

Effect of Cancellation by First Mortgagee.—The legal title to mortgaged lands is conveyed by the instrument to the mortgagee, and remains in him until transferred or assigned, for the purpose of the security or the cancellation of the instrument, under this section and where the mortgagor has afterwards conveyed the fee-simple title to another, and receives a mortgage back to secure a note for the balance of the purchase price of which the same mortgagee becomes the holder, his personal cancellation of the first mortgage, without producing it or the note it secures, is a complete discharge or release of the lien thereof, and where he borrows money after such cancellation, and hypothecates the note of the second mortgage as collateral to his own, the lender for the purposes of the security, acting in good faith, has a prior lien on the lands. First Nat. Bank v. Sauls, 183 N. C. 165, 110 S. E. 865.

Entry of "Satisfied" as Evidence of Payment of Debt.—It is competent to introduce as evidence of payment of an indebtedness secured by mortgage the entry of "satisfied" on the margin of the record signed by the mortgagee and witnessed by the register of deeds. Robinson v. Sampson, 121 N. C. 99, 100, 28 S. E. 189.

Not Retroactive in Effect.—Subsection five is not to be construed retroactively so as to effect those who became creditors prior to its passage. Hicks v. Kearney, 127 N. C. 35, 127 S. E. 205.

The conclusive presumption of payment of a note secured by mortgages or deeds of trust of land after fifteen years, etc., is prospective in effect, and inapplicable to such instruments theretofore executed. Const. of N. C., Art. 1, § 17; Humphrey v. Stephens, 191 N. C. 101, 131 S. E. 383; Hicks v. Kearney, 189 N. C. 316, 127 S. E. 205.

Compliance or Payment under Subsection 5.—A careful examiner, when he finds upon the registry an uncanceled mortgage or deed of trust, which still lacks the quality of presumptive compliance or payment arising from the expiration of fifteen years, is put on notice of whatever a reasonable inquiry would disclose. Massachusetts Bonding, etc., Co. v. Knox, 220 N. C. 725, 732, 18 S. E. (2d) 436, 138 A. L. R. 1438. (con. op.).

Payee or Mortgagee Must Be Sui Juris.—In order to constitute a valid cancellation under subsection 2, this section clearly contemplated a payee or mortgagee who is sui juris. Faircloth v. Johnson, 189 N. C. 429, 127 S. E. 346.

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

§ 45-38. Entry of foreclosure.—In case of foreclosure of any deed of trust, or mortgage, the trustee or mortgagee shall enter upon the margin of the record thereof the fact of such foreclosure and the date when, and the person to whom, a conveyance was made by reason thereof. (1923, c. 192, s. 2; C. S. 2594(a).)

Failure of Trustee to Comply Does Not Affect Purchaser.—The purchaser of lands at a foreclosure sale made in conformity with a deed of trust upon lands is not affected with constructive notice of fraud by the omission of the trustee to comply with the provisions of this or the following section. Cheek v. Squires, 200 N. C. 661, 662, 158 S. E. 198.

Cancellation without Knowledge of Cestui.—Where the trustor paid the trustee the amount of the mortgage debt and the trustee entered a cancellation of the deed of trust on the records under this section, without the knowledge of the cestui que trust, the cancellation was held valid. Parham v. Hinnant, 206 N. C. 200, 173 S. E. 26.

§ 45-39. Trustees or mortgagees making sales to file accounts.—It shall be the duty of any trustee or mortgagee making sale under the provisions of any power to file an account with the clerk of the superior court in the county where the land lies as is required by commissioners making sales for partition, and for the auditing and recording of said account the clerk shall be allowed the same fees as are provided for auditing accounts of such commissioners. (1923, c. 192, s. 3; C. S. 2594(b).)

Cross References.—As to procedure for filing, auditing and recording accounts of commissioners making sales for partition, see §§ 46-1 and 1-406. As to clerk's fees for auditing and recording accounts of commissioners making sales for partitions, see § 2-26, wherein is set forth fees of clerks for "auditing and recording the final account of commissioners appointed to sell real estate."

§ 45-40. Register to enter satisfaction on index.—When satisfaction of the provisions of any deed of trust or mortgage is acknowledged and entry of such acknowledgment of satisfaction is made upon the margin of the record of said deed of trust or mortgage, or when the register of deeds or his deputy shall cancel the mortgage or other instrument by entry of satisfaction, then the register of deeds or his deputy shall enter upon the alphabetical indexes kept by him, as required by law, and opposite the names of the grantor and grantee and on a line with the names of said grantor and grantee, the words "satisfied mortgage," if the instrument of which satisfaction has been acknowledged or entered is a mortgage, and the words "satisfied deed of trust," if the instrument of which satisfaction has been acknowledged or entered is a deed of trust. (1909, c. 658, s. 1; C. S. 2595.)

§ 45-41. Recorded deed of release of mortgagee's representative. — The personal representative of any mortgagee or trustee in any mortgage or deed of trust which has heretofore or which may hereafter be registered in the manner required by the laws of this state may discharge and release the same and all property thereby conveyed by deed of quit claim, release or conveyance executed, acknowledged and recorded as is now prescribed by law for the execution, acknowledgment and registration of deeds and mortgages in this state. (1909, c. 283, s. 1; C. S. 2596.)

Cross Reference.—As to provisions regarding probate and registration of deeds and mortgages, etc., see § 47-1 et seq.

§ 45-42. Release of corporate mortgages by corporate officers.—All mortgages and deeds in trust executed to a corporation may be satisfied and so marked of record, as by law provided for the satisfaction of mortgages and deeds in trust, by the president, any vice-president, cashier, assistant cashier, secretary, assistant secretary, treasurer, assistant treasurer, trust officer or assistant trust officer of such corporation signing the name of such corporation by him as such officer. Where mortgages or deeds in trust were marked "satisfied" on the records before the twenty-third day of February, nineteen hundred and nine, by any president, secretary, treasurer or cashier of any corporation by such officer writing his own name and affixing thereto the title of his office in such corporation, such satisfaction is validated, and is as effective to all intents and purposes as if a deed of release duly executed by such corporation had been made, acknowledged and recorded. (1909, c. 283, ss. 2, 3; 1935, c. 271; C. S. 2597.)

Editor's Note.—By the amendment of 1935, vice-president, assistant cashier, assistant secretary, assistant treasurer, trust officer and assistant trust officer, were added to the list of officers enumerated in the first sentence of the section.

Art. 5. Real Estate Mortgage Loans.

§ 45-43. Real estate mortgage loans; commissions.—Any individual or corporation authorized by law to do a real estate mortgage loan business may make or negotiate loans of money on notes secured by mortgages or deeds of trust on real estate bearing legal interest payable semi-annually at maturity or otherwise, and in addition thereto, may charge, collect and receive such commission or fee as may be agreed upon for making or negotiation of any such loan, not exceeding, however, an amount equal to one and one-half per cent of the principal amount of the loan for each year over which the repayment of the said loan is extended: Provided, however, the repayment of such loan shall be in annual installments extending over a period of not less than three nor more than fifteen years, and that no annual installment, other than the last, shall exceed thirty-three and one-third per cent of the principal amount of loans which are payable in installments extending over a period of as much as three years and less than four years, twenty-five per cent of the principal amount of

loans which are payable in installments extending over a period of not less than four years nor more than five years, and fifteen per cent of the principal amount of loans which are payable in installments extending over a period of more than five years and not more than fifteen years. This section shall only apply to the counties of Ashe, Buncombe, Caldwell, Forsyth, Gaston, Henderson, McDowell, Madison, Rutherford, Watauga, and Yancey. (Ex. Sess. 1924, c. 35; 1925, cc. 28, 209; Pub. Loc. 1925, c. 592; modified by 1927, c. 5; Pub. Loc. 1927, c. 187.)

Chapter 46. Partition.

Art. 1. Partition of Real Property.

Art. 2. Partition Sales of Real Property.

Art. 3. Partition of Lands in Two States.

Art. 4. Partition of Personal Property.

Art. 1. Partition of Real Property.

§ 46-1. Partition is a special proceeding.—Partition under this chapter shall be by special proceeding, and the procedure shall be the same in all respects as prescribed by law in special proceedings, except as modified herein. (Rev., s. 2485; Code, s. 1923; 1868-9, c. 122, s. 33; C. S. 3213.)

Cross Reference.—As to special proceedings generally, see § 1-393 et seq.

Editor's Note.—At one time partition could be effected only by a suit in equity of which the several State courts possessing general equity or chancery jurisdiction had cognizance. This was changed in 1868 and the proceedings made special.

Tenant in Common Entitled to Partition.—Ordinarily, a tenant in common in realty or personalty is entitled to partition of the property. Chadwick v. Blades, 210 N. C. 609, 188 S. E. 198.

Chapter Does Not Apply to Partition by Agreement.—This chapter applies to compulsory or judicial partition. It does not apply to partition by agreement. Keener v. Den, 73 N. C. 132. As to the authority of the court in a partition by agreement, and the procedure therein, see Outlaw v. Outlaw, 184 N. C. 255, 114 S. E. 4; Newsome v. Harrell, 168 N. C. 295, 84 S. E. 337.

When the proceeding for partition becomes adverse to him the plaintiff is not allowed to take a voluntary nonsuit. Haddock v. Stocks, 167 N. C. 70, 83 S. E. 9.

Applied in Gibbs v. Higgins, 215 N. C. 201, 1 S. E. (2d) 554.

Cited in Skinner v. Carter, 108 N. C. 106, 12 S. E. 908.

§ 46-2. Venue in partition.—The proceeding for partition, actual or by sale, must be instituted in the county where the land or some part thereof lies. If the land to be partitioned consists of one tract lying in more than one county, or consists of several tracts lying in different counties, proceedings may be instituted in either of the counties in which a part of the land is situated, and the court of such county wherein the proceedings for partition are first brought shall have jurisdiction to proceed to a final disposition of said proceedings, to the same extent as if all of said land was situate in the county where the proceedings were instituted. (Rev., s. 2486; Code, s. 1898; 1868-9, c. 122, s. 7; Ex. Sess. 1924, c. 62, s. 1; C. S. 3214.)

Editor's Note.—The latter part of the section, stating the

extent of the jurisdiction of the court, and the provision for partition of land consisting of several tracts, were added by the Public Laws of 1924, Extra Session.

Waiver of Venue.—Construing secs. 1-82, 1-83 and this section, in pari materia, venue cannot be jurisdictional, and it may always be waived. Pleading to the merits waives defective venue. Venue is a matter not to be determined by the common law, but by legislative regulation. Clark v. Carolina Homes, 189 N. C. 703, 128 S. E. 20, 25. For distinctions between venue and jurisdiction, see the Editor's Note to sec. 1-76.

§ 46-3. Petition by cotenant. — One or more persons claiming real estate as joint tenants or tenants in common may have partition by petition to the superior court. (Rev., s. 2487; Code, s. 1892; 1886-9, c. 122, s. 1; C. S. 3215.)

I. In General.
II. Parties.
III. Plea of Sole Seizin.

Cross Reference.

As to procedure for sale or mortgage of property where there is a vested interest and a contingent remainder to uncertain persons, see § 41-11.

I. IN GENERAL.

Jurisdiction of Superior Court.—The superior court acquires jurisdiction over proceedings to partition lands upon their being transferred by the clerk thereto, in term, and may proceed therewith and fully determine all matters in controversy. In such case it is immaterial whether it was properly instituted before the clerk. Baggett v. Jackson, 160 N. C. 26, 76 S. E. 86.

Necessity of Possession.—Tenants in common who are not in possession can not procure an order for partition. Church v. Thornton, 158 N. C. 119, 73 S. E. 810; Wood v. Sugg, 91 N. C. 93, 49 Am. Rep. 639.

Tenants in common may make a valid agreement, either at the time of the creation of the tenancy or afterwards, whereby the right to partition is modified or limited, provided the waiver of the right to partition is not for an unreasonable length of time. Chadwick v. Blades, 210 N. C. 609, 188 S. E. 198. See also, 15 N. C. Law Rev. 279.

The Petition—Omission of Term of Court.—A petition entitled in the original cause, but addressed to the clerk, in special proceedings for partition is not demurrable because it does not give the term of court or any court in the caption. Hartsfield v. Bryan, 177 N. C. 166, 98 S. E. 379.

Same—Possession.—If the petition alleges that the petitioners are tenants in common in fee, it will not be dismissed for failure to allege that they are entitled to immediate possession. Epley v. Epley, 111 N. C. 505, 16 S. E. 321; Alexander v. Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep., 757.

Same—Leave to Amend.—On petition before the clerk for partition, permission to amend the petition is purely within the discretion of the clerk. Simmons v. Jones, 118 N. C. 472, 24 S. E. 114.

Lands Not Included in Petition.—The petitioners are not entitled as a matter of right to have a part only of the lands divided, and the defendants may have other land held in common included. Luther v. Luther, 157 N. C. 499, 73 S. E. 102. But see section 46-16 and note thereto as to partial partition.

Not Proper Remedy for Ouster.—Where a tenant in common has been actually ousted by his cotenant, his remedy is by ejectment, and not partition. Thomas v. Garvin, 15 N. C. 223, 25 Am. Dec. 708, cited in note in 20 L. R. A. 627.

Divorced Couple Entitled to Partition.—When marriage is dissolved by divorce, the husband and wife become tenants in common of property formerly held by the entirety, and are entitled to partition. McKinnon, etc., Co. v. Caulk, 167 N. C. 411, 83 S. E. 559, L. R. A. 1915C, 396.

Partition as to Churches. — Churches belonging to an association controlling a school are not entitled to partition. Church v. Thornton, 158 N. C. 119, 73 S. E. 810.

Question of Fact for Court.—Whether or not, in a proceeding instituted under this section, for partition of land, held by two or more persons as tenants in common, between or among such persons, there shall be an actual partition, or a sale for partition, as authorized by statute, involves a question of fact to be determined by the court. Talley v. Murchison, 212 N. C. 205, 206, 193 S. E. 148.

Applied in Gibbs v. Higgins, 215 N. C. 201, 1 S. E. (2d) 554.

II. PARTIES.

In General.—Parties claiming to hold in common may properly be brought in as defendants. McKeel v. Holloman, 163 N. C. 132, 79 S. E. 445. Partition can be made only by tenants in common who are seized of the freehold, and not by those in remainder or reversion. Ordinarily, partition lies only in favor of one who has a seizin and right of immediate possession. Osborne v. Mull, 91 N. C. 203.

Sale or Partition of Reversions, Remainders and Executory Interests.—This section is no authority for partition as between the life tenant and remaindermen, except where the proceeding is brought by the remaindermen, and the life tenant is joined. Burton v. Cahill, 192 N. C. 505, 510, 135 S. E. 332. For a full treatment of the interests mentioned in the catch-line, see section 46-23 and the notes thereto.

Persons Bound. — Persons not parties are not bound. Henderson v. Wallace, 72 N. C. 451; Patillo v. Lytle, 158 N. C. 92, 73 S. E. 200. And if named as parties they must be served with process. Patillo v. Lytle, 158 N. C. 92, 73 S. E. 200.

Partition by Infant and Another.—Where partition was brought by a minor and another, the latter was bound by the judgment, although it was not approved by the judge of the court. Lindsay v. Beaman, 128 N. C. 189, 38 S. E. 811.

Claimant of Paramount Title.—In an action for partition of lands, it is proper to allow another party claiming paramount title to the land to intervene and assert his rights. Roughton v. Duncan, 178 N. C. 5, 100 S. E. 78. But such a claimant may be estopped by his laches. Thomas v. Garvin, 15 N. C. 223, 25 Am. Dec. 703.

Administrator Not a Party.—In an action by the heirs at law for partition of an intestate's lands, the administrator cannot be made a party defendant because he opposes the partition and wishes in the same action to make application to sell the land for debts of the estate. Garrison v. Cox, 99 N. C. 478, 6 S. E. 124.

Judgment Creditors and Mortgagees.—In proceedings for partition, judgment creditors of the individual tenants, and their mortgagees, are proper parties to the proceedings; and where such lienors have been made parties thereto, it is error for the trial judge to dismiss the action as to them. Holley v. White, 172 N. C. 77, 89 S. E. 1061.

The mortgagee of one tenant in common is not a necessary party to special proceedings to partition the land. Rostan v. Huggins, 216 N. C. 386, 5 S. E. (2d) 162, 126 A. L. R. 410.

Making Additional Party for Purpose of Setting Aside Sale.—An application to be made a party defendant in partition proceedings after confirmation of sale was properly denied, where it was based on deeds from persons who never had claimed any title and accompanied by a motion to set aside the sale to permit his principals to make a bid. Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113.

Presence of Unnecessary Party.—The presence of an unnecessary party, in proceedings for partition of lands, will be regarded as immaterial, except as affecting costs. Baggett v. Jackson, 160 N. C. 26, 76 S. E. 86.

Unknown Parties.—See section 46-6 and notes thereto.

III. PLEA OF SOLE SEIZIN.

Effect of Plea.—Where the plea of sole seizin is set up, the effect is practically to convert it into an action of ejectment. When it is not set up, the parties are taken to be tenants in common, and the only inquiry is as to the interests owned. Haddock v. Stocks, 167 N. C. 70, 74, 83 S. E. 9; Graves v. Barrett, 126 N. C. 267, 270, 35 S. E. 539. Where the plea is set up the proper course is for the court to try title to the land. Purvis v. Wilson, 50 N. C. 22, 69 Am. Dec. 773.

Plea Not Put in before Partition Ordered. — Where, in partition, a plea of sole seisin is not put in before the order of partition is made, it will be considered as waived. Wright v. McCormick, 69 N. C. 14.

Burden of Proof.—Where the defendants plead sole seizin in proceedings to partition lands, the burden of proof is with the plaintiff, which will devolve upon the defendant to establish adverse possession, when relied upon for title, after a prima facie case of tenancy in common is made out. Lester v. Harvard, 173 N. C. 83, 91 S. E. 698.

Effect of Adjudication When Title Put in Issue.—While proceedings for the partition of lands do not ordinarily place the title at issue, such may be done by the tenants in common, and the judgment thereunder will estop them. Baugham v. Trust Co., 181 N. C. 406, 107 S. E. 431; Buchanan v. Harrington, 152 N. C. 333, 67 S. E. 747, 136 Am. St. Rep. 838.

Cited in Brittain v. Mull, 91 N. C. 498, 504.

§ 46-4. Surface and minerals in separate owners; partitions distinct. — When the title to the

mineral interests in any land has become separated from the surface in ownership, the tenants in common or joint tenants of such mineral interests may have partition of the same, distinct from the surface, and without joining as parties the owner or owners of the surface; and the tenants in common or joint tenants of the surface may have partition of the same, in manner provided by law, distinct from the mineral interest and without joining as parties the owner or owners of the mineral interest. In all instances where the mineral interests and surface interests have thus become separated in ownership, the owner or owners of the mineral interests shall not be compelled to join in a partition of the surface interests, nor shall the owner or owners of the surface interest be compelled to join in a partition of the mineral interest, nor shall the rights of either owner be prejudiced by a partition of the other interests. (Rev., s. 2488; 1905, c. 90; C. S. 3216.)

§ 46-5. Petition by judgment creditor of cotenant; assignment of homestead.—When any person owns a judgment duly docketed in the superior court of a county wherein the judgment debtor owns an undivided interest in fee in land as a tenant in common, or joint tenant, and the judgment creditor desires to lay off the homestead of the judgment debtor in the land and sell the excess, if any, to satisfy his judgment, the judgment creditor may institute before the clerk of the court of the county wherein the land lies a special proceeding for partition of the land between the tenants in common, making the judgment debtor, the other tenants in common and all other interested persons parties to the proceeding by summons. The proceeding shall then be in all other respects conducted as other special proceedings for the partition of land between tenants in common. Upon the actual partition of the land the judgment creditor may sue out execution on his judgment, as allowed by law, and have the homestead of the judgment debtor allotted to him and sell the excess, as in other cases where the homestead is allotted under execution. The remedy provided for in this section shall not deprive the judgment creditor of any other remedy in law or in equity which he may have for the enforcement of his judgement lien. (Rev., s. 2489; 1905, c. 429; C. S. 3217.)

Cross References.—As to homestead and exemptions in sale under execution, see § 1-369 et seq. As to execution, see § 1-302 et seq.

Intervention in Partition Proceeding of Cotenant.—See Edmonds v. Wood, 222 N. C. 118, 122, 22 S. E. (2d) 237.

§ 46-6. Unknown parties; summons and representation.—If, upon the filing of a petition for partition, it be made to appear to the court by affidavit or otherwise that there are any persons interested in the premises whose names are unknown to and cannot after due diligence be ascertained by the petitioner, the court shall order notices to be given to all such persons by a publication of the petition, or of the substance thereof, with the order of the court thereon, in one or more newspapers to be designated in the order. If after such general notice by publication any person interested in the premises and entitled to notice fails to appear, the court shall in its discretion appoint some disinterested person to represent the owner of any shares in the property to be divided, the ownership of which is unknown and unrepresented. (Rev., s. 2490; 1887, c. 284; C. S. 3218.)

Appointment Discretionary.—It is discretionary, by the express terms of the statute, with the trial judge as to whether he will appoint some disinterested person to represent the interest of unknown persons, etc., and this discretion is not reviewable. Lawrence v. Hardy, 151 N. C. 123, 65 S. E. 766.

Purchaser Acquires Good Title.—When the service of summons has been made by publication on parties unknown, as required by this section, the proceedings being regular upon their face, and the court having jurisdiction of the subject matter, a purchaser for full value without notice acquires title, free from claim or demand of such heir upon whom summons has been thus served. Lawrence v. Hardy, 151 N. C. 123, 65 S. E. 766.

Purchaser Cannot Resist Payment of Purchase Price. — Where the method prescribed by this section is followed, a purchaser may not successfully resist payment of the purchase price of the land on the ground of a defect in title for that the commissioner's deed would not preclude the claim of the missing heir. Bynum v. Bynum, 179 N. C. 14, 101 S. E. 527.

§ 46-7. Commissioners appointed. — The superior court shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common, or joint tenants. Provided, in cases where the land to be partitioned lies in more than one county, then the court may appoint such additional commissioners as it may deem necessary from counties where the land lies other than the county where the proceedings are instituted. (Rev., s. 2487; Code, s. 1892; 1868-9, c. 122, s. 1; Ex. Sess. 1924, c. 62, s. 2; C. S. 3219.)

Editor's Note.—The provision of this section in regard to the appointment of additional commissioners when the land lies in more than one county was added to the original section by the amendment of 1924.

Confirmation and Approval by Two Appraisers Held Error.—Testator's children selected three appraisers in accordance with the will, but prior to final report one of the appraisers died, whereupon the court ordered the two surviving appraisers to complete the appraisal and file report, which report was later approved by the court. It was held that under the terms of the will and under this section, it is necessary that three appraisers act in the matter, although two of them may file the report, § 46-17, and the superior court should have appointed a third appraiser, and the confirmation and approval of the report based upon the findings of but two appraisers is reversible error. Sharpe v. Sharpe, 210 N. C. 92, 185 S. E. 634.

§ 46-8. Oath of commissioners.—The commissioners shall be sworn by a justice of the peace, or other person authorized to administer oaths, to do justice among the tenants in common, in respect to such partition, according to their best skill and ability. (Rev., s. 2492; Code, s. 1893; 1868-9, c. 122, s. 2; C. S. 3220.)

Cross Reference.—As to form of oath, see § 11-11.

§ 46-9. Delay or neglect of commissioner penalized.—If, after accepting the trust, any of the commissioners unreasonably delay or neglect to execute the same, every such delinquent commissioner shall be liable for contempt and may be removed, and shall be further liable to a penalty of fifty dollars, to be recovered by the petitioner. (Rev., s. 2498; Code, s. 1901; 1868-9, s. 122, s. 10; C. S. 3221.)

§ 46-10. Commissioners to meet and make partition; equalizing shares. — The commissioners, who shall be summoned by the sheriff, or any constable, must meet on the premises and partition the same among the tenants in common, or joint

tenants, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition. (Rev., s. 2491; Code, s. 1894; 1887, c. 284, s. 2; 1868-9, c. 122, s. 3; C. S. 3222.)

Applies Only to Compulsory Partition or Sale. — Where the partition was not compulsory but was under an agreement between cotenants, this section is not applicable. Outlaw v. Outlaw, 184 N. C. 255, 258, 114 S. E. 4; Newsome v. Harrell, 168 N. C. 295, 84 S. E. 337.

Action of Two Commissioners Valid.—Where three commissioners are appointed to partition land the action of any two of them is valid. Thompson v. Shemwell, 93 N. C. 222. And this action may consist in filling the vacancy caused by the absence of the third commissioner, when done in the presence of the interested parties and without their objection. Simmons v. Foscue, 81 N. C. 86.

By the very terms of section 46-17, the signature of two of the commissioners to their report is sufficient. Thompson v. Shemwell, supra.

Existing Easement.—It would seem that existing easements are not destroyed by a division in partition. See Jones v. Swindell, 176 N. C. 34, 96 S. E. 663.

Improvements.—A tenant in common is entitled to recover against a co-tenant for betterments he has placed on the land. Daniel v. Dixon, 163 N. C. 137, 79 S. E. 425. Section 1-340 does not apply in such a case. See that section and the last paragraph of the notes thereto.

Where no appeal is taken from the order allowing for the improvements, it concludes the plaintiff from having the good faith of the defendant, in making the improvements, inquired into. Fisher v. Toxaway Co., 171 N. C. 547, 88 S. E. 887.

But where in a partition an excessive portion is allotted to one, which is reduced on a re-allotment, he cannot be allowed for improvements made on the excess, as it was his own folly to make them before obtaining a final decree and his deed. Carland v. Jones, 55 N. C. 506.

Basis of Owelty.—The right to owelty on an unequal partition is based on the implied warranty attaching to each share from all the others. Cheatham v. Crews, 88 N. C. 38; Nixon v. Lindsay, 55 N. C. 230.

Owelty Not Mere Lien Debt. — The charge in partition upon the more valuable shares is not a mere debt secured by lien. The debtor is a tenant in common with the holder of the share in whose favor the decree is entered to the extent of the charge, until the same shall be satisfied. In re Walker, 107 N. C. 340, 12 S. E. 136.

Same—Charge upon Land.—The sums charged upon "the more valuable dividends," in partitions of lands are charges, not upon the persons of the owners of such dividends, but upon the land alone. Young v. Trustees, 62 N. C. 261.

Owelty Follows Land.—Charges upon land for equality of partition follow the land into the hands of all persons to whom it may come; and they are held to be affected by constructive notice. Powell v. Weatherington, 124 N. C. 40, 32 S. E. 380; Dobbin v. Rex, 106 N. C. 444, 11 S. E. 260. As to the docketing of owelty charges, see section 46-21.

When Land Charged with Payment of Several Shares.—Payment under execution of the charge in favor of one share does not discharge the land in the hands of the purchaser from the payment of a charge in favor of another share. Meyers v. Rice, 107 N. C. 24, 12 S. E. 66.

Effect of Discharge in Bankruptcy on Owelty.—A discharge in bankruptcy does not cancel the charge of owelty of partition against the land of the bankrupt. In re Walker, 107 N. C. 340, 12 S. E. 136.

Division of Costs.—The costs in proceedings for partition (including the expenses of the partition) are charges upon the several shares in proportion to their respective values. Hinnant v. Wilder, 122 N. C. 149, 150, 29 S. E. 221.

Costs Precede Homestead Exemption.—Where in an ex parte proceeding for the partition of lands, partition was duly made and one part was assigned in severalty to A, and A failed to pay the costs adjudged against her and the share allotted to her was sold on execution issued on the judgment, and no homestead was allotted to A, who has no other land, and her interest was not worth $1,000, in an action by the heirs of A against the purchaser at the execution sale, the sale was held to be valid. Hinnant v. Wilder, 122 N. C. 149, 150, 29 S. E. 221.

Procedure to Subject Land Charged. — A motion in the cause for execution is the proper proceeding to subject land charged with owelty of partition to the payment thereof. Meyers v. Rice, 107 N. C. 24, 12 S. E. 66.

Charges for equality of partition should be enforced by proceedings in rem against the more valuable shares of the land divided, and not by personal judgments against the owners thereof. Young v. Trustees, 62 N. C. 261; Waring v. Wadsworth, 80 N. C. 345; Meyers v. Rice, 107 N. C. 24, 12 S. E. 66, 67.

Confirmation Necessary to Execution.—No execution can issue to satisfy a charge against land in partition proceedings until the commissioners' report has been confirmed. In re Ausborn, 122 N. C. 42, 29 S. E. 56.

Parties to Action to Recover Owelty of Partition.—The widow of the party upon whose land a charge is placed is not a necessary party to an action brought to recover the sum charged. Ruffin v. Cox, 71 N. C. 253.

Counterclaim.—A cotenant, who is charged in the partition proceedings with owelty, may set up by way of counterclaim damages sustained by his eviction from part of the land awarded to him. Huntley v. Cline, 93 N. C. 458.

Cited in Capps v. Capps, 85 N. C. 408, 409.

§ 46-11. Owelty to bear interest.—The sums of money due from the more valuable dividends shall bear interest until paid. (Rev., s. 2496; Code, s. 1899; 1868-9, c. 122, s. 8; C. S. 3223.)

§ 46-12. Owelty from infant's share due at majority.—When a minor to whom a more valuable dividend shall fall is charged with the payment of any sum, the money shall not be payable until such minor arrives at the age of twenty-one years, but the general guardian, if there be one, must pay such sum whenever assets shall come into his hands, and in case the general guardian has assets which he did not so apply, he shall pay out of his own proper estate any interest that may have accrued in consequence of such failure. (Rev., s. 2497; Code, s. 1900; 1868-9, c. 122, s. 9; C. S. 3224.)

Charged Land Inherited by Infants. — Owelty may be enforced against land inherited by infants from an adult who owned the land when the owelty was made a charge against it, though as to land partitioned to an infant cotenant owelty is not payable until he reaches his majority. Powell v. Weatherington, 124 N. C. 40, 32 S. E. 380.

§ 46-13. Partition where shareowners unknown or title disputed.—If there are any of the tenants in common, or joint tenants, whose names are not known or whose title is in dispute, the share or shares of such persons shall be set off together as one parcel. If, in any partition proceeding, two or more appear as defendants claiming the same share of the premises to be divided, or if any part of the share claimed by the petitioner is disputed by any defendant or defendants, it shall not be necessary to decide on their respective claims before the court shall order the partition or sale to be made, but the partition or sale shall be made, and the controversy between the contesting parties may be afterwards decided either in the same or an independent proceeding. If two or more tenants in common, or joint tenants, by petition or answer, request it, the commissioners may, by order of the court, allot their several shares to them in common, as one parcel, provided such division shall not be injurious or detrimental to any co-tenant or joint tenant. (Rev., ss. 2491, 2511; Code, s. 1894; 1868-9, c. 122, s. 3; 1887, c. 284, ss. 2, 4, 1937, c. 98; C. S. 3225.)

Editor's Note.—The 1937 amendment added the last sentence. While the primary purpose of the partition proceeding is to allot to each of the former cotenants his share of the property in severalty, this amendment by no means militates

against such purpose but makes it possible for some of the former cotenants, who find it economically desirable, to have their several shares allotted to them as one parcel so that they may again hold as cotenants that parcel of land. 15 N. C. Law Rev. 355.

§ 46-14. Judgments in partition of remainders validated.—In all cases where land has been conveyed by deed, or devised by will, upon contingent remainder, executory devise, or other limitation, where a judgment of partition has been rendered by the superior court authorizing a division of said lands upon the petition of the life tenant or tenants and all other persons then in being who would have taken such land if the contingency had then happened, and those unborn being duly represented by guardian ad litem, such judgment of partition authorizing a division of said lands among the respective life tenants and remaindermen, or executory devisees, shall be valid and binding upon the parties thereto and upon all other persons not then in being. (1933, c. 215, s. 1.)

§ 46-15. Dower claims settled on partition; dower valued.—When there is dower or right of dower on any land, petitioned to be sold or divided in severalty by actual partition, the woman entitled to dower or right of dower therein may join in the petition. The land to be divided in severalty shall be allotted to the tenants in common, or joint tenants, subject to the dower right or dower, and either may be asked and assigned at the same time that partition thereof is made and by same commissioners. On a decree of sale, the interest of one-third of the proceeds shall be secured and paid to her annually; or in lieu of such annual interest, the value of an annuity of six percent on such third, during her probable life, shall be ascertained and paid to her absolutely out of the proceeds. (Rev., s. 2517; Code, s. 1909; 1893, c. 341; 1868-9, c. 122, s. 18; C. S. 3226.)

Cross References.—As to computation of present value of annuity, see § 8-47. As to allotment of dower generally, see § 30-11 et seq.

Partition and Dower in Same Proceedings.—Partition of lands and the allotment of dower therein may be had in the same proceedings. Baggett v. Jackson, 160 N. C. 26, 76 S. E. 86. See also Vannoy v. Green, 206 N. C. 77, 173 S. E. 277.

Allotment before Division. — The widow of a deceased owner of lands held by him in common with another may have her dower interest therein set apart to her before division of the lands among the heirs at law. Dudley v. Tyson, 167 N. C. 67, 82 S. E. 1025.

Immediate Payment of Dower.—In a sale for partition of land subject to dower, where the widow is a party, her life estate may be valued in money and the money paid to her in lieu of the interest for life on one-third of the proceeds of the sale. Ex Parte Winstead, 92 N. C. 703.

Dower Allotment Cannot Be Attacked Collaterally.—An allotment to the widow in dower proceedings cannot be attacked collaterally in proceedings for partition of the lands of the deceased ancestor by his heirs at law. Dudley v. Tyson, 167 N. C. 67, 82 S. E. 1025.

Cited in High v. Pearce, 220 N. C. 266, 274, 17 S. E. (2d) 108 (con. op.).

§ 46-16. Partial partition; balance sold or left in common.—In all proceedings under this chapter actual partition may be made of a part of the land sought to be partitioned and a sale of the remainder; or a part only of any land held by tenants in common, or joint tenants, may be partitioned and the remainder held in cotenancy. (Rev., s. 2506; 1887, c. 214, s. 1; C. S. 3227.)

Intent of Section.—This section does not authorize a partition or a sale of the undivided interest of some of the cotenants, in an entire tract of land, leaving the undivided interest of other cotenants unaffected. Patillo v. Lytle, 158 N. C. 92, 73 S. E. 200, citing Brooks v. Austin, 95 N. C. 474.

§ 46-17. Report of commissioners; contents; filing.—The commissioners, within a reasonable time, not exceeding sixty days after the notification of their appointment, shall make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust and describing particularly the land or parcels of land divided, and the share allotted to each tenant in severalty, with the sum or sums charged on the more valuable dividends to be paid to those of inferior value. The report shall be filed in the office of the superior court clerk. (Rev., s. 2494; Code, s. 1896; 1868-9, c. 122, s. 5; C. S. 3228.)

Alteration of Report. — The report of commissioners in partition proceedings, dividing land, when filed, approved, confirmed, recorded and registered, becomes a muniment of title, and the commissioners, without the order and approval of the court, have no right to alter or change the same. Clinard v. Brummell, 130 N. C. 547, 41 S. E. 675.

Findings as to Value of Property.—The findings of commissioners on value is not subject to review in the appellate court. Fisher v. Toxaway Co., 171 N. C. 547, 88 S. E. 887.

Under this section, two commissioners can make the report, but the parties whose rights are to be effected have the right to have three disinterested parties appointed under the will or statute, so that the three can consider the questions involved. Sharpe v. Sharpe, 210 N. C. 92, 98, 185 S. E. 634.

§ 46-18. Map embodying survey to accompany report.—The commissioners are authorized to employ the county surveyor or, in his absence or if he be connected with the parties, some other surveyor, who shall make out a map of the premises showing the quantity, courses and distances of each share, which map shall accompany and form a part of the report of the commissioners. (Rev., s. 2493; Code, s. 1895; 1868-9, c. 122, s. 4; C. S. 3229.)

§ 46-19. Confirmation and impeachment of report.—If no exception to the report of the commissioners is filed within twenty days, the same shall be confirmed. Any party after confirmation may impeach the proceedings and decrees for mistake, fraud or collusion by petition in the cause: Provided, innocent purchasers for full value and without notice shall not be affected thereby. (Rev., s. 2494; Code, s. 1896; 1868-9, c. 122, s. 5; C. S. 3230.)

Proceedings Interlocutory until Confirmation.—Until the decree of confirmation by the judge, the proceedings for the partition of lands are not final, but interlocutory, and rest in his discretion. Tayloe v. Carrow, 156 N. C. 6, 72 S. E. 76.

Effect of Failure to Object.—Where no exceptions were filed and no objections made, plaintiff was entitled to a decree of confirmation as a matter of law. Roberts v. Roberts, 143 N. C. 309, 55 S. E. 721.

Time for Filing Exception.—Exceptions to the report of the commissioners appointed to make partition of land must be filed within twenty days after the report is filed. Floyd v. Rock, 128 N. C. 10, 38 S. E. 33. As to objection to confirmation, see sec. 46-32 and notes thereto.

Sufficiency of Exception.—Where within 20 days after filing the report the defendant notified the clerk that he desired to file exceptions, whereupon the clerk made a memorandum that the defendant had objected to the report, and later amended exceptions, setting out various grounds why the report should not be confirmed, were filed with the clerk without objection, it was held error to confirm the report on the ground that no exception had been filed within 20 days. McDevitt v. McDevitt, 150 N. C. 644, 64 S. E. 761.

Resale after Confirmation.—After confirmation a resale

may be ordered for sufficient cause shown; but should be upon petition or notice to the purchaser who has acquired equitable rights under the first confirmation. Ex parte White, 82 N. C. 378.

Estoppel as to Lands Not Included in Petition.—When land is assigned in a decree in a partition proceeding with the knowledge and consent of the parties thereto, the administrator of one of the parties is estopped from denying that the land was not originally included in the petition for partition. Lindsay v. Beaman, 128 N. C. 189, 38 S. E. 811.

Appeals May Be to Different Judges.—When appeals from the clerk in proceedings for partition are made successively to different judges, a judge before whom comes a later appeal may set aside or modify a former interlocutory order, it not being required for that purpose that the same judge should have passed upon the former appeals. Tayloe v. Carrow, 156 N. C. 6, 72 S. E. 76.

Jurisdiction of Judge in Chambers.—A judge in chambers has jurisdiction of appeals from the report of commissioners appointed in special proceedings to partition land. McMillan v. McMillan, 123 N. C. 577, 31 S. E. 729.

Right of Clerk to Set Aside Former Order.—Where it appears of record that the clerk of the court in proceedings to partition lands had rendered a judgment in the plaintiff's favor, and had set it aside on the defendant's motion made before him seventeen months thereafter upon allegation of fraud in its procurement, and that the plaintiff had fraudulently prevented the defendant from appearing and defending, to which the plaintiff did not except, the plaintiff's motion in the superior court, in the cause transferred, for judgment in his favor upon the whole record cannot be allowed. It is held that the clerk was within the provisions of this section in setting aside his former order, in plaintiff's favor, on defendant's motion, at the time it was made before him. Turner v. Davis, 163 N. C. 38, 79 S. E. 257.

Statute of Limitations. — Where the commissioners to divide lands held by tenants in common award owelty to one of them to equalize his share with the other, the ten-year statute of limitations begins to run from the confirmaion of the report by the clerk, approved by the judge, and the fact that the clerk has not docketed the judgment in the seven years, as between the parties having at least constructive notice of the proceedings, does not alone repel the bar of the statute. Cochran v. Colson, 192 N. C. 663, 135 S. E. 794.

Some of the earlier cases, since overruled, held that limitations do not run aganist a charge on land for owelty of partition. In re Ausborn, 122 N. C. 42, 29 S. E. 56; Sutton v. Edwards, 40 N. C. 425.

Under the Acts of 1837.—For a case where proceedings for a partition of lands were under the provisions of chapter 85 Revised Statutes of 1837, which did not contain provisions similar to this section and section 46-20, see Power Co. v. Taylor, 188 N. C. 351, 124 S. E. 634.

§ 46-20. Report and confirmation enrolled and registered; effect.—Such report, when confirmed, together with the decree of confirmation, shall be enrolled and certified to the register of deeds and registered in the office of the county where such real estate is situated, and shall be binding among and between the claimants, their heirs and assigns. (Rev., s. 2495; Code, s. 1897; 1868-9, c. 122, s. 6; C. S. 3231.)

Effect of Adjudication before Clerk.—In proceedings to partition lands among tenants in common, the adjudication before the clerk operates as an estoppel as to them and those in privity with them, when no appeal has been taken. Southern State Bank v. Leverette, 187 N. C. 743, 748, 123 S. E. 68 and cases cited. Matters not in issue and claims for different rights are not, however, concluded. Gillans v. Edmonson, 154 N. C. 127, 69 S. E. 9.

Color of Title.—The record of the proceedings constitutes color of title. Lindsay v. Beaman, 128 N. C. 189, 38 S. E. 811.

Admissibility of Record in Evidence.—The record of the proceedings is admissible in evidence though not recorded as required by this section. Lindsay v. Beaman, 128 N. C. 189, 38 S. E. 811.

§ 46-21. Clerk to docket owelty charges; no release of land and no lien.—In case owelty of partition is charged in favor of certain parts of said land and against certain other parts, the clerk shall enter on the judgment docket the said owelty charges in like manner as judgments are entered on said docket, persons to whom parts are allotted in favor of which owelty is charged being marked plaintiffs on the judgment docket, and persons to whom parts are alloted against which owelty is charged being marked defendants on said docket; said entry on said docket shall contain the title of the special proceeding in which the land was partitioned, and shall refer to the book and page in which the said special proceeding is recorded; when said owelty charges are paid said entry upon the judgment docket shall be marked satisfied in like manner as judgments are canceled and marked satisfied; and the clerk shall be entitled to the same fees for entering such judgment of owelty as he is entitled to for docketing other judgments: Provided, that the docketing of said owelty charges as hereinbefore set out shall not have the effect of releasing the land from the owelty charged in said special proceeding: Provided, any judgment docketed under this section shall not be a lien on any property whatever, except that upon which said owelty is made a specific charge. (1911, c. 9, s. 1; C. S. 3232.)

Effect of Failure to Docket.—Failure of the clerk to docket the owelty of partition upon his judgment docket, within seven years after such date, does not affect the right of plaintiff to enforce payment of the owelty by execution. Cochran v. Colson, 192 N. C. 663, 135 S. E. 794.

Art. 2. Partition Sales of Real Property

§ 46-22. Sale in lieu of partition.—Whenever it appears by satisfactory proof that an actual partition of the lands cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof. (Rev., s. 2512; Code, ss. 1904, 1921; 1868-9, c. 122, ss. 13, 31; C. S. 3233.)

Cross Reference.—As to power of court to enter judgment for money due on judicial sales, see § 1-243.

Entitled to Actual Partition.—Tenants in common are entitled to an actual partition, if it can be made without injury to any of the co-owners. Tayloe v. Carrow, 156 N. C. 6, 72 S. E. 76; Gillespie v. Allison, 115 N. C. 542, 548, 20 S. E. 627.

Tenant Entitled to Homestead.—That a tenant in common is entitled to a homestead against the judgment cannot prevent a sale for partition. Holley v. White, 172 N. C. 77, 89 S. E. 1061.

Purchase of Lands by Tenant in Common.—A tenant in common suing to partition the premises controlled by h m as agent for the cotenants cannot, on being appointed commissioner to sell the premises, purchase them at the sale nor procure any one to do it for him, and he cannot speculate for his own benefit or do any act detrimental to the interest of his cotenants. Tuttle v. Tuttle, 146 N. C. 484, 59 S. E. 1008. See also Credle v. Baugham, 152 N. C. 18, 67 S. E. 46.

Issues of Fact—Questions of Fact.—In Ledbetter v. Piner, 120 N. C. 455, 27 S. E. 123, it is held: "The only controverted fact arising on the pleadings was as to the advisability of a sale for partition or an actual division. This was not an issue of fact but a question of fact for the decision of the clerk subject to review by the judge on appeal." Vanderbilt v. Roberts, 162 N. C. 273, 78 S. E. 156.

Question for Court.—Whether or not, in a proceeding instituted under § 46-3, for partition of the land of tenants in common, there shall be an actual partition, or a sale for partition, involves question of fact to be determined by court. In such proceedings, an allegation that the land is incapable of actual division without injury to some or all of the tenants in common raises a question of fact for the trial judge, and not an issue of fact for the jury, and he has the power to order a sale for partition. Barber v. Barber, 195 N. C. 711, 143 S. E. 469.

Under this section the burden is on the party seeking sale for partition to show necessity therefor, and where sale for partition is decreed by the court without hearing evidence

or finding facts to show the right to sell, the cause will be remanded. Wolfe v. Galloway, 211 N. C. 361, 190 S. E. 213.

Court must find the facts required by this section in order to support a decree of sale for partition. Priddy & Co. v. Sanderford, 221 N. C. 422, 20 S. E. (2d) 341.

Effect of Interests of Others.—The owner of an undivided one-half interest in land cannot be denied his rights to have a partition or sale in lieu of partition, because of interests which defendants, other than his cotenants, claiming under him, have acquired in and to his undivided interest. Barber v. Barber, 195 N. C. 711, 143 S. E. 469.

Effect of Trust Created by Another Co-Tenant. — The right of a tenant in common to have the lands sold for a division, under this section cannot be defeated by a trust creating an interest in the lands by another of the tenants. Barber v. Barber, 195 N. C. 711, 143 S. E. 469.

Parties—Trustee and Beneficiaries. — The trustee and beneficiaries under a trust created in lands by a tenant in common are proper parties to the proceedings for a sale for division. Barber v. Barber, 195 N. C. 711, 143 S. E. 469.

Same—Right of Wife of Co-Tenant to Resist Partition.—The wife of a tenant in common has an interest in his portion of the lands or the proceeds of the sale thereof, for division, contingent upon her surviving him, and is a proper party to the proceedings for partition, under this section or section 46-3, with the right to be heard when the lands are sold for division in order to protect her contingent interests in the proceeds of the sale. But she cannot resist the plaintiff's right to a partition nor challenge the power of the court to order sale for partition. Barber v. Barber, 195 N. C. 711, 143 S. E. 469.

A wife having a dower interest in property held by her husband as tenant in common may not defeat sale for partition. Citizen Bank, etc., Co. v. Watkins, 215 N. C. 292, 1 S. E. (2d) 853.

Interest of Trust Beneficiaries Attaches to Proceeds. — The interest of the beneficiaries under a deed of trust upon the interest of a tenant in common in land will upon its sale under this section attach to the proceeds and be fully protected in the final judgment or order in the proceedings. Barber v. Barber, 195 N. C. 711, 143 S. E. 469.

Review of Decision.—The action of a judge of the superior court in setting aside the report of partition commissioners, advising actual partition, and ordering a sale, is not reviewable, unless an error of law was committed. Tayloe v. Carrow, 156 N. C. 6, 72 S. E. 76; Albemarle Steam Nav. Co. v. Wovell, 133 N. C. 93, 45 S. E. 466.

Since a tenant in common has the right to actual partition unless it is made to appear by satisfactory proof that actual partition cannot be made without injury to some or all of the parties interested, an order for sale for partition affects a substantial right, and an appeal will lie to the supreme court from such order entered by the judge on appeal from the clerk. Hyman v. Edwards, 217 N. C. 342, 7 S. E. (2d) 700.

Applied in Talley v. Murchison, 212 N. C. 205, 193 S. E. 148.

§ 46-23. Remainder or reversion sold for partition; outstanding life estate.—The existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common or joint tenants shall be deemed seized and possessed as if no life estate existed. But this shall not interfere with the possession of the life tenant during the existence of his estate. (Rev., s. 2508; 1887, c. 214, s. 2; C. S. 3234.)

Cross Reference.—See also § 41-11.

Rule before Section Adopted.—Before the passage of this section cotenants in remainder or reversion had no right to enforce a compulsory partition of land in which they had such estate. Gillespie v. Allison, 115 N. C. 542, 20 S. E. 627, 628. See Wood v. Sugg, 91 N. C. 93; Ex parte Miller, 90 N. C. 625. But partition was permitted between the holder of the life estate and the owner in fee. McEachern v. Gilchrist, 75 N. C. 196.

Right of Possession.—A tenant in common is entitled to a compulsory partition, and to enable said tenant to maintain a proceeding for such partition he must have an estate in possession, or the right of possession. The possession need not be actual. The actual possession may be in a life tenant. Moore v. Baker, 222 N. C. 736, 24 S. E. (2d) 749. See also, Priddy & Co. v. Sanderford, 221 N. C. 422, 20 S. E. (2d) 341.

Section Not Limited to Sale.—By the wording of this section, that is, "a sale for partition" followed by the words "purposes of partition," it is apparent that the Legislature did not intend to limit the application of the section to sales, and it is held that it is to be construed to include actual partition by the remaindermen, as well as for a sale for division by them. Baggett v. Jackson, 160 N. C. 26, 76 S. E. 86.

Section Enlarges Vested Rights.—A statute giving to remaindermen the right to have partition of lands in remainder vested before the passage of such statute is remedial and, instead of impairing, enlarges vested rights. Gillespie v. Allison, 115 N. C. 542, 20 S. E. 627.

All Parties Interested.—A sale for partition will not be decreed when there are contingent remainders or other conditional interests therein unless all the persons who may be by any possibility interested unite in asking such a decree. Pendleton v. Williams, 175 N. C. 248, 95 S. E. 500, quoting Aydlett v. Pendleton, 111 N. C. 28, 16 S. E. 8.

If contingent interests are to be affected by the partition they must be represented. Overman v. Tate, 114 N. C. 571, 19 S. E. 706.

Life Estate with Power of Sale.—When lands are devised to the wife for life, giving her control thereof with power to sell, pay debts, etc., this section does not apply, for if applied it would defeat the very purpose as to powers given the wife. Makely v. Makely, 175 N. C. 121, 95 S. E. 51.

Holder of Contingent Interest.—Proceedings for partition of lands cannot be maintained when the plaintiff holds only a contingent interest in the lands, determinable on the death of the life tenant, who is still living at the time. Vinson v. Wise, 159 N. C. 653, 75 S. E. 732.

Proceeding Instituted before Clerk.—The locus in quo was devised to testator's children for life with remainder to testator's grandchildren, the remainder to the children of each child being defeasible if all the children of such child should predecease the first taker, and the limitation over being subject to be opened up to include after-born children. Petition was filed before the clerk by the life tenants and the remaindeermen in esse for sale of the land for partitions, under this section. The minor remaindermen were represented by their next friend, duly appointed by the court, who filed supplemental petition alleging that the sale would materially promote the interest of the minors. The clerk appoined a trustee for any unborn remaindermen and ordered the land sold. Unborn children of each life tenant were also represented by a child of such life tenant then in esse. The judge holding the courts of the district entered an order at chambers, upon its finding that the interest of the minors would be materially promoted by the sale, confirming the decree of sale. Thereafter the clerk approved the commisioner's report of sale to one of the life tenants and later appointed the respective parents of the remaindermen, in esse and in posse, trustees to receive the share of their respective children. The judge, apparently at term, approved the order of confirmation. It was held that even conceding the proceeding was irregular, the superior court acquired jurisdiction and the proceeding was not so fatally defective as to render it void. Perry v. Bassenger, 219 N. C. 838, 15 S. E. (2d) 365.

§ 46-24. Life tenant as party; valuation of life estate.—In all proceedings for partition of land whereon there is a life estate, the life tenant may join in the proceeding and on a sale the interest on the value of the share of the life tenant shall be received and paid to such life tenant annually; or in lieu of such annual interest, the value of such share during the probable life of such life tenant shall be ascertained and paid out of the proceeds to such life tenant absolutely. (Rev., s. 2509; 1887, c. 214, s. 3; C. S. 3235.)

Cross References.—As to evaluation of life tenant's interest, see § 8-47. As to dower upon partition, see § 46-15.

Life Tenants May Waive Rights.—Under a will providing that "home place shall remain a home for all the single members of the family as long as they shall live, if they choose to do so, and then be divided between the next of kin," single members of the family were entitled to partition of the home place among remaindermen as directed by will, where they showed the court that they no longer desired to retain it as a home, since life tenants could waive the right if they desired to enjoy their share in severalty. Sides v. Sides, 178 N. C. 554, 101 S. E. 100.

While the life tenant during the existence of her estate may waive her rights and consent to the sale of her estate, under this section, this may not be done, against her will,

in a partition proceeding. Priddy & Co. v. Sanderford, 221 N. C. 422, 20 S. E. (2d) 341.

Estate Durante Viduitate.—This section does not apply to an estate durante viduitate, as there is no practicable rule by which the present value of such an estate can be determined; hence, where land to which an estate durante viduitate attached was sold for partition and the proceeds are in custody of the court below, they cannot be divided among the widow and the remaindermen, against the will of the remaindermen, but will remain real estate until partition can be made at the termination of the estate durante viduitate. Gillespie v. Allison, 117 N. C. 512, 23 S. E. 438.

Same—Payment until Termination of Estate.—Where the tenant of an estate durante viduitate joins with some of the remaindermen for a sale for partition of the lands, this section will be satisfied with the payment to her of the interest upon the proceeds of the lands sold, until the termination of the particular estate by her marriage or death. Gillespie v. Allison, 115 N. C. 542, 20 S. E. 627.

Application of Life Tenant for Sale.—While under this and the preceding section there is authority for a sale for partition, at the instance of the remaindermen, of the reversion, or by their joining the life tenants, or between tenants in common or joint tenants, there is no statute which authorizes the sale on the application of the life tenant as against the remaindermen. Ray v. Poole, 187 N. C. 749, 751, 123 S. E. 5.

Cited in Pendleton v. Williams, 175 N. C. 248, 95 S. E. 500.

§ 46-25. Sale of standing timber on partition; valuation of life estate.—When two or more persons own, as tenants in common, joint tenants, or copartners, a tract of land, either in possession, or in remainder or reversion, subject to a life estate, on which there may be standing timber trees, a sale of said timber trees, separate from the land, may be had upon the petition of one or more of said owners, or the life tenant, for partition among the owners thereof, including the life tenant, upon such terms as the court may order, and under like proceedings as are now prescribed by law for the sale of land for partition: Provided, that when the land is subject to a life estate, the life tenant shall be made a party to the proceedings, and shall be entitled to receive his portion of the net proceeds of sales, to be ascertained under the mortuary tables established by law. (Rev., s. 2510; 1895, c. 187; C. S. 3236.)

Cross Reference.—As to mortuary tables and present worth of annuities, see §§ 8-46, 8-47.

§ 46-26. Sale of mineral interests on partition.—In case of the partition of mineral interests, in all instances where it is made to appear to the court that it would be for the best interests of the tenants in common, or joint tenants, of such interests to have the same sold, or if actual partition of the same cannot be had without injury to some or all of such tenants (in common), then it is lawful for and the duty of the court to order a sale of such mineral interests and a division of the proceeds as the interests of the parties may appear. (Rev., s. 2507; 1905, c. 90, s. 2; C. S. 3237.)

The mere conclusion of the court that the mineral interest is incapable of actual division, unsupported by allegation, proof, or finding, will not support a decree of sale for partition. Carolina Mineral Co. v. Young, 220 N. C. 287, 17 S. E. (2d) 119.

§ 46-27. Sale of land required for public use on cotenant's petition.—When the lands of joint tenants or tenants in common are required for public purposes, one or more of such tenants, or their guardian for them, may file a petition verified by oath, in the superior court of the county where the lands or any part of them lie, setting forth therein that the lands are required for public purposes, and that their interests would be promoted by a sale thereof. Whereupon the court, all proper parties being before it, and the facts alleged in the petition being ascertained to be true, shall order a sale of such lands, or so much thereof as may be necessary, in the manner and on the terms it deems expedient. The expenses, fees and costs of this proceeding shall be paid in the discretion of the court. (Rev., s. 2518; Code, s. 1907; 1868-9, c. 122, s. 16; C. S. 3238.)

§ 46-28. Manner and terms of partition sale.—The sale shall be made by some person appointed by the court, on such terms as to size of lots, place or manner of sale, time of credit and security for payment of purchase money, as may be most advantageous to the parties concerned. (Rev., s. 2512; Code, ss. 1904, 1921; 1868-9, s. 122, ss. 13, 31; C. S. 3239.)

Private or Public Sale.—The superior court may, in the exercise of its discretion, order a sale of lands in proceedings for partitions, where minors are interested and represented by guardian ad litem, either to be publicly or privately made. Ryder v. Oates, 173 N. C. 569, 92 S. E. 508. And where no abuse of this discretion is shown on appeal, the action of the lower court will not be reviewed. Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113.

Private Bids.—The court may authorize its commissioner in a proceeding for sale for partition to receive and report to it a private offer or bid for the land. Wooten v. Cunningham, 171 N. C. 123, 88 S. E. 1.

§ 46-29. Notice of partition sale. — The notice of sale, under this proceeding, shall be the same as required by law on sales of real estate by sheriff under execution: Provided, however, that in case a re-sale of such real property shall become necessary under such proceeding, that such real property shall then be re-sold only after notice of re-sale has been duly posted at the courthouse door in the county for fifteen days immediately preceding the re-sale and also published at any time during such fifteen day period once a week for two successive weeks of not less than eight days in some newspaper published in the county, if a newspaper is published in the county, but if there be no newspaper published in said county the notice of re-sale must be posted at the courthouse door and three other public places in the county for fifteen days immediately preceding the re-sale. (Rev., s. 2514; Code, s. 1905; 1868-9, c. 122, s. 14; 1933, c. 187; C. S. 3240.)

Cross Reference.—As to notice in execution and judicial sales, see § 1-325.

See 11 N. C. Law Rev., 219, for brief review of this section.

Editor's Note.—Public Laws 1933, c. 187, added the proviso at the end of this section relating to notices of resale.

§ 46-30. Title made to purchaser; effect of deed.—On the coming in of the report of sale, and confirmation thereof, and payment of the purchase money, the title shall be made to the purchaser or purchasers at such time and by such person as the court may direct, and in all cases where the persons in possession have been made parties to the proceeding, the court may grant an order for possession. And the deed of the officer or person designated to make such sale shall convey to the purchaser such title and estate in the property as the tenants in common, or joint tenants, had. (Rev., s. 2512; Code, ss. 1904, 1921; 1868-9, c. 122, ss. 13, 31; C. S. 3241.)

Sale an Official Act.—When an officer of the court, desig-

nated either by his official or individual name in the order, is commissioned to make sale of real or personal estate, he acts in his official capacity and his sureties undertake for the fidelity of his conduct. Kerr v. Brandon, 84 N. C. 128, 131.

Enforcement.—Upon acceptance by court's commissioner of a bid, whether at public or private sale, for land involved in partition proceedings, the court has jurisdiction over the purchaser to enforce the bid. Wooten v. Cunningham, 171 N. C. 123, 88 S. E. 1.

Same—Balance of Bid.—The purchaser of land at a judicial sale for partition can be required by summary proceedings to pay into court the amount of his bid which remains unpaid after the confirmation of the sale and delivery of the deed, such proceedings not being unconstitutional as depriving the purchaser of his right to a jury trial. Lyman v. Southern Coal Co., 183 N. C. 581, 112 S. E. 242.

When Title Passes.—Where, under a petition of tenants in common, lands are sold for division, under the provisions of this section title to the lands held in common will not pass to the purchaser until the purchase price has been paid, and a deed executed to the purchaser by the one appointed to sell under the order of the court. Crocker v. Vann, 192 N. C. 422, 135 S. E. 127.

Title of Intending Purchaser before Confirmation.—An intending purchaser at a partition sale is a mere preferred proposer, and not a purchaser, until after the sale has been confirmed. Patillo v. Lytle, 158 N. C. 92, 73 S. E. 200.

After Confirmation Purchaser Regarded Equitable Owner.—Under section 41-32 after confirmation by the court of a judicial sale of lands, the purchaser is regarded as the equitable owner, and the sale, as it affects his interest, can only be set aside for "mistake, fraud, or collusion," established on petition regularly filed in the cause. Upchurch v. Upchurch, 173 N. C. 88, 91 S. E. 702.

When Purchaser Fails to Pay.—Where a purchaser of land under decree of court fails to pay the price, the title will not be made even though there be a confirmation of the sale. And if the land in such case be sold under an execution against said purchaser, the purchaser thereof takes subject to the equities against the defendant in the execution. Burgin v. Burgin, 82 N. C. 197.

Formal Direction to Make Title Unnecessary.—A formal direction to make title is not necessary when the order of sale reserves the title as an additional security for the purchase-money, and the money has been paid. Latta v. Vickers, 82 N. C. 501.

Purchaser Need Not Look beyond Decree.—A purchaser at a judicial sale, if not a party to the proceeding, is not bound to look beyond the decree if the facts necessary to give jurisdiction appear on the face of the proceedings. If there has been an irregularity, or the jurisdiction has been improvidently exercised, it will not be corrected at his expense. Herbin v. Wagoner, 118 N. C. 656, 657, 24 S. E. 490.

When Judgment Creditor Not Made Party. — Where judgment creditors of a tenant in common are not made parties to a partition proceeding, the purchaser buys subject to their liens. Holley v. White, 172 N. C. 77, 89 S. E. 1061.

Estoppel of Persons Parties to Sale.—One who was a party to ex parte partition proceedings, was present at the sale, and received her share of the purchase money could not thereafter have the judgment and sale set aside for division as to her. In re Wilson, 161 N. C. 211, 75 S. E. 1086; Hargrove v. Wilson, 148 N. C. 439, 62 S. E. 520.

Liens against Interest of Tenant in Common.—"The purchaser at a judicial sale takes the property subject to whatever liens and encumbrances exist thereon . . . and cannot have the proceeds of sale applied to discharge such liens." Jordan v. Faulkner, 168 N. C. 466, 84 S. E. 764.

Proceedings Cannot Be Collaterally Attacked. — When land is sold and the sale confirmed, in proceedings for partition of lands, and the record therein is regular in form, and on its face it appears that plaintiffs were parties, the proceedings cannot be collaterally attacked, as the remedy is by petition in the cause. Hargrove v. Wilson, 148 N. C. 439, 62 S. E. 520.

Deed Erroneously Made to Husband and Wife.—Where the wife alone is entitled to a deed in the severance of her interest as a tenant in common of lands sold for division, and in proceedings thereunder it is erroneously adjudged by the court that the deed be made to her and her husband by entireties, the title will inure only to her under a resulting trust, and the husband cannot acquire by survivorship. Crocker v. Vann, 192 N. C. 422, 135 S. E. 127.

§ 46-31. Who appointed to sell. — The court may authorize any officer thereof, or any other competent person, to be designated in the decree of sale, to sell the real estate under this proceeding; but no clerk of any court shall appoint himself or his deputy to make sale of real property or other property in any proceeding before him. (Rev., s. 2513; Code, s. 1906; 1868-9, c. 122, s. 15; 1899, c. 161; C. S. 3242.)

Editor's Note.—The last part of this section was passed to abolish the practice of clerks appointing themselves to make partition sales. This practice was condemned in Evans v. Cullens, 122 N. C. 55, 28 S. E. 961, and thereupon the next Legislature adopted the last clause.

§ 46-32. Report of sale; filing; confirmation and impeachment. — Such officer or person shall file his report of sale, giving full particulars thereof, within ten days after the sale, in the office of the clerk of the superior court, and if no exception thereto is filed within ten days, the same shall be confirmed. Any party, after the confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: Provided, innocent purchasers for full value and without notice shall not be affected thereby. (Rev., s. 2513; Code, s. 1906; 1899, c. 161; 1868-9, c. 122, s. 15; 1937, c. 71; C. S. 3243.)

Cross Reference.—As to confirmation of judicial sales in vacation, see § 1-218.

Editor's Note.—The 1937 amendment reduces the time for filing exceptions from twenty to ten days. The proceedings are thus speeded up, and it is now possible for the partition sale to be confirmed within 20 days after it is held instead of 30 days as formerly required. 15 N. C. Law Rev. 355.

In General.—This section does not require formal exceptions; but because of the use of the word "shall" it is a prerequisite to the power of the court to order a resale that exceptions in a recognized legal way be made within the time prescribed. McCormick v. Patterson, 194 N. C. 216, 139 S. E. 225.

What Exceptions Contemplated.—In the contemplation of this section an exception is an objection to the regularity of the proceeding or sale or because of "inequitable adjustment." McCormick v. Patterson, 194 N. C. 216, 139 S. E. 225.

Section Relates Only to Public Sale.—This section relates only to public sales, and does not prevent confirmation of a private sale within 20 days. Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113.

Execution Sales.—This section is not applicable to execution sales. Weir v. Weir, 196 N. C. 268, 269, 145 S. E. 281.

Effect of Failure to File Report.—Upon the commissioner's failure to file a report and final account with the clerk, as provided by this section, the demand upon the commissioner or his administrator, for the disbursement of the funds, will be considered to have been made as a matter of law. Peal v. Martin, 207 N. C. 106, 176 S. E. 282.

Power of Superior Court to Confirm Sale.—The superior court in a partition action, having general jurisdiction in law and equity, has power to order and confirm a private as well as a public sale. Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113; McAfee v. Green, 143 N. C. 411, 418, 55 S. E. 828.

Power to Set Aside.—Where lands are ordered to be sold for partition by a court of equity, the authority of the court to set aside an inchoate sale and reopen the biddings applies as well to cases where all the parties are adults as where some of them, or all, are infants. Ex parte Post, 56 N. C. 482.

Same—Objection Must Be Timely. — Under this section exceptions must be filed or an increased bid placed upon the purchase price within twenty days or before a motion to confirm the sale is made. McCormick v. Patterson, 194 N. C. 216, 219, 139 S. E. 225.

Same—Sufficiency of Objection. — Where three commissioners for the sale of lands in partition proceedings for a division have regularly sold the locus in quo as provided by law, and two of them have filed the report of sale, and the other protests against its confirmation upon the ground of a mistake in fact and appears before the clerk and gives

his reason therefor within the statutory time, his conduct may amount to a substantial compliance with the statute leaving the matter within the power of the court to order a resale. McCormick v. Patterson, 194 N. C. 216, 139 S. E. 225.

Advance in Bid.—Before a partition sale has been confirmed, if an advanced bid of 10 per cent. is offered, the court may, in its discretion, order a resale. Trull v. Rice, 92 N. C. 572. But where no increase bid was received within twenty days and the purchaser moved promptly for confirmation, an increased bid received thereafter will not prevent confirmation. Ex parte Garrett, 174 N. C. 343, 93 S. E. 838.

Same—Where Parties Do Not Join in Motion.—The court did not abuse its discretion in a partition action in refusing to grant a re-sale upon an offer of an advance bid on motion of the officer in which none of the parties joined. Thompson v. Rospigliosi, 162 N. C. 145, 77 S. E. 113; Tayloe v. Carrow, 156 N. C. 6, 72 S. E. 76.

Same—Ten Per Cent Advance Unnecessary. — While it has been in accord with the practice in this State to refuse to confirm a judicial sale unless there has been an advanced bid from a responsible bidder, this is but to afford evidence as to the inadequacy of the price, which the court, in the exercise of its discretion to confirm or set aside the sale, may regard or disregard; and while a bid of 10 per cent will customarily be considered, so may, also, an advanced bid in a less sum, when the amount is large. Upchurch v. Upchurch, 173 N. C. 88, 91 S. E. 702.

Cited in Buncombe County v. Arbogast, 205 N. C. 745, 748, 172 S. E. 364.

§ 46-33. Shares in proceeds to cotenants secured.—Upon confirmation of the report, the court shall secure to each tenant in common, or joint tenant, his ratable share in severalty of the proceeds of sale. (Rev., s. 2513; Code, s. 1921; 1868-9, c. 122, s. 31; C. S. 3244.)

§ 46-34. Shares to persons unknown or not sui juris secured.—When a sale is made under this chapter, and any party to the proceedings be an infant, non compos mentis, imprisoned, or beyond the limits of the state, or when the name of any tenant in common is not known, it is the duty of the court to decree the share of such party, in the proceeds of sale, to be so invested or settled that the same may be secured to such party or his real representative. (Rev., s. 2516; Code, s. 1908; 1887, c. 284, s. 3; 1868-9, c. 122, s. 17; C. S. 3245.)

Effect on Title.—This section in nowise interferes with power to free the title and make a valid conveyance of the same. Bynum v. Bynum, 179 N. C. 14, 17, 101 S. E. 527.

Same—Failure to Invest. — A purchaser for full value, without notice, of lands at a sale for partition thereof by the heirs at law, acquires a title which is not affected by the failure of the court to retain and invest funds sufficient to protect the rights of such unknown persons, served with summons by publication, who may afterwards appear and establish an interest in the lands. Lawrence v. Hardy, 151 N. C. 123, 65 S. E. 766.

Consent of Court Necessary to Agreement.—Parties can not stipulate as to the distribution of the proceeds of a judicial sale without the full knowledge and consent of the court, especially where there are infants in the case whose rights may be seriously prejudiced by such an agreement. Lyman v. Southern Coal Co., 183 N. C. 581, 112 S. E. 242.

Infant's Share of Proceeds Remains Realty. — The proceeds of land, sold for partition, to which an infant is entitled, remain real estate until such infant comes of age and elects to take them as money. Bateman v. Latham, 56 N. C. 35.

Payment to Guardian.—A payment made by purchaser of lands, under a decree for the sale and partition of lands which directed the proceeds to be paid over to the parties according to law, to the guardian of one of the tenants in common, is proper and in pursuance of the statute. Howerton v. Sexton, 104 N. C. 75, 10 S. E. 148. As to sufficiency of payment to husband before the modern statute liberating married women from their legal disabilities, see Burgin v. Burgin, 82 N. C. 177.

Cited in McCormick v. Patterson, 194 N. C. 216, 139 S. E. 225.

Art. 3. Partition of Lands in Two States.

§§ 46-35 to 46-41: Repealed by Session Laws 1943, c. 543.

Art. 4. Partition of Personal Property.

§ 46-42. Personal property may be partitioned; commissioners appointed.—When any persons entitled as tenants in common, or joint tenants, of personal property desire to have a division of the same, they, or either of them, may file a petition in the superior court for that purpose; and the court, if it think the petitioners entitled to relief, shall appoint three disinterested commissioners, who, being first duly sworn, shall proceed within twenty days after notice of their appointment to divide such property as nearly equally as possible among the tenants in common, or joint tenants. (Rev., s. 2504; Code, s. 1917; 1868-9, c. 122, s. 27; C. S. 3253.)

Exclusiveness of Remedy.—A petition for the partition of personal property is the only remedy one tenant in common has against another for withholding possession. Grim v. Wicker, 80 N. C. 343; Powell v. Hill, 64 N. C. 169.

Same—No Right to Exclusive Possession.—One tenant in common or joint owner of personal property cannot maintain an action against the other tenant or owner to recover the exclusive possession of the property because the defendant forcibly took it from the plaintiff's possession; the plaintiff's only remedy is to have the property partitioned. Thompson v. Silverthorne, 142 N. C. 12, 54 S. E. 782.

Injunction to Prevent Destruction.—Where, pending a suit for partition of personal property, the defendant threatened the destruction or removal of the property, the court, on the plaintiff's application, might grant an injunction or appoint a receiver. Thompson v. Silverthorne, 142 N. C. 12, 54 S. E. 782.

Title to Personalty.—In petitions for the partition of personal property owned in common, where the defendant sets up title in severalty in himself, the title to the property may be tried on the petition. Edwards v. Bennett, 32 N. C. 361, cited in note in 27 L. R. A., N. S., 69.

Notes.—The owners of notes, as tenants in common, are entitled to partition. Central Bank, etc., Co. v. Board of Commissioners, 195 N. C. 678, 681, 143 S. E. 252.

Quoted in Chadwick v. Blades, 210 N. C. 609, 188 S. E. 198.

§ 46-43. Report of commissioners. — The commissioners shall report their proceedings under the hands of any two of them, and shall file their report in the office of the clerk of the superior court within five days after the partition was made. (Rev., s. 2505; Code, s. 1918; 1868-9, c. 122, s. 28; C. S. 3254.)

Cited in Clement v. Ireland, 129 N. C. 220, 39 S. E. 838.

§ 46-44. Sale of personal property on partition; report of officer.—If a division of personal property owned by any persons as tenants in common, or joint tenants, cannot be had without injury to some of the parties interested, and a sale thereof is deemed necessary, the court shall order a sale to be made by some officer of the court or other competent person, who shall file his report of sale in the office of the clerk of the court within ten days after sale. (Rev., s. 2519; Code, s. 1919; 1868-9, c. 122, s. 29; C. S. 3255.)

Cited in Chadwick v. Blades, 210 N. C. 609, 188 S. E. 198.

§ 46-45. Confirmation and impeachment of reports of commissioners or officer.—If no exception to the report of the commissioners making partition, or to the report of the officer making sale, as the case may be, is filed within ten days, the same shall be confirmed. Any party, after confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: Provided, inno-

cent purchasers for full value and without notice shall not be affected thereby. (Rev., ss. 2505, 2519; Code, ss. 1918, 1919; 1868-9, c. 122, ss. 28, 29; 1943, c. 543; C. S. 3256.)

Cross Reference.—As to confirmation of judicial sales in vacation, see § 1-218.

Editor's Note.—The 1943 amendment substituted "ten" for "twenty" in line four.

§ 46-46. Notice of sale of personal property.—The sale shall be made after twenty days notice, by advertisement in three or more public places in the county, and shall be on such terms as the court may direct. (Rev., s. 2520; Code, s. 1920; 1868-9, c. 122, s. 30; C. S. 3257.)

Chapter 47. Probate and Registration.

Art. 1. Probate.

§ 47-1. Officials of state authorized to take probate.—The execution of all deeds of conveyance, contracts to buy, sell or convey lands, mortgages, deeds of trust, assignments, powers of attorney, covenants to stand seized to the use of another, leases for more than three years, releases and any and all instruments and writings of whatsoever nature and kind which are required or allowed by law to be registered in the office of the register of deeds or which may hereafter be required or allowed by law to be so registered, may be proved or acknowledged before any one of the following officials of this state: the several justices of the supreme court, the several judges of the superior court, commissioners of affidavits appointed by the governor of this state, the clerk of the supreme court, the several clerks of the superior court, the deputy clerks of the superior court, the several clerks of the criminal courts, notaries public, and the several justices of the peace. (Rev., s. 989; Code, s. 1246; 1895, c. 161, ss. 1, 3; 1897, c. 87; 1899, c. 235; C. S. 3293.)

Effect of Disqualification.—If the disqualification of either the probating or acknowledging officer appears upon the face of the record, the registration is a nullity as to subsequent purchasers and incumbrances. Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99. But when the incapacity of the acknowledging or probating officer is latent, i. e., does not appear upon the record, one who takes under the

grantee in such instrument gets a good title, unless the party claiming the benefit of the defected acknowledgment or probate is cognizant of the facts. Richmond Co. v. Walston, 187 N. C. 67, 122 S. E. 663; County Sav. Bank v. Tolbert, 192 N. C. 126, 130, 133 S. E. 558.

Woman Notary Qualified.—A woman is qualified to act as a notary public since the adoption of the amendment to the Constitution of this State, Art. VII, sec. 7; and also to pass upon the proper probate of a deed to lands, and make a valid certificate for its registration, when deputized by the clerk of the superior court under the provisions of our statutes. Preston v. Roberts, 183 N. C. 62, 110 S. E. 586.

Interest and Relationship.—As to disqualification on the ground of interest and relationship, see section 47-7.

Cited in McClure v. Crow, 196 N. C. 657, 146 S. E. 713.

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

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

.....
Signature of Officer

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

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

Cross References.—As to commissioner of affidavits and deeds appointed by the governor, see § 3-1 et seq. As to powers of clerks of courts of record of other states, see § 3-7. As to power of notaries public in and out of state, see § 10-4. As to form of certificate required upon acknowledgment by nonresident official, see §§ 47-44 and 47-45.

Editor's Note.—Both 1943 amendments inserted the words "any commissioner of oaths" in the first sentence. The first 1943 amendment also added to the first sentence the provisions relating to military, naval and merchant marine officials.

Compliance Essential.—This section prescribing how deeds may be proved and acknowledgment and privy examination taken in other states as well as in foreign countries, must be followed, or they and the registration thereon will be declared void. New Hanover Shingle Mills v. Roper Lumber Co., 171 N. C. 410, 88 S. E. 633.

This case, although decided in 1916 and holding a probate before a commissioner of deeds of another state to be ineffectual, was pending in 1913 when an act amended § 47-2 so as to allow probate and acknowledgment before a commissioner of deeds of another state. By the amendatory act, all prior probates and acknowledgments before such commissioners of deeds, except those which affected pending litigation or vested rights, were validated.

Proof before Notary Public in Another State.—A deed regularly proved before a notary public in South Carolina by authority of this section, is effectual to pass title as against creditors. County Sav. Bank v. Tolbert, 192 N. C. 126, 133 S. E. 558.

Proof in This State by Notary of Another State.—The probate of an instrument taken in this State by a notary public of another state is defective. County Sav. Bank v. Tolbert, 192 N. C. 126, 133 S. E. 558.

Same—Rights of Purchaser Where Record Is Clear.—While a probate of a mortgage taken in this State by a notary public of another state is defective, the purchaser at the mortgage sale will acquire by his deed the title as against a subsequent judgment creditor, when the probate appears of record, in the office of the register of deeds in the county wherein the land is situate here, to have been regularly taken in South Carolina, and there is no evidence that such purchaser had knowledge of the defect at or before the time he acquired his deed. County Sav. Bank v. Tolbert, 192 N. C. 126, 133 S. E. 558.

By Woman Notary Public.—The position cannot be maintained that the probate is fatally defective, being taken by a woman, for it will be assumed that the notary was rightfully appointed in the State in which the deed was probated, and her act will be recognized as valid here. Nicholson v. Eureka Lumber Co., 160 N. C. 33, 75 S. E. 730.

§ 47-3. Commissioner appointed by clerk for nonresident maker.—When it appears to the clerk of the superior court of any county that any person nonresident of this state desires to acknowledge a power of attorney, deed or other conveyance touching any real estate situated in the county of said clerk, he may issue a commission to a commissioner for receiving such acknowledgment, or taking such proof, and said commissioner may likewise take the acknowledgment and privy examination of a married woman separate and apart from her husband, touching her assent to any power of attorney, deeds or other conveyances, touching real estate in said county. The commissioner shall make certificate of the acknowledgments or proof and privy examination made by him, and shall return the same to the clerk of the superior court, whereupon he

shall adjudge that such conveyance, power of attorney or other instrument is duly acknowledged or proved, and that such examination is in due form, and shall order the same to be registered. (Rev., s. 991; Code, s. 1258; 1869-70, c. 185; C. S. 3295.)

Cross Reference.—As to acknowledgments before officials of the United States, foreign countries, and sister states, see §§ 3-5, 10-4, 47-2, 47-6, 47-44, 47-45.

§ 47-4. By justice of peace of other than registering county.—If the proof or acknowledgment of any instrument is had before a justice of the peace of any county other than the county in which such instrument is offered for registration, the certificate of proof or acknowledgment made by such justice of the peace shall be accompanied by the certificate of the clerk of the superior court of the county in which said justice of the peace resides, that such justice of the peace was at the time his certificate bears date an acting justice of the peace of such county, and that such justice's genuine signature is set to his certificate. The certificate of the clerk of the superior court herein provided for shall be under his hand and official seal. (Rev., s. 992; 1899, c. 235, s. 4; C. S. 3296.)

Cross Reference.—As to form of clerk's certificate, see § 47-44.

Omission to Register Seal Not Fatal.—The execution of a deed was proved before a justice of the peace in the County of Franklin, and the clerk of the superior court of that county certified the official character of the Justice of the peace under his official seal; the deed was thereupon registered in Granville County upon the fiat of the clerk of the superior court of the county, but the official seal of the clerk of Franklin superior court was not registered: It was held that the registration was valid. Perry v. Bragg, 111 N. C. 159, 16 S. E. 10.

§ 47-5. When seal of officer necessary to probate.—When proof or acknowledgment of the execution of any instrument by any maker of such instrument, whether a married woman or other person or corporation, is had before any official authorized by law to take such proof and acknowledgment, and such official has an official seal, he shall set his official seal to his certificate. If the official before whom the instrument is proved or acknowledged has no official seal he shall certify under his hand, and his private seal shall not be essential. When the instrument is proved or acknowledged before the clerk or deputy clerk of the superior court of the county in which the instrument is to be registered, the official seal shall not be necessary. (Rev., s. 993; 1899, c. 235, s. 8; C. S. 3297.)

Cross References.—See also § 10-9. As to validation of certain acknowledgments of deeds, etc., before a notary public where seal omitted, see §§ 47-52, 47-102. As to validation of certain acknowledgments before officers with seal where seal does not appear of record, see § 47-53.

Name of Notary on Notarial Seal.—The statute does not require that his name or any name should be used on the notarial seal, though customarily the name of the notary does appear thereon. The seal appended by the notary to his certificate is presumably his, in the absence of evidence to the contrary. This is not rebutted by the mere fact that the notary signs his name "Geo. Theo. Sommer" and the seal has on it the name of "Theo. Sommer," when the fact of the execution of the deed is adjudged to have been proved by such seal and certificate of the notary. Deans v. Pate, 114 N. C. 194, 196, 19 S. E. 146.

Effect of Omission of Justices' Seal.—The omission by a justice of the peace to attach his seal to a certificate of the proof of execution of a deed and privy examination of the wife will not invalidate his action, otherwise regular. Lineberger v. Tidwell, 104 N. C. 506, 10 S. E. 758.

No Seal When Not Required by Statute.—The certificate of probate to a deed need not have a seal if not required by statute at the date of the execution. Westfelt v. Adams, 131 N. C. 379, 42 S. E. 823.

Presumption as to Seal.—When a copy of the certificate of the commissioner of affidavits concludes, "Given under my hand and seal," the presumption is that the seal was affixed to the original, though not appearing in the copy. Johnson v. Eversole Lumber Co., 147 N. C. 249, 60 S. E. 1129.

§ 47-6. Officials may act although land or maker's residence elsewhere.—The execution of all instruments required or permitted by law to be registered may be proved or acknowledged before any of the officials authorized by law to take probates, regardless of the county in this state in which the subject-matter of the instrument may be situated and regardless of the domicile, residence or citizenship of the person who executes such instrument, or of the domicile, residence or citizenship of the person to whom or for whose benefit such instrument may be made. (Rev., s. 994; 1899, c. 235, s. 13; C. S. 3298.)

§ 47-7. Probate where clerk is a party.—All instruments required or permitted by law to be registered to which clerks of the superior court are parties, or in which such clerks are interested, may be proved or acknowledged and privy examination of any married woman may be taken before any justice of the peace or notary public of the county of said clerk, which clerk may then under his hand and official seal certify to the genuineness thereof. Such proofs, acknowledgments and examinations may also be taken before any judge of the superior court or justice of the supreme court, and the instruments may be probated and ordered to be registered by such judge or justice, in like manner as is provided by law for probates by clerks of the superior court in other cases. Provided, that nothing contained herein shall prevent the clerk of the superior court who is a party to any instrument, or who is a stockholder or officer of any bank or other corporation which is a party to any instrument, from adjudicating and ordering such instruments for registration as have been acknowledged or proved before some justice of the peace or notary public. All probates, adjudications, and orders of registration made prior to January first, one thousand nine hundred thirty, by any such clerk of conveyances or other papers in which said clerk is an interested party, or other papers by any corporation in which such clerk also is an officer or stockholder, are hereby validated and declared sufficient for all such purposes. (Rev., s. 995; 1891, c. 102; 1893, c. 3; 1913, c. 148, s. 1; 1921, c. 92; 1921, c. 106, s. 2; 1939, c. 210, s. 1; C. S. 3299.)

Cross References.—As to disqualification of clerk to act, see § 2-17. See also § 47-7.

Editor's Note.—The 1939 amendment in effect inserted the words "who is a party to any instrument or" in the proviso after the words "clerk of the superior court."

Officer Party Trustee or Cestui Que Trust.—An acknowledgment and privy examination before an officer who was a party, trustee or cestui que trust in the deed is invalid. Long v. Crews, 113 N. C. 256, 18 S. E. 499; McAllister v. Purcell, 124 N. C. 262, 264, 32 S. E. 715.

Relation to Parties Not a Disqualification.—Probate and private examination taken before an officer are not invalid simply because he is related to the parties. McAllister v. Purcell, 124 N. C. 262, 32 S. E. 715.

§ 47-8. Attorney in action not to probate papers therein.—No practicing attorney at law has power to administer any oaths to a person to any paper writing to be used in any legal proceedings

in which he appears as attorney. (Rev., s. 2350; Ex. Sess. 1908, c. 105, s. 2; C. S. 3300.)

§ 47-9. Probates before stockholders in building and loan associations.—No acknowledgment or proof of execution, including the privy examination of any married woman, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any building and loan association shall hereafter be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination, is a stockholder in said building and loan association. This section does not authorize any officer or director of a building and loan association to take acknowledgments, proofs and privy examinations. The provisions of this section shall apply to federal savings and loan associations having their principal offices in this state. Acknowledgments and proofs of execution, including private examinations of any married woman taken before March 20, 1939 by an officer who is or was a stockholder in any federal savings and loan association, are hereby validated. (1913, c. 110, ss. 1, 3; 1939, c. 136; C. S. 3301.)

Editor's Note.—The 1939 amendment, which added the last sentence of this section, provides: "Acknowledgments and proofs of execution, including private examinations of any married woman heretofore taken by an officer who is or was a stockholder in any federal savings and loan association, are hereby validated. Provided that the provisions of this Act shall not affect pending litigation."

§ 47-10. Probate before stockholders in banking corporations. — No acknowledgment or proof of execution, including privy examination of married women, of any mortgage, or deed of trust executed to secure the payment of any indebtedness to any banking corporation, taken prior to the first day of January, one thousand nine hundred twenty-nine, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination, was a stockholder or director in such banking corporation. (1929, c. 302, s. 1.)

Acknowledgment before Bank Official.—Under this section where a mortgage is executed on the equity in lands in order to secure endorsers on a note against loss and the note is discounted at a bank, the contract to secure the endorsers against loss is a collateral agreement between the makers and endorsers to which the bank is not a party, and the acknowledgment to the mortgage taken by a official of the bank is valid. Watkins v. Simonds, 202 N. C. 746, 164 S. E. 363.

§ 47-11. Subpœnas to maker and subscribing witnesses.—The grantee or other party to an instrument required or allowed by law to be registered may at his own expense obtain from the clerk of the superior court of the county in which the instrument is required to be registered a subpoena for any or all of the makers of or subscribing witnesses to such instrument, commanding such maker or subscribing witness to appear before such clerk at his office at a certain time to give evidence concerning the execution of the instrument. The subpœna shall be directed to the sheriff of the county in which the person upon whom it is to be served resides. If any person refuses to obey such subpœna he is liable to a fine of forty dollars or to be attached for contempt by the clerk, upon its being made to appear to the satisfaction of the clerk that such disobedience was intentional, under the same rules of law as are prescribed in the cases of other defaulting witnesses. (Rev., s. 996; Code, s. 1268; 1899, c. 235, s. 16; 1897, c. 28; C. S. 3302.)

Cross References.—As to powers of clerk, see § 2-16. As to power of clerk to punish for contempt, see § 5-6.

§ 47-12. Proof of attested writing.—If an instrument required or permitted by law to be registered has a subscribing witness and such witness is dead or out of the state, or of unsound mind, the execution of the same may be proved before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of such subscribing witness or of the handwriting of the maker, but this shall not be proof of the execution of instruments by married women. Provided, that no instrument required or permitted by law to be registered shall be proved, probated or ordered to be registered upon the oath and examination of a subscribing witness who is also the grantee named in said instrument, and the registration of any instrument which has been proven and admitted to probate upon the oath and examination of a subscribing witness who is the grantee in said instrument shall be void: Provided further, that nothing herein shall invalidate the registration of any instrument registered prior to the ninth day of April, A.D. one thousand nine hundred and thirty-five. (Rev., s. 997; 1899, c. 235, s. 12; 1935, c. 168; 1937, c. 7; C. S. 3303.)

Editor's Note.—The provisos added by the 1935 amendment were changed by the 1937 amendment. The 1937 amendment omitted the prohibition of registration of an instrument if the witness attesting its execution is the agent or servant of the grantee. This is proper since the interest, if any, of such a witness would seem to be rather remote. It also omitted a former proviso applying the section to agricultural liens. This omission is quite logical since the statute is applicable to all instruments "required or permitted by law to be registered," and agricultural liens fall within such a category. 15 N. C. L. Rev. 337.

§ 47-13. Proof of unattested writing.—If an instrument required or permitted by law to be registered has no subscribing witness, the execution of the same may be proved before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of the maker, but this shall not apply to proof of execution of instruments by married women. (Rev., s. 998; 1899, c. 235, s. 11; C. S. 3304.)

Cross References.—As to proof by attesting witnesses of instruments not required to be attested, see § 8-38. As to proof of handwriting by comparison as evidence, see § 8-40.

Admission to Probate by Proof of Handwriting of the Maker.—A deed having no subscribing witness, may be admitted to probate and registration upon proof of the handwriting of the maker; or, if the subscribing witness be dead, upon proof of his handwriting. Rollins v. Henry, 78 N. C. 342, overruled upon this point. Black v. Justice, 86 N. C. 504.

Proof of Writing of Nonresident by Resident Party. — Where the parties to an instrument requiring registration are nonresidents, except one, the instrument may be probated by proving the handwriting of the nonresident by the resident party. LeRoy v. Jacobosky, 136 N. C. 443, 48 S. E. 796.

§ 47-14. Clerk to pass on certificate and order registration. — When the proof or acknowledgment of the execution of any instrument, required or permitted by law to be registered, is had before any other official than the clerk or deputy clerk of the superior court of the county in which such instrument is offered for registration, the clerk or deputy clerk of the superior court of the county in which the instrument is offered for

registration shall, before the same is registered, examine the certificate or certificates of proof or acknowledgment appearing upon the instrument, and if it appears that the instrument has been duly proved or acknowledged and the certificate or certificates to that effect are in due form, he shall so adjudge, and shall order the instrument to be registered, together with the certificates. (Rev., s. 999; 1899, c. 235, s. 7; 1905, c. 414; 1921, c. 91; 1939, c. 210, s. 2; C. S. 3305.)

Cross Reference.—As to form of adjudication and order of registration, see § 47-37.

Elements of Adjudication.—If the certificate is not found in due form, the instrument is rejected. If the certificate is adjudged in due form, then the clerk admits to probate, i. e., probates it, passes upon the certificate as furnishing proof of execution, adjudges as to the genuineness of the certificate, the authority of the officer, and whether the justice or officer certifying is such, and the sufficiency of proof as certified. White v. Connelly, 105 N. C. 65, 66, 68, 11 S. E. 177.

Adjudication by Clerk Mandatory.—This section requiring clerks of the superior court to adjudicate upon the probate to a deed for lands situated here is mandatory, and its omission will invalidate the conveyance as against the rights of purchasers and creditors. Champion Fibre Co. v. Cozad, 183 N. C. 600, 112 S. E. 810.

The requirement of this section that the clerk of the court shall pass upon the sufficiency of the probate of a deed is mandatory and not directory. Woodlief v. Woodlief, 192 N. C. 634, 635, 135 S. E. 612.

In Champion Fibre Co. v. Cozad, 183 N. C. 600, 112 S. E. 810, two lines of decisions, one holding that this section is directory, the other holding that it is mandatory, are reviewed and distinguished. The first series, to which belong Holmes v. Marshall, 72 N. C. 37; Young v. Jackson, 92 N. C. 144; Darden v. Neuse, etc., Steamboat Co., 107 N. C. 437, 12 S. E. 46; and Heath v. Lane, 176 N. C. 119, 96 S. E. 889, hold that inasmuch as every clerk of the superior court in North Carolina has equal jurisdiction with every other clerk in respect to probate matters, where the clerk of the court of any county in the state takes the acknowledgment of a deed and orders it to registration, it is not absolutely necessary that the certificate of this clerk be passed upon by the clerk of the court of the county in which the land is situated. In the other series of cases, which includes Simmons v. Gholson, 50 N. C. 401; Evans v. Etheridge, 99 N. C. 43, 5 S. E. 386; White v. Connelly, 105 N. C. 65, 11 S. E. 177; and Cozad v. McAden, 148 N. C. 10, 61 S. E. 633, the section is held to be mandatory, but in these cases the probate was taken before some officer other than the clerk of court, judges of the superior court, or justices of the supreme court. In Darden v. Neuse, etc., Steamboat Co., supra, the court apparently limits the doctrine that the statute is directory to cases in which deeds have been acknowledged before other clerks, judges, or justices of the supreme court.

Same—Qualification of the Rule.—While it is held that such act of adjudication and order of registration are directory upon the clerk of the superior court of the county wherein the land is situated, it is so only where the fiat or order of registration has been properly made by the clerk of another county upon which such power has been conferred by the statute, and in the absence of any proper fiat or order for registration, the conveyance will be ineffectual against the rights of purchasers and creditors of the grantor. Champion Fibre Co. v. Cozad, 183 N. C. 600, 112 S. E. 810.

Same—Where Probate Taken by Foreign Commissioner of Deeds.—The probate to a mortgage of lands situated in North Carolina, taken by the commissioner of deeds in another state, registered without the fiat or order for registration by a clerk of the superior court within the State, and clothed with authority to do so by our statute, is ineffectual as against purchasers or creditors to pass title to the purchaser at the foreclosure sale, or those claiming under him. Champion Fibre Co. v. Cozad, 183 N. C. 600, 112 S. E. 810.

Use of Words "In Due Form" Not Essential to Adjudication.—The adjudication by the clerk of the superior court that "the foregoing instrument has been duly proved, as appears from the foregoing seal and certificate," does not follow the very words of the statute in that it does not adjudge that said probate is "in due form." But it is intelligible and means substantially the same thing and "will be upheld without regard to mere form." Devereux v. McMahon, 102 N. C. 284, 9 S. E. 635. The acknowledgment was before an officer authorized to take it and probate was in fact in due form. The omission, therefore, of the clerk to adjudge in just so many words that the probate was "in due form" when in substance he did so adjudge, was not sufficient ground to exclude the deed. Deans v. Pate, 114 N. C. 194, 196, 19 S. E. 146.

Adjudication Exercise of Judicial Function.—When the clerk of the superior court, upon the certificate of the acknowledgment of a grantor in a conveyance, or of proof of its execution, and privy examination of a married woman by a justice of the peace, adjudges such certificate to be in due form, admits the instrument to probate, and orders its registration, this is the exercise of a judicial function. White v. Connelly, 105 N. C. 65, 11 S. E. 177.

Substantial Compliance Sufficient.—A substantial compliance with this section and section 47-37, is all that is necessary to be observed by the clerk of the superior court of the county wherein the land lay, in passing upon the certificate to a deed thereto made and executed in another state; and when objection to the validity of registration is made on that ground, and it appears of record on appeal that the certificate made in such other state is in fact sufficient, the validity of the registration will be declared and upheld by the Supreme Court. Kleybolte & Co. v. Black Mountain Timber Co., 151 N. C. 635, 66 S. E. 663.

Certificate of Probate or Acknowledgment Necessary Even if Probate Made before Clerk.—The statutes of North Carolina require, as the method of authentication and warrant to the register to record a deed, that a certificate complying substantially with the terms of the statute shall be attached to or indorsed upon the deed, even though probate is had before the clerk of the superior court, and where no sufficient certificate was attached to or indorsed upon an instrument, it could not be shown by parol that proper proof was made before the clerk. National Bank v. Hill, 226 Fed. 102, 103.

Registration No Evidence of Adjudication without Signed Certificate of Clerk.—Where a justice of the peace has properly and in due form taken the acknowledgment of the grantor and his wife to a deed to lands, and the clerk of the court has failed or omitted to sign his name to the certificate for registration, the registration of the instrument is no evidence that the clerk or his deputy has complied with the provisions of this section requiring the clerk, etc., to adjudicate the sufficiency of the certificate of the justice of the peace, or permit a copy of such deed to be used in evidence under the provisions of section 8-18. The curative statutes, §§ 47-49, 47-86, 47-87, 47-88 and 47-89, have no application. Woodlief v. Woodlief, 192 N. C. 634, 135 S. E. 612.

No Adjudication When Instrument Proved before Clerk.—It is only required for a valid probate that the clerk should certify to the proof of a deed taken before him and it is only when he passes upon a probate taken before some other officer that he is required to certify to the correctness of the probate and certificate, and order the instrument to be registered. Table Rock Lumber Co. v. Branch, 158 N. C. 251, 73 S. E. 154.

Adjudication of Instrument Probated in Another State.—When a deed in trust made and executed beyond the borders of this State conveying lands herein has been there acknowledged and probated before a notary public, and (unnecessarily) the clerk of the Supreme Court in compliance with a statute there, has certified the official character of the notary and his authority as such, it is a sufficient compliance with this and section 47-37, for the clerk of the superior court of the county wherein the land lay, to certify that "the foregoing and annexed certificate of (naming the clerk), a clerk of the Supreme Court, etc., duly authenticated by his official seal, is adjudged to be correct, in due form and according to law, and the foregoing and annexed deed of trust is adjudged to be duly proved, etc." Kleybolte & Co. v. Black Mountain Timber Co., 151 N. C. 635, 66 S. E. 663.

Certificate of Clerk for Registration of Grant by State Not Required.—The certificate of the clerk of the court, required as a prerequisite to the registration of instruments of writing named therein, is not essential to the validity of the registration of a grant; the great seal of the State being sufficient authority for such registration. Ray v. Stewart, 105 N. C. 472, 11 S. E. 182.

Presumption of Regularity from Clerk's Certificate.—Where it appears that the clerk appended to a lease offered for registration his certificate, it will be presumed, nothing to the contrary appearing, that it was in due form. Darden v. Neuse, etc., Steamboat Co., 107 N. C. 437, 12 S. E. 46.

Defective Corporate Deed—Invalid Notwithstanding Adjudication.—A corporate deed of trust was executed by the trustee, as well as the corporation, and bore a notary's certificate of proof of the trustee's execution, and a certificate

of the clerk that the instrument had been duly proved, "as appears from the foregoing seals and certificate, which are adjudged to be in due form and according to law," but no certificate as to the proof of execution by the corporation was attached. It was held, under this section that the clerk's certificate was invalid, and did not entitle the deed to registration. National Bank v. Hill, 226 Fed. 102, 103.

Ancient Document Rule.—Plaintiffs claimed the locus in quo under seven years adverse possession under color and under twenty years adverse possession. Defendants objected to certain deeds in plaintiffs' chain of color of title on the ground that they were improperly registered and did not comply with this and section 47-17. It was held the deeds, having been on record for some thirty years, were competent under the ancient document rule to be submitted to the jury on the claim of adverse possession for twenty years, and error, if any, in admitting the deeds as color of title was not prejudicial under the facts. Owens v. Blackwood Lbr. Co., 212 N. C. 133, 193 S. E. 219.

§ 47-15. Probate of husband's deed where wife insane.—When a deed executed by a married man whose wife is insane or a lunatic, and whose homestead has been allotted, together with the certificate of the clerk of the superior court or with the certificate of the superintendent of the insane institution of the state where the wife is confined in conformity to section 39-14 under the chapter Conveyances, is offered for probate before the clerk of the superior court of the county in which the land conveyed is situated, and the execution of such deed is acknowledged or proved, the clerk shall adjudge whether the certificate of the superintendent or the clerk is in due form, and if adjudged to be in due form he shall order the registration of the deed and certificate. (Rev., s. 1000; 1905, c. 138, s. 2; 1919, c. 20; C. S. 3306.)

§ 47-16. Probate of corporate deeds, where corporation has ceased to exist.—It is competent for the clerk of the superior court in any county in this state, on proof before him upon the oath and examination of the subscribing witness to any contract or instrument required to be registered under the laws of this state, to adjudge and order that such contract or instrument be registered as by law provided, when such contract or instrument is signed by any corporation in its corporate name by its president, and when such corporation has been out of existence for more than ten years when the said contract or instrument is offered for probate and registration, and when the grantee and those claiming under any such grantee have been in the uninterrupted possession of the property described in said contract or instrument since the date of its execution; and said contract or instrument so probated and registered shall be as effective to all intents and purposes as if signed, sealed, and acknowledged, or proven, as provided under the existing laws of this state. (1911, c. 44, s. 1; C. S. 3307.)

Cross Reference.—As to forms of probate for deeds and other conveyances by corporations, see § 47-41.

Art. 2. Registration.

§ 47-17. Probate and registration sufficient without livery.—All deeds, contracts or leases, before registration, except those executed prior to January first, one thousand eight hundred and seventy, shall be acknowledged by the grantor, lessor or the person executing the same, or their signature proven on oath by one or more witnesses in the manner prescribed by law, and all deeds executed and registered according to law shall be valid, and pass title and estates without livery of seizin, attornment or other ceremony. (Rev., s. 979; Code, s. 1245; 1885, c. 147, s. 3; 29, Ch. II, c. 3; R. C., c. 37, s. 1; 1715, c. 7; 1756, c. 58, s. 3; 1838-9, c. 33; 1905, c. 277; C. S. 3308.)

Purpose of Section.—This section together with section 47-20 were intended to uproot all secret liens, trusts, unregistered mortgages, etc., and under its force it has been held that no notice, however full and formal, will supply the place of registration. Robinson v. Willoughby, 70 N. C. 358; Hooker v. Nichols, 116 N. C. 157, 160, 21 S. E. 207.

Application to All Deeds.—The construction first put upon this section was, that it only applied to such deeds as operated at common law by livery of seizin. Hogan v. Strayhorn, 65 N. C. 279. But our courts, in their policy of relaxing the rigid and technical rules of common law, have since extended the construction so as to bring all of our deeds of conveyance within the purview of that statute. Thus it has been held that deeds of bargain and sale and covenants to stand seized to uses are put on the same footing with feoffments at common law, with respect to seizin, the declaration of uses thereon, and the consideration. Love v. Harbin, 87 N. C. 249; Ivy v. Cranberry, 66 N. C. 224. Prior to that statute, and the more recent interpretation upon it, if there was a deed of bargain and sale upon a consideration, the consideration raised a use for the bargainee, and then the statute transferred the legal estate to the uses, that is, to the bargainee, but no further use could be declared by the deed, for it was held a use could not be mounted upon a use. But there is no reason now why it may not be done, since the registration of the deed has all the effect of livery of seizin. Jones v. Jones, 164 N. C. 320, 324, 80 S. E. 430.

All Registered Deeds Put on Same Footing with Feoffment.—This section in terms at least, does not give to registered deeds the effect of conveyances with livery, but on the contrary enacts that registered deeds without livery shall pass title. It is, however, settled law in North Carolina that by the statute all registered deeds "are put on the same footing with feoffments at common law, with respect to seizin, the declaration of uses thereon, and the consideration." Bryan v. Eason, (1908) 147 N. C. 284, 61 S. E. 71. That is, because the statute has abolished livery, all registered deeds operate as if they were given with livery. 1 N. C. Law Rev. 155.

Probate May Be Sufficient as Contract.—While the order of probate cannot authorize the registration of an instrument in the form of a deed which has been defectively executed, it is sufficient, nevertheless, to authorize its registration as a contract to convey, which is expressly provided for in this and the following section. Haas v. Rendleman, 62 F. (2d) 701.

Subsequently Acquired Title—Estoppel.—See article in 1 N. C. Law Rev. 153, as to relation of this section to the doctrine of estoppel and rebutter where the grantor at the time of conveyance has no interest in the property conveyed but subsequently acquires title thereto.

Registration between Parties Not Necessary to Validity of Conveyance.—See annotations to § 47-18.

Evidence Supporting Judgment for Recovery of Land.—Evidence showing good record title in plaintiff, without any record evidence of title in defendant, held to support judgment for plaintiff for recovery of land. Knowles v. Wallace, 210 N. C. 603, 188 S. E. 195.

Cited in McClure v. Crow, 196 N. C. 657, 660, 146 S. E. 713; General Motors Acceptance Corp. v. United States, 23 Fed. (2d) 799; Owens v. Blackwood Lbr. Co., 212 N. C. 133, 193 S. E. 219; Freeman v. Morrison, 214 N. C. 240, 199 S. E. 12.

§ 47-18. Conveyances, contracts to convey, and leases of land.—No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof within the county where the land lies: Provided, the provisions of this section shall not apply to contracts, leases or deeds executed prior to March first, one thousand eight hundred and eighty-five, until the first day of January, one thousand eight hundred and eighty-six; and no purchase from any such donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to the first day of December, one thousand eight

hundred and eighty-five, when the person holding or claiming under such unregistered deed shall be in the actual possession and enjoyment of such land, either in person or by his tenant, at the time of the execution of such second deed, or when the person claiming under or taking such second deed had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person holding or claiming thereunder. (Rev., s. 980; Code, s. 1245; 1885, c. 147, s. 1; C. S. 3309.)

I. In General.
II. Registration as between the Parties.
III. What Instruments Affected.
IV. Rights of Persons Protected.
V. Notice.
VI. Effect of Defective Registration.
VII. Unregistered Deed as Color of Title.

Cross Reference.

As to the statute of frauds with reference to contracts for sale of land, leases, etc., see § 22-2.

I. IN GENERAL.

The object of probate and registration in the county where the land lies was intended to give notice to creditors and purchasers for value, or others whose rights might otherwise be seriously and unjustly impaired by the deed. Warren v. Williford, 148 N. C. 474, 62 S. E. 697; Weston v. Roper Lumber Co., 160 N. C. 263, 266, 75 S. E. 800; Massachusetts Bonding, etc., Co. v. Knox, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438.

The purpose of the registration laws is to give notice, and where the index is sufficient to put a careful and prudent examiner upon inquiry, the records are notice of all matters which would be discovered by reasonable inquiry, but the records are intended to be self-sufficient, and a person examining a title is not required to go out upon the premises and ascertain who is in possession and under what claim, the proviso of this section being applicable only to deeds executed prior to 1 December, 1885. Dorman v. Goodman, 213 N. C. 406, 196 S. E. 352.

The purpose of this section was to enable purchasers to rely with safety upon the examination of the records, and act upon the assurance that, as against all persons claiming under the "donor, bargainor, or lessor," what did not appear did not exist. Grimes v. Guion, 220 N. C. 676, 679, 18 S. E. (2d) 170.

An unregistered deed does not convey complete title and is ineffectual as against subsequent grantees under registered deeds and creditors of the grantor. Glass v. Lynchburg Shoe Co., 212 N. C. 70, 192 S. E. 899.

Not Applicable to Grants.—This section does not apply to grants, the registration of which is regulated by sections 146-47 and 146-48. Wyman v. Taylor, 124 N. C. 426, 32 S. E. 740.

Date of Registration Controls Title as against Purchasers.—Under this section a grantee in a deed acquires title thereto, as against subsequent purchasers for value, from the date of the registration of the instrument. Sills v. Ford, 171 N. C. 733, 88 S. E. 636.

Liberal Construction of Proviso.—The words of the proviso should receive a liberal construction so as to give full force and effect to the spirit and intention of the section. Cowen v. Withrow, 112 N. C. 736, 737, 17 S. E. 575.

Similar Construction with Section 47-20.—This section and section 47-20 in view of the similarity of their terminology, may be construed interchangeably. Cowen v. Withrow, 112 N. C. 736, 740, 17 S. E. 575.

Lis pendens and registration each have the purpose of giving constructive notice by record, and this section and § 1-117 must be construed in pari materia, and while the lis pendens statutes do not affect the registration laws, the converse is not true. Massachusetts Bonding, etc., Co. v. Knox, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438.

Registry Does Not Cure Lack of Mental Capacity, though Prior Deed Unregistered.—Where a deed, void for mental incapacity of the grantor to make it, is registered prior to one theretofore made by the same grantor, for a valuable consideration, when he had sufficient mental capacity, the registration under this section can give no effect to the invalid deed, and the valid deed, though subsequently registered, will be effective. Thompson v. Thomas, 163 N. C. 500, 79 S. E. 896.

Effect of Amendment of 1885, Connor Act.—Under this section a conveyance of land, made prior to the amendment of 1885, is not valid against creditors or bona fide purchasers, unless registered before 1 January, 1886. Phillips v. Hodges, 109 N. C. 248, 13 S. E. 769.

Where plaintiff's deed was executed fraudulently, in which fraud plaintiff participated, for the purpose of depriving defendant of her life estate in the land, theretofore created by paper writing executed by plaintiff's grantor, this section does not apply, and defendant's rights are superior to those of plaintiff under the registered deed, even though the paper writing giving defendant a life estate was not registered, since the protection of this section extends only to creditors and purchasers for value. Twitty v. Cochran, 214 N. C. 265, 199 S. E. 29.

Conversion in Partition Proceedings—Registration before Confirmation of Sale.—In a sale of lands in proceedings for partition, the conversion from realty to personalty does not take place until the land is sold and the sale confirmed by the court. Therefore, an unregistered deed made by some of the cotenants of their interest in the lands held in common is not good as against a subsequently made and registered deed by the same grantors of the same interest, to another, after the decree of sale for partition, but before the sale was confirmed. McLean v. Leitch, 152 N. C. 266, 67 S. E. 490.

Registered Deed Good Although Deed to Grantor Was Unregistered.—Upon registration, the deed is good even as against creditors and purchasers for value, even though the deed by which the grantor acquired title is unregistered. Durham v. Pollard, 219 N. C. 750, 14 S. E. (2d) 818.

Applied in Fidelity, etc., Co. v. Massachusetts Mut. Life Ins. Co., 74 F. (2d) 881.

Cited in Johnson v. Fry, 195 N. C. 832, 836, 143 S. E. 857, holding the section not applicable; Jones v. Rhea, 198 N. C. 190, 151 S. E. 255; Threlkeld v. Malcragson Land Co., 198 N. C. 186, 151 S. E. 99; Tocci v. Nowfall, 220 N. C. 550, 18 S. E. (2d) 225.

II. REGISTRATION AS BETWEEN THE PARTIES.

Formerly Registration Prerequisite Even as between Parties.—The provision of this section prior to its amendment, as construed in White v. Holly, 91 N. C. 67, was that "no conveyance of land nor contract to convey, etc., shall be good and available in law, unless the same shall be acknowledged by the grantor, or proved, etc., and registered." At the next session of the General Assembly the law was so amended as to provide that "no conveyance of land or contract to convey, shall be valid to pass any property, as against creditors or purchasers for a valuable consideration from the doner, bargainor or lessor, but from the registration thereof in the county where the land lies." The manifest purpose of this section therefore, is to protect purchasers for value and creditors, and leave the parties to contracts for the sale of lands inter se to litigate their rights under the rules of evidence in force. Hargrove v. Adcock, 111 N. C. 166, 167, 170, 16 S. E. 16.

At Present Instrument Good between Parties without Registration.—A deed is good and valid between the parties thereto without registration, and may be proved on the trial as at common law. Warren v. Williford, 148 N. C. 474, 62 S. E. 697; Weston v. Roper Lumber Co., 160 N. C. 263, 266, 75 S. E. 800; Glass v. Lynchburg Shoe Co., 212 N. C. 70, 192 S. E. 899.

Contracts to convey land, as between the parties thereto, may be read in evidence without being registered. Hargrove v. Adcock, 111 N. C. 166, 16 S. E. 16.

An unregistered deed is good as between the parties and the fact that it is not registered does not affect the equities between the parties, the sole purpose of the statute being to determine and make certain the question of title. Patterson v. Bryant, 216 N. C. 550, 5 S. E. (2d) 849.

Same—Deed Effective under Statute of Uses.—Under this section registration is not necessary to the validity of a deed for valuable consideration, effective under the Statute of Uses, as between the parties. In cases where livery of seisin was formerly required registration still supplies the place of that ceremony. Hinton v. Moore, 139 N. C. 44, 46, 51 S. E. 787.

Same—Registration after Commencement of Action.—As between the parties, there being no question of title arising from prior registration of junior deeds, a deed registered after the commencement of an action is admissible in evidence. Hudson v. Jordan, 108 N. C. 10, 12 S. E. 1029.

Same—Analogy with Section 47-20.—The Connor Act (the amendment to this section) has substantially the same legal effect upon deeds that the Act of 1829 had upon mortgages and deeds in trust (Robinson v. Willoughby, 70 N. C. 358, 362), leaving them, although unregistered, valid as between the parties and as to all others except purchasers for value, and creditors. King v. McRackan, 168 N. C. 621, 624, 84 S. E. 1027.

The registration laws are not for the protection of the

grantor, and therefore laches on the part of his first grantee in failing to promptly record his deed is not available as an equitable defense in such grantee's action for damages for failure of title by reason of the execution by the grantor of a second deed to the same property which is first recorded. Patterson v. Bryant, 216 N. C. 550, 5 S. E. (2d) 849.

Quoted in Tucker v. Almond, 209 N. C. 333, 183 S. E. 407.

III. WHAT INSTRUMENTS AFFECTED.

Instruments in Writing Dealing with Estates Which Lie in Grant.—It will be observed that this section, in terms, applies only to conveyances of land, contracts to convey, and leases of land for more than three years. Such instruments deal with estates that lie in grant, and therefore, are required to be in writing under the statute of frauds and under the law of North Carolina. Spence v. Foster Pottery Co., 185 N. C. 218, 220, 117 S. E. 32.

Same—Parol and Implied Trusts Not Affected.—The primary purpose and intent of the Legislature, in the passage of this act, was to establish a known and ready method for the settlement of conflicting claims and priorities arising from registrations. Hence, from its very nature and purpose it would seem to require that it be restricted to written instruments capable of being registered. There are certain parol trusts, and those created by operation of law, dealing with beneficial interests in lands, which are fully recognized in this jurisdiction. Jones v. Jones, 164 N. C. 320, 80 S. E. 430, and cases there cited. And it has been held with us consistently that these trusts, though resting in parol, or not evidenced by any writing, may be enforced against the holder of the legal title, unless it appear that such holder, or some one under whom he claims, has acquired his title for a fair and reasonable value and without notice of the trust. Here it will be observed that a bona fide purchaser for value without notice (but not a creditor) is protected against the claim of one in whose favor the trust is sought to be established, not by virtue of the terms of this section, but on the broad principles of equity. Spence v. Foster Pottery Co., 185 N. C. 218, 220, 117 S. E. 32; Sills v. Ford, 171 N. C. 733, 88 S. E. 636; Pritchard v. Williams, 175 N. C. 319, 95 S. E. 570; Roberts v. Massey, 185 N. C. 164, 116 S. E. 407; Eaton v. Doub, 190 N. C. 14, 21, 128 S. E. 494.

Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of this section. These trusts were purposely omitted from its terms for the reason that, being incapable of registration because not in writing, it was considered unfair and subversive of right to destroy them in favor of one who had acquired his title with full knowledge of their existence. See concurring opinion of Hoke, J., in Pritchard v. Williams, 175 N. C. 319, 95 S. E. 570, and opinion of Connor, J., author of the act, in Wood v. Tinsley, 138 N. C. 507, 51 S. E. 59. See, also, Roberts v. Massey, 185 N. C. 164, 116 S. E. 407; Spence v. Foster Pottery Co., 185 N. C. 218, 220, 117 S. E. 32; Sansom v. Warren, 215 N. C. 432, 2 S. E. (2d) 459.

Certain parol trusts in land are enforceable in this jurisdiction when the holder of the legal title, or those claiming under him, have not acquired it for a fair and reasonable value without notice; and this section requiring notice by registration as against creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor, necessarily, in contemplation of the express provisions of the statute, refer to such instruments as are in writing and capable of registration. Spence v. Foster Pottery Co., 185 N. C. 218, 117 S. E. 32.

When the plaintiff seeks to engraft a parol trust in his favor against the holder of the legal title to lands, only a bona fide purchaser for value without notice is protected, and this under the broad principles of equity, and creditors expressly referred to in this section, are not included, Spence v. Foster Pottery Co., 185 N. C. 218, 117 S. E. 32.

A declaration of trust is not a conveyance, or contract to convey, or lease of land, requiring registration as against creditors, by virtue of the provisions of this section. Crossett v. McQueen, 205 N. C. 48, 51, 169 S. E. 829.

Contracts to Sell—The One First Registered Prevails. — Among two or more contracts to sell land, the one first registered will confer the superior right. Combes v. Adams, 150 N. C. 64, 68, 63 S. E. 186.

Wills Not Affected—Purchaser under a Will Not Purchaser for Value.—The evil which it was intended to remedy by this section was the uncertainty of title to real estate caused by persons withholding deeds, contracts, etc., based upon a valuable consideration, from the public records. This evil could not exist in regard to wills, where the devisee is not a purchaser for value, but takes as a donee or volunteer. Bell v. Couch, 132 N. C. 346, 349, 43 S. E. 911.

Hence it is not necessary to examine the book of wills to see if the grantor of lands has devised them, or a part thereof, to another, and actual notice thereof will not affect the title conveyed by a registered deed. Harris v. Dudley Lumber Co., 147 N. C. 631, 61 S. E. 604.

Same—Will Not a Conveyance.—Looking to the purpose of the Legislature and the meaning of the language used, the statute can not by construction include wills under the general term "conveyance." Bell v. Couch, 132 N. C. 346, 349, 43 S. E. 911.

Same—But Purchaser from Devisee Prevails against Unregistered Deed.—This section requiring conveyances of land, contracts to convey, and leases to be recorded, applies when the grantee in a deed fails to record his deed until after the probate of a will of the grantor devising the same land, and after the registration of a deed for the same land from the devisee to a purchaser for value. Bell v. Couch, 132 N. C. 346, 43 S. E. 911.

What Included in Phrase "Unregistered Deed" in Proviso.—The use of the words "unregistered deed" in the proviso is in their broad generic sense and has reference to the same scope as the words "conveyance of land, or contract to convey, or lease of land," used in the first part of the section. McNeill v. Allen, 146 N. C. 283, 59 S. E. 689.

Agreement for Division of Proceeds of Sale Not Affected.—An instrument which is neither a conveyance of land, nor a contract to convey, nor lease of land, but only an agreement for a division of the proceeds of sales thereafter to be made of land and authority to one to take entire control and management of sales of land for the parties, is not required to be registered. Lenoir v. Valley River Min. Co., 113 N. C. 513, 18 S. E. 73.

Applies to Both Lost and Unlost Deeds.—This section applies both to lost and unlost deeds executed after 1 December, 1885, and there was no error in rejecting parol evidence to show that the plaintiff's grantor deeded the land in controversy to W. in 1891 and that the said deed had been lost before registration, where the plaintiff was purchaser for value of said title under registered conveyances. Hinton v. Moore, 139 N. C. 44, 51 S. E. 787.

Lease in Writing.—In order to affect with notice and bind a purchaser of lands to a contract of lease for more than three years made by a tenant with a former owner, it is necessary that the lease be registered in the proper county, and, consequently, the lease must be in writing. Mauney v. Norvell, 179 N. C. 628, 103 S. E. 372.

Mortgages Included.—Mortgages have been uniformly held to be conveyances of the legal title, and require the formality of a conveyance in their assignment as against purchasers for value, and, therefore, as against purchasers, the legal title vested in the mortgagee comes within the provisions of the registration act, and this section includes mortgages within its terms. First Nat. Bank v. Sauls, 183 N. C. 165, 170, 110 S. E. 865.

Creation of Building Restrictions Included. — A building restriction, being an easement, which must be created by a grant is within this section. Davis v. Robinson, 189 N. C. 589, 127 S. E. 697.

Rents Accruing Included.—While rents accrued are choses in action and an assignment thereof need not be recorded. rents accruing are incorporeal hereditaments which, if for a period of more than three years, must be registered to pass any property as against purchasers for valuable consideration. First, etc., Nat. Bank v. Sawyer, 218 N. C. 142, 10 S. E. (2d) 656.

IV. RIGHTS OF PERSONS PROTECTED.

In General.—By virtue of this section only creditors of the donor, bargainor, or lessor, and purchasers for value are protected against an unregistered deed, contract to convey, or lease of land for more than three years. Gosney v. McCullers, 202 N. C. 326, 162 S. E. 746; Case v. Arnold, 215 N. C. 593, 2 S. E. (2d) 694; Durham v. Pollard, 219 N. C. 750, 752, 14 S. E. (2d) 818; Warren v. Williford, 148 N. C. 474, 62 S. E. 697; Virginia-Carolina Joint Stock Land Bank v. Mitchell, 203 N. C. 339, 166 S. E. 69.

In Lowery v. Wilson, 214 N. C. 800, 200 S. E. 861, it was held that creditors and purchasers for value are entitled to rely on the record of the instrument as written and recorded, under this and § 47-20, and as to them the mortgagee is not entitled to reformation.

Right to Easement.—Under this section where a grantor conveys land by registered deed creating an easement in land reserved by grantor, his grantee is entitled to the easement unaffected by an unregistered contract to convey the reserved land executed prior to the deed. Walker v. Phelps, 202 N. C. 344, 162 S. E. 727.

Where a deed provides that it is subject to a written lease previously executed by the grantor, the grantee takes the premises subject to the lease although the lease is for

more than three years and is not recorded. Hildebrand Machinery Co. v. Post, 204 N. C. 744, 169 S. E. 629.

Creditors Put upon the Same Plane as Purchasers.—No distinction is made in the statute or in the opinions of the court, construing and applying the statute, between creditors and purchasers for value. No conveyance of land is valid to pass any property from the donor or grantor, as against either creditors or purchasers for value, but from the registration thereof. As to a purchaser for value, who has recorded his deed, it has been held that a prior deed from the same grantor, unregistered, does not exist, as a conveyance or as color of title. The same is true as against the creditors. Eaton v. Doub, 190 N. C. 14, 19, 128 S. E. 494.

Volunteers and Donees Not Protected.—This section for lack of timely registration, only postpones or subordinates a deed older in date to creditors and purchasers for value. As against volunteers or donees, the older deed, though not registered, will, as a rule, prevail. Tyner v. Barnes, 142 N. C. 110, 113, 54 S. E. 1008.

While the cancellation of a preëxisting debt may be sufficient consideration to constitute the grantee in a registered deed from the debtor a purchaser for value within the protection of the Conner Act, so as to take free from the claim of the grantee in a prior unregistered deed from the debtor, where the debtor transfers the property without consideration to a third person, who in turn transfers the property to the creditor without any consideration moving from the creditor to such third person, the creditor cannot maintain that the cancellation of the debt constitutes him a purchaser for value so as to be protected under the Conner Act, since his deed from the third person is not supported by any consideration, and it is required that the creditor be a "purchaser for value from the donor, bargainor, or lessor" in order to be protected. Sansom v. Warren, 215 N. C. 432, 2 S. E. (2d) 459.

The trustee in bankruptcy is regarded as a purchaser for value under the amendment to the Bankrupt Act of 1910, and acquires a valid title as against the holder of the unregistered deed, under this section. Lynch v. Johnson, 171 N. C. 611, 89 S. E. 61. This is also true under the Chandler Act, the 1938 amendment to the National Bankruptcy Act.

Dower Where Title Divested Prior to Marriage.—Where a man executed and delivered a deed to a tract of land prior to his marriage and remained on the land up to his death, and the deed was not recorded until after his death, his widow is not entitled to dower. She is not a purchaser. Haire v. Haire, 141 N. C. 88, 53 S. E. 340.

Possessor under Unregistered Contract to Convey—Rights to Improvements.—One who goes into possession of land, under a parol contract to convey, paying the purchase money and making improvements thereon, cannot assert the right to remain in possession until he is repaid the amount expended for purchase money and improvements as against a purchaser for value from the vendor, under a duly registered deed. Wood v. Tinsley 138 N. C. 507, 51 S. E. 59. As to a purchaser for value, from the common grantor, the rule applies to one in possession, under an unregistered deed, who has enhanced the value of the land by improvements, although made in good faith. Eaton v. Doub, 190 N. C. 14, 21, 128 S. E. 494. Expressions in Kelly v. Johnson, 135 N. C. 647, 47 S. E. 674, conflicting with these views, were obiter and were corrected by Wood v. Tinsley, supra.

Tort Feasor Neither a Purchaser Nor a Creditor.—A tort feasor, whose negligence has damaged a chattel in the rightful possession of the mortgagor, is neither a purchaser nor creditor within the contemplation of our registration laws, §§ 47-18, 47-20, and 47-23, and in action may be maintained against him for the consequent damage either by the mortgagor or mortgagee, and a settlement with one will preclude a recovery by the other. Harris v. Seaboard Air Line R. Co., 190 N. C. 480, 130 S. E. 319.

Trustee or Mortgagee as Purchaser.—A trustee or mortgagee, whether for old or new debts, is a purchaser for valuable consideration. Brem v. Lockhart, 93 N. C. 191.

Priorities between Unregistered Deed and Execution of Judgment.—A sale of land under the execution of a judgment in the due course and practice of the court, and conveyance to the purchaser at the sale, regular in form and sufficiently describing the land, conveys the title superior to that of an unregistered deed from the judgment debtor to another, previously made, no notice, however formal, being sufficient to supply that required by registration; though a mortgage for the balance of the purchase price had been given by the grantee of the debtor, and duly registered before the docketing of the judgment, under the execution of which the conveyance had been made to the purchaser at the sale. Wimes v. Hufham, 185 N. C. 178, 116 S. E. 402.

Purchaser under Execution Sale — Prior Purchaser in Possession.—The purchaser at execution sale who registers his deed prior to a deed from the defendant in execution to his wife, which was executed before the sale, acquires the title to the land; and the wife in possession of the land conjointly with her husband at the time of the sale and of the execution of the sheriff's deed to the plaintiff, is not within the saving clause of the act, as the plaintiff does not take as purchaser from the "donor, bargainor or lessor," as against a donee in possession under an unregistered deed, but from the sheriff, who is the agent of the law. Cowen v. Withrow, 109 N. C. 636, 13 S. E. 1022.

Extent of Judgment Creditor's or Execution Sale Purchaser's Right.—A judgment creditor or purchaser at an execution sale can acquire no greater lien or interest in the property of the judgment debtor than such debtor had at the time the judgment lien became effective. Bristol v. Hallyburton, 93 N. C. 384, 387; Spense v. Foster Pottery Co., 185 N. C. 218, 117 S. E. 32.

Rights of Creditor Whose Judgment Docketed between Execution and Registration of Prior Deed.—The grantee, in a deed executed by the grantor and deposited with the holder of a mortgage under an agreement between the latter and the grantee that it should not be registered until the payment of the purchase price, took subject to the lien of a judgment creditor of the grantor, whose judgment was rendered and docketed between execution and registration of the deed. Board v. Micks, 118 N. C. 162, 24 S. E. 729.

Execution Purchaser with Notice Prior to 1885, Subordinate to Prior Unregistered Deed.—The proviso that no purchase of land from a donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to 1 December, 1885, where there is constructive or actual notice, applies as well to a purchaser of land at an execution sale with actual notice as to a purchaser from the "bargainor or lessor." Cowen v. Withrow, 112 N. C. 736, 17 S. E. 575.

Priority of Judgment Obtained before Registration of Prior Deed.—Where a judgment is obtained against a grantor of lands subsequent to the execution of the conveyance, but prior to the time of its registration, the lien of the judgment has priority over the title of the grantee, and the lands conveyed are subject to execution under the judgment. Maxton Realty Co. v. Carter, 170 N. C. 5, 86 S. E. 714.

The lien of a regularly docketed judgment is superior to a claim under an unrecorded deed from the judgment debtor. Eaton v. Doub, 190 N. C. 14, 128 S. E. 494.

Same—Agreement between Parties as to Registration.—Under the provisions of this section the holder of a subsequently registered conveyance takes subject to the lien of a judgment creditor of the grantor where the judgment was rendered and docketed before the registration of the deed, even though there was an agreement between the grantor and the grantee that such deed should not be registered till the payment of the purchase money. Board v. Micks, 118 N. C. 162, 24 S. E. 729; Bostic v. Young, 116 N. C. 766, 21 S. E. 552; Francis v. Herren, 101 N. C. 497, 8 S. E. 353; Colonial Trust Co. v. Sterchie Bros., 169 N. C. 21, 24, 85 S. E. 40.

Same—Judgment against Grantee.—Where a judgment has been obtained and docketed against the grantee, the lien thereof immediately attaches upon the registraion of his deed, and cannot be defeated by a deed in trust subsequently registered and carrying out the agreement theretofore resting only in parol; and the consideration recited in grantee's deed is immaterial. Colonial Trust Co. v. Sterchie Bros., 169 N. C. 21, 85 S. E. 40.

Collateral Attack by Creditors for Want of Registration.—The want of registration does not invalidate the instrument so that creditors, merely as such, may treat it as a nullity in a collateral proceeding; but it is void against proceedings, instituted by them and prosecuted to a sale of the property or acquirement of a lien, as against all who derive title thereunder. Boyd v. Turpin, 94 N. C. 137; Brem v. Lockhart, 93 N. C. 191; Francis v. Herren, 101 N. C. 507, 8 S. E. 353.

V. NOTICE.

No Notice Will Supply Want of Registration.—No notice, however full or formal, will supply the want of registration of a deed. Collins v. Davis, 132 N. C. 106, 43 S. E. 579. See Knowles v. Wallace, 210 N. C. 603, 188 S. E. 195; Case v. Arnold, 215 N. C. 593, 2 S. E. (2d) 694; Grimes v. Guion, 220 N. C. 676, 18 S. E. (2d) 170; Turner v. Glenn, 220 N. C. 620, 18 S. E. (2d) 197.

Where defendant alleged that she went into possession of the land, paid taxes and made improvements under a parol agreement with the owner that if the owner should fail to return and repay the taxes and pay for the improvements defendant should have the land in fee, and that plaintiff, seeking to recover possession of the land by virtue of a duly registered deed from the heirs of the vendor, took with knowledge of the terms of the agreement and

that defendant was in possession thereunder, it was held that the parol agreement was ineffectual as against plaintiff notwithstanding his knowledge, since no notice, however full and formal, will supply notice by registration as required by this section. Grimes v. Guion, 220 N. C. 676, 18 S. E. (2d) 170.

A deed to lands registered under this section, conveys title as against any unregistered deed though previously executed to the knowledge of the grantee of the later deed, no notice supplying the place of registration, though the claimant is in possession; the provision of this section as to such possession is restricted to deeds executed prior to 1 December, 1885. Lanier v. Roper Lumber Co., 177 N. C. 200, 98 S. E. 593.

No notice however full and formal as to the existence of a prior deed can take the place of registration. McClure v. Crow, 196 N. C. 657, 659, 146 S. E. 713.

Ordinarily, a person interested in a transaction involving title to land may rely upon the public records, and a grantee, mortgagee, or trustee for value in registered instruments takes title conveyed in such instruments free from claims arising from prior unregistered instruments, and no notice, however full and formal, will supply want of registration. Smith v. Turnage-Winslow Co., 212 N. C. 310, 193 S. E. 685.

This section provides, for reasons of public policy, that the rights of successive grantees of the same property shall be determined by registration, and that even actual knowledge on the part of the grantee in a registered instrument of the execution of a prior unregistered deed will not defeat his title as purchaser for a valuable consideration in the absence of fraud or matters creating an estoppel. Patterson v. Bryant, 216 N. C. 550, 5 S. E. (2d) 849.

See note under § 47-20.

In order for a registered deed to give constructive notice to creditors or purchasers for value, the probate must not be defective upon its face as to a material requirement, and where the probate is taken upon the examination of an attesting witness it must actually or constructively appear upon the face of the probate that the certificate was made upon evidence taken of the subscribing witness under oath, and if not so appearing the registration of the deed is insufficient to give the statutory notice. McClure v. Crow, 196 N. C. 657, 146 S. E. 713.

Possession No Notice after 1885.—The mere possession of the locus in quo under an unregistered ninety-nine year lease or any other circumstances is not sufficient notice to the owner of the fee under a valid paper chain of title. Dye v. Morrison, 181 N. C. 309, 107 S. E. 138.

Possession as Notice Only as to Deeds before 1885.—The proviso making actual possession notice to subsequent purchasers, applies only to deeds executed prior to 1 December, 1885. Collins v. Davis, 132 N. C. 106, 43 S. E. 579.

A deed executed prior to the Registration Act of 1885, ch. 147, but not registered until after the registration of a mortgage from the same grantor, is competent evidence to show title in the grantee, he being in possession before the passage of the said act. Laton v. Crowell, 136 N. C. 377, 48 S. E. 767.

Doctrine of Estoppel Not Applicable.—The equitable doctrine of estoppel has no application to an innocent purchaser of lands for a valuable consideration, where the party setting up the estoppel under his deed has not had the latter recorded; for no notice, however full or formal, will, under this section, supply the place of registration. Sexton v. Elizabeth City, 169 N. C. 385, 86 S. E. 344.

VI. EFFECT OF DEFECTIVE REGISTRATION.

Registration of Defectively Probated Deed Ineffective. — The registration of a deed executed outside of the State with defective probate is without authority and ineffective for any purpose; such a deed previously executed and so registered, unless probated and registered prior to January 1, 1866, takes effect to pass the legal title only from the date of lawful registration, and is invalid as against a conveyance made and registered in the meantime under a decree of court against the grantor which left in him no title to pass thereunder. United States v. Hiawassee Lumber Co., 202 Fed. 35.

The registration of a deed upon an unauthorized probate is invalid, and it cannot be introduced in evidence for the purpose of showing an essential link in the chain of title. Allen v. Burch, 142 N. C. 524, 525, 55 S. E. 354.

While a defective probate of a deed to lands appearing upon its face is ineffectual to pass title as against creditors, etc., it is otherwise when the probate appears to have been in conformity with law, regularly taken by a notary public in some other state and there is no evidence that the grantee in the commissioner's deed under the foreclosure of a mortgage had actual notice of the defect. County Sav. Bank v. Tolbert, 192 N. C. 126, 133 S. E. 558.

VII. UNREGISTERED DEED AS COLOR OF TITLE.

Unregistered Deed as Color of Title—Synopsis of Law.—Formerly an unregistered deed was in all cases color of title if sufficient in form (Hunter v. Kelly, 92 N. C. 285), but after the passage of the Conner Act it was held in Austin v. Staten, 126 N. C. 783, 36 S. E. 338, that an unregistered deed was not color of title.

The question was again considered in Collins v. Davis, 132 N. C. 106, 43 S. E. 579, and the ruling in the case of Austin v. Staten was modified so that it only applied in favor of the holder of a subsequent deed executed upon a valuable consideration, and the court has since then consistently adhered to the latter decision. Janney v. Robbins, 141 N. C. 400, 53 S. E. 863; Burwell v. Chapman, 159 N. C. 209, 211, 74 S. E. 685; Gore v. McPherson, 161 N. C. 638, 644, 77 S. E. 835; King v. McRackan, 168 N. C. 621, 624, 84 S. E. 1027.

Where one makes a deed for land, for a valuable consideration, and the grantee fails to register it, but enters into possession thereunder, and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee, in a subsequent deed for a valuable consideration, who has duly registered his deed. Collins v. Davis, 132 N. C. 106, 43 S. E. 579. Except in cases coming within this rule, the rights acquired by adverse possession for seven years under color of title are not disturbed or affected by this section. Roberts v. Massey, 185 N. C. 164, 116 S. E. 407; Eaton v. Doub, 190 N. C. 14, 18, 128 S. E. 494.

Same—Qualification — Adverse Possession. — The principle, that under this section an unregistered deed does not constitute color of title, does not extend to a claim by adverse possession held continuously for the requisite time under deeds "foreign" to the true title or entirely independent of the title under which the plaintiff makes his claim. Austin v. Staten, 126 N. C. 783, 36 S. E. 338, distinguished. Janney v. Robbins, 141 N. C. 400, 53 S. E. 863.

But where one makes a deed for land for a valuable consideration and grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee in a subsequent deed for a valuable consideration who has duly registered his deed. King v. McRackan, 168 N. C. 621, 624, 84 S. E. 1027.

Same—No Color of Title as against Judgment Creditors. —The possession of a grantee under an unregistered deed of lands is not under color of title as against subsequent judgment creditors of his grantor, who have thus obtained their liens on the locus in quo, the source of title being a common one, nor can the grantee establish his rights to betterments. Eaton v. Doub, 190 N. C. 14, 128 S. E. 494.

Registration as Affecting Commencement of Limitations. —The statute of limitations does not begin to run in favor of the lessee in possession under a ninety-nine-year lease of lands until the registration of the lease, as against the owner of the fee under a paper chain of title from a common source. Dye v. Morrison, 181 N. C. 309, 107 S. E. 138.

§ 47-19. Unregistered deeds prior to January, 1890, registered on affidavit.—Any person holding any unregistered deed or claiming title thereunder, executed prior to the first day of January, one thousand eight hundred and ninety, may have the same registered without proof of the execution thereof by making an affidavit, before the officer having jurisdiction to take probate of such deed, that the grantor, bargainor or maker of such deed, and the witnesses thereto, are dead or cannot be found, that he cannot make proof of their handwriting, and that affiant believes such deed to be a bona fide deed and executed by the grantor therein named. Said affidavit shall be written upon or attached to such deed, and the same, together with such deed, shall be entitled to registration in the same manner and with the same effect as if proved in the manner prescribed by law for other deeds. (Rev., s. 981; 1885, c. 147, s. 2; 1905, c. 277; 1913, c. 116; 1915, cc. 13, 90; Ex. Sess. 1924, c. 56; C. S. 3310.)

Editor's Note.—The amendment of 1924, Public Laws, c.

56, extended the operation of this section to deeds executed between 1885 to 1890.

Affidavit in Case of Corporation Grantee, by Whom Made.—Where a corporation is the holder of such a deed, the affidavit under this section, may properly be made by its president. Richmond Cedar Works v. Pinnix, 208 Fed. 785.

Affirmation of Belief That Deed Is Bona Fide, Essential.—The probate of a deed dated in 1845 upon an affidavit that the affiant claims title under the said deed and that the maker of said deed and the witnesses thereto are dead, and that he cannot make proof of their handwriting, is defective, in that it does not appear by the affidavit that the "affiant believes such a deed to be a bona fide deed and executed by the grantor therein named." Allen v. Burch, 142 N. C. 524, 525, 55 S. E. 354.

§ 47-20. Deeds of trust and mortgages, real and personal.—No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies; or in case of personal estate, where the donor, bargainor or mortgagor resides; or in case the donor, bargainor or mortgagor resides out of the state, then in the county where the said personal estate, or some part of the same, is situated; or in case of choses in action, where the donee, bargainee or mortgagee resides. For the purposes mentioned in this section the principal place of business of a domestic corporation is its residence. (Rev., s. 982; Code, s. 1254; R. C., c. 37, s. 22; 1829, c. 20; 1909, c. 874, s. 1; C. S. 3311.)

I. In General.
II. Registration as between Parties.
III. Instruments Affected.
IV. Rights of Persons Protected.
V. Notice.
VI. Place of Registration.

Cross References.

As to form of chattel mortgage, see § 45-1. As to discharge of record of mortgages and deeds of trust, see § 45-37. For identity in phraseology and purpose the constructions placed upon section 47-18 are, for the most part, applicable to this section. See annotations to that section. See note under § 47-23.

I. IN GENERAL.

Section Liberally Construed. — This section is liberally construed. General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767.

Registration Statutory.—The probate and registration of deeds and mortgages are entirely statutory, and creditors and purchasers are entitled to rely upon at least a substantial compliance with the statute. National Bank v. Hill, 226 Fed. 102.

The object of this section was to prevent fraud, and to that end it requires all encumbrances upon estates to be registered, so that purchasers and creditors might have notice of their existence and nature, and that all persons might see for what the encumbrance was created.

When the registration is made the means of knowledge thus furnished, it enables creditors of the mortgagor to avail themselves of their legal remedy against the equity of redemption in the land. This publicity affords the creditor all the benefit he can reasonably ask or that the law intended. Starke v. Etheridge, 71 N. C. 240, 244.

The courts of this state have adopted a strict policy in regard to notice and registration in order to encourage immediate and proper recording. 15 N. C. Law Rev. 166.

Character of Registration.—The recording of the transfer is not required by this section in the sense in which that word is used in section 60b of the National Bankruptcy Act concerning voidable preferences. In re Cunningham, 64 F. (2d) 296, 299.

Effective from Time of Registration.—A mortgage deed, not registered within time, when registered operates from the time of registration only, and has no relation back to its date. Davison v. Beard, 9 N. C. 520.

Identical Construction with Section 47-18. — In view of practical identity of the terminology of this section and section 47-18, the construction put upon them will be identical. Cowan v. Withrow, 112 N. C. 736, 740, 17 S. E. 575; Francis v. Herren, 101 N. C. 497, 8 S. E. 353.

Registration of Chattel Mortgages at Common Law.—At common law, mortgages of personal property were not required to be reduced to writing, and our statute only requires them to be reduced to writing and registered as affecting creditors and purchasers for value. Butts v. Screws, 95 N. C. 215.

This section is a substitute for possession by the mortgagee. If the mortgagee as such takes possession of the mortgaged personal property, it renders registration unnecessary. Possession, in such circumstances, will render the mortgage as good as it would be if registered. Coggin v. Hartford Acci., etc., Co., 9 F. Supp. 785, 788, citing Cowan v. Dale, 189 N. C. 684, 128 S. E. 155.

If possession is to be substituted for registration under this section, it seems that the possession should be by virtue of the mortgage. Coggin v. Hartford Acci., etc., Co., 9 F. Supp. 785, 788.

In the instant case, the record shows very clearly that possession of the property was not taken in the capacity of mortgagee. The defendant obtained possession by promising the contractor a preference when letting the contract for completion. The motive of the bankrupt, to the knowledge of surety, was to perpetuate a fraud on his creditors. The transaction is void and cannot supply the place of registration. Id.

Valid Mortgage Not Constituting a Preference.—The mortgage was executed for a valuable consideration years before the filing of petition in bankruptcy, and through inadvertence and without fraud, it was not recorded until within four months from the filing of petition, but no lien having attached, and no proof of insolvency of bankrupt at time of recording mortgage, the mortgage is valid and does not constitute a preference. In re Finley, 6 F. Supp. 105, 106.

No Inference of Fraud Where Contracts of Road Contractor Were Not Recorded.—In Hartford Acci., etc., Co. v. Coggin, 78 F. (2d) 471, 476, it was held that no inference of fraud could fairly be drawn from the failure to record application contracts of road contractor containing chattel mortgage provisions, especially in view of the publicity and general knowledge that attends public works.

The Words "at Law" Construed.—The words "at law" in this section do not mean in a court of law only, but in all courts. "At law" is an expression in a statute which does not mean merely a legal tribunal as distinguished from an equitable jurisdiction, but, generally, our system of jurisprudence, whether legal or equitable. Hooker v. Nichols, 116 N. C. 157, 160, 21 S. E. 207.

Effect of Defective Registration.—A defective registration is no registration and is void; and hence does not prevent the rights of subsequent purchasers for value from attaching upon the property. Cowan v. Dale, 189 N. C. 684, 128 S. E. 155, 156.

Under this and § 47-23 where a chattel mortgage is registered prior to the registration of the title-retaining contract the lien of the chattel mortgage is superior to that of the title-retaining contract. Jordan v. Wetmur, 202 N. C. 279, 162 S. E. 610.

Want of Registration at Any Particular Time Does Not Avoid Instruments.—This section does not avoid a deed of trust for want of registration at any particular time, but declares that it shall not operate "but from" the registration; and that is deemed to be done on the day of its delivery to the register, as noted by him on the deed. McKinnon v. McLean, 19 N. C. 79.

Determination of Priorities between Mortgages by the Time of Filing.—The priorities between two mortgages or deeds of trust on land, appearing upon the index of the register of deeds to have been registered on the same month, exact date not given, nothing else appearing, may be determined by the time of filing for registration, and their relative position on the index. Blacknall v. Hancock, 182 N. C. 369, 109 S. E. 72.

Sale of Mortgaged Property — Left with Mortgagor — Waiver by Mortgagee.—Where the mortgagor of an automobile has sold it to another after the registration of the mortgage, in claim and delivery, there was conflicting evidence as to whether the mortgagee gave permission for the sale. It was held, that an instruction that the registration of the mortgage was notice of the lien to the defendant purchaser, and he acquired the automobile subject to the mortgage lien, unless the jury find that the plaintiff mortgagee had waived the right to his lien, is correct. This principle is distinguished from one in which a mortgage is taken of an entire stock of goods which was left with the mortgagor for sale. Rogers v. Booker, 184 N. C. 183, 113 S. E. 671.

Applied in Commercial Casualty Ins. Co. v. Willaims, 37 F. (2d) 326; First Nat. Bank v. Raleigh Sav. Bank &

Trust Co., 37 F. (2d) 301; Ward v. Southern Sand & Gravel Co., 33 F. (2d) 773.

Cited in Hetherington & Sons v. Rudisill, 28 Fed. (2d) 713; Andrews Music Store v. Boone, 197 N. C. 174, 176, 148 S. E. 39; Threlkeld v. Malcragson Land Co., 198 N. C. 186, 189, 151 S. E. 99; In re Wallace, 212 N. C. 490, 193 S. E. 819; Freeman v. Morrison, 214 N. C. 240, 199 S. E. 12; Massachusetts Bonding, etc., Co. v. Knox, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438.

II. REGISTRATION AS BETWEEN PARTIES.

Between the Parties—Valid without Registration. — As between the parties a mortgage is valid without registration. Leggett v. Bullock, 44 N. C. 283, 285; In re Finley, 6 F. Supp. 105.

As between the parties, a mortgage is valid without registration, but not so as to creditors. Ellington v. Supply Company, 196 N. C. 784, 789, 147 S. E. 307.

Same—Personal Representative Occupies Intestate's Position.—As between the original parties, the lien of an unregistered mortgage holds priority. Wallace v. Cohen, 111 N. C. 103, 15 S. E. 892; Deal v. Palmer, 72 N. C. 582; Leggett v. Bullock, 44 N. C. 283. And the personal representative of a deceased mortgagor stands in the shoes of the latter. Hence, the plaintiff holding an unregistered second mortgage on the lands of the defendant's intestate is entitled to his lien upon the funds derived from the sale in excess of the first mortgage, in preference to other creditors of the deceased. McBrayer v. Harrill, 152 N. C. 712, 68 S. E. 204.

Intended Primarily to Protect Creditors and Purchasers. —This section was intended primarily to protect creditors and purchasers, and not to attach to the instrument additional efficacy as between the mortgagor and the mortgagee. South Georgia Motor Co. v. Jackson, 184 N. C. 328, 331, 114 S. E. 478.

III. INSTRUMENTS AFFECTED.

Absolute Sale Not Affected.—When the circumstances of a given transaction amount to an absolute sale, rather than a mortgage, such transaction is valid without registration as against the persons protected under this section. Chemical Co. v. Johnson, 98 N. C. 123, 3 S. E. 723.

It is not necessary under this section that a sale or conveyance of personal property by a corporation shall be in writing or shall be registered for any purpose when such sale is absolute and delivery of the property is made to the purchaser. Carolina Coach Co. v. Begnell, 203 N. C. 656, 166 S. E. 903.

Same—Except Where It Is Actually a Mortgage.—A bill of sale of property, absolute on its face, but intended as a mortgage, is void as against a purchaser for valuable consideration, by force of this section requiring mortgages, etc., to be registered. Dukes v. Jones, 51 N. C. 14.

Agreement in Substance a Chattel Mortgage.—A bankrupt, having several textile mills, in order to provide working capital agreed that claimants, who were factors, should advance on its goods, in process of manufacture, in transit, in the hands of finishers, and in the possession of customers until paid for, and that the goods should be subject to advances to him, made generally by claimants against all merchandise in and produced at enumerated mills. It was to be held in effect a chattel mortgage, and not an equitable lien, and hence such contract, not being recorded as required, was not a valid lien against the creditors of the bankrupt. In re Southern Textile Co., 174 Fed. 523.

Under this section where a transaction is in effect a pledge of security for borrowed money, it is not a chattel mortgage requiring registration as against creditors and third persons. Bundy v. Commercial Credit Co., 201 N. C. 604, 163 S. E. 676.

Advancement of Money to Pay Off Lien.—This section does not apply to the application of the equitable subrogation of lien in favor of one advancing money to pay off existing mortgage liens upon lands. Wallace v. Benner, 200 N. C. 124, 125, 156 S. E. 795.

Preferred Stock Giving Lien. — Where preferred stockholders of a corporation are given a priority over creditors by an agreement in its charter and certificates of stock giving the holders thereof a lien on its realty, even if the agreement be construed as a mortgage, it is inoperative as to creditors without compliance with this section requiring registration. Ellington v. Supply Co., 196 N. C. 784, 147 S. E. 307.

Purchase Money Deed of Trust Registered Prior to Deed. —Where the owner of lands deeds same to a wife, according to the language of the registered instrument, and the husband alone executes a purchase money deed of trust on the lands which is registered prior to the registration of the deed in fee to the wife, the records are insufficient to show that the husband had any interest in the land, and the purchase money deed of trust is ineffective as against creditors or subsequent purchasers for value from the wife, and where the husband and wife thereafter execute a mortgage, which is duly registered, the mortgagee is entitled to foreclose same upon default as against those claiming title by foreclosure under the purchase money deed of trust, and this result is not affected by the fact that the mortgage, in the clause warranting title, referred to the purchase money deed of trust by page number of the registry book, since such reference does not constitute even constructive notice in that the records would not have shown that the husband had any interest in the land, and since no notice, however full and formal, will supply want of registration. Smith v. Turnage-Winslo, 212 N. C. 310, 193 S. E. 685.

IV. RIGHTS OF PERSONS PROTECTED.

Not Valid without Registration — As against Judgment Creditor.—Under this section a deed of trust is of no validity whatever as against a judgment creditor unless registered. Bostic v. Young, 116 N. C. 766, 21 S. E. 552.

In Lowery v. Wilson, 214 N. C. 800, 200 S. E. 861, it was held that creditors and purchasers for value are entitled to rely on the record of the instrument as written and recorded, under this and § 47-18, and as to them the mortgagee is not entitled to reformation.

Same—As against Subsequent Purchasers Whose Deeds Are Registered.—A mortgage not registered in time is ineffectual against purchasers subsequent to the mortgage whose conveyances are registered before the mortgage. Cowan v. Green, 9 N. C. 384. See "Place of Registration" under this section.

Void as to Creditors of Mortgagor and Not of Mortgagee. —An unregistered mortgage or deed of trust is void as against creditors of the mortgagor, and not of the mortgagee. Chemical Co. v. Johnson, 98 N. C. 126, 3 S. E. 723.

Between Mortgagee and Creditor.—While the sale of property to a creditor in possession in partial payment of a preëxisting debt is not good as against the equity of a mortgagee having a prior unregistered chattel mortgage against the property, since the creditor takes the property subject to the equities existing against it in the hands of the debtor, the chattel mortgage in itself creates no equity in favor of the mortgagee therein, and where the mortgagee shows no equity existing in his favor, the creditor takes the property free from the lien of the unregistered chattel mortgage in view of this section. Weil v. Herring, 207 N. C. 6, 175 S. E. 836.

General Creditors Not Protected. — Under this section general creditors are not protected as against prior unregistered mortgages or deeds of trust, unless and until such general creditors have secured a specific lien upon the property covered by the mortgage or deed of trust. Only the lien creditors are protected. National Bank v. Hill, 226 Fed. 102, 103. See also In re Cunningham, 64 F. (2d) 296; In re Finley, 6 F. Supp. 105.

Same — Even in Bankruptcy Proceedings. — In Holt v. Crucible Steel Co., 224 U. S. 262, 56 L. Ed. 756, 32 S. Ct. 414, Justice Van Devanter discussed the Kentucky statute in regard to the registration of mortgages, which, in this respect, is the same as this section, holding that, as no creditor has fastened any lien upon the property covered by the mortgage prior to the proceedings in bankruptcy, by which the title passed to the trustee, the mortgage was valid as against him. Davis v. Hanover Sav. Fund Society, 210 Fed. 768, 127 C. C. A. 318; National Bank v. Hill, 226 Fed. 102, 115.

Before a creditor can claim a lien given by a state statute on property of a bankrupt, he must perfect the same, as required by such statute. In re Franklin, 151 Fed. 642.

Mortgagee for Future and Contingent Debts.—A debtor may lawfully mortgage his property to secure future and contingent debts, and that he does so is not of itself proof of a fraudulent intent. The mortgagee in such case is deemed a purchaser for value, and his rights are not affected by a prior unregistered mortgage. Moore v. Ragland, 74 N. C. 343.

Trustee or Mortgagee as Purchaser.—A trustee or mortgagee, whether for old or new debts, is a purchaser for a valuable consideration. Brem v. Lockhart, 93 N. C. 191.

Right of Attachment Creditors. — The registration of a mortgage prior to attachments issued by creditor makes it superior to the creditors' lien, but only on property situated in the county where the mortgage was registered. Williamson v. Bitting, 159 N. C. 321, 74 S. E. 808.

Collateral Attack by Creditors Not Warranted.—The want of registration does not invalidate the instrument so that creditors, merely as such, may treat it as a nullity in a col-

lateral proceeding; but it is void against proceedings instituted by them and prosecuted to a sale of the property or acquirement of a lien, as against all who derive title thereunder. Boyd v. Turpin, 94 N. C. 137; Brem v. Lockhart, 93 N. C. 191; Francis v. Herron, 101 N. C. 497, 507, 8 S. E. 353.

Rights of Mortgagee Registering within Four Months of Bankruptcy of Mortgagor.—Under the Federal Bankruptcy Act of 1898, section 60b, and under this section a chattel mortgage given by a bankrupt, but not registered until some time after its execution and within four months of the filing of the petition, is a "preference," if on the date of its registration the mortgagee knew that the mortgagors were insolvent and that the mortgage would constitute a preference, though the mortgagors were solvent at the date of the execution of the mortgage. Brigman v. Covington, 219 Fed. 500. This is also true under the Chandler Act, the 1938 amendment to the National Bankruptcy Act.

Priority between Judgment Creditor and Purchaser at the Same Term. — A. executed a mortgage upon his land; the mortgage was filed for registration during a term of the superior court, at a subsequent day of which a judgment was rendered against him and duly docketed. It was held that the lien of the judgment was prior to that of the mortgage. Fleming v. Graham, 110 N. C. 374, 14 S. E. 922.

Mortgagee for Purchase Price—Priority against Subsequent Mortgage.—A mortgage executed and registered contemporaneously with a deed by the same parties to the same land, to secure the balance of the purchase price, is one act, giving the mortgagee a lien on the land described superior to that of a later executed and registered mortgage thereon. Allen v. Stainback, 186 N. C. 75, 118 S. E. 903.

Tort Feasor as Purchaser or Creditor.—See Harris v. Seaboard Air Line R. Co., 190 N. C. 480, 130 S. E. 319, annotations, sec. 47-18.

Trustee in Bankruptcy.—A mortgagee who failed to register his mortgage has no rights to the property mortgaged as against the trustee in bankruptcy of a corporation, to which the mortgagor subsequently conveyed the property in consideration of stock in such corporation. Holt v. Pick & Co., 25 Fed. (2d) 378.

Where Right of Surety Is Superior to That of Trustee in Bankruptcy.—Where no creditor has secured a lien upon the property of a road contractor prior to bankruptcy, the transfer of possession of the property to the surety-mortgagee before bankruptcy had the same effect under the North Carolina law as if the mortgage had been recorded. Cowan v. Dale, 189 N. C. 684, 128 S. E. 155. It follows that the right of the surety to the property transferred is superior to the claim of the trustee in bankruptcy. Hartford Acci., etc., Co. v. Coggin, 78 F. (2d) 471, 476.

Applications of Road Contractor Not Valid as against Trustee without Registration.—Applications of road contractor in so far as they profess to convey property, are chattel mortgages and are not valid as against the trustee without registration. Coggin v. Hartford Acci., etc., Co., 9 F. Supp. 785, 787, citing Commercial Cas. Ins. Co. v. Williams, 37 F. (2d) 326.

Chattel Mortgage Good against Purchasers and Creditors Only from Registration.—Under this section a chattel mortgage is good against bona fide purchasers for value and against creditors only from registration. A general creditor must yield to the lien of the mortgage from the moment of its registration, unless the lien can be successfully assailed as a fraudulent conveyance. Coggin v. Hartford Acci., etc., Co., 9 F. Supp. 785, 787.

Before a creditor can defeat the lien of the mortgage properly registered he must acquire a prior lien by way of judgment, as against land, and by levying an execution against personal property. Id.

Application contracts containing a conveyance whereby a road contractor as of the date thereof assigns, transfers, and conveys to the surety, all his right, title, and interest in the tools, plant, equipment, and materials that he may then or thereafter have upon the work, authorizing and empowering the surety and its agents to enter upon and take possession thereof, are chattel mortgages within the meaning of this recordation statute. Hartford Acci., etc., Co. v. Coggin, 78 F. (2d) 471, 474.

Where Mortgagor Displaying Property in Sales Room.—Where a mortgagee of an automobile permits the mortgagor, a dealer, to keep it on display at his show room for sale with others therein, and the mortgage sufficiently describes the property, giving the serial and motor numbers and is duly registered under the provisions of this section the mortgagee by his conduct does not lose his right of lien as against a subsequent purchaser from the dealer, and the doctrine of implied authority to the dealer to sell the machine free from the mortgage lien as agent of the mortgagee does not apply under the facts of this case. Whitehurst v. Garrett, 196 N. C. 154, 144 S. E. 835.

Priority is given to the mortgage first recorded, by virtue of this section. Wayne Nat. Bank v. National Bank, 197 N. C. 68, 72, 147 S. E. 691. As to priority in proceeds of insurance on property, see note under § 58-160.

V. NOTICE.

No Notice Will take Place of Registration.—No notice, however full and formal, will supply the place of registration, in the case of mortgages and deeds of trust, as is the case under section 47-18. Robinson v. Willoughby, 70 N. C. 358; Blacknall v. Hancock, 182 N. C. 369, 371, 109 S. E. 72; Hooker v. Nichols, 116 N. C. 157, 160, 21 S. E. 207. Therefore, mortgage given for the purchase-money of land is not entitled to priority over a second mortgage which is filed first, though the second mortgagee has notice thereof. Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99.

"In construing the registration laws of this State, this Court has consistently held that no notice, however full and formal, will supply the place of registration. Whitehurst v. Garrett, 196 N. C. 154, 144 S. E. 835; Mills v. Kemp, 196 N. C. 309, 145 S. E. 557; Salassa v. Mortgage Co., 196 N. C. 501, 146 S. E. 83; Weeks v. Adams, 196 N. C. 512, 146 S. E. 130." Ellington v. Supply Co., 196 N. C. 784, 789, 147 S. E. 307.

No notice, however full and formal, will supply the place of registration required by this section, and a registered mortgage on lands constitutes a first lien on the mortgaged lands as against prior mortgages or equities which the registration books in the county in which the land lies does not disclose. Duncan v. Gulley, 199 N. C. 552, 155 S. E. 244.

No notice, however full and formal, can replace the statutory notice of registration as against creditors or purchasers for value, and where a mortgage on lands is executed and delivered, but not registered until after the registration of a later executed mortgage, the prior registered mortgage is a first lien on the land, and it is not sufficient to change this result that the prior registered mortgage was marked upon its face "second mortgage." Nor can notice aliunde advantage the holder of the mortgage first executed. Williams v. Lewis, 158 N. C. 571, 74 S. E. 17, cited and distinguished. Story v. Slade, 199 N. C. 596, 155 S. E. 256.

No notice, however full and formal, can replace the statutory notice of registration, and where a second mortgage is executed and delivered, but not registered until after the registration of a third mortgage, the mortgage third in execution is prior to the mortgage secondly executed and subsequently registered, and this result is not changed by the fact that the mortgage third in execution contained a reference to a first and second deed of trust, and contained a warranty against encumbrances "except as above stated," the references being insufficient to show that the parties intended to recognize the prior instruments as superior liens. Lawson v. Key, 199 N. C. 664, 155 S. E. 570.

Same—Except Where Fraud Is Used.—Where one who knows of a prior unregistered deed of trust or mortgage, procures a mortgage for his own benefit on the same property, which is registered first, he gets the first lien on the property, unless he used fraud to prevent the registration of the mortgage which is first in date. Traders Nat. Bank v. Lawrence Mfg. Co., 96 N. C. 298, 3 S. E. 363.

Same—Except When Subsequent Mortgage Recites Prior Mortgage.—While it is the established rule that as no notice, however full or formal, can take the place of registration, where the subsequent mortgage of the same property recites that it is made subject to a prior mortgage, such recitation is more than a mere notice of the prior incumbrance: and it establishes a trust in equity in favor of the prior incumbrances even though this instrument is not registered. Bank v. Vass, 130 N. C. 590, 594, 41 S. E. 791; Avery County Bank v. Smith, 186 N. C. 635, 120 S. E. 215.

Where a trust deed is given to secure purchase money for land, and later a mortgage is given on the same land, which refers to the trust deed as a prior lien for purchase money, and the mortgage is registered before the trust deed, the debt secured by the trust deed must be paid by the mortgagee from the proceeds of the sale of the land, but the mortgagee is entitled to the possession of the land. Bank v. Vass, 130 N. C. 590, 41 S. E. 791.

Constructive Notice to All the World.—Under this section deeds of trust and mortgages on real and personal property, when properly probated and registered, are constructive notice to all the world. Whitehurst v. Garrett, 196 N. C. 154, 144 S. E. 835.

Record of unsatisfied mortgage is sufficient notice to put a third person upon inquiry, and whatever puts a person upon inquiry is in equity notice to him of all the facts

which such inquiry would have disclosed. Collins v. Davis, 132 N. C. 106, 43 S. E. 579.

Registration upon a defective probate does not have the effect of actual or constructive notice of the existence of the mortgage deed, so as to affect a subsequent purchaser for value. Todd, etc., Co. v. Outlaw, 79 N. C. 235.

Same—Mortgage for Future Advances—Effect of Actual Notice.—Where the plaintiffs took a mortgage from A. to secure future advancements, there being a prior mortgage to B. defectively registered, it was held that if after the execution of the plaintiffs' mortgage, and before they had made any part of or all the advancements stipulated, they had been fixed with actual notice of prior mortgages in equity, any advancements subsequently made by them would have been made at their peril; but if they were unaffected with notice before they paid out their money, their legal title must prevail as a security for repayment. **Todd, etc.,** Co. v. Outlaw, 79 N. C. 235.

Same—Corporate Deed. — Where the execution of a corporate deed of trust was not proved as the statute required, its registration was without warrant or authority of law, and as against creditors and purchasers for value it was not registered until subsequently probated in proper form and again registered. National Bank v. Hill, 226 Fed. 102.

VI. PLACE OF REGISTRATION.

County of Actual Personal Residence.—The mere fact that a person had personal property in a certain county does not constitute residence. The purpose of the statute is to have the deed of trust or mortgage of personalty registered in the county where the donor, bargainor, or mortgagor has actual personal residence. The reason is that persons interested to have knowledge in such respect would go to the county where a person resides to see what disposition he had made of his personal property by deeds and other instruments required to be registered; they would not ordinarily look elsewhere. The statutory requirement is too plain to be mistaken. Harris v. Allen, 104 N. C. 86, 10 S. E. 127; Bank v. Cox, 171 N. C. 76, 79, 87 S. E. 967.

The term "residence" as used in this section is the actual personal residence of the mortgagor. Industrial Discount Corp. v. Radecky, 205 N. C. 163, 170 S. E. 640.

Registration in County Where Land Lies.—Under this section a mortgage deed, conveying land which is not registered in the county where the land lies, is not valid as against creditors or purchasers for value. King v. Portis, 77 N. C. 25.

Same—Where Land Lies in Two or More Counties.—Upon the question whether a mortgage of one tract of land described by metes and bounds and registered in one county only—both mortgagor and mortgagee believing the whole tract to be situated in such county—is valid against creditors and purchasers, when in fact a part of said tract is situated in an adjoining county, about which the controversy arose, it was held invalid. King v. Portis, 77 N. C. 25, 26.

Registration at Changed Residence.—We know of no law requiring a new registration of mortgages of personal property whenever the mortgagor changes his residence. Weaver v. Chunn, 99 N. C. 431, 6 S. E. 370; Harris v. Allen, 104 N. C. 86, 90, 10 S. E. 127.

Effect of Registration in Wrong County.—This section requires that a mortgage on personal property be registered where the mortgagor resides, and where a mortgage on such property has been registered in the wrong county, and subsequently registered in the right one, but after a mortgage on the same property has been given to another and properly registered, the second mortgage has priority of lien over the first one, and no other notice, however full, will take the place of that of registration required by the statute. Bank v. Cox, 171 N. C. 76, 87 S. E. 967.

§ 47-21. Blank or master forms of mortgages, etc., embodiment by reference in instruments later filed.—It shall be lawful for any person, firm or corporation to have a blank or master form of mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, filed, indexed and recorded in the office of the register of deeds. When any such blank or master form is filed with the register of deeds, he shall record the same, and shall index the same in the manner now provided by law for the indexing of instruments recorded in his office, except that the name of the person, firm or corporation whose name appears on such blank or master form shall be inserted in the indices as grantor and also as grantee. The fee for filing, recording and indexing such blank or master form shall be five ($5.00) dollars.

When any deed, mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, refers to the provisions, terms, covenants, conditions, obligations, or powers set forth in any such blank or master form recorded as herein authorized, and states the office of recordation of such blank or master form, book and page where same is recorded such reference shall be equivalent to setting forth in extenso in such deed, mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, the provisions, terms, covenants, conditions, obligations and powers set forth in such blank or master form. Provided this section shall not apply to Chowan, Stanly, Iredell. Yates, Watauga, Guilford, Camden, Transylvania, Jackson, Washington, Alleghany, Bladen, Halifax, Ashe, Dare, Beaufort, Moore, Swain, Orange, Granville, Perquimans, Martin, Vance, Columbus, Cartaret, Cleveland, Avery, Sampson counties. (1935, c. 153.)

Editor's Note.—The scheme authorized by this section has obvious advantages and disadvantages. The advantages lie in the shortening of the later instruments. There will be some saving in recordation fees to persons and corporations giving or taking numerous deeds, deeds of trust, and mortgages, especially documents of a bulky character, such as some corporate mortgages. The disadvantages are that persons concerned with the subsequent documents will be obliged to examine the record of the master form in order to be sure what the provisions of the documents are. Furthermore, if single provisions as distinguished from all the provisions of the master form may be incorporated by reference to the master form, the device is dangerous. 13 N. C. Law Rev. 395.

It is hard to see why the section authorizes specifically a master form for mortgages and deeds of trust, but does not mention deeds. Deeds are included in the words "other instrument conveying an interest in—real and/or personal property," but so are mortgages. The intent to include deeds is made clear, however, by the specific mention of them among the instruments which may incorporate the provisions of the master form. 13 N. C. Law Rev. 396.

Conditional sales are doubtless covered by the statute, both because in North Carolina they are "mortgages" and because they are instruments "conveying an interest in, or creating a lien on," personal property. Various other security devices, such as trust receipts are included for similar reasons. So also bills of sale are obviously instruments "conveying an interest in" personal property. Id.

§ 47-22. Counties may provide for photographic or photostatic registration.—The board of county commissioners of any county is hereby authorized and empowered to provide for photographic or photostatic recording of all instruments filed in the office of the register of deeds and in the office of the clerk of the superior court and in other offices of such county where said board may deem such recording feasible. The board of county commissioners may also provide for filing such copies of said instruments in loose leaf binders. (1941, c. 286.)

For comment on the 1941 amendment, see 19 N. C. Law Rev. 513.

§ 47-23. Conditional sales of personal property.—All conditional sales of personal property in which the title is retained by the bargainor shall be reduced to writing and registered in the same manner, for the same fees and with the same legal effect as is provided for chattel mortgages, in the county where the purchaser resides, or, in

case the purchaser shall reside out of the state, then in the county where the personal estate or some part thereof is situated, or in case of choses in action, where the donee, bargainee or mortgagee resides. (Rev., s. 983; Code, s. 1275; 1891, c. 240; 1883, c. 342; C. S. 3312.)

Cross References.—As to foreclosure in the event of a conditional sale, see § 45-24. As to chattel mortgages generally, see § 45-1 et seq.

In General.—Prior to the time when this section became operative, "conditional sales" of personal property, that is, sales, whether the contract of sale was reduced to writing or not, in which it was stipulated, that although the property agreed to be sold, was placed in the possession of the bargainee and used by him, the title to the same should not pass to him, but should remain in, and be retained by, the bargainor, until the bargainee should pay the price agreed to be paid for it, were upheld in this State, as valid against all persons claiming under the bargainee, without registration. Such sales became frequent and a public grievance. They were the source of much fraud, and many fraudulent practices. The bargainee having possession of the property, and being the apparent owner, easily obtained credit on the faith of it, and when it became necessary to resort to it to satisfy his just debts, he would take shelter behind the bargainor, who retained the title. To cure this evil, the statute was passed. The bargainor really retained the title to the property so sold by him, only as a security for the purchase money due him for it. The Legislature, therefore, deemed it just and salutary, that he should be required to reduce the contract of sale to writing, and register the same, just as creditors are required to do, who take the lien created by chattel mortgages. Empire Drill Co. v. Allison, 94 N. C. 548, 552.

The purpose of this section requiring all conditional sales of personal property to be reduced to writing and registered, is to protect creditors and purchasers for value. It is no part of its purpose to render such sales, whether in writing or not, invalid as between the parties to it. As between them, such sale has the same qualities and is just as effectual as it would have been, and may be proven by the like evidence as before the statute was enacted, and the parties may have the like remedies against each other. Brem v. Lockhart, 93 N. C. 191; Empire Drill Co. v. Allison, 94 N. C. 548; Butts v. Screws, 95 N. C. 215; Kornegay v. Kornegay, 109 N. C. 188, 190, 13 S. E. 770.

Purpose of Section—Forfeiture Proceedings by Government. — This section is designated for the protection of creditors or purchasers for value, without notice, and the government of the United States, in a forfeiture proceeding under the National Prohibition Act does not come under either class. So, the failure to register a conditional sales contract does not render the seller's lien void as against the government's claim of forfeiture. General Motors Acceptance Corp. v. United States, 23 Fed. (2d) 799, 802.

Section Liberally Construed.—This section is liberally construed. General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767.

The effect of this section requiring all conditional sales of personal property to be reduced to writing and registered, is to render inoperative, as against creditors and purchasers for value, so much of the contract as reserves the title in the vendor unless and until the contract is registered. Brem v. Lockhart, 93 N. C. 191.

Where personal property is sold under a registered conditional sales contract and the purchase price is not paid in accordance with the agreement, the seller is the owner thereof and is entitled to possession as against the purchaser and all persons claiming under him. Brunswick-Balke-Collender Co. v. Carolina Bowling Alleys, 204 N. C 609, 169 S. E. 186.

Validity of Conditional Sales Apart from This Section.—Prior to the enactment of this section, a conditional sale contract was valid without registration not only between the parties but also as against all the world. Perry v. Young, 105 N. C. 463, 466, 11 S. E. 511.

Sufficiency of Form.—The certificate of registration of a contract of sale of personal property reserving title need not be in any particular form to meet the requirement for registration. Manufacturers' Finance Co. v. Amazon Cotton Mills Co., 182 N. C. 408, 109 S. E. 67.

Where the certificate for registration of a contract of sale of personal property thereon appears to have been "subscribed before" a notary public, with the seal attached showing the county, and has been certified to for registration by the clerk of the court of that county, and in the caption of the contract also appears the name of the county and state in which it had been registered, and by reference to the certificate and the paper to which it relates the names of the parties sufficiently appear, it was held, that the contract is sufficient in form for the purposes of registration as to the venue, the name of the party, and as to its having been sufficiently acknowledged; the fact that it was sworn to as well as subscribed is regarded as surplusage and immaterial. Manufacturers' Finance Co. v. Amazon Cotton Mills Co., 182 N. C. 408, 109 S. E. 67.

No Registration or Writing as between Parties.—As between the parties, a conditional sale is binding without registration, and is only void if not reduced to writing and registered as against creditors and purchasers for value. Deal v. Palmer, 72 N. C. 582; Gay v. Nash, 78 N. C. 100; Reese & Co. v. Cole, 93 N. C. 87. And as between the parties it is not essential that it should be reduced to writing, for the act gives to conditional sales the same effect as that given by law to chattel mortgages. But chattel mortgages are not required to be reduced to writing, except when it is necessary to have them registered to validate them against creditors and purchasers for value, and then only for the reason they could not be registered without being reduced to writing. Butts v. Screws, 95 N. C. 215, 218.

It has been uniformly held that a mortgage or conditional sales contract although not recorded, is valid as between the parties. It is void only as against creditors or purchasers for value. Cutter Realty Co. v. Dunn Moneyhun Co., 204 N. C. 651, 653, 169 S. E. 274.

Other Notice Will Not Take Place of Registration.—No notice however full and formal can supply notice by registration, and thus, by virtue of this section, where a conditional sale contract has not been registered, a subsequent purchaser acquires title free from its lien. Brown v. Burlington Hotel Corp., 202 N. C. 82, 161 S. E. 735.

Registration Required to Prevail over Subsequent Chattel Mortgage.—A conditional sale requires registration in respect to its priority of lien over chattel mortgages subsequently given to others upon the same property and registered in the proper county. Commercial Inv. Trust v. Albemarle Motor Co., 193 N. C. 663, 137 S. E. 874.

Regarded as Chattel Mortgages as to Registration. — Under this section conditional sales are regarded as chattel mortgages and void as to creditors and purchasers, except from registration. Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526.

Priority between Vendor and Mortgagee of After-Acquired Property. — Under this section conditional sale contracts of personal property are in effect chattel mortgages, and are required to be recorded as such, and such contracts covering machinery or fixtures sold to a corporation and attached by the purchaser to realty which is subject to a mortgage containing an after-acquired property clause, unless recorded, are not effective as against the mortgagee. Union Trust Co. v. Southern Sawmills, etc., Co., 166 Fed. 193.

Where the bargainor under a conditional sale to a corporation has not recorded the instrument, as required by this section and a receiver has been appointed, under the provisions of sec. 55-149, his right to a preferential lien has been lost by his failure to register the instrument, the receiver representing the rights of the other creditors, and he is only entitled as any other general distributee of the funds. Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526. But see Union Trust Co. v. Southern Sawmills, etc., Co., 166 Fed. 193, where it is held that contracts of conditional sales of loose personal property, such as live stock, to a corporation, although not recorded as required by this section, where the property passes into the hands of a receiver for the corporation and is sold together with its other property, entitle the sellers to priority of payment from the proceeds over the holders of a prior mortgage upon the property of the corporation containing an after-acquired property clause.

Priority between Widow's Year's Allowance and Vendor's Rights.—A conditional sale of personal property made to the husband, registered after his death, like a mortgage, takes precedence over an allotment of a year's allowance, made to his widow after the registration. Williams v. Jones, 95 N. C. 504; Hinkle, etc., Co. v. Greene, 125 N. C. 489, 34 S. E. 554.

Transactions Constituting Conditional Sales.—Where the vendor of personalty ships to itself as consignee, order notify the purchaser, and the latter has received money from another with which to pay the draft and obtain the goods from the common carrier, under an agreement that the title to the goods shall vest in such third person until the goods are paid for, the effect of the contract is a conditional sale falling within the meaning of this section.

General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767.

A contract under which the seller ships to the purchaser certain goods, to which the latter acquires title upon the payment of the specified purchase price, is a conditional sale, requiring registration as against the rights of creditors. National Furniture Mfg. Co. v. Price, 195 N. C. 602, 143 S. E. 208.

See Hetherington & Sons v. Rudisill, 28 Fed. (2d) 713.

Necessity for Registration—Between Parties to Contract.—Between the parties to a conditional sales contract probate and registration is not required by this section. Pick & Co. v. Morehead Bluffs Hotel Co., 197 N. C. 110, 147 S. E. 819; General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767; National Furn. Mfg. Co. v. Price, 195 N. C. 602, 143 S. E. 208; Andrews Music Store v. Boone, 197 N. C. 174, 148 S. E. 39.

Same—As to Receiver of Corporation.—While a conditional sale to a corporation does not require registration as between the parties, after receivership of the corporation its validity as to the rights of creditors depends upon its registration. General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767; National Furniture Mfg. Co. v. Price, 195 N. C. 602, 143 S. E. 208; Hetherington & Sons v. Rudisill, 28 Fed. (2d) 713.

Registration in County of Residence at Time of Purchase.—The provision of this section requiring conditional sales to be reduced to writing and registered in the county where the purchaser resides, refers to the county in which he resides at the time the contract is made, and as construed by the Supreme Court of the State the contract is valid if there recorded, although the property is thereafter removed into another county to which the purchaser changes his residence. In re Franklin, 151 Fed. 642.

A bankrupt at the time of purchasing property under a conditional sale contract had acquired no fixed place of residence in the state but was then residing and receiving his mail in the county where the contract was made and to which the property was shipped. It was held that the recording of the contract in that county was sufficient to preserve the seller's lien. In re Franklin, 151 Fed. 642.

No Registry Required in the County of Removal. — An instrument constituting a conditional sale of personal property is properly registered in the county where the purchaser resides, and in case of the latter's removal to another county with the property, need not be again recorded in the latter county. Barrington v. Skinner, 117 N. C. 47, 48, 23 S. E. 90.

Transaction in Effect Absolute Sale.—Where goods were sold and delivered under a contract in which it was stipulated that the vendee should deliver to the vendor the notes taken by the vendee from purchasers of such goods, to be held by the vendor "as collateral security for the payment of the purchase-money to him," and further, that such "goods, as well as the proceeds therefrom, are to be held in trust by him for the payment of the price to the vendor": It was held that this agreement was not a mortgage, nor a conditional sale, but an absolute sale of the goods, and its registration was not necessary. Chemical Co. v. Johnson, 98 N. C. 123, 3 S. E. 723.

Instrument in Effect Conditional Sale Required to Be Registered.—A contract for the "lease" of personal property upon payments of rent, the property to belong to the lessee upon the last payment of rent, is in effect a conditional sale, and unless registered its stipulation for the retention of title by the vendors is invalid as to third parties. Clark v. Hill, 117 N. C. 11, 23 S. E. 91.

Conditional Sale, and Conditional Hiring Distinguished.—A contract of "conditional sale," and a contract of hiring, conditional in its provisions, are essentially different in their respective natures and purposes. The latter need not be in writing, and when it is, it need not be registered. The former, to be effectual against creditors and subsequent purchasers for value, must be in writing and registered. Foreman v. Drake, 98 N. C. 311, 315, 3 S. E. 842.

Priority over Attachment.—A title retaining contract in the sale of personalty is in the nature of a chattel mortgage, and when registered prior to an attachment of the property it is superior to the claim of the attaching creditor. And this is true though the purchaser falsely entered into the contract under an assumed name. Weeks v. Adams, 196 N. C. 512, 146 S. E. 130.

Section Not Repealed by Laws 1923—Registration Cannot Be Dispensed with.—Chapter 236, Public Laws of 1923, requiring a certificate of the transfer of title to an automobile to be issued to the purchaser by the Secretary of State, does not repeal this section so as not to require the registration of title retaining contract to secure the balance due on the purchase price of an automobile, as against subsequent purchaser for value, and no notice, however formal, is sufficient to supply that of registration required by the statute. Carolina Discount Corp. v. Landis Motor Co., 190 N. C. 157, 129 S. E. 414. See Whitehurst v. Garrett, 196 N. C. 154, 144 S. E. 835. See also note under § 47-20.

Tort Feasor as Purchaser or Creditor.—See Harris v. Seaboard Air Line R. Co., 190 N. C. 480, 130 S. E. 319, annotations to section 47-18.

This section has no retroactive effect. Harrell v. Godwin, 102 N. C. 330, 8 S. E. 925.

Interest of Innocent Party in Unregistered Mortgage Not Subject to Confiscation. — Failure to register a mortgage taken to secure payment on an automobile, will not subject the interest of an innocent mortgagee to confiscation under section 3404 of the Consoldiated Statutes, for violation of that section relating to seizure of automobiles engaged in illegal transportation of liquor. South Georgia Motor Co. v. Jackson, 184 N. C. 328, 114 S. E. 478. Section 3404 of the Consolidated Statutes has been superseded by § 18-6 of the General Statutes, which transfers the lien from the confiscated property to the proceeds from the sale of it.

Question for Jury.—Upon conflicting evidence as to whether one was a purchaser for value from the vendee in a conditional sales contract, the issue is properly submitted to the jury, and a motion as of nonsuit is properly denied. Andrews Music Store v. Boone, 197 N. C. 174, 148 S. E. 39.

Cited in Standard Motors Finance Co. v. Weaver, 199 N. C. 178, 179, 153 S. E. 861; Ward v. Southern Sand & Gravel Co., 33 F. (2d) 773.

§ 47-24. Conditional sales or leases of railroad property. — When any railroad equipment and rolling stock is sold, leased or loaned on the condition that the title to the same, notwithstanding the possession and use of the same by the vendee, lessee, or bailee, shall remain in the vendor, lessor or bailor until the terms of the contract, as to the payment of the installments, amounts or rentals payable, or the performance of other obligations thereunder, shall have been fully complied with, such contract shall be invalid as to any subsequent judgment creditor, or any subsequent purchaser for a valuable consideration without notice, unless—

1. The same is evidenced by writing duly acknowledged before some person authorized to take acknowledgments of deeds.

2. Such writing is registered as mortgages are registered, in the office of the register of deeds in at least one county in which such vendee, lessee or bailee does business.

3. Each locomotive or car so sold, leased or loaned has the name of the vendor, lessor, or bailor, or the assignee of such vendor, lessor or bailor plainly marked upon both sides thereof, followed by the word owner, lessor, bailor or assignee as the case may be.

This section shall not apply to or invalidate any contract made before the twelfth day of March, one thousand eight hundred and eighty-three. (Rev., s. 984; Code, s. 2006; 1883, c. 416; 1907, c. 150, s. 1; C. S. 3313.)

§ 47-25. Marriage settlements. — All marriage settlements and other marriage contracts, whereby any money or other estate is secured to the wife or husband, shall be proved or acknowledged and registered in the same manner as deeds for lands, and shall be valid against creditors and purchasers for value only from registration. (Rev., s. 985; Code, ss. 1269, 1270, 1281; 1885, c. 147; R. C., c. 37, ss. 24, 25; 1785, c. 238; 1871-2, c. 193, s. 12; C. S. 3314.)

Cross Reference.—As to marriage settlements, void as to existing creditors, see § 39-18.

Place of Registration.—Registration of a marriage settlement, embracing the slaves of a feme, was held to be properly made in the county where the feme resided and the

slaves were, at the time the instrument was executed. Latham v. Bowen, 52 N. C. 337.

Deed Possessing Two Characters.—A deed combining the two characters of a deed of trust to secure creditors, and a deed of settlement in trust for a wife and children, may operate and have effect in both characters, provided it has been duly proved and registered. Johnston v. Malcom, 59 N. C. 120.

Registration after Three Years, as against Subsequent Creditors.—A deed of settlement, in trust for a wife and children, proved and registered three years after the date of its execution, was held to be valid as against creditors, whose debts were contracted after such registration. Johnston v. Malcom, 59 N. C. 120.

Agreement in Effect Not a Marriage Settlement.—An agreement by which the husband consents that the wife may convert one tract of land, which is in nowise subject to the claims of his creditors, into another tract of land, and in which, in order to enable her to make the conversion, he stipulates to allow her to hold as her separate property the price of her land until it can be reinvested in another tract of land, is not a marriage settlement falling within the section. Teague v. Downs, 69 N. C. 280, 287.

The Law of What Time Governs.—Where a marriage took place, and a deed was made between husband and wife prior to 1868, it is governed by the law as it then existed and is not affected by the changes in the marital relations brought about by the Constitution of 1868, and the statutes passed in pursuance thereof, although the deed was not registered until 1884. Walton v. Parish, 95 N. C. 259.

Registration in Another State.—An antenuptial contract entered into between a husband whose domicile was in North Carolina and a wife whose domicile was in New York, and which was duly registered in New York, but not in North Carolina, is good against the creditors of the husband, although the property was removed to North Carolina and changed from what it originally was when the contract was signed. Hicks v. Skinner, 71 N. C. 539.

§ 47-26. Deeds of gift.—All deeds of gift of any estate of any nature shall within two years after the making thereof be proved in due form and registered, or otherwise shall be void, and shall be good against creditors and purchasers for value only from the time of registration. (Rev., s. 986; Code, s. 1252; 1885, c. 147; R. C., c. 37, s. 18; 1789, c. 315, s. 2; C. S. 3315.)

Cross Reference.—As to extension of time for registering deeds of gift, see § 146-64.

Editor's Note.—The time of the registration of deeds of gifts under this section has been unaffected by § 146-64 which extended the time in which certain instruments could be registered until September 1, 1926. The effect of the curative act has given rise to some conflict of opinion in the case of Booth v. Hairston, 193 N. C. 278, 136 S. E. 879. In that case A made a deed of gift of her property, which deed was not registered until after the statutory period of two years had expired. After such expiration A devised this land to her daughter. The question arose whether the devisee under the will or the grantee under the deed prevailed under the statute above referred to; the court held that the deed was void, not having been registered within the time prescribed, and that the statute extending the time would not validate a deed which had been once avoided, so as to impair vested rights. This decision met a strong dissent in the same case and has also been criticized in 5 N. C. Law Review 365. The criticism is based on the ground that as the devisee took no interest under the will until after the death of the testarix (for the will speaks as of the date of the death of its maker) no vested rights of third parties were involved and that as between the grantor and the grantee the deed would be valid, even though not registered within two years, under the extension given by the above referred to statute.

Though met with criticism and dissent, it seems that the majority holding is correct. This conclusion may be justified upon the analogy of the effect of curative statutes upon a right of action already barred under the statute of limitations. It has been uniformly held throughout this country that where a right of action has been barred by the statute of limitations a subsequent statute extending the time of its enforcement does not revive the right of action already barred. It may also be justified upon the ground of legislative intention as expressed by the use of the word "extended". This word in its etymological sense confers the idea of continuity without any intermission. It follows that the word "extended" as used in this statute cannot refer to the registration of a deed which has already been barred. Extension of a limitation can only take effect from a time on or prior to the expiration of such limitation. Any new time limited thereafter is not an "extension" of the prior limitation, but a new limitation in itself.

A deed of gift not registered within the time prescribed by this section is void, and thereafter the Legislature is without power to bring it to life again by the enactment of a statute lengthening the period in which it may be registered. Booth v. Hairston, 195 N. C. 8, 141 S. E. 480, affirming Booth v. Hairston, 193 N. C. 278, 136 S. E. 879, 57 A. L. R. 1186, on rehearing.

Formerly when this section was differently worded it was held that the requirement of recordation of deeds of gift applied only where creditors and purchasers were interested. Hancock v. Hovey, 1 N. C. 152. But the present section in plain terms rebuts this holding.—Ed. Note.

"Making" means date of execution. The execution of a deed is not complete until the instrument is signed, sealed and delivered. Turlington v. Neighbors, 222 N. C. 694, 697, 24 S. E. (2d) 648.

Registration as Notice. — The registration of the prior voluntary deed is notice to the subsequent purchaser. Taylor v. Eatman, 92 N. C. 602.

Unregistered Deed Void Regardless of Fraud.—Where a deed appearing on its face to be a deed of gift is not registered in two years from its execution as required by this section, it is void, and may be set aside in an action by creditors of the grantor regardless of whether it was executed in fraud of creditors. Reeves v. Miller, 209 N. C. 362, 183 S. E. 294.

Acknowledgment and Resigtration after Lapse of Period.—Where the owner of lands executed a deed of gift thereto and delivered same to the grantee, and some three and a half years thereafter he acknowledges the deed and filed same for registration, the acknowledgment of the execution was not a re-execution of the deed, and the deed of gift, not having been registered within two years of its execution, was void, and may not be revived by curative act of the legislature. Cutts v. McGhee, 221 N. C. 465, 20 S. E. (2d) 376.

Applied in Allen v. Allen, 209 N. C. 744, 184 S. E. 485.

Cited in Blades v. Wilmington Trust Co., 207 N. C. 771, 774, 178 S. E. 565.

§ 47-27. Deeds of easements. — All persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights of way and easements of any character whatsoever shall record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated. Where such deeds and agreements may have been acquired, but no use has been made thereof, the person, firm, or corporation holding such instrument, or any assignment thereof, shall not be required to record them until within ninety days after the beginning of the use of the easements granted thereby. If after ninety days from the beginning of the easement granted by such deeds and agreements the person, firm, or corporation holding such deeds or agreements has not recorded the same in the office of the register of deeds of the county where the land affected is situated, then the grantor in the said deed or agreement may, after ten days notice in writing served and returned by the sheriff or other officer of the county upon the said person, firm, or corporation holding such lease or agreement, file a copy of the said lease or agreement for registration in the office of the register of deeds of the county where the original should have been recorded, but such copy of the lease or agreement shall have attached thereto the written notice above referred to, showing the service and return of the sheriff or other officer. The registration of such copy shall have the same force and effect as the original would have had if recorded: Provided, said copy shall be duly probated before being registered.

Nothing in this section shall require the regis-

tration of the following classes of instruments or conveyances, to wit:

1. It shall not apply to any deed or instrument executed prior to January first, one thousand nine hundred and ten.

2. It shall not apply to any deed or instrument so defectively executed or witnessed that it cannot by law be admitted to probate or registration, provided that such deed or instrument was executed prior to the ratification of this section.

3. It shall not apply to decrees of a competent court awarding condemnation or confirming reports of commissioners, when such decrees are on record in such courts.

4. It shall not apply to local telephone companies, operating exclusively within the state, or to agreements about alley-ways.

The failure of electric companies or power companies operating exclusively within this state or electric membership corporations, organized pursuant to chapter 291 of the Public Laws of 1935[G. S. §§ 117-6 to 117-27], to record any deeds or agreements for rights of way acquired subsequent to one thousand nine hundred and thirty-five, shall not constitute any violation of any criminal law of the State of North Carolina.

No deed, agreement for right of way, or easement of any character shall be valid as against any creditor or purchaser for a valuable consideration but from the registration thereof within the county where the land affected thereby lies. (1917, c. 148; 1919, c. 107; 1943, c. 750; C. S. 3316.)

Local Modification.—Alleghany, Harnett, Lee, Surry, Wilkes: C. S. 3316; Halifax, Martin: 1939, c. 45.

Editor's Note.—The 1943 amendment added the last two paragraphs, and struck out a former provision making a violation of this section a misdemeanor.

§ 47-28. Powers of attorney.—Every power of attorney, wherever made or concerning whatsoever matter, may, on acknowledgment or proof of the same before any competent official, be registered in the county wherein the property or estate which it concerns is situate, if such power of attorney relate to the conveyance thereof; if it does not relate to the conveyance of any estate or property, then in the county in which the attorney resides or the business is to be transacted. (Rev., s. 987; Code, s. 1249; 1899, c. 235, s. 15; C. S. 3317.)

Cross Reference.—As to form for acknowledgment of instrument executed by attorney in fact, see § 47-43.

Power of Attorney Given by Married Woman. — See Hollingsworth v. Harman, 83 N. C. 153, prior to this section, holding that a power of attorney given by a married woman to dismiss an action concerning her land need not be registered to give it validity.

§ 47-29. Recording of bankuptcy records. — A copy of the petition with the schedules omitted beginning a proceeding under the United States Bankruptcy Act, or of the decree of adjudication in such proceeding, or of the order approving the bond of the trustee appointed in such proceeding, shall be recorded in the office of any register of deeds in North Carolina, and it shall be the duty of the register of deeds, on request, to record the same. The register of deeds shall be entitled to the same fees for such registration as he is now entitled to for recording conveyances. (1939, c. 254.)

For comment on this enactment, see 17 N. C. Law Rev. 344.

§ 47-30. Plats and subdivisions.—Any person, firm or corporation owning land in this State may have a plat thereof recorded in the office of the register of deeds of the county in which such land or any part thereof is situated, upon proof upon oath by the surveyor making such plat that the same is in all respects correct and was prepared from an actual survey by him made, giving the date of such survey, or if the surveyor making such plat is dead, or where land has been sold and conveyed according to an unrecorded plat, upon the oath of a duly licensed surveyor that said map is in all respects correct and that the same was actually and fully checked and verified by him, giving the date on which the same was verified and checked. Such plat, when so proven and probated as deeds and other conveyances, shall be recorded either by transcribing a correct copy thereof upon or by permanently attaching the original to the records or in a book to be designated the "Book of Plats"; and when so recorded shall be duly indexed. Reference in any instrument heretofore or hereafter executed to the record of any plat herein authorized or validated shall have the same effect as if the description of the lands as indicated on the record of the plat were set out in the instrument.

Where any map or plat has been recorded, either by transcribing a correct copy thereof upon or by permanently attaching the original to the records or in a book designated "Book of Plats," such map or plat shall be deemed to have been recorded in full compliance with this section, notwithstanding the fact that the same has not been probated in accordance with the provisions hereof; and the registration of all plats and maps which have been recorded by transcribing a correct copy thereof upon or by permanently attaching the original to the records or in a book designated "Book of Plats" is hereby validated as fully as if the statute had been fully and completely complied with. (1911, c. 55, s. 2; 1923, c. 105; 1935, c. 219; 1941, c. 249; C. S. 3318.)

Editor's Note.—The amendment of 1935 so changed this section that a comparison is necessary to determine the full extent. The 1941 amendment added the provision as to recording plats when the surveyor making the plat is dead.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 513.

Object in Enacting Section.—This section was enacted in view of a decision of the Supreme Court in Sexton v. Elizabeth City, 169 N. C. 385, 86 S. E. 344, in which it was held that a purchaser in reference to a second plat who had registered his deed would take precedence over one under a former plat, but who had failed to have his deed registered; this on the ground that, as no statute provided for registration of plats, the date of registration of the deed would determine the matter. Wittson v. Dowling, 179 N. C. 542, 547, 103 S. E. 18.

Intended to Regulate Priorities.—The statute was designed to regulate priorities as between two conflicting dedications, and does not and was not intended to affect the general principles, dedication and acceptance, and the owner's right of revocation. Wittson v. Dowling, 179 N. C. 542, 547, 103 S. E. 18.

§ 47-31. Certified copies may be registered; used as evidence.—A duly certified copy of any deed or writing required or allowed to be registered may be registered in any county; and the registry or duly certified copy of any deed or writing when registered in the county where the land is situate may be given in evidence in any court of the state. (Rev., s. 988; Code, s. 1253; 1858-9, c. 18, s. 2; C. S. 3319.)

Cross References.—As to court records as proof of de-

stroyed instruments, see §§ 98-12, 98-13. As to certified copies of registered instruments as evidence, see § 8-18. As to certified copies of deeds, mortgages, etc., as evidence and for registry, see § 8-20.

Registration of Copies in Proper County Allowed.—This section allows certified copies of deeds erroneously registered to be recorded in the proper counties. Weston v. Roper Lumber Co., 160 N. C. 263, 75 S. E. 800.

Proper Registration of the Original Presumed.—It is to be assumed that the deed was properly put upon the registry, until the contrary is made to appear, and nothing more is required to render the copy competent evidence when certified by the register. Starke v. Etheridge, 71 N. C. 240; Love v. Hardin, 87 N. C. 249; Strickland v. Draughan, 88 N. C. 315, 317.

Copy of Contract Used in Evidence to Prove Lost Original.—For proof of the loss of a contract to convey land, a copy thereof, if shown to be correct, is admissible as secondary evidence to prove the contents of the original, though no search was made to ascertain whether the original was registered. Such a contract is valid between the parties without registration. Mauney v. Crowell, 84 N. C. 314.

Certified Copy 100 Years Old May Be Registered though Mutilated.—Under this section a certified copy of a deed over 100 years old, which showed that the original was a perfect deed of conveyance, is admissible to probate and registration, though by reason of the mutilation of the records some lines of the conveyance showing the consideration therefor were lost; this being particularly true where an earlier certified copy of the same conveyance included the destroyed portions. Richmond Cedar Works v. Stringfellow, 236 Fed. 264.

Cited in United States v. 7,405.3 Acres of Land, 97 F. (2d) 417.

§ 47-32. Photostatic copies of plats, etc.; fees of clerks.—In all special proceedings in which a plat, map or blue-print shall be filed as a part of the papers, the Clerk of the Superior Court may have a photostatic copy of said plat, map or blue-print made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, shall place said photostatic copy in said book at the end of the report of the commissioners or other document referring to said plat, map or blue-print. The Clerk of Superior Court shall be allowed a fee to be fixed by the County Commissioners not exceeding the sum of five dollars to be taxed in the bill of costs, which fee shall cover the cost of making said photostatic copy and all services of the clerk in connection therewith. (1931, c. 171.)

§ 47-33. Certified copies of deeds made by alien property custodian may be registered.—Any copy of a deed made, or purporting to be made, by the United States alien property custodian duly certified pursuant to Title twenty-eight, section six hundred sixty-one of United States Code by the department of justice of the United States, with its official seal impressed thereon, when the said certified copy reveals the fact that the execution of the original was acknowledged by the alien property custodian before a notary public of the District of Columbia, and that the official seal of the alien property custodian by recital was affixed or impressed on the original, and further reveals it to have been approved, as to form, by general counsel, and the copy also shows that the original was signed and approved by the acting chief, division of trusts, and was witnessed by two witnesses, shall, when presented to the register of deeds of any county wherein the land described therein purports to be situate, be recorded by the register of deeds of such county without other or further proof of the execution and/or delivery of the original thereof, and the same when so recorded shall be indexed and cross-indexed by the register of deeds as are deeds made by individuals upon the payment of the usual and lawful fees for the registration thereof. (1937, c. 5, s. 1.)

§ 47-34. Certified copies of deeds made by alien property custodian admissible in evidence. — The record of all such recorded copies of such instruments authorized in § 47-33 shall be received in evidence in all the courts of this state and the courts of the United States in the trial of any cause pending therein, the same as though and with like effect as if the original thereof had been probated and recorded as required by the law of North Carolina, and the record in the office of register of deeds of such recorded copy of such an instrument shall be presumptive evidence that the original of said copy was executed and delivered to the vendee, or vendees therein named, and that the original thereof has been lost or unintentionally destroyed without registration, and in the absence of legal proof to the contrary said so registered copy shall be conclusive evidence that the United States alien property custodian conveyed the lands and premises described in said registered copy to the vendees therein named, as said copy reveals, and title to such land shall pass by such recorded instrument. (1937, c. 5, s. 2.)

§ 47-35. Register to fill in deeds on blank forms with lines.—Registers of deeds shall, in registering deeds and other instruments, where printed skeletons or forms are used by the register, fill all spaces left blank in such skeletons or forms by drawing or stamping a line or lines in ink through such blank spaces. (1911, c. 6, s. 1; C. S. 3320.)

§ 47-36. Errors in registration corrected on petition to clerk.—Every person who discovers that there is an error in the registration of his grant, conveyance, bill of sale or other instrument of writing, may prefer a petition to the clerk of the superior court of the county in which said writing is registered, in the same manner as is directed for petitioners to correct errors in grants or patents, and if on hearing the same before said clerk it appears that errors have been committed, the clerk shall order the register of the county to correct such errors and make the record conformable to the original. The petitioner must notify his grantor and every person claiming title to or having lands adjoining those mentioned in the petition, thirty days previous to preferring the same. Any person dissatisfied with the judgment may appeal to the superior court as in other cases. (Rev., s. 1008; Code, s. 1266; R. C., c. 37, s. 28; 1790, c. 326, ss. 2, 3, 4; C. S. 3321.)

Cross Reference.—As to correction of grants, see § 146-55 et seq.

Proceedings provided for by this section are exclusive. Hopper v. Justice, 111 N. C. 418, 16 S. E. 626.

Same—Grantor Cannot call upon Grantee to Correct Mistake.—Where, by the mistake or oversight of the makers of a deed, the same is incorrectly written, they have no equity to call upon the grantee to correct the mistake in the books of the register, as they have an ample remedy under this section and a promise by the grantee to make such correction at his own expense and trouble would be nudum pactum. Oldham v. First Nat. Bank, 85 N. C. 241.

The Register May Correct His Mistake.—The order of registration by the clerk is a continuous one, with which the register may subsequently comply upon inadvertently having omitted to copy the words it contained upon his book. Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302.

Original Deed as Evidence to Show Mistake of Register.—The original deed may be shown in evidence to correct an omission by the register of deeds of the signature of the

justice of the peace before whom the deed was acknowledged. Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302.

Art. 3. Forms of Acknowledgment, Probate and Order of Registration.

§ 47-37. Adjudication and order of registration.—The form of adjudication and order of registration required by § 47-14 shall be substantially as follows:

North Carolina, ... County.

The foregoing (or annnexed) certificate of (here give name and official title of the officer signing the certificate passed upon) is adjudged to be correct. Let the instrument and the certificate be registered.

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

(Official seal.)

.....

(Signature of officer.)

But the order of registration may be substantially in the form: "Let the same with this certificate be registered." (Rev., ss. 1001, 1010; 1899, c. 235, s. 7; 1905, c. 344; C. S. 3322.)

It is a sufficient compliance with this section for the clerk of the superior court of the county wherein the land lay, to certify that "the foregoing and annexed certificate of (naming the clerk), a clerk of the Supreme Court, etc., duly authenticated by his official seal, is adjudged to be correct, in due form and according to law, and the foregoing and annexed deed of trust is adjudged to be duly proved, etc." Kleybolte & Co. v. Black Mountain Timber Co., 151 N. C. 635, 66 S. E. 663.

§ 47-38. Acknowledgment by grantor.—Where the instrument is acknowledged by the grantor or maker, the form of acknowledgment shall be in substance as follows:

North Carolina, ... County.

I (here give the name of the official and his official title), do hereby certify that (here give the name of the grantor or maker) personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and (where an official seal is required by law) official seal this the .... day of .... (year).

(Official seal.)

.....

(Signature of officer.)

(Rev., s. 1002; C. S. 3323.)

Certificates of acknowledgment will be liberally construed and will be upheld if in substantial compliance with the statute. Freeman v. Morrison, 214 N. C. 240, 199 S. E. 12.

"Acknowledgment" describes the act of personal appearance before a proper officer and there stating to him the fact of the execution of the instrument as a voluntary act. Freeman v. Morrison, 214 N. C. 240, 199 S. E. 12.

Acknowledgment Taken Over Telephone. — Section 39-7, providing the proper mode of conveyance of real property by husband and wife of his lands, tenements and hereditaments, contemplates that the acknowledgment and the privy examination of the wife provided for shall be made in the presence of the officer, which is emphasized by this section and section 47-39 as to acknowledgments of grantors and married women; and such acknowledgment, taken of the wife over a telephone, does not meet the statutory requirements, and renders the conveyance invalid as to her. Southern State Bank v. Summer, 187 N. C. 762, 122 S. E. 848.

Position of the Name of the Justice.—It is not necessary to the validity of the probate of a deed that the signature of the name of the justice before whom it was acknowledged should be recorded at the end, when it appears from the certificate as recorded and from the clerk's adjudication thereon that his name appeared in the first line, and that in fact he properly took the acknowledgment. Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302.

Cited in McClure v. Crow, 196 N. C. 657, 146 S. E. 713.

§ 47-39. Private examination of wife.—When an instrument purports to be signed by a married woman, the form of certificate of her acknowledgment and private examination before any officer authorized to take the same shall be in substance as follows:

North Carolina, ... County.

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

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

(Official seal.)

.....

(Signature of officer.)

(Rev., s. 1003; 1899, c. 235, s. 8; 1901, c. 637; C. S. 3324.)

Cross Reference.—As to conveyances by husband and wife and requirement of private examination of wife, see § 39-7 et seq.

"And Doth Voluntarily Assent Thereto" Not Essential.—The privy examination of a feme covert which sets out that she signed the deed of her own free will and accord, and without any compulsion of her husband, is sufficient, without adding the words, "and doth voluntarily assent thereto." Robbins v. Harris, 96 N. C. 557, 2 S. E. 70.

§ 47-40. Husband's acknowledgment and wife's examination before same officer.—Where the instrument is acknowledged by both husband and wife or by other grantor before the same officer the form of acknowledgment shall be in substance as follows:

North Carolina, ... County.

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

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

(Official seal.)

.....

(Signature of officer.)

(Rev., s. 1004; 1899, c. 235, s. 8; 1901, c. 299; C. S. 3325.)

Cross Reference.—As to necessity of seal of probating officer when such officer has an official seal, see § 47-5.

§ 47-41. Corporate conveyances.—The following

forms of probate for deeds and other conveyances executed by a corporation shall be deemed sufficient, but shall not exclude other forms of probate which would be deemed sufficient in law. If the deed or other instrument is executed by the president or vice president of the corporation, is sealed with its common, or corporate seal, and is attested by its secretary or assistant secretary, or, in case of a bank, by its secretary, assistant secretary, cashier or assistant cashier, the following form of acknowledgment is sufficient:

.....
(State and county, or other description of place where acknowledgment is taken)

I, ..., ...,
(Name of officer taking acknowledgment) (Official title of officer taking acknowledgment)

certify that ..... personally
(Name of secretary, assistant secretary, cashier or assistant cashier)

came before me this day and acknowledged that he (or she) is ..... of .....,
(Secretary, assistant secretary, cashier or assistant cashier) (Name of corporation)

a corporation, and that, by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its .....,
(President or vice-president)

sealed with its corporate seal, and attested by himself (or herself) as its .....
(Secretary, assistant secretary, cashier or assistant cashier)

My commission expires .....
(Date of expiration of commission as notary public)

Witness my hand and official seal, this the ..... day of ....., ...
(Month) (Year)

.....
(Signature of officer taking acknowledgment)
(Official seal, if officer taking acknowledgement has one.)

(a) The words "a corporation" following the blank for the name of the corporation may be omitted when the name of the corporation ends with the word "Corporation" or "Incorporated."

(b) The words "My commission expires" and the date of expiration of the notary public's commission may be omitted except when a notary public is the officer taking the acknowledgment.

(c) The words "and official seal" and the seal itself may be omitted when the officer taking the acknowledgment has no seal or when such officer is the clerk, assistant clerk or deputy clerk of the superior court of the county in which the deed or other instrument acknowledged is to be registered.

If the instrument is executed by the president or presiding member or trustee and two other members of the corporation, and sealed with the common seal, the following form shall be sufficient:

North Carolina, ... County.

This ..... day of ....., A. D. ....., personally came before me (here give the name and official title of the officer who signs this certificate), A. B. (here give the name of the subscribing witness), who, being by me duly sworn, says that he knows the common seal of the (here give the name of the corporation), and is also acquainted with C. D., who is the president (or presiding member or trustee), and also with E. F. and G. H., two other members of said corporation; and that he, the said A. B., saw the said president (or presiding member or trustee) and the two said other members sign the said instrument, and saw the said president (or presiding member or trustee) affix the said common seal of said corporation thereto, and that he, the said subscribing witness, signed his name as such subscribing witness thereto in their presence. Witness my hand and (when an official seal is required by law) official seal, this.... day of ..... (year).

(Official seal.)

.....
(Signature of officer.)

If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by its secretary or assistant secretary, either of the following forms of proof and certificate thereof shall be deemed sufficient:

North Carolina, ... County.

This .... day of ....., A. D. ....., personally came before me (here give name and official title of the officer who signs the certificate) A. B. (here give the name of the attesting secretary or assistant secretary), who, being by me duly sworn, says that he knows the common seal of (here give the name of the corporation), and is acquainted with C. D., who is the president of said corporation, and that he, the said A. B., is the secretary (or assistant secretary) of the said corporation, and saw the said president sign the foregoing (or annexed) instrument, and saw the said common seal of said corporation affixed to said instrument by said president (or that he, the said A. B., secretary or assistant secretary as aforesaid, affixed said seal to said instrument), and that he, the said A. B., signed his name in attestation of the execution of said instrument in the presence of said president of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the ..... day of ..... (year).

(Official seal.)

.....
(Signature of officer.)

North Carolina, ... County.

This is to certify that on the .... day of ....., 19...., before me personally came ..... (president, vice-president, secretary or assistant secretary, as the case may be), with whom I am personally acquainted, who, being by me duly sworn, says that ..... is the president (or vice-president), and ..... is the secretary (or assistant secretary) of the ....., the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president (or vice-president), and that said president (or vice-president) and secretary (or assistant secretary) subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the .... day of ..... (year).

(Official seal.)

.....
(Signature of officer.)

If the deed or other instrument is executed by the signature of the president, presiding member or trustee of the corporation, and sealed with its common seal and attested by its secretary, or assistant secretary, the following form of proof and certificate thereof shall be deemed sufficient:

This .... day of ....., A. D. ....., personally came before me (here give name and official title of the officer who signs the certificate) A. B., who, being by me duly sworn, says that he is president (presiding member or trustee) of the ..... Company, and that the seal affixed to the foregoing (or annexed) instrument in writing is the corporate seal of the company, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said A. B. acknowledged the said writing to be the act and deed of said corporation.

(Official seal.)

.....
(Signature of officer.)

If the officer before whom the same is proven be the clerk or deputy clerk of the superior court of the county in which the instrument is offered for registration, he shall add to the foregoing certificate the following: "Let the instrument with the certificate be registered."

All corporate conveyances probated and recorded prior to February 14, 1939, wherein the same was attested by the assistant secretary, instead of the secretary, and otherwise regular, are hereby validated as if attested by the secretary of the corporation. (Rev., s. 1005; 1899, c. 235, s. 17; 1901, c. 2, s. 110; 1905, c. 114; 1907, c. 927, s. 1; 1939, c. 20, ss. 1, 2; 1943, c. 172; C. S. 3326.)

Cross Reference.—As to sections validating certain corporate acknowledgments, see §§ 47-70, 47-71, 47-72, 47-73.

Editor's Note.—The 1943 amendment inserted the first form of acknowledgment and paragraphs (a), (b) and (c).

Power of Directors to Mortgage Corporate Property.—This section appears to recognize inferentially the power of a board of directors to mortgage the corporate property. Wall v. Rothrock, 171 N. C. 388, 390, 88 S. E. 633.

Reference to Forms of Probate Sufficient by Common Law. — This section providing that it shall not exclude "other forms of probate which would be deemed sufficient in law," can only refer to forms of probate deemed sufficient by the common law, under which a certificate, showing that the officer whose duty it was to affix the seal acknowledged that he did so, is sufficient. National Bank v. Hill, 226 Fed. 102.

Substantial Compliance Sufficient. — Under the decisions of the Supreme Court of North Carolina, the probate of a deed of a corporation is sufficient if it substantially shows the facts required by the statute which expressly provides that the form prescribed "shall not exclude other forms of probate." Board v. Wills & Sons, 236 Fed. 362.

Where the probate of a corporation's deed for land is in substantial compliance with this section, parol evidence is competent, in an action attacking its validity, that tends to corroborate the recitations of the probate, and to further show that the president and secretary had proper authority to act therein on its behalf. Bailey v. Hassell, 184 N. C. 450, 115 S. E. 166.

While it is the better course to follow the suggested methods of this section, in the execution of a corporate chattel mortgage, there being no general law or charter provision to the contrary, it is not necessary to its validity that the witness to the probate certifies in its probate that he saw the presiding member sign it, when otherwise it complies with the requirements of the general law. Merchants, etc., Bank v. Pearson, 186 N. C. 609, 613, 120 S. E. 210.

Same—What Does Not Constitute Substantial Compliance.—When it does not appear from the probate of a corporation's deed to lands that the seal affixed is the common seal of the corporation, or that it was affixed by the proper officers of the corporation, it is not a substantial compliance with this section, and the deed is ineffectual to pass title to the lands as against creditors and purchasers. Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748.

A corporation's deed is defective which fails to show by its certificate, read in connection with the deed, that the corporate officials acknowledged the instrument as the act and deed of the corporation, or that the official executing the deed in behalf of and under authority from the corporation acknowledged it to be "his" act and deed, as such. Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748.

Same—Seal of Corporation. — It is not necessary to the valid probate of a deed made by a corporation that it literally follows the statutory printed forms of this section if it substantially complies with the law regulating the probate of a conveyance of land; and where the probate shows the acknowledgment of the president and secretary, each acting in his official capacity, or as representing the corporation, who is designated as "the grantor, for the purpose therein expressed," it is sufficient; and the finding of the jury, upon evidence, that their officials were properly authorized to act for and in behalf of the corporation, and had so acted; and had used the word "seal" enclosed in scroll, that had been lawfully adopted for the purpose, makes it a valid execution and probate of the deed as an act of the corporation itself; and were it otherwise, the defects as to the "seal" seems to be cured under the provisions of § 47-72, and as to signatures of the officials by § 47-73. Bailey v. Hassell, 184 N. C. 450, 115 S. E. 166.

Acknowledgment of Individuals Instead of Officers.—The probate of a deed of a corporation by the acknowledgment of individuals instead of by its officers, is fatally defective and its registration, in consequence, is a nullity. Bernhardt v. Brown, 122 N. C. 587, 29 S. E. 884.

§ 47-42. Attestation of banking corporation conveyances by cashier.—In all forms of proof and certificate for deeds and conveyances executed by banking corporations, which corporations have no secretary, the cashier of said banking corporation shall attest such instruments; all deeds and conveyances executed prior to February 14, 1939, by banking corporations, where the cashier of said banking corporation has attested said instruments, which deeds and conveyances are otherwise regular, are hereby validated. (1939, c. 20, s. 2½.)

Cross Reference.—As to probate of deeds by examination of subscribing witness in certain cases, when corporation has ceased to exist, see § 47-16.

§ 47-43. Form of certificate of acknowledgment of instrument executed by attorney in fact.—When an instrument purports to be signed by parties acting through another by virtue of the execution of a power of attorney, the following form of certificate shall be deemed sufficient, but shall not exclude other forms which would be deemed sufficient in law:

"North Carolina, ...County.

I (here give name of the official and his official title), do hereby certify that (here give name of attorney in fact), attorney in fact for (here give names of parties who executed the instrument through attorney in fact), personally appeared before me this day, and being by me duly sworn, says that he executed the foregoing and annexed instrument for and in behalf of (here give names of parties who executed the instrument through attorney in fact), and that his authority to execute and acknowledge said instrument is contained in an instrument duly executed, acknowledged, and recorded in the office of (here insert name of official in whose office power of attorney is recorded, and the County and State of recordation), on the (day of month, month, and year of recordation), and that this instrument was executed under and by virtue of the authority given by said instrument granting him power of attorney; that the said (here give name of attorney in fact) acknowledged the due execution of the foregoing

and annexed instrument for the purposes therein expressed for and in behalf of the said (here give names of parties who executed the instrument through attorney in fact).

WITNESS my hand and official seal, this .... day of ....., (year) .....

(Official Seal). ....."

Signature of Officer

(1941, c. 238.)

Cross Reference.—As to registration of power of attorney, see § 47-28.

§ 47-44. Clerk's certificate upon probate by justice of peace. — When the proof or acknowledgment of any instrument is had before a justice of the peace of some other state or territory of the United States, or before a justice of the peace of this state, but of a county different from that in which the instrument is offered for registration, the form of certificate as to his official position and signature shall be substantially as follows:

North Carolina, ... County.

I, A. B. (here give name and official title of a clerk of a court of record), do hereby certify that C. D. (here give the name of the justice of the peace taking the proof, etc.), was at the time of signing the foregoing (or annexed) certificate an acting justice of the peace in and for the county of ..... and state (or territory) of ....., and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this ..... day of ....., A. D. .....

(Official seal.)

.....

(Signature of officer.)

(Rev., s. 1006; 1899, c. 235, s. 8; C. S. 3327.)

§ 47-45. Clerk's certificate upon probate by nonresident official without seal.—When the proof or acknowledgment of any instrument is had before any official of some other state, territory or country and such official has no official seal, then the certificate of such official shall be accompanied by the certificate of a clerk of a court of record of the state, territory or country in which the official taking the proof or acknowledgment resides, of the official position and signature of such official; such certificate of the clerk shall be under his hand and official seal and shall be in substance as follows:

.....County.

I, A. B. (here give name and official title of the clerk of a court of record as provided herein), do hereby certify that C. D. (here give name of the official taking the proof, etc.) was at the time of signing the foregoing (or annexed) certificate a (here give the official title of the officer taking proof, etc.) in and for the county of ..... and state of ..... (or other political division of the state, territory or country, as the case may be), and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this .... day of ....., A. D. .....

(Official seal.) .....

(Signature of Clerk.)

(Rev., s. 1007; 1899, c. 235, s. 8; C. S. 3328.)

§ 47-46. Verification; form of entry.—The registers of deeds in the several counties of the State shall, after each instrument or document has been transcribed on the record, verify the record with the original and the entry of record shall read "Recorded and Verified," and the same shall be without extra charge. (1929, c. 320, s. 1.)

Art. 4. Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-47. Defective order of registration; "same" for "this instrument."—Where instruments were admitted to registration prior to March 2, 1905, and the clerk's order for the registration used the word "same" in place of "this instrument," the said registrations are good and valid. (Rev., s. 1010; 1905, c. 344; C. S. 3329.)

§ 47-48. Clerk's certificate failing to pass on all prior certificates.—When it appears that the clerk of the superior court or other officer having the power to probate deeds, in passing upon deeds or other instruments, and the certificates thereto, having more than one certificate of the same or a prior date, by other officer or officers taking acknowledgment or probating the same, has in his certificate or order mentioned only one or more of the preceding or foregoing certificates or orders, but not all of them, but has admitted the same deed or other instrument to probate, it shall be conclusively presumed that he has passed upon all the certificates of said deed or instrument necessary to the admission of the same to probate, and the certificate of said clerk or other probating officer shall be deemed sufficient and the probate and registration of said deed or instrument is hereby made and declared valid for all intents and purposes. (1917, c. 237; C. S. 3330.)

§ 47-49. Defective certification or adjudication of clerk, etc., admitting to registration. — In all cases where, prior to January first, nineteen hundred and nineteen, instruments by law required or authorized to be registered, with certificates showing the acknowledgment or proof of execution thereof as required by the laws of the state of North Carolina, have been ordered registered by the clerk of the superior court or other officer qualified to pass upon probates and admit instruments to registration, and actually put upon the books in the office of the register of deeds as if properly proven and ordered to be registered, all such probates and registrations are hereby validated and made as good and sufficient as though such instruments had been in all respects properly proved and recorded, notwithstanding the failure of clerks or other officers qualified to pass upon the proofs or acknowledgments of instruments and to admit such instruments to registration to adjudge or certify that said instruments were duly proven, and notwithstanding the failure of such officers to adjudge or certify that the certificates of proof or acknowledgment of said instruments were correct or in due form. (1919, c. 248; C. S. 3331.)

§ 47-50. Order of registration omitted.—In all cases prior to January 1, 1941, where it appears from the records in the office of the register of

deeds of any county in this state that the execution of a deed of conveyance or other instrument by law required or authorized to be registered was duly acknowledged, as required by the laws of the state of North Carolina, and the clerk or deputy clerk of the superior court of such county has properly proved and adjudged that the certificate or certificates of the official before whom such acknowledgment was taken is in due form, except that the order for registration by said clerk was omitted, any and all such probates and registration are hereby validated, and the record of such deeds of conveyance, or other instruments authorized or required to be registered, may be read in evidence upon the trial or hearing of any cause with the same force and effect as if the same had been duly ordered registered. (1911, cc. 91, 166; 1913, c. 61; Ex. Sess. 1913, c. 73; 1915, c. 179, s. 1; 1941, cc. 187, 229; C. S. 3332.)

§ 47-51. Official deeds omitting seals.—All deeds executed prior to July 1, 1939, by any sheriff, commissioner, receiver, or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall not be invalid on account of the omission of such seal. (1907, c. 807; 1917, c. 69, s. 1; Ex. Sess. 1924, c. 64; 1941, c. 13; C. S. 3333.)

Editor's Note.—The acts of 1924 and 1941 each changed the date mentioned in this section.

§ 47-52. Defective acknowledgment on old deeds validated. — The clerk of the superior court may order registered any deed, or other conveyance of land, in all cases where the instrument and probate bears date prior to January first, one thousand nine hundred and seven (1907) where the acknowledgment, private examination, or other proof of execution, has been taken or had before a notary public residing in the county where the land is situate, where said officer failed to affix his official seal, and where the certificate of said officer appears otherwise to be genuine. (1933, c. 439.)

§ 47-53. Probates omitting official seals. — In all cases where the acknowledgment, private examination, or other proof of the execution of any deed, mortgage, or other instrument authorized or required to be registered has been taken or had by or before any commissioner of affidavits and deeds of this state, or clerk or deputy clerk of a court of record, or notary public of this or any other state, territory, or district, and such deed, mortgage, or other instrument has heretofore been recorded in any county in this state, but such commissioner, clerk, deputy clerk, or notary public has omitted to attach his or her official or notarial seal thereto, or it does not appear of record that such seal was attached to the original deed, mortgage, or other instrument, or such commissioner, clerk, deputy clerk, or notary public has certified the same as under his or her "official seal," "notarial seal," or words of similar import, and no such seal appears of record, then all such acknowledgments, private examinations, or proofs taken prior to January first, gages, or other instruments, and the registration thereof, are hereby made in all respects valid and binding. The provisions of this section apply to acknowledgments, private examinations, or proofs taken prior to January first, 1929. (Rev., s. 1012; 1907, cc. 213, 665, 971; 1911, c. 4; 1915, c. 36; 1929, c. 8, s. 1; C. S. 3334.)

Editor's Note.—The Act of 1929 amended the last two sentences as formerly appearing in this section to read as the last sentence above.

§ 47-54. Registrations by register's clerks or deputies.—All registration of deeds and other instruments heretofore made by the several registers of deeds of the several counties of the state by their deputies and clerks, and signed in the name of the register of deeds by a deputy or clerk, and when said registration is in all other respects regular, are hereby validated and declared of the same force and effect as if signed in the name of the register and not by a deputy or clerk. (1911, c. 184, s. 1; C. S. 3335.)

§ 47-55. Before officer in wrong capacity or out of jurisdiction.—All deeds, conveyances, or other instruments permitted by law to be registered in this state, which have been probated or ordered to be registered previous to January first, one thousand nine hundred and thirteen, before any officer of this or any other state or country, authorized by law to take acknowledgments or to order registration, where the certificate of the probate or order of registration is sufficient in form, but appears to have been certified by the officer in some capacity other than that in which such officer was authorized to act, or appears to have been made out of the county or district authorized by law, but within the state, and where the instrument with such certificate has been recorded in the proper county, are hereby declared to have been duly proved, probated and recorded, and to be valid. (Rev., ss. 1017, 1030; 1913, c. 125, s. 1; C. S. 3336.)

Deeds, etc., Ordered to Be Registered by Justices Validated.—All deeds, conveyances, or other instruments permitted by law to be registered in this State which have been probated or ordered to be registered by any of the several justices of the peace appointed under the Act of 1921 C. 237, set out since the first Monday in April, nineteen hundred and twenty-five, where the certificate of the probate is sufficient in form, but appears to have been certified by one of the several justices of the peace named in said act, are hereby declared to have been duly proved, probated and recorded, and to be valid. 1927, ch. 189, section 2.

Has no Retroactive Effect as to Vested Rights of Third Parties.—Acts validating irregular acknowledgments and probates while good, as between the parties, and as to third parties from the passage of the acts, would not validate such acknowledgments and probates as to third parties whose rights had already been acquired prior to the validating statutes. Gordon v. Collett, 107 N. C. 362, 12 S. E. 332; Williams v. Kerr, 113 N. C. 306, 310, 18 S. E. 501.

§ 47-56. Before justices of peace, where clerk's certificate or order or registration defective.—In every case where it appears from the record of the office of any register of deeds in this state that a justice of the peace in this state has taken and certified the proof of any instrument required by law to be registered, or the privy examination of a married woman thereto, and the deed and certificate have been registered, prior to the first day of January, one thousand nine hundred and seven, in the county where the lands described in the instrument are located, without or with a defective certificate of the clerk of the official character of the justice, or as to the genuineness of his signature, or without the order of registration of the clerk, or his adjudication of due probate, or with a defective adjudication thereof, such proofs, cer-

tificates and registration are validated; but as against creditors or purchasers from donor, bargainor or lessor, only from February first, nineteen hundred and seven. (1907, c. 83, s. 1; C. S. 3337.)

Local Modification.—Clay: 1933, c. 530.

§ 47-57. Probates on proof of handwriting of maker refusing to acknowledge.—All registrations of instruments, prior to February fifth, one thousand eight hundred and ninety-seven, permitted or required by law to be registered, which were ordered to registration upon proof of the handwriting of the grantor or maker who refused to acknowledge the execution, are hereby validated. (Rev., s. 1026; 1897, c. 28; C. S. 3338.)

§ 47-58. Before judges of supreme or superior courts or clerks before 1889.—Wherever the judges of the supreme or the superior court, or the clerks or deputy clerks of the superior court, or courts of pleas and quarter sessions, mistaking their powers, have essayed previously to the first day of January, one thousand eight hundred and eighty-nine, to take the probate of any instrument required or allowed by law to be registered, and the privy examination of femes covert, whose names are signed to such deeds, and have ordered said deeds to registration, and the same have been registered, all such probates, privy examinations and registrations are validated. (Rev., s. 1009; Code, s. 1260; 1871-2, c. 200, s. 1; 1889, c. 252; 1891, c. 484; C. S. 3339.)

In General.—It is evident from the general scope of all the legislation upon this important subject that this section was intended to ratify and validate what had erroneously been done by officials having general or special powers of probate and registration, so that the essence of what was done should not be sacrificed to the form of doing it, and to save rights of property where no substantial departure from legal requirements appeared, but merely an irregularity which could be cured without injury to the rights of others. Weston v. Roper Lumber Co., 160 N. C. 263, 75 S. E. 800, 801.

Liberal Construction.—The statutes validating defective probates and registrations of deeds are remedial, and must be liberally construed to embrace all cases fairly within their scope. Weston v. Roper Lumber Co., 160 N. C. 263, 75 S. E. 800.

Defective Probates of County Courts Embraced.—Where it is argued by counsel that this section does not refer to probates taken by the county courts, but to those of the clerks of said courts, it was held that the probates of the county courts were intended to be validated. The phraseology and punctuation, as well as the grammatical construction, of the statute, lead to that conclusion. If the other meaning had been intended, the preposition "of" would have been inserted before the words "courts of pleas and quarter sessions." The section also validates registrations made upon such probates. Weston v. Roper Lumber Co., 160 N. C. 263, 75 S. E. 800, 801.

Was Not Intended to Validate Intentional Breaches of Authority. — There was no purpose to give efficacy and vitality to a certificate of probate or adjudication of its correctness, where the error consisted not in misconceiving the extent of the power affirmatively conferred by law, but in disregarding a plain prohibition of the statute, and committing a breach of propriety in breaking over the barriers constructed to limit their authority. It was never intended that an officer, who exercised authority in the face of a plain statutory prohibition, should under the curative provisions of this section derive benefit from thus disregarding such legal restrictions for his own advantage or convenience. Freeman v. Person, 106 N. C. 251, 253, 10 S. E. 1037.

Probate of Officer Who is a Party Not Validated.—This section has been considered in Freeman v. Person, 106 N. C. 251, 10 S. E. 1037, and it is there held that it cannot be construed to validate the probate of an officer in regard to a matter in which he or his wife was a party. White v. Connelly, 105 N. C. 65, 71, 11 S. E. 177.

Probate by Deputy Clerks.—At the time, and prior to the enactment of this section, deputy clerks could not, take proof of deeds and other instruments requiring registration; but an erroneous impression prevailed then and before that time, that they and the judges of the courts had authority to do so, and in many instances they undertook to exercise such authority. This was attributable to confused legislation on the subject of the probate of deeds and other instruments, and the fact that such officers were invested with such power before the present statutes on that subject were enacted. To cure errors in this respect, and render effectual many official acts done by honest misapprehension of the law, the Legislature enacted this section. Tatom v. White, 95 N. C. 453, 458. Deputy clerks are now authorized by section 47-1 to take probate on instruments.—Ed. Note.

Same—Signing by Deputy Clerk.—This section validates probates of deeds and privy examinations taken before a deputy clerk prior to January 1, 1889, and it is immaterial whether the deputy clerk, in making the probate, signed as deputy clerk or merely signed the name of the clerk thereto. Gordon v. Collett, 107 N. C. 362, 12 S. E. 332.

Constitutionality.—This curative statute is constitutional and valid if rights of third parties have not accrued, but it would not divert the title of a party acquired by a subsequent deed from the same grantor which is registered prior to the enactment of the curative statute. Gordon v. Collett, 107 N. C. 362, 12 S. E. 332.

Scope of the Original Section. — This section originally rendered valid all probates of deeds, etc., made before the officers therein named, prior to 12 February, 1872; and registrations made in pursuance of such probates were held embraced within the operation of the statutes, although made after that date, but before the enactment of the Code. Tatom v. White, 95 N. C. 453.

§ 47-59. Before clerks of inferior courts.—All probates and orders of registration made by and taken before any clerk of any inferior or criminal court prior to the twentieth day of February, one thousand eight hundred and eighty-five, and valid in form and substance, shall be valid and effectual, and all deeds, mortgages or other instruments requiring registration, registered upon such probate and order of registration, shall be valid. This section shall apply only to the counties of Halifax, Northampton, Hertford, Buncombe, Mecklenburg, Granville, Beaufort, Lenoir, Robeson, Cumberland, Ashe, Martin, Wayne, Greene, Iredell, Bertie, Edgecombe, Duplin and New Hanover. This section applies to probates and private examinations taken before the clerks of the criminal court of Buncombe prior to February second, one thousand eight hundred and ninety-three. (Rev., ss. 1020, 1021; 1885, cc. 105, 108; 1889, c. 143; 1889, c. 463; C. S. 3340.)

§ 47-60. Order of registration by judge, where clerk party.—All deeds, mortgages or other instruments which prior to the twentieth day of January, one thousand eight hundred and ninety-three, have been probated by a justice of the peace and ordered to registration by a judge of the superior court or justice of the supreme court, to which clerks of the superior court are parties, are hereby confirmed, and the probates and orders for registration declared to be valid. (Rev., s. 1011; 1893, c. 3, s. 2; C. S. 3342.)

§ 47-61. Order of registration by interested clerk.—The probate and registration of all deeds, mortgages and other instruments requiring registration prior to the fifteenth day of January, one thousand nine hundred and thirty-five, to which the clerks of the superior courts are parties, or in which they have an interest, and which have been registered on the order of such clerks or their deputies, or by assistant clerks of the superior courts, on proof of acknowledgment taken before such clerks, assistant clerks, deputy clerks, justices of the peace or notaries public, be,

and the same are declared valid. (Rev., s. 1015; 1891, c. 102; 1899, c. 258; 1905, c. 427; 1907, c. 1003, s. 2; Ex. Sess. 1908, c. 105, s. 1; 1935, c. 235; C. S. 3343.)

Editor's Note.—The amendment of 1935 changed the date from "prior to the fourth day of March, 1908" to "prior to the fifteenth day of January, 1935." It also validated registration on the order of deputies or assistant clerks.

§ 47-62. Probates before interested notaries.—The proof and acknowledgment of instruments required by law to be registered in the office of the register of deeds of a county, and all privy examinations of a feme covert to such instruments made before any notary public on or since March eleventh, one thousand nine hundred and seven, are hereby declared valid and sufficient, notwithstanding the notary may have been interested as attorney, counsel or otherwise in such instruments. (Ex. Sess. 1908, c. 105, s. 2; C. S. 3344.)

§ 47-63. Probates before officer of interested corporation.—In all cases when acknowledgment or proof of any conveyance has been taken before a clerk of superior court, justice of the peace or notary public, who was at the time a stockholder or officer in any corporation, bank or other institution which was a party to such instrument, the certificates of such clerk, justice of the peace, or notary public shall be held valid, and are so declared. (Rev., s. 1015; 1907, c. 1003, s. 1; C. S. 3345.)

Although a grantee in a chattel mortgage is not qualified to take the acknowledgment thereof, a chattel mortgage to a bank will not be declared void because the acknowledgment thereof was taken by its cashier. Bank of Duplin v. Hall, 203 N. C. 570, 166 S. E. 526.

§ 47-64. Probates before officers, stockholders or directors of corporations prior to January 1, 1943.—No acknowledgment or proof of execution, including privy examination of married women, of any deed, mortgage or deed of trust to which instrument a corporation is a party, executed prior to the first day of January, one thousand nine hundred and forty-three, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination was an officer, stockholder, or director in said corporation; but such proofs and acknowledgments and the registration thereof, if in all other respects valid, are declared to be valid. Nor shall the registration of any such instrument ordered to be registered be held invalid by reason of the fact that the clerk or deputy clerk ordering the registration was an officer, stockholder or director in any corporation which is a party to any such instrument. (Ex. Sess. 1913, c. 41; 1929, c. 24, s. 1; 1943, c. 135; C. S. 3346.)

Editor's Note.—The Act of 1929 inserted the above section in lieu of the one formerly appearing.

The 1943 amendment changed the year named in this section from 1929 to 1943.

§ 47-65. Clerk's deeds, where clerk appointed himself to sell.—All deeds made by any clerk of the superior court of any county or his deputy, prior to the first day of January, one thousand nine hundred and five, in any proceeding before him in which he has appointed himself or his deputy to make sale of real property or other property are hereby validated. (1911, c. 146, s. 1; C. S. 3347.)

§ 47-66. Certificate of wife's "previous" examination.—All probates of deeds, letters of attorney or other instruments requiring registration to which married women were parties, had and taken prior to the fourteenth day of February, one thousand eight hundred and ninety-three, in which probate it appears that such married women were "previously examined" instead of "privately examined," are hereby validated and confirmed. (Rev., s. 1016; 1893, c. 130; C. S. 3348.)

§ 47-67. Probates of husband and wife in wrong order.—All probates prior to March 6, 1893, of instruments executed by a husband and wife in which the probate as to the husband has been taken before or subsequent to the privy examination of his wife are validated. (Rev., s. 1017; 1893, c. 293; C. S. 3349.)

Cross Reference.—As to order of acknowledgment being immaterial, see § 39-8.

Rights of Third Parties Acquired before Statute Cannot Be Divested.—If third parties acquired rights, as by liens, against the grantor or conveyances from him, registered before the curative act, though with notice of such defectively probated instruments, the rights of such third parties could not be divested or impaired by this curative statute. Robinson v. Willoughby, 70 N. C. 358; Smith v. Castrix, 27 N. C. 318; Gordon v. Collett, 107 N. C. 362, 12 S. E. 332; Long v. Crews, 113 N. C. 256, 18 S. E. 499; Williams v. Kerr, 113 N. C. 306, 18 S. E. 501; Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99; Barrett v. Barrett, 120 N. C. 127, 129, 26 S. E. 691.

Husband's Deed Acknowledged or Subscribed by Witnesses.—The Curative Act, 1893, chap. 293, made valid probates where the wife's privy examination was had prior to the husband's "acknowledgment," and under this provision it was held that this embraces, in the true intendment of the act, cases in which the execution of the deed by the husband was proved by a subscribing witness, and not by his technical acknowledgment. Barrett v. Barrett, 120 N. C. 127, 130, 26 S. E. 691. The wording of the present section seems to cover both situations,—Ed. Note.

§ 47-68. Probates of husband and wife before different officers.—Where, prior to the second day of March, one thousand eight hundred and ninety-five, the probate of a deed or other instrument, executed by husband and wife, has been taken as to the husband and the wife by different officers having the power to take probates of deeds, whether both officers reside in this state or one in this state and the other in another state, or foreign country, the said probate, in the cases mentioned, shall be valid to all intents and purposes, and all deeds and other instruments required to be registered, and which have been ordered to registration by the proper officer in this state, and upon such probate or probates, and have been registered, shall be taken and considered as duly registered, and the word "probate," as used in this section, shall include privy examination of the wife. (Rev., s. 1018; 1895, c. 120; 1907, c. 34, s. 1; C. S. 3350.)

Cross Reference.—As to acknowledgment before different officers at different times and places, see § 39-8.

§ 47-69. Wife free trader; no examination or husband's assent. — In all cases prior to the twenty-fourth day of September, nineteen hundred and thirteen, where a married woman who was at the time a free trader by her husband's consent has executed and delivered a deed conveying her land, without her privy examination having been taken, and without the written assent of her husband other than his written assent contained in the instrument making her a free trader, such deed shall be valid and effectual to

convey her land as if she had been, at the time of the execution and delivery of such deed, a feme sole. This section does not validate such deed where it would affect the title to land or property of purchasers or their grantees or assignees from such married woman and free trader subsequent to the execution of such deed. (Ex. Sess. 1913, c. 54, s. 1; C. S. 3351.)

Section 52-12 Not Affected.—This section does not affect section 52-12, requiring the additional certificate in deed of wife of her separate realty to her husband. Foster v. Williams, 182 N. C. 632, 109 S. E. 834.

Application to Deed to Husband.—It is not within the meaning or intent of this section purporting to insure defective execution of deeds of married women, free traders, that it should apply to deeds made directly to the husband, or annul the requirement that the probate officer certify that it was not unreasonable or injurious to her; but this should only apply to such conveyances made to third persons in respect to the husband's assent, etc., coming within the provisions of the section referred to, when the grantor is a free trader. Foster v. Williams, 182 N. C. 632, 109 S. E. 834. See notes of this case under section 52-12.

§ 47-70. By president and attested by treasurer under corporate seal.—All deeds and conveyances for lands in this state, made by any corporation of this state, which have heretofore been proved or acknowledged before any notary public in any other state, or before any commissioner of deeds and affidavits for the state of North Carolina in any other state, and sealed with the common seal of the corporation and attested by the treasurer, are hereby ratified and declared to be good and valid deeds for all purposes. Where such deeds have been executed for the corporation by its president and attested, sealed and acknowledged or probated as aforesaid, and the acknowledgment or probate has been duly adjudged sufficient by any deputy clerk and ordered registered, the acknowledgment, probate and registration are ratified, and said deed is declared valid. Such deeds, or certified copies thereof, may be used as evidence of title to the lands therein conveyed in the trial of any suits in any of the courts of this state where the title of said lands shall come in controversy. (Rev., s. 1028; 1905, c. 307; C. S. 3352.)

§ 47-71. By president and attested by witness before January, 1900.—Any deed or conveyance for land in this state, made prior to January first, one thousand nine hundred, by the president of any corporation duly chartered under the laws of this state, and attested by a witness, is hereby declared to be a good and valid deed by such corporation for all purposes, and shall be admitted to probate and registration and shall pass title to the property therein conveyed to the grantee as fully as if said deed were executed according to provisions and forms of law in force in this state at the date of the execution of said deed. (1909, c. 859, s. 1; C. S. 3353.)

§ 47-72. Corporate name not affixed, but signed otherwise prior to January, 1927.—In all cases prior to the first day of January, one thousand nine hundred and twenty-seven, where any deed conveying lands purported to be executed by a corporation, but the corporate name was in fact not affixed to said deed, but same was signed by the president and secretary of said corporation, or by the president and two members of the governing body of said corporation, and said deed has been registered in the county where the land conveyed by said deed is located, said defective execution above described shall be and the same is hereby declared to be in all respects valid, and such deed shall be deemed to be in all respects the deed of said corporation. (1919, c. 53, s. 1; 1927, c. 126; C. S. 3354.)

§ 47-73. Probated and registered on oath of subscribing witness.—In all cases prior to the first day of January, one thousand nine hundred and nineteen, where any deed conveying lands was executed by a corporation, and said deed was probated and ordered registered upon the oath and examination of a subscribing witness, by the clerk of the superior court of the county in which the land conveyed by said deed is located, and said deed has been duly registered by the register of deeds of said county, such probate and order of registration shall be, and the same is hereby, declared to be in all respects valid. (1919, c. 53, s. 2; C. S. 3355.)

§ 47-74. Certificate alleging examination of grantor instead of witness.—Wherever any deed of conveyance registered prior to January first, eighteen hundred and eighty-six, purports to have been attested by two witnesses and in the certificate of probate and acknowledgment it is stated that the execution of such deed was proven by the oath and examination of one of the grantors in said deed instead of either of the witnesses named, all such probates and certificates are hereby validated and confirmed, and any such deed shall be taken and considered as duly acknowledged and probated. (1925, c. 84.)

§ 47-75. Proof of corporate articles before officer authorized to probate.—All proofs of articles of agreement for the creation of corporations which were, prior to the eighteenth day of February, one thousand nine hundred and one, made before any officer who was at that time authorized by the law to take proofs and acknowledgments of deeds and mortgages are ratified. (Rev., s. 1027; 1901, c. 170; C. S. 3356.)

§ 47-76. Before officials of wrong state. — In all cases where the acknowledgment, examination and probate of any deed, mortgage, power of attorney or other instrument required or authorized to be registered has been taken before any judge, clerk of a court of record, notary public having a notarial seal, mayor of a city having a seal, or justice of the peace of a state other than the state in which the grantor, maker or subscribing witness resided at the time of the execution, acknowledgment, examination or probate thereof, and such acknowledgment, examination or probate is in other respects according to law, and such instrument has been duly ordered to registration and has been registered, then such acknowledgment, examination, probate and registration are hereby in all respects made valid and binding. This section applies to probates and acknowledgments of deputy clerks of other states when such probate and acknowledgment has been attested by the official seal of said office and adjudged sufficient and in due form of law by the clerk of the court in the state where the instrument is required to be registered. (Rev., s. 1013; 1905, c. 505; C. S. 3357.)

§ 47-77. Before notaries and clerks in other states.—All deeds and conveyances made for lands in this state which have, previous to February fifteenth, one thousand eight hundred and eighty-three, been proved before a notary public or clerk of a court of record, or before a court of record, not including mayor's court, of any other state, where such proof has been duly certified by such notary or clerk under his official seal, or the seal of the court, or in accordance with the act of congress regulating the certifying of records of the courts of one state to another state, or under the seal of such courts, and such deed or conveyance, with the certificate, has been registered in the office of register of deeds in the book of records thereof for the county in which such lands were situate at the time of such registration, are declared to be validly registered, and the proof and registration is adjudged valid. All deeds and conveyances so proved, certified and registered, or certified copies of the same, may be used as evidence of title for the lands on the trial of any suit in any courts where title to the lands come into controversy. (Rev., ss. 1022, 1023; Code, ss. 1262, 1263; 1883, c. 129, ss. 1, 2; 1885, c. 11; 1915, c. 213; C. S. 3358.)

Deed Probated in Tennessee in 1869. — When no vested rights are impaired, a deed dated in 1869 is not incompetent evidence upon the ground of a defective probate, showing the acknowledgment of the grantor and his wife, and her privy examination, taken before the clerk of a certain county court of Tennessee, with the seal of that court, which appears to be the seal of his office, affixed thereto, the same being validated by this section. Penland v. Barnard, 146 N. C. 378, 59 S. E. 1109.

Registry of Deed Upon Certificate of Commissioner of Deeds from Another State.—A deed registered in the proper county upon the certificate of a commissioner of deeds from another state must have the fiat from the clerk ordering it to be registered, or the registration will be invalid. This defect is not cured by this section. Cozard v. McAden, 148 N. C. 10, 61 S. E. 633. See section 47-81.

Constitutionality.—The Legislature has the constitutional right to enact statutes making valid deeds theretofore invalid by reason of defective probate, when no vested rights are impaired. Penland v. Barnard, 146 N. C. 378, 59 S. E. 1109.

§ 47-78. Acknowledgment by resident taken out of state.—When prior to the ninth day of March, one thousand eight hundred and ninety-five, a deed or mortgage executed by a resident of this state has been proved or acknowledged by the maker thereof before a notary public of any other state of the United States, and has been ordered to be registered by the clerk of the superior court of the county in which the land conveyed is situated, and said deed or mortgage has been registered, such registration is valid. (Rev., s. 1019; 1895, c. 181; C. S. 3359.)

§ 47-79. Before deputy clerks of courts of other states.—Where any deed or conveyance of lands in this state, executed prior to January first, one thousand nine hundred and thirteen, has been acknowledged by the grantor or the privy examination of any married woman has been taken before the deputy clerk of a court of record of any other state, and the certificate of acknowledgment and privy examination is otherwise sufficient under the laws of this state, except that it appears to have been signed in the name of the clerk of said court, by the deputy clerk, and the seal of the court has been affixed thereto, and such certificate has been duly approved by the clerk of the superior court of this state in the county where the lands conveyed are situated and the instrument ordered to be recorded, such certificate and probate and the registration made thereon is validated, and the conveyance, if otherwise sufficient, is declared valid. (1913, c. 57, ss. 1, 2; C. S. 3360.)

§ 47-80. Sister state probates without governor's authentication. — In all cases where any deed concerning lands or any power of attorney for the conveyance of the same, or any other instrument required or allowed to be registered, has been, prior to the twenty-ninth day of January, one thousand nine hundred and one, acknowledged by the grantor therein, or proved and the private examination of any married woman, who was a party thereto, taken according to law, before any judge of a supreme, superior or circuit court of any other state or territory of the United States where the parties to such instrument resided, and the certificate of such judge as to such acknowledgment, probate or private examination, and also the certificate of the secretary of state of said state or territory instead of the governor thereof (as required by the laws of this state then in force) that the judge, before whom the acknowledgment or probate and private examination were taken, was at the time of taking the same a judge as aforesaid, are attached to said deed, or other instrument, and the said deed or other instrument, having said certificates attached, has been exhibited before the former judge of probate, or the clerk of the superior court of the county in which the property is situated, and such acknowledgment, or probate and private examination have been adjudged by him to be sufficient and said deed or other instrument ordered to be registered and has been registered accordingly, such probate and registration shall be valid. Nothing herein contained affects the rights of third parties who are purchasers for value, without notice, from the grantor in such deed or other instrument. (Rev., s. 1014; 1901, c. 39; C. S. 3361.)

§ 47-81. Before commissioners of deeds.—Any deed or other instrument permitted by law to be registered, and which has prior to the third day of March, one thousand nine hundred and thirteen, been proved or acknowledged before a commissioner of deeds, is validated; and its registration is authorized and validated. (1913, c. 39, s. 2; C. S. 3362.)

Does Not Interfere with Vested Rights.—This section is remedial in character and beneficent in purpose—making for the saving of titles, and not their destruction—yet it will not be permitted to impair or to interfere with the vested rights of others. Champion Fibre Co. v. Cozard, 183 N. C. 600, 611, 112 S. E. 810.

Same—Purchasers at Execution Sale.—This section cannot have the effect of impairing vested rights of purchasers at an execution sale under judgment, or those holding the land under his deed. Champion Fibre Co. v. Cozard, 183 N. C. 600, 112 S. E. 810.

§ 47-81.1. Before commissioner of oaths.—All deeds, mortgages or other instruments required to be registered, which prior to March 5, 1943, have been probated by a commissioner of oaths and ordered registered, are hereby validated and confirmed as properly probated and registered instruments. (1943, c. 471, s. 2.)

§ 47-81.2. Before army, etc., officers.—In all

cases where instruments and writings have been proved or acknowledged before any officer of the army of the United States or United States marine corps having the rank of captain or higher, before any officer of the United States navy or coast guard having the rank of lieutenant, senior grade, or higher, or any officer of the United States merchant marine having the rank of lieutenant, senior grade, or higher, such proofs or acknowledgments, where valid in other respects, are hereby ratified, confirmed and declared valid. (1943, c. 159, s. 2.)

§ 47-82. Foreign probates omitting seals.—In all cases where the acknowledgment, privy examination or other proof of the execution of any instrument authorized or required to be registered has been taken by or before any ambassador, minister, consul, vice consul, vice consul general or commercial agent of the United States in any country beyond the limits of the United States, and such instrument has heretofore been recorded in any county in this state, but the official before whom it was taken has omitted to attach his seal of office, or it does not appear of record that such seal was attached to the instrument, or such official has certified the same as under his "official seal" or seal of his office, or words of similar import, and no such seal appears of record, then all such acknowledgments, privy examinations or other proof of such instruments, and the registration thereof, are hereby made in all respects valid, and such instruments, after the ratification hereof, shall be competent to be read in evidence. (1913, c. 69, s. 1; C. S. 3363.)

§ 47-83. Before consuls general.—Any deed or other instrument permitted by law to be registered, and which has prior to the thirteenth day of October, nineteen hundred and thirteen, been proved or acknowledged before a "consul general," is validated; and its registration is authorized and validated. (Ex. Sess. 1913, c. 72, s. 2; C. S. 3364.)

§ 47-84. Before vice consuls and vice consuls general.—The order for registration by the clerk of the superior court and the registration thereof of all deeds of conveyance and other instruments in any county of this state prior to January first, one thousand nine hundred and five, upon the certificate of any vice consul or vice consul general of the United States residing in a foreign country, certifying in due form under his name and the official seal of the United States consul or United States consul general of the same place and country where such vice consul or vice consul general resided and acted, that he has taken the proof or acknowledgments of the parties to such instruments, together with the privy examinations of married women parties thereto, are hereby, together with such proof and acknowledgments, privy examinations and certificates, validated. (Rev., s. 1024; 1905, c. 451, s. 2; C. S. 3365.)

Application to Right Prior to Statute—Person Not Claiming from Same Grantor Not Protected.—This section validating acknowledgment of deeds in foreign countries before "vice consuls and vice consuls general," though not valid against a deed from the same grantor duly registered or a lien against the grantor acquired before the validating act, is good as against a person not claiming under the grantor therein. Powers v. Baker, 152 N. C. 718, 68 S. E. 203.

§ 47-85. Before masters in chancery.—All probates, acknowledgments, and private examinations of deeds and conveyances of land heretofore taken before masters in equity or masters in chancery in any other state are declared to be valid, and all registrations of such deeds or conveyances upon such probates, acknowledgments and private examinations, or any of them, are hereby declared to be sufficient. All such deeds and conveyances and registration thereof, and all certified copies of such registrations, shall be received in evidence or otherwise used in the same manner and with the same force and effect as other deeds and conveyances with probates, acknowledgments, or private examinations made in accordance with provisions of statutes of this state in force at the time and as registrations thereof and certified copies of such registrations. Nothing in this section contained shall have effect to deprive any one of any legal rights acquired, before its passage, from the grantors in such deeds or conveyances subsequently to their execution, where the deeds or conveyances by which such rights were acquired have been duly acknowledged or probated and registered. (1911, c. 10; C. S. 3366.)

§ 47-86. Validation of probate of deeds by clerks of courts of record of other states, where official seal is omitted.—In all cases where, prior to the first day of January, one thousand eight hundred and ninety-one, the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage, other instrument authorized to be registered has been taken before a clerk of a court of record in another state, and such clerk has failed or neglected to affix his official seal to his certificate of such acknowledgment, privy examination, or other proof of execution, of such deed, mortgage or other instrument, or where such court had no official seal and no official seal was affixed to such certificate by reason of that fact, and such deed, mortgage, or other instrument has been ordered to registration by the clerk of the superior court of any county in this state and has been registered, the probate of any and every such deed, mortgage, or other instrument authorized to be registered shall be and hereby is to all intents and purposes validated. (1921, c. 15, ss. 1, 2; C. S. 3366(a).)

§ 47-87. Validation of probates by different officers of deeds by wife and husband.—In all cases where, prior to the second day of March, one thousand eight hundred and ninety-five, the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage, or other instrument, authorized to be registered, executed by husband and wife, has been taken as to the husband and wife in different states and by different officers having power to take acknowledgments, any and every such acknowledgment, privy examination of a married woman, or other proof of execution, and the probate of any and every such deed, mortgage or other instrument shall be and hereby is, to all intents and purposes validated. (1921, c. 19, ss. 1, 4; C. S. 3366(b).)

§ 47-88. Registration without formal order validated. — In all cases where the acknowledg-

ment, privy examination of a married woman, or other proof of the execution of any deed, mortgage or other instrument, authorized to be registered, has been taken before a commissioner in another state appointed by the probate judge of any county of this state, under the provisions of section twenty of chapter thirty-five of Battle's Revisal, during the time said chapter remained in force and effect, and such commissioner has certified to such acknowledgment, privy examination or other proof, and has returned such deed, mortgage or other instrument to said probate judge, with his certificate endorsed thereon, and such deed, mortgage or other instrument, together with such certificate, has been registered, without any adjudication or order of registration by such probate judge, the probate and registration of any and every such deed shall be, and hereby is, to all intents and purposes validated. (1921, c. 19, ss. 2, 4; C. S. 3366(c).)

§ 47-89. Same.—In all cases where any deed, mortgage or other instrument has heretofore been acknowledged or probated in accordance with the provisions of §§ 47-87 and 47-88, and such deed, mortgage or other instrument has been registered, without any order of registration by the probate judge or clerk of the superior court appearing thereon, the probate and registration of any and every such deed, mortgage or other instrument shall be, and hereby is to all intents and purposes validated. (1921, c. 19, ss. 3, 4; C. S. 3366(d).)

§ 47-90. Validation of acknowledgments taken by notaries public holding other office.—In every case where deeds or other instruments have been acknowledged before a notary public, when the notary public, at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment taken by such notary public is hereby declared to be sufficient and valid. (1921, c. 21; C. S. 3366(e).)

§ 47-91. Validation of certain probates of deeds before consular agents of the United States.—In all cases where the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage or other instrument authorized or required to be registered has been taken before any consular agent of the United States, during the time chapter thirty-five of Battle's Revisal remained in force and effect, and such acknowledgment, privy examination, or other proof of the execution of such deed, mortgage, or other instrument is in other respects regular and in proper form, and such deed, mortgage, or other instrument has been duly ordered to registration and registered in the proper county, the acknowledgment, probate, and registration of any and every such deed, mortgage, or other instrument is hereby validated as fully and to the same effect as though such acknowledgment, privy examination, or other proof of execution had been taken before one of the officers named in subsection five of section two of said chapter thirty-five of Battle's Revisal. (1921, c. 157; C. S. 3366(f).)

§ 47-92. Probates before stockholders and directors of banks.—No acknowledgment or proof of execution, including privy examination of married women, of any mortgage, or deed of trust executed to secure the payment of any indebtedness to any banking corporation, taken prior to the first day of January, one thousand nine hundred and twenty-three (1923), shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof, or privy examination was a stockholder or director in such banking corporation. (1923, c. 17; C. S. 3366(g).)

Editor's Note.—A provision for a similar purpose to that of this section is found in section 47-63.

This section is summarized in 1 N. C. Law Rev. 302.

§ 47-93. Acknowledgments taken by stockholder, officer, or director of bank.—No acknowledgment or proof of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any banking corporation taken prior to the first day of January, one thousand nine hundred and twenty-four, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof, or privy examination was a stockholder, officer, or director in such banking corporation. (Ex. Sess. 1924, c. 68.)

§ 47-94. Acknowledgment and registration by officer or stockholder in building and loan association.—All acknowledgments and proofs of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any building and loan association prior to the first day of January, one thousand nine hundred and twenty-nine, shall not be, nor held to be, invalid by reason of the fact that the clerk of the Superior Court, justice of the peace, notary public, or other officer taking such acknowledgment, proof of execution or privy examination, was an officer or stockholder in such building and loan association; but such proofs and acknowledgments of all such instruments, and the registration thereof, if in all other respects valid, are hereby declared to be valid.

Nor shall the registration of any such mortgage or deed of trust ordered to be registered by the clerk of the Superior Court, or by any deputy or assistant clerk of the Superior Court, be or held to be invalid by reason of the fact that the clerk of the Superior Court, or deputy, or assistant clerk of the Superior Court, ordering such mortgages or deeds of trust to be registered was an officer or stockholder in any building and loan association, whose indebtedness is secured in and by such mortgage or deed of trust. (Ex. Sess. 1924, c. 108; 1929, c. 146, s. 1.)

Editor's Note.—The Act of 1929 made this section applicable to acknowledgments and registrations prior to Jan. 1, 1929, instead of Aug. 10, 1924, as formerly provided.

§ 47-95. Acknowledgments taken by notaries interested as trustee or holding other office.—In every case where deeds and other instruments have been acknowledged and privy examination of wives had before notaries public, or justices of the peace, prior to January 1, 1939, when the notary public or justice of the peace at the time was interested as trustee in said instrument or at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment and privy examination taken by such notary public or

justice of the peace is hereby declared to be sufficient and valid. (1923, c. 61; 1931, cc. 166, 439; 1939, c. 321; C. S. 3366(h).)

Editor's Note.—It is suggested in 1 N. C. Law Rev. 302, where it is analyzed, that this section should be considered as an addition to section 47-62.

Public Laws 1931, c. 438, inserted the justice of peace in the list of interested officers. The other 1931 act and the act of 1939 merely changed the date.

§ 47-96. Validation of instruments registered without probate.—In every case where it shall appear from the records in the office of the register of deeds of any county in the state that any instrument of writing required or allowed by law to be registered prior to January first, eighteen hundred and sixty-nine, without any acknowledgment, proof, privy examination, or probate, or upon a defective acknowledgment, proof, privy examination, or probate, the record of such instrument may, notwithstanding, be read in evidence in any of the courts of this state, if otherwise competent. (1923, c. 215, s. 1; C. S. 3366(i).)

Local Modification.—Cherokee, Graham: 1935, c. 92.

Editor's Note.—It is suggested in 1 N. C. Law Rev. 302, where this section is summarized, that it probably means that the registration must have been made prior to 1869, and that this and section 47-98 should be considered as amendments or additional sections to chapter 8, article 2, and §§ 47-47 to 47-85.

§ 47-97. Validation of corporate deed with mistake as to officer's name. — In all cases where the deed of a corporation executed before the first day of January, 1918, is properly executed, properly recorded and there is error in the probate of said corporation's deed as to the name or names of the officers in said probate, said deed shall be construed to be a deed of the same force and effect as if said probate were in every way proper. (1933, c. 412, s. 1.)

§ 47-98. Registration on defective probates beyond state.—In every case where it shall appear from the records in the office of the register of deeds of any county in this state that any instrument required or allowed by law to be registered, bearing date prior to the year one thousand eight hundred and thirty-five, executed by any person or persons residing in any of the United States, other than this state, or in any of the territories of the United States, or in the District of Columbia, has been proven or acknowledged, or the privy examination of any feme covert taken thereto, before any officer or person authorized by any of the laws of this state in force prior to the said year one thousand eight hundred and thirty-five to take such proofs, privy examinations and acknowledgments, and the said instrument has been registered in the proper county without the certificate of the governor of the state or territory in which such proofs, acknowledgments or privy examinations were taken, or of the secretary of state of the United States, when such certificate or certificates were required, as to the official character of the person taking such acknowledgment, proof or privy examination, as aforesaid, and without an order of registration made by a court or judge in this state having jurisdiction to make such order, then and in all such cases such proofs, privy examinations, acknowledgments and registrations are hereby in all respects fully validated and confirmed and declared to be sufficient in law, and such instruments so registered may be read in evidence in any of the courts of this state. (1923, c. 215, ss. 2, 3; C. S. 3366(j).)

§ 47-99. Certificate of clerks without seal.—All certificates of acknowledgment and all verifications of pleadings, affidavits, and other instruments executed by clerks of the Superior Court of the State prior to March 10, 1925, and which do not bear the official seal of such clerks, are hereby validated in all cases in which the instruments bearing such acknowledgment or certification are filed or recorded in any county in the State other than the county in which the clerk executing such certificates of acknowledgment or vertifications resides, and such acknowledgments and verifications are hereby made and declared to be binding, valid and effective to the same extent and in the same manner as if said official seal had been affixed. (1925, c. 248.)

§ 47-100. Acknowledgments taken by officer who was grantor.—In all cases where a deed or deeds dated prior to the first day of January, 1910, purporting to convey lands, have been registered in the office of the Register of Deeds of the county where the lands conveyed in said deed or deeds are located, prior to said first day of January, nineteen hundred and ten, and the acknowledgments or proof of execution of such deed or deeds has been taken as to some of the grantors by an officer who was himself one of the grantors named in such deed or deeds, such defective execution, acknowledgment and proof of execution and probate of such deed or deeds thereon and the registration thereof as above described, shall be, and the same are hereby declared to be in all respects valid, and such deed or deeds shall be declared to be in all respects duly executed, probated and recorded to the same effect as if such officer taking such proof or acknowledgment of execution had not been named as a grantor therein, or in anywise interested therein. (1929, c. 48, s. 1.)

Editor's Note.—By express provision this section does not affect actions and proceedings pending at the time of its ratification, which was on the 21st of February, 1929.

§ 47-101. Seal of acknowledging officer omitted; deeds made presumptive evidence.—In all cases where deeds appear to have been executed for land prior to January 1, 1900, and appear to have been recorded in the offices of the registers of deeds in the proper counties in this state, and the same appear to have been acknowledged before commissioners of affidavits (or deeds) of North Carolina, residing in the District of Columbia or elsewhere in the different states, or appear to have been recorded without any certificate being recorded on the record of such deed or deeds, such record or records shall be presumptive evidence of the execution of such deed or deeds by the grantor or the grantors to the grantee or grantees therein named for the lands therein described, and the record of such deed or deeds may be offered or read in evidence upon the trial or hearing of any cause in any of the courts of this state as if the same had been properly probated and recorded. Provided, however, that nothing herein contained shall prevent such record or records from being attacked for fraud, and provided further that this section shall not apply to creditors or purchasers, but as to them

the same shall stand as if this section had not been passed, and shall only apply to deeds executed prior to January first, nineteen hundred. (1929, c. 14, s. 1.)

§ 47-102. Absence of notarial seal.—Any deed executed prior to the first day of January, nineteen hundred and thirty-five, and duly acknowledged before a North Carolina notary public, and the probate recites "witness my hand and notarial seal," or words of similar import, and no seal was affixed to the said deed, shall be ordered registered by the clerk of the superior court of the county in which the land lies, upon presentation to him: Provided, the probate is otherwise in due form. (1935, c. 130; 1943, c. 472.)

The 1943 amendment changed the year named in this section from 1910 to 1935.

§ 47-103. Deeds probated and registered with notary's seal not affixed, validated.—Any deed conveying or affecting real estate executed prior to January 1, 1932, and ordered registered and recorded in the county in which the land lies prior to said date, from which deed and the acknowledgment and privy examination thereof the seal of the notary public taking the acknowledgment or privy examination of the grantor or grantors thereof was omitted, is hereby declared to be sufficient and valid, and the probate and registration thereof are hereby in all respects validated and confirmed to the same effect as if the seal of said notary was affixed to the acknowledgment or privy examination thereof. (1941, c. 20.)

§ 47-104. Acknowledgments of notary holding another office.—In every case where deeds or other instruments have been acknowledged before a notary public, when the notary public at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment taken by such notary public is hereby declared to be sufficient and valid. (1935, c. 133; 1937, c. 284.)

Editor's Note.—The 1937 amendment re-enacted this section without change.

§ 47-105. Acknowledgment and private examination of married woman taken by officer who was grantor.—In all cases where a deed or deeds of mortgages or other conveyances of land dated prior to the first (1st) day of January, one thousand nine hundred and twenty-six (1926), purporting to convey lands have been registered in the office of the register of deeds of the county where the lands conveyed in said deeds are located prior to said first (1st) day of January, one thousand nine hundred and twenty-six (1926), and the acknowledgments or proof of execution of such deed or deeds and the private examination of any married woman who is a grantor in such deed or deeds have been taken as to some of the grantors, and the private examination of any married woman grantor in such deed has been taken by an officer who was himself one of the grantors named in such deed or deeds, such defective execution, acknowledgment, proof of execution and the private examination of such married woman, evidenced by the certificate thereof on such deed and the registration thereof as above described and set forth, shall be and the same are hereby declared to be in all respects valid, and such deed or deeds or other conveyances of land are declared to be in all respects duly executed, probated and recorded to the same effect as if such officer taking such proof or acknowledgment of execution or taking the private examination of such married woman and certifying thereto upon such deed or deeds had not been named as grantor therein and had not been interested therein in any way whatsoever. (1937, c. 91.)

§ 47-106. Certain instruments in which clerk of superior court was a party, validated.—In all cases where a deed, or other conveyance of land dated prior to the first day of January, one thousand nine hundred and eighteen, purporting to convey land, wherein the grantor or one of the grantors therein was at the time clerk of the superior court of the county where the land purporting to be conveyed was located, was acknowledged, proof of execution, privy examination of a married woman, and, or, order of registration had and taken before a deputy clerk of the superior court of said county, and the instrument registered upon the order of said deputy clerk of the superior court in the office of the register of deeds of said county, within two years from the date of said instrument, such instrument and its probate are hereby in all respects validated and confirmed; and such instrument, together with such defective acknowledgment, proof of execution, privy examination of a married woman, order of registration, and the certificate of such deputy clerk of the superior court, and the registration thereof, are hereby declared in all respects to be valid and binding upon the parties of such instrument and their privies, and such instrument so probated and recorded together with its certificates may be read in evidence as a muniment of title, for all intents and purposes, in any of the courts of this state. (1939, c. 261.)

§ 47-107. Validation of probate and registration of certain instruments where name of grantor omitted from record.—All deeds, deeds of trust, conveyances or other instruments permitted by law to be registered in this state, which have been registered prior to January first, one thousand nine hundred and twenty-four, and in which a clerk of the superior court has adjudged the certificate of the officer before whom the acknowledgment was taken to be in due form and correct and has ordered the instrument to be recorded, but in which the name of a grantor which appears in the body of the instrument and as a signer of the instrument has been omitted from the record of the certificate of the officer before whom the acknowledgment was taken, are hereby declared to have been duly proved, probated and recorded and to be valid. (1941, c. 30.)

§ 47-108. Acknowledgments before notaries under age.—All acts of notaries public for the state of North Carolina who were not yet twenty-one years of age at the time of the performance of such acts are hereby validated; and in every case where deeds or other instruments have been acknowledged before such notary public who was not yet twenty-one years of age at the time of taking of said acknowledgment, such acknowledgment taken before such notary public is hereby declared to be sufficient and valid. (1941, c. 233.)

§ 47-108.1. Certain corporate deeds, etc., declared validly admitted to record.—Deeds, con-

veyances and other instruments of writing of corporations entitled to registration, which have been heretofore duly executed in the manner required by law, by the proper officers of the corporation, and which have prior to March 8, 1943, been admitted to registration, on the acknowledgment or proof of the proper executing officer, in the manner required by law, shall be, and the same are hereby declared to be, in all respects validly admitted to record, although such officer at the date of such acknowledgment or proof had ceased to be an officer of such corporation, or such corporation at the date of such acknowledgment or proof had ceased to exist. (1943, c. 598.)

Art. 5. Registration of Official Discharges from the Military and Naval Forces of the United States.

§ 47-109. Book for record of discharges in office of register of deeds; specifications.—There shall be provided, and at all times maintained, in the office of the register of deeds of each county in North Carolina a special and permanent book, in which shall be recorded official discharges from the military and naval forces of the United States. Said book shall be securely bound, and the pages of the same shall be printed in the form of discharge papers, with sufficient blank lines for the recording of such dates as may be contained in the discharge papers offered for registration. (1921, c. 198, s. 1; C. S. 3366(k).)

§ 47-110. Registration of official discharge or certificate of lost discharge.—Upon the presentation of any official discharge, or official certificate of lost discharge, from the army, navy, or marine corps of the United States, it shall be the duty of the register of deeds of the several counties of the state to record such discharge in the book provided for in the preceding section. (1921, c. 198, s. 2; 1943, c. 599; C. S. 3366(l).)

The 1943 amendment struck out the former provision relating to fee for registration.

§ 47-111. Inquiry by register of deeds; oath of applicant.—If any register of deeds shall be in doubt as to whether or not any paper so presented for registration is an official discharge from the army, navy, or marine corps of the United States, or an official certificate of lost discharge, he shall have power to examine, under oath, the person so presenting such discharge, or otherwise inquire into its validity; and every register of deeds to whom a discharge or certificate of lost discharge is presented for registration shall administer to the person offering such discharge or certificate of lost discharge for registration the following oath, to be recorded with and form a part of the registration of such discharge or certificate of lost discharge:

"I, ..., being duly sworn, depose and say that the foregoing discharge (or certificate of lost discharge) is the original discharge (or certificate of lost discharge) issued to me by the Government of the United States; and that no alterations have been made therein by me, or by any person to my knowledge.

.....

Subscribed and sworn to before me this ..... day of ....., 19 ...."

(1921, c. 198, s. 3; C. S. 3366(m).)

§ 47-112. Forgery or alteration of discharge or certificate; punishment. — Any person who shall forge, or in any manner alter any discharge or certificate of lost discharge issued by the Government of the United States, and offer the same for registration or secure the registration of the same under the provisions of this article shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1921, c. 198, s. 4; C. S. 3366(n).)

§ 47-113. Certified copy of registration; fee.—Any person desiring a certified copy of any such discharge, or certificate of lost discharge, registered under the provisions of this article shall apply for the same to the register of deeds of the county in which such discharge or certificate of lost discharge is registered; and it shall be the duty of the register of deeds to furnish such certified copy upon the payment of a fee of fifty (50) cents therefor. (1921, c. 198, s. 5; C. S. 3366(o).)

Division IX. Domestic Relations.

Chapter 48. Adoption of Minors.

§ 48-1. Petition for adoption and change of name.—Any proper adult person or husband and wife, jointly, who have legal residence in North Carolina may petition the superior court of the county in which he or they have legal residence or the county in which the child resides, or of the county in which the child had legal residence when it became a public charge, or of the county in which is located any agency or institution operating under the laws of this state having guardianship and custody of the child, for leave to adopt a minor child and for a change of the name of such child. Provided, that in every instance when the parent, guardian or custodian of the child is not a citizen or resident of the state of North Carolina at the time of filing of petition for adoption, or where the child has been brought into the state for the purpose of placement and adoption by a parent, person, agency, institution or association, the provisions of chapter two hundred twenty-six of the Public Laws of one thousand nine hundred and thirty-one [§§ 110-50 to 110-56] must be complied with before the child is eligible for adoption. Such petition for adoption shall be filed in duplicate on standard form to be supplied by the state board of charities and public welfare, one form to be held in the files of the said superior court, and the other to be sent to said state board of charities and public welfare. Provided, that where a child or children have been duly adopted in North Carolina by a husband or wife and the name of the other spouse of said husband or wife was omitted in said adoption proceedings, and it being made to appear to the court by petition and affidavit of the original petitioner in said adoption proceeding and spouse of said petitioner that the name of said husband or wife of said petitioner was omitted through inadvertence, and that it was the intention of all parties to said proceeding that both the husband or wife of the original petitioner and the petitioner should be the adopting parties, then, and in that event, the court shall order that the original proceeding be corrected to the end that the husband or wife of the petitioner be made one of the adopting parties, and said order when so made shall have the effect of making said husband or wife one of the adopting parties; that this order shall be made notwithstanding the fact that the adopted child or children have reached their majority, unless said adoptee or adoptees should object to said adoption. (1935, c. 243; 1937, c. 422; 1939, cc. 32, 132, s. 1; 1943, c. 735.)

Editor's Note.—The 1937 amendment to this section limited the former one year's residence requirement to children born outside of the state. Chapter 132 of Public Laws of 1939 inserted the first proviso of the present section in lieu of that provision.

The 1943 amendment added the last proviso.

For a critical analysis and appraisal of this chapter, see 13 N. C. Law Rev. 355.

For an article entitled "Thwarting Adoptions," see 19 N. C. Law Rev. 127.

Strictly Construed.—Since the laws of inheritance and distribution of property are directly involved in an adoption proceeding, and since the proceeding is in derogation of the common law, it must be strictly construed. In re Holder, 218 N. C. 136, 10 S. E. (2d) 620.

Juvenile Court Act Not an Amendment.—The Juvenile Court Act was not an amendment to the former Adoption Law and did not affect the procedure therein prescribed for the adoption of minors. Ward v. Howard, 217 N. C. 201, 7 S. E. (2d) 625.

Jurisdiction.—The evidence disclosed that the child in question was brought by its mother into the juvenile court of the county of their residence charged with being a dependent child, that the court commited it to the custody of a children's home society having its home office in another county of the state, but that the child was immediately taken by the persons seeking to adopt it to their residence in another state. Held, the child never resided in the county in which is located the home office of the children's home society, its mere commitment to the children's home not having the effect of making the child's constructive residence there, and adoption proceedings in that county are void since the child was never within its jurisdiction. In re Holder, 218 N. C. 136, 10 S. E. (2d) 620.

An agreement to adopt a minor, made between the person desiring to adopt the minor and the minor's parents, as the respective parties to the agreement, is not intended as an "Adoption of Minors" under this and following sections. Chambers v. Byers, 214 N. C. 373, 199 S. E. 398.

Cited in Stewart v. Cary, 220 N. C. 214, 17 S. E. (2d) 29.

§ 48-2. Use of true name of child unnecessary; identification.—It shall not be necessary in the petition for adoption or other papers, except the report on investigation of the conditions and antecedents of the child, to give the true or legal name of the child to be adopted, but it shall be competent to name or identify the child to be adopted by such name as may be presented in the petition of adoption, and the adoption proceedings shall not be invalidated by reason thereof. In every case, however, the true name of the child proposed to be adopted shall be set forth in, and made known to the court through, the report upon the conditions and antecedents of the child to be made by the superintendent or superintendents of public welfare or duly authorized representa-

tive of a child-placing agency as hereinafter provided. (1935, c. 243.)

§ 48-3. Investigation of conditions and antecedents of child and of suitableness of foster home. —Upon the filing of a petition for the adoption of a minor child the court shall instruct the county superintendent of Public Welfare, or a duly authorized representative of a child-placing agency, licensed by the State Board of Charities and Public Welfare, to investigate the conditions and antecedents of the child for the purpose of ascertaining whether he is a proper subject for adoption, and to make appropriate inquiry to determine whether the proposed foster home is a suitable one for the child; or the court may instruct the superintendent of public welfare of one county to make an investigation of the conditions and antecedents of the child and the superintendent of public welfare of another county or counties to make any other part of the necessary investigation. The county superintendent or superintendents of public welfare or the duly authorized representative of such agency described hereinbefore shall make a written report of his or their findings, on a standard form supplied by the state board of charities and public welfare, for examination by the court of adoption. (1935, c. 243.)

§ 48-4. Necessary parties to proceeding. — The parents or surviving parent or guardian, or the person or persons having charge of such child, or with whom it may reside, must be a party or parties of record to this proceeding: Provided, that where the parents or surviving parent or guardian of the child whose adoption is sought cannot be found within this state for the service of process, that fact shall be made known to the court either by affidavit or return of the sheriff of the county in which such person or persons were last known to reside. It shall be competent to make such service by publication of summons as provided by §§ 1-98, et seq., and such person shall be bound in every respect by such service: Provided, that when the parent, parents, or guardian of the person of the child has signed a release of all rights to the child, the person, agency, or institution to which said rights were released shall be made a party to this proceeding and it shall not be necessary to make the parent, parents or guardian parties: Provided, further, that when such parent, parents, or guardian has consented to an adoption as specified in § 48-5, he shall not be a necessary party of record to this proceeding. (1935, c. 243; 1939, c. 32; 1941, c. 281, s. 1.)

Editor's Note.—The first proviso in this section was added to the law by Chapter 32 of Public Laws of 1939. The 1941 amendment added the last proviso.

For comment on the 1939 amendment, see 17 N. C. Law Rev. 350.

For comment on the 1941 amendment to this and other sections in this chapter, see 19 N. C. Law Rev. 449.

Noncompliance Deprives Clerk of Jurisdiction.—In Trueblove v. Parker, 191 N. C. 430, 132 S. E. 295, decided under similar provisions of a former law, it is said: "Upon the record in this case it is held that neither the father nor the mother of the child was a party to the proceeding within the contemplation of the statute, and that the clerk had no jurisdiction of their person, (consequently) he had no jurisdiction of the subject-matter." See note of this case in 5 N. C. Law Rev. 67.

Mother of illegitimate child must be made a party to proceedings for the adoption of the child, and her consent to the adoption or proof of abandonment of the child in the statutory or legal sense, must be made to appear as a jurisdictional matter. In re Holder, 218 N. C. 136, 10 S. E. (2d) 620.

Parent's consent to adoption must be shown within record and must relate to particular persons seeking to adopt the child. In re Holder, 218 N. C. 136, 10 S. E. (2d) 620.

Cited in Chambers v. Byers, 214 N. C. 373, 199 S. E. 398.

§ 48-5. Tentative approval and order of adoption; completion of adoption within two years.— Upon the examination of the written report of the Superintendent of Public Welfare or of a duly authorized representative of said agency described hereinbefore and with the consent of the parent or parents if living or of the guardian, if any, or of the person with whom such child resides, or who may have charge of such child, except in cases hereinafter provided for, the Court, if it be satisfied that the petitioner is a proper and suitable person and that the child is a proper subject for adoption and that the adoption is for the best interests of the child, may tentatively approve the adoption and issue an order giving the care and custody of the child to the petitioner: Provided, that when the parent, parents, or guardian of the person of the child has in writing surrendered the child to a duly licensed child-placing agency, or the Superintendent of Public Welfare of the County and has in writing consented to adoption of the child by any person or persons to be designated by said agency or officer, this shall be deemed a sufficient consent for the purposes of this chapter, and no further consent of the parent, parents, or guardian to a subsequent specific adoption shall be necessary: Provided, however, that if any child is placed in any home or institution referred to in this chapter by its mother, then said mother shall give her written consent that said child may be adopted without further consent upon her part. Such consent shall not be revocable by the consenting party. For the purpose of this chapter, a parent under the age of twenty-one shall be deemed to have capacity for the purposes of giving consent, releasing rights in the child, and for all other purposes of this chapter, and shall be as fully bound thereby as if the parent had been twenty-one. Within two years of the interlocutory order, but not earlier than one year from the date of such order, the Court shall complete the proceeding by an order granting letters of adoption or, in its discretion, by an order dismissing the proceeding, and the effect of any adoption so completed shall be retroactive to the date of application. During this interval the child shall remain the ward of the Court and shall be subject to such supervision as the Court may direct. Upon making the interlocutory order the written report of the investigation made by the Superintendent or Superintendents of Public Welfare or representative of the child-placing agency described hereinbefore shall be forwarded by the Clerk of the Superior Court to the State Board of Charities and Public Welfare. Upon receipt of the same the said Board shall cause said report to be recorded in a book to be kept for that purpose, which book shall be properly indexed showing the name of the child, the names of its natural parents, the names of its adoptive parents, and the new legal name, if any, given to said child; and said Board shall also cause the original report to be permanently indexed and filed. Neither the original report nor the record thereof in the aforesaid book shall be made public, nor shall any in-

formation concerning the contents of either of them be disclosed by any person except upon order of a Judge of the Superior Court, made upon application of any party requiring such information, and when in the opinion of the said Judge it may be to the interests of the said child or to the public to have such information disclosed. It shall be a misdemeanor for any person having charge of the said report or record to allow said report or records to be examined by anyone or to give any information concerning the contents of either except upon order of a Judge of the Superior Court as herein provided. No party to a completed and final adoption proceeding nor anyone claiming under such a party may later question the validity of the adoption proceeding, by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, save for such appeal as may be allowed by law. Further, no adoption may be questioned by reason of any procedural or other defect by anyone not injured by such defect. Such order granting letters of adoption shall have the force and effect of, and shall be entitled to, all the presumptions attaching to a judgment rendered by a court of general jurisdiction in a common law action. A parent who has not consented to nor been made a party to an adoption proceeding where such steps are required may have the adoption vacated provided he bring action to vacate within one year of actual notice of the adoption, and provided he failed to appear in the adoption proceedings because he did not know of such proceedings. In any case where a parent or parents in writing surrenders a child for adoption (other than to a duly licensed child-placing agency or the Superintendent of Public Welfare of the County, which situation is governed by an earlier part of this section), and the child is taken by prospective adoptive parents in reliance thereon and kept for a period of six months or more, the surrender shall not be revocable by the surrendering parent or parents. (1935, c. 243; 1941, c. 281, ss. 2, 3.)

The 1941 amendment struck out the former second sentence of this section and inserted in lieu thereof the two provisos following the first sentence and the three sentences following the provisos. The amendment also added the last five sentences of the section.

§ 48-6. Form and contents of adoption order; parent-child relationship established; rights of inheritance, etc.—Such order granting letters of adoption shall be made upon a standard form supplied by the state board of charities and public welfare, and shall state whether for the minority or for the life-time of such child and shall have the effect forthwith to establish the relation of parent and child between the petitioner and the child. A child adopted for its minority shall not be deemed a relative of its adopted parents when determining succession of property to, through or from it. But where adoptions are for life succession by, through, and from adopted children and their adoptive parents shall be the same as if the adopted children were the natural, legitimate children of the adoptive parents. Succession by children adopted for life and their lineal descendants from or through their natural parents or by or through the natural parents from such adopted children or their lineal descendants shall take place only where but for such succession the state of North Carolina would succeed to the intestate's property. Further, for all other purposes whatsoever a child adopted for life and his adoptive parents shall be in the same legal position as they would be if he had been born to his adoptive parents. No defect or irregularity, jurisdictional or otherwise, in an adoption proceedings shall prevent inheritance by a child, adopted for life, who has after the adoption continuously lived as the adopted child of the adoptive parents. (1935, c. 243; 1939, c. 132, s. 2; 1941, c. 281, s. 4.)

Cross References.—As to rights under Workmen's Compensation Act, see § 97-2, paragraph 1. As to rules of descent, see § 29-1, rule 2. As to order of distribution, see § 28-149.

Editor's Note.—The 1941 amendment struck out this section as it formerly appeared and inserted the above in lieu thereof.

The cases treated under this section were decided under former provisions of the law.

Strictly Construed.—As statutes, such as this section, are in derogation of the common law, they must not be construed to enlarge or confer any rights not clearly given. Edwards v. Yearby, 168 N. C. 663, 665, 85 S. E. 19; Grimes v. Grimes, 207 N. C. 778, 780, 178 S. E. 573.

Right of Inheritance.—This section has reference to cases of the intestacy of persons standing in loco parentis, and does not apply where the property is disposed of by will. King v. Davis, 91 N. C. 142; Sorrell v. Sorrell, 193 N. C. 439, 137 S. E. 306.

A child adopted under this section does come within the terms of a devise to "heirs lawfully begotten." Love v. Love, 179 N. C. 115, 101 S. E. 562.

A deed to the grantor's daughter conveyed the lands to be held, with remainder over as designated thereinafter, with habendum to her for her natural life then over to any child or children she may leave surviving her in fee, qualified by the expression, "should any child or children born unto her predecease her the other such children should take in fee," with an ultimate and further contingent limitation over. It was held that a child adopted by the grantee after the death of the grantor, no other child having been born, is excluded as against the ultimate takers of the blood of the grantor provided by the deed. Tankersley v. Davis, 195 N. C. 542, 142 S. E. 765.

Same—Adopting Parent Does Not Inherit.—This section confers the right of inheritance on the adopted child only, and not on the adopted father. So where the adopted child dies seized of realty, without brothers or sisters, the law confers it upon the natural rather than the adopted father. Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19. This case contains an excellent review of similar statutes in other states. Ed. Note.

It gives no power to the adopted child to inherit through the adoptive parent, or from any source other than the "estate of the petitioner." It limits the right to inherit to the property of the adoptive parent, and it cannot be construed to give the adopted child the right to inherit from his father's ancestors or other kindred, or to be a representative of them. Grimes v. Grimes, 207 N. C. 778, 780, 178 S. E. 573.

The effect of the adoption is simply to create a personal status between the adoptive parent and the child adopted, so that the adopted child may inherit from the adoptive parent such estate of the adoptive parent as such parent, during his lifetime, might voluntarily have given to such child. Grimes v. Grimes, 207 N. C. 778, 780, 178 S. E. 573.

§ 48-7. Change of name; report to bureau of vital statistics; entry on birth certificate. — For proper cause shown the court may decree that the name of the child shall be changed to such name as may be prayed in the petition: Provided, that whenever the name of any child is so changed, the court shall immediately report such change to the bureau of vital statistics of the state board of health, authorizing said bureau to enter change of name on the original birth certificate of the child and to issue upon request a certificate of birth bearing the new name of a child as shown in the decree of adoption, the name of the foster parents of said child, age, sex, date of birth, but no reference in any certified copy of the birth

certificate shall be made to the adoption of the said child. However, original registration of birth shall remain a part of the record of the said bureau of vital statistics. The provisions of this section shall apply to all minors heretofore adopted in accordance with the laws existing at the time of such adoptions in as full a manner as to adoptions hereunder. (1935, c. 243.)

§ 48-8. Surety bond required of petitioner where child with estate is without guardian. — When the court grants the petitioner the custody of the child, if the child is an orphan and without guardian and possesses any estate, the court shall require from the petitioner such bond as is required by law to be given by guardians. (1935, c. 243.)

§ 48-9. Recordation of adoption proceedings; revocation of orders.—All papers, except the report upon the conditions and antecedents of the child and consent of natural parents or guardian to the adoption, shall be recorded in the book or books in which other special proceedings are recorded in the office of the clerk of the superior court in the county in which the adoption is made; and all orders made in the proceedings may be revoked at any time by the court for good cause shown. On issuing such order granting letters of adoption, the clerk of the superior court of the county in which the order is issued shall send a copy of such order to the state board of charities and public welfare and likewise a copy of the revocation of the order to said board to be held as a permanent record. (1935, c. 243.)

Editor's Note.—Section 190 of Michie's Code of 1931 provided for the restoration of the parent's right to custody of a child after such right had been forfeited by abandonment. Under that section it was held in Newsome v. Bunch, 142 N. C. 19, 54 S. E. 785, that where the court, in habeas corpus proceedings for the custody of a child, found that there had been no abandonment, it was error to order a restoration of the child without considering the interest or welfare of the child as prescribed by that section. This case was remanded by the supreme court with a direction to the court below to make a finding as to whether the child's interests would be prejudiced, the lower court found that, under the circumstances, no prejudice would result from the restoration, and the supreme court affirmed this decision in 144 N. C. 15, 56 S. E. 509.

§ 48-10. Parents, etc., not necessary parties to adoption proceedings upon finding of unfitness or abandonment.—In all cases where a juvenile court has declared the parent or parents or guardians unfit to have the care and custody of such child, or has declared the child to be an abandoned child, such parent, parents, or guardians shall not be necessary parties to any action or proceeding under this chapter nor shall their consent be required. But in the event that the child be of age beyond the jurisdiction of the juvenile court, and the juvenile court has not theretofore determined that an abandonment has taken place, then on notice to the parent, parents, or guardian the court in the adoption proceedings is hereby authorized to determine that an abandonment has taken place, provided that if the parent, parents, or guardian deny that an abandonment has taken place, this issue of fact shall be determined as provided in § 1-273, and if abandonment be determined, then the consent of the parent, parents, or guardian shall not be required. (1935, c. 243; 1941, c. 281, s. 5.)

Editor's Note.—The 1941 amendment struck out this section as it formerly appeared and inserted the above in lieu thereof.

The cases treated under this section were decided under former provisions of the law.

Abandonment Judicially Determined. — The existence of abandonment as ground for an adoption without parental consent must be judicially determined. Truelove v. Parker, 191 N. C. 430, 439, 132 S. E. 295.

Abandonment Must Be Willful.—Where there was evidence in behalf of the defendant father tending to show that the plaintiff took possession of his children against his will and prevented him from performing his parental duty, as well as evidence to the contrary, it was held that when the jury found for the defendant, the case did not fall within the meaning of this section. Howell v. Solmon, 167 N. C. 588, 83 S. E. 609. Wilfully as employed in this section means "purposely and deliberately in violation of law." State v. Whitner, 93 N. C. 590.

In the case of In re Jones, 153 N. C. 312, 69 S. E. 217, this section is cited and the statement is made that there was no abandonment shown of an illegitimate child.

Intention to Forego Parental Duties.—To constitute abandonment by a parent of its child, so as to deprive him of the right to prevent the adoption of the child, there must be some conduct on the part of the parent which evinces a purpose to forego the parental duties. Truelove v. Parker, 191 N. C. 430, 132 S. E. 295.

Death by Wrongful Act.—This section does not deprive the parent of the right to recover for the wrongful death of the child. Avery v. Brantley, 191 N. C. 396, 399, 131 S. E. 721.

Stated in In re Osborne, 205 N. C. 716, 721, 172 S. E. 491.

§ 48-11. Past adoption proceedings validated. —All proceedings for the adoption of minors in courts of this State are hereby validated and confirmed, and the orders and judgments therein are declared to be binding upon all parties to said proceedings and their privies and all other persons, until the orders or judgments shall be vacated as provided by law. (1935, c. 243.)

§ 48-12. Procuring custody of child by forfeiting parents declared crime.—Any parent whose rights and privileges have been forfeited as provided by § 48-10 and who shall procure the possession and custody of such child, with respect to whom his rights and privileges are forfeited, otherwise than by law provided, shall be guilty of a crime, and shall be punished as for abduction. (1935, c. 243.)

§ 48-13. "Legal resident" defined.—For the purpose of this chapter a legal resident is any person who has had his domicile anywhere in the state of North Carolina for a period of at least twelve consecutive months after entering said state for the purpose of residence. (1939, c. 132, s. 3.)

§ 48-14. Rights of adoptive parents. — When a child is duly adopted pursuant to the provisions of this chapter, the adoptive parents shall not thereafter be deprived of any rights in the child, at the instance of the natural parents or otherwise, except in the same fashion and for the same causes as are applicable in proceedings to deprive natural parents of their children. (1941, c. 281, s. 6.)

§ 48-15. Construction of 1941 Amendment. — The provisions of § 48-6 except for the last sentence, shall apply only to adoptions made after March 15, 1941. All other provisions of chapter 281 of the Public Laws of 1941, amending §§ 48-4, 48-5, 48-10, adding § 48-14, including the last sentence of § 48-6, referred to above, shall apply to all adoptions heretofore and hereafter made. No adoption proceeding had before March 15, 1941, shall be declared void because of procedural defects

therein, and all adoption proceedings theretofore conducted substantially in accordance with the provisions of §§ 48-1 to 48-13, are hereby validated and declared to be as binding as if said procedural defects did not exist. (1941, c. 281, s. 8.)

Chapter 49. Bastardy.

Art. 1. Support of Illegitimate Children.

Art. 2. Legitimation of Illegitimate Children.

Art. 1. Support of Illegitimate Children.

§ 49-1. Title.—This article shall be referred to as "An act concerning the support of children of parents not married to each other." (1933, c. 228, s. 11.)

§ 49-2. Non-support of illegitimate child by parents made misdemeanor.—Any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided. A child within the meaning of this article shall be any person less than fourteen years of age and any person whom either parent might be required under the laws of North Carolina to support and maintain as if such child were the legitimate child of such parent. (1933, c. 228, s. 1; 1937, c. 432, s. 1; 1939, c. 217, ss. 1, 2.)

Editor's Note.—Prior to the 1937 amendment the age specified was ten years. The 1939 amendment repealed the 1937 act, struck out section one of the 1933 act, and re-enacted this section as it appeared when amended by the 1937 Act.

A number of the cases treated in the following note were decided under the former law. They are, however, made available to the practitioner with the hope that they may be of some aid in construing the new law, but they must be read in the light of the former law.

The question as to whether bastardy proceedings under the former law are criminal or civil in their nature presents a subject which has occasioned much controversy, and one in which there are three sharp lines of demarcation established by the cases. The early decisions up to and including State v. Edwards, 110 N. C. 511, 14 S. E. 741, (1892) held without dissent that the proceedings were civil in their nature, and that the statute did not even carry a quasi criminal aspect.

The period between 1892 and 1904, may be designated as the criminal era; during that time several decisions were rendered by the Supreme Court which flatly reversed the former holdings. The opinion in the second of these cases, State v. Ostwalt, 118 N. C. 1208, 24 S. E. 660, delivered by Judge Avery, is a cogent and forceful declaration of the principle.

Subsequent to these decisions, in 1904, the court again reverted to the civil theory, and in an able opinion Chief Justice Clark, who had dissented consistently from the criminal theory, refuted Judge Avery's contention and declared that while containing some anomalous features the proceeding is a civil action. This opinion is very interesting and gives the entire history of the subject. See State v. Liles, 134 N. C. 735, 47 S. E. 750. The following decisions, confirming the Liles case, held that bastardy is in its nature a civil action to enforce a police regulation. State v. Addington, 143 N. C. 683, 57 S. E. 398; State v. McDonald, 152 N. C. 802, 67 S. E. 762; State v. Currie, 161 N. C. 275, 76 S. E. 694; Sanders v. Sanders, 167 N. C. 319, 83 S. E. 490; Payne v. Thomas, 176 N. C. 401, 97 S. E. 212; State v. Carnegie, 193 N. C. 467, 468, 137 S. E. 308.

Purpose of Act. — The object of the bastardy act was to shift the burden of maintaining the child from the innocent many to the guilty one. State v. Roberts, 32 N. C. 350, 353.

The sole aim of the proceeding is to ascertain the paternity of the child and impose upon the father the burden of its support, such as he would incur if it were his lawful instead of his illegitimate offspring, and to save the county the expense of its maintenance. State v. Collins, 85 N. C. 511, 513. See also, State v. Robeson, 24 N. C. 46; State v. Brown, 46 N. C. 129; State v. Durham, 52 N. C. 100; Ward v. Bell, 52 N. C. 79.

Liberally Construed.—As former section 265 was not a penal act, but one of police regulation, it was held that it ought to receive such a construction as would carry out the intention of the legislature and facilitate its execution. State v. Roberts, 32 N. C. 350, 351.

The old bastardy act is repealed in toto by ch. 228, Public Laws of 1933, the provisions of sec. 2 that the act should not affect pending litigation or accrued actions being repugnant to the specific repealing clause of sec. 9, and in a prosecution under the Act of 1933 a demurrer on the grounds that proceedings under the old bastardy act were then pending should be overruled. See State v. Morris, 208 N. C. 44, 179 S. E. 19, holding that the Act of 1933 was intended to cover the entire subject dealing with bastardy.

And Proceeding under Former Law Will Not Bar Proceeding under Present Statute. — Bastardy proceedings against defendant under C. S., 265, et seq. (repealed by sec. 9, ch. 228, Public Laws of 1933), being civil, will not support a plea of former jeopardy in a prosecution under this and the following sections for wilful failure to support his illegitimate child. State v. Mansfield, 207 N. C. 233, 176 S. E. 761.

Constitutionality.—This section does not violate due process of law or impose imprisonment but by the law of the land. State v. Spillman, 210 N. C. 271, 186 S. E. 322.

Warrant Must Charge a Crime. — Where the warrant upon which defendant was tried is insufficient to charge any crime, defendant's motion in arrest of judgment should be allowed, since the defect is one appearing on the face of the record. State v. Tyson, 208 N. C. 231, 180 S. E. 85.

The failure of the warrant to charge defendant with wilful failure to support his illegitimate child is not cured by the charge or verdict, where the warrant fails to charge any criminal offense. Id.

Defective Warrant.—Where the warrant fails to charge that defendant's failure to support his illegitimate child was willful, defendant's motion in arrest of judgment should be allowed. State v. Tarleton, 208 N. C. 734, 182 S. E. 481; State v. Sturdivant, 220 N. C. 535, 17 S. E. (2d) 661; State v. Clarke, 220 N. C. 392, 17 S. E. (2d) 468.

The warrant in a prosecution under this and following sections, must allege that the failure or refusal of defendant to support his illegitimate child was willful, and where it does not do so, defendant's motion in arrest of judgment

should be allowed. State v. McLamb, 214 N. C. 322, 199 S. E. 81.

Sufficiency of Indictment.—In a prosecution for willful failure and refusal to support an illegitimate child, under this and following sections, an exception on the ground that the indictment failed to charge the specific date in the month in which the offense was alleged to have been committed cannot be sustained. State v. Oliver, 213 N. C. 386, 196 S. E. 325.

The begetting of an illegitimate child is not of itself a crime, and a warrant charging defendant with being the putative father of an unborn, illegitimate child is insufficient to support a prosecution under this statute, nor is such insufficiency cured by an amendment allowing the word "wilful" to be inserted therein, in the absence of an amendment alleging the birth of the child and defendant's refusal to support the child. State v. Tyson, 208 N. C. 231, 180 S. E. 85.

Wilfulness Is Essential Element of Offense.—The father of an illegitimate child may be convicted of neglecting to support such child only when it is established that such neglect was wilful, that is, without just cause, excuse or justification. The wilfulness of the neglect is an essential ingredient of the offense, and as such must not only be charged in the bill, but must be proven beyond a reasonable doubt. The presumption of innocence with which the defendant enters the trial includes the presumption of innocence of wilfulness in any failure on his part to support his illegitimate child. The failure to support may be an evidential fact tending to show a wilful neglect, but it does not raise a presumption of willfulness. State v. Cook, 207 N. C. 261, 262, 176 S. E. 757.

Construing the word "wilful" in the light of the decided cases, it is clear that one cannot be brought within the meaning of the statute without proving the criminal intent, and that it is error for the court to charge the jury that if the defendant failed to support his illegitimate child "the presumption is he wilfully did so." Id.

The word "wilfully" as used in the statute is used with the same import as in the act relating to wilful abandonment of wife by husband (see § 14-322). State v. Cook, 207 N. C. 261, 262, 176 S. E. 757, and authorities therein discussed.

The willfulness of the neglect is an essential ingredient of the offense, and as such must not only be charged in the bill, but must be proved beyond a reasonable doubt. State v. Spillman, 210 N. C. 271, 272, 186 S. E. 322.

It is worthy of note that the new act operates against both parents, not primarily the father, and it is a criminal, not a civil statute; it begins by making wilful failure to support the illegitimate child by "any parent" a misdemeanor. It is the failure to support, not the bastardy, which is made a crime. The consequence or punishment of the crime is the fixing of a sum to be paid by the parent for the support of the child. The failure to pay this sum brings on the other possible consequences as previously enumerated. No provision is made for execution against the parent for the sum fixed; there is no section comparable to former § 275. The only means of enforcing payment specifically provided in the act are the list of alternatives above set forth to which the court can turn if payment is not made. 11 N. C. Law Rev. 205, 206.

The proceeding now being a criminal one, probably the defendant is now legally subject to extradition. See 11 N. C. Law Rev. 191, 206.

State Must Prove Paternity of Child and Willful Neglect.—It is not necessary that defendant's paternity of the child should be first judicially determined, but the state must prove on the trial, first, defendant's paternity of the child, and then his willful neglect or refusal to support the child. State v. Spillman, 210 N. C. 271, 186 S. E. 322.

Since the statute raises no presumption against a person accused, the failure to support being evidence of wilfulness, but raising no presumption thereof, but to the contrary, the statute requires the state to overcome the presumption of innocence both as to the willfulness of the neglect to support the illegitimate child and defendant's paternity of the child. State v. Spillman, 210 N. C. 271, 186 S. E. 322.

Violation of Statute Is a Continuing Offense.—Defendant was convicted and served the sentence imposed for willfully failing and refusing to support his illegitimate child under this and following sections. After completion of his term, defendant still willfully failed and refused to support the child, and this prosecution was instituted for breach of this and following sections subsequent to his release. Defendant entered a plea of former jeopardy. It was held that the violation of the statute constitutes a continuing offense, and the prior prosecution is not a bar to a prosecution for breach of the statute for the period subsequent to defendant's release from the imprisonment imposed in the first prosecution. State v. Johnson, 212 N. C. 566, 194 S. E. 319.

Offense Punishable after Effective Date of Section Although Child Born before. — A parent may be prosecuted under this section for willful failure to support his illegitimate child begotten and born before the effective date of the statute, the offense being the willful failure to support an illegitimate child, and it being sufficient if such willful failure occur after the effective date of the statute. State v. Parker, 209 N. C. 32, 182 S. E. 723.

Applied in State v. Moore, 209 N. C. 44, 182 S. E. 692; State v. Bradshaw, 214 N. C. 5, 197 S. E. 564; State v. Moore, 222 N. C. 356, 23 S. E. (2d) 31.

§ 49-3. Place of birth of child no consideration.—The provisions of this article shall apply whether such child shall have been begotten or shall have been born within or without the state of North Carolina: Provided, that the child to be supported is a bona fide resident of this state at the time of the institution of any proceedings under this article. (1933, c. 228, s. 2.)

§ 49-4. Action must be commenced within three years after birth.—Proceedings under this article to establish the paternity of such child may be instituted at any time within three years next after the birth of the child, and not thereafter: Provided, however, that where the reputed father has acknowledged the paternity of the child by payments for the support of such child within three years from the date of the birth thereof, and not later, then, in such case, prosecution may be brought under the provisions of said sections within three years from the date of such acknowledgment of the paternity of such child by the reputed father thereof. (1933, c. 228, s. 3; 1939, c. 217, s. 3.)

Editor's Note.—A number of the cases treated under this section were decided under the former law. They are, however, made available to the practitioner with the hope that they may be of some aid in construing the present law, but they must be read in the light of the former law.

The 1939 amendment added the proviso to this section.

In General.—Even when bastardy proceedings were considered criminal in their nature it was held that former § 274 provided the limitation and that such proceedings were not controlled by the provision limiting criminal prosecutions for misdemeanors to two years. State v. Perry, 122 N. C. 1043, 30 S. E. 139; State v. Hedgepeth, 122 N. C. 1039, 30 S. E. 140.

A proceeding to establish the paternity of an illegitimate child and to prosecute the father, who willfully neglects or refuses to support and maintain the same, may be instituted at any time within three years next after the birth of the child. State v. Moore, 222 N. C. 356, 23 S. E. (2d) 31.

This section cannot be limited to proceedings to establish paternity. Its language is clear, positive and unbending. It seems to have been taken from C. S., 274, of the old law, which was held to supersede the general statute of limitations on the subject. State v. Bradshaw, 214 N. C. 5, 6, 197 S. E. 564.

A proceeding upon indictment charging defendant with willful neglect and refusal to support his illegitimate child, instituted more than three years after the birth of the child, is properly dismissed, under this section, and this result is not affected by the fact that defendant had admitted paternity of the child in a prior proceeding under §§ 265-279 (now repealed), the limitation provided in this section not being confined to proceedings to establish the paternity of the child. Id.

Compliance Must Appear from Examination.—The examination of the mother must appear on its face to have been taken within three years, otherwise the action will be quashed, State v. Ledbetter, 26 N. C. 242. The objection proper time, i. e., before issue is tendered, or it will be deemed waived. State v. Robeson, 24 N. C. 46; State v. Carson, 19 N. C. 368.

A defendant may be prosecuted under this statute, for wilful failure to support his legitimate child born after the passage of the act although the child was begotten

before the effective date of the statute, and defendant's contention that in regard to such prosecution the statute is ex post facto cannot be sustained, since the offense is the wilful failure to support the child, and the time it was begotten is immaterial. State v. Mansfield, 207 N. C. 233, 176 S. E. 761, followed in State v. Morris, 208 N. C. 44, 179 S. E. 19.

Maximum Time for Prosecution Is Six Years from Birth.—In a prosecution against the reputed father for failure to maintain and support his illegitimate child, proceedings to determine the paternity of the child must be instituted within three years from the date of its birth, with the proviso that where the reputed father acknowledges paternity by making payments for the support of such child, prosecution may be instituted at any time within three years from the date of such payments made within three years from the date of birth, so that the greatest length of time that may elapse between the birth of the child and the prosecution even under the proviso of the statute is six years, and a prosecution is properly dismissed upon a special verdict establishing that the reputed father continuously supported the child for eight years and that the prosecution was not instituted until more than nine years after its birth. State v. Killian, 217 N. C. 339, 7 S. E. (2d) 702.

An Acknowledgment Made More than Three Years from Birth Does Not Prevent Running of Limitation.—Where acknowledgment has been made of the paternity of the child by payments for its support within three years from the date of the birth, prosecution for nonsupport may be brought within three years thereafter, but a later acknowledgment, made more than three years from the birth, will not avail to prevent the running of the statute. State v. Hodges, 217 N. C. 625, 9 S. E. (2d) 24.

§ 49-5. Prosecution; indictments; death of mother no bar; determination of fatherhood.—Proceedings under this article may be brought by the mother or her personal representative, or, if the child is likely to become a public charge, the superintendent of public welfare or such person as by law performs the duties of such official in said county where the mother resides or the child is found. Indictments under this article may be returned in the county where the mother resides or is found, or in the county where the putative father resides or is found, or in the county where the child is found. The fact that the child was born outside of the state of North Carolina shall not be a bar to indictment of the putative father in any county where he resides or is found, or in the county where the mother resides or the child is found. The death of the mother shall in no wise affect any proceedings under this article. Preliminary proceedings under this article to determine the paternity of the child may be instituted prior to the birth of the child but when the judge or court trying the issue of paternity deems it proper, he may continue the case until the woman is delivered of the child. When a continuance is granted, the courts shall recognize the person accused of being the father of the child with surety for his appearance, either at the next term of the court or at a time to be fixed by the judge or court granting a continuance, which shall be after the delivery of the child. (1933, c. 228, s. 4.)

Editor's Note.—The cases treated under this section were decided under the former law. They are, however, made available to the practitioner with the hope that they may be of some aid in construing the new law, but they must be read in the light of the former law.

Married Women.—It was held in State v. Pettaway, 10 N. C. 623, and in State v. Wilson, 32 N. C. 131, cited with approval in State v. Allison, 61 N. C. 346, that, though the section specifies "any single woman big with child or delivered of the child," the subsequent language in the section, that the object is to protect the public against the charge of maintaining bastard children, includes married women, since a bastard child can be begotten upon a married woman as well as upon a single woman. See State v. Liles, 134 N. C. 735, 742, 47 S. E. 750; Wilkie v. West, 5 N. C. 319.

Child Not Born.—The former statute expressly authorized the mother to proceed against the putative father before the child was born, that is, when it was en ventre sa mere. The Court may continue the proceedings until the birth of the child. This clearly implies that the proceedings may be commenced during pregnancy. State v. Wynne, 116 N. C. 981, 21 S. E. 35; State v. Addington, 143 N. C. 683, 687, 57 S. E. 398.

Formalities of the Examination.—The examination need not be signed by the mother and if the warrant issued, signed by the justices, is on the same paper as the examination it is a sufficient signature of the examination, State v. Thompson, 26 N. C. 484; in any event the signature may be made by amendment, State v. Thomas, 27 N. C. 366. But the examination must be under oath as prescribed by the section or the proceedings will be quashed. State v. Ledbetter, 26 N. C. 242, 245.

Venue.—In bastardy cases the jurisdiction of the justice to issue the warrant before the birth of the child, depends upon the domicil of the mother at the time, and not on her legal place of settlement; and if the mother continues to reside in the same county until the birth of her child, making her whole residence therein more than twelve months, the full jurisdiction of the case will be in that county. State v. Hales, 65 N. C. 244. See also, State v. Elam, 61 N. C. 460; Meritt v. McQuaig, 63 N. C. 551.

The Judgment.—Under former section 267 authorizing the Court, in bastardy proceedings, to commit defendant "until he find surety," such a judgment though conditional, was valid. State v. Wynne, 116 N. C. 981, 21 S. E. 35.

Promise of Father to Support Child.—Where the mother of a bastard child has refrained from enforcing maintenance thereof under former § 267, this was held to constitute consideration to support an action on a promise of the father to support and educate it. Thayer v. Thayer, 189 N. C. 502, 127 S. E. 553.

The Appeal.—The provision in former section 267 that either party could appeal, applied to the affiant, the woman or the defendant, and so did not conflict with the general rule that the State may not appeal from a judgment upon a verdict of not guilty. Myers v. Stafford, 114 N. C. 234, 241, 19 S. E. 764.

A bastardy proceeding under the former law was, in its principal features and purposes, a civil action, and was within the operation of superior court rule 24, which provides that appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term. State v. Edwards, 110 N. C. 511, 14 S. E. 741.

Rights of Surety.—The surety on the appearance bond of the defendant, who, in bastardy proceedings, appealed from a justice of the peace to the county court and there remanded for want of jurisdiction, may insist upon the exact terms of his bond; and where the defendant has been legally convicted and has served his term as the law provides on failing to pay the allowance made to the prosecutrix, costs, etc., the provisions in the appearance bond as to the surety's liability has been discharged. State v. Carnegie, 193 N. C. 467, 137 S. E. 308.

Death of Child.—What kind of order should be entered where the child dies pending the trial at the next term of court, is in the discretion of the judge. Former § 268 seemed to require an order in every case. State v. Beatty, 66 N. C. 648.

§ 49-6. Mother not excused on ground of self-incrimination; not subject to penalty.—No mother of an illegitimate child shall be excused, on the ground that it may tend to incriminate her or subject her to a penalty or a forfeiture, from attending and testifying, in obedience to a subpoena of any court, in any suit or proceeding based upon or growing out of the provisions of this article, but no such mother shall be prosecuted or subjected to any penalty or forefeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, she may so testify. (1933, c. 228, s. 5; 1939, c. 217, s. 5.)

§ 49-7. Jurisdiction of inferior courts; issues and orders.—Proceedings under this article shall

be instituted only in the superior court of any county of this state, or in any court inferior to the superior court of this state, except courts of justices of the peace and courts whose criminal jurisdiction does not exceed that of justices of the peace. Justices of the peace may issue warrants for violations of this article made returnable to any court having jurisdiction of such violations under the terms of this article.

The court before which the matter may be brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to support and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative, the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the particular child who is the object of the proceedings. The court in fixing this sum shall take into account the circumstances of the case, the financial ability to pay and earning capacity of the defendant, and his or her willingness to cooperate for the welfare of the child. The order fixing the sum shall require the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to the court to require. Compliance by the defendant with any or all of the further provisions of this article or the order or orders of the court requiring additional acts to be performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed or any modification or increase thereof. (1933, c. 228, s. 6; 1937, c. 432, s. 2; 1939, c. 217, ss. 1, 4.)

Editor's Note.—The possibility of imposing a sentence of imprisonment in excess of thirty days was thought by some to exclude the jurisdiction of justices of the peace, but in many instances they did exercise jurisdiction. The amendment clearly excludes justices. 15 N. C. Law Rev. 347.

For comment on the 1939 amendatory act, see 17 N. C. Law Rev. 351.

Jurisdiction.—Former § 265 expressly conferred jurisdiction upon justices of the peace. State v. Mize, 117 N. C. 780, 23 S. E. 330.

Acquittal on Charge of Non-Support Bars Appeal Involving Issue of Parentage.—Where the jury found the defendant to be the father of the bastard child, but not guilty of non-support, this is an acquittal. The defendant therefore is not entitled to an appeal under § 15-180 for the refusal of the court to allow his motions that the action be dismissed, and that the answer to the issue of parentage be set aside. State v. Hiatt, 211 N. C. 116, 189 S. E. 124.

Modification of Orders.—Where defendant pleaded guilty and orders were made for the support of the child, the court had no authority to strike out a plea of guilty or a judgment at a former term; but, under this section, the court may modify the conditions of the former judgment, or increase from time to time the amount necessary for the child's support. State v. Duncan, 222 N. C. 11, 21 S. E. (2d) 822.

Cited in State v. Black, 216 N. C. 448, 5 S. E. (2d) 313.

§ 49-8. Power of court to modify orders; suspend sentence, etc.—Upon the determination of the issues set out in the foregoing section and for the purpose of enforcing the payment of the sum fixed, the court is hereby given discretion, having regard for the circumstances of the case and the financial ability and earning capacity of the defendant and his or her willingness to coöperate, to make an order or orders upon the defendant and to modify such order or orders from time to time as the circumstances of the case may in the judgment of the court require. The order or orders made in this regard may include any or all of the following alternatives:

(a) Commit the defendant to prison for a term not to exceed six months;

(b) Suspend sentence and continue the case from term to term;

(c) Release the defendant from custody on probation conditioned upon the defendant's compliance with the terms of the probation and the payment of the sum fixed for the support and maintenance of the child;

(d) Order the defendant to pay to the mother of the said child the necessary expenses of birth of the child and suitable medical attention for her;

(e) Require the defendant to sign a recognizance with good and sufficient security, for compliance with any order which the court may make in proceedings under this article. (1933, c. 228, s. 7; 1939, c. 217, s. 6.)

Editor's Note.—The cases treated under this section were decided under the former law. They are, however, made available to the practitioner with the hope that they may be of some aid in construing the present law, but they must be read in the light of the former law.

The 1939 amendment struck out former subsection (d) relating to apprenticing defendant to superintendent of county home.

Constitutionality.—Proceedings in bastardy under former § 273 for an allowance to be made to the woman were civil and not criminal, for the enforcement of police regulations, and that section was held not to be contrary to the provisions of the Constitution, Art. IV, sec. 27. Richardson v. Egerton, 186 N. C. 291, 119 S. E. 487.

A judgment for an allowance for the mother of the bastard, is not a debt arising out of contract, to which the protection afforded by the inhibition of the Constitution, Article 1, sec. 16, extended, but is rendered as a means of enforcing a legal obligation and duty imposed by the Legislature under the police power of the State upon one who is responsible for bringing into existence a bastard child that may become a burden to society. State v. Cannady, 78 N. C. 539; State v. Parsons, 115 N. C. 730, 20 S. E. 511; State v. Manuel, 20 N. C. 144; State v. Nelson, 119 N. C. 797, 799, 25 S. E. 863; State v. Wynne, 116 N. C. 981, 21 S. E. 35.

Effect of Death of Child.—Under former § 273 the intention was to secure to the mother either her probable expenses or to reimburse her actual outlay, and the death of the child when born did not affect the right of the mother to "support"; among other things, she was entitled to pay for medical attention and medicine for herself, and the burial expenses of the child, consequent upon the defendant's unlawful act. State v. Addington, 143 N. C. 683, 57 S. E. 398.

The section simply required that this allowance should be made without directing how the money should be spent. This left it discretionary with her as to how she would apply it. She was compelled to pay for medical attention and medicine for herself, and the burial expenses of the child, all consequent upon the defendant's unlawful act. State v. Addington, 143 N. C. 683, 688, 57 S. E. 398.

Suggestion of Fraud.—A mother of a bastard child, to whom an allowance has been made in bastardy proceedings, is such a creditor of the father of her child as to permit her to oppose the insolvent's discharge by suggesting fraud in answer to his petition. State v. Parsons, 115 N. C. 730, 20 S. E. 511.

Notice.—Where the mother of a bastard obtained judgment against the putative father, and purchased his land under an execution thereon, held, that in the ejectment for the land, she must prove the father had notice of her intention to move for judgment, or that the sheriff had returned non est inventus. Doe v. McCoy, 13 N. C. 391.

Defenses.—In a proceeding under that section a defendant, who alleged that he had paid the mother of the child a certain sum, for which he exhibited her receipt, which receipt, it was contended and so charged by said mother, was obtained from her by fraud, was entitled to have the issue thus joined tried by a jury; and it was error in the court

below to refuse a trial by jury, when demanded by the defendant. State v. Beasley, 75 N. C. 211.

Same—Right to Claim Exemption.—The father was not entitled to the constitutional exemption of $500 as against such debt due the mother. State v. Parsons, 115 N. C. 730, 20 S. E. 511.

Imprisonment.—Where defendant was in default only for a fine of $10 and an allowance of $50 to the mother of the bastard, a sentence to imprisonment at hard labor for twelve months was excessive. State v. Nelson, 119 N. C. 797, 25 S. E. 863.

Imprisonment of the putative father for failure to obey an order of maintenance, or to give the bond, is a matter of legislative discretion, and is not imprisonment for debt. State v. Morgan, 141 N. C. 726, 53 S. E. 142; State v. Green, 71 N. C. 172; State v. Wynne, 116 N. C. 981, 21 S. E. 35.

Work on Roads.—When there is no house of correction in the county, the court can only commit the putative father to jail until the performance of the order of support. He cannot be put to work on roads. State v. Addington, 143 N. C. 683, 57 S. E. 398, overruling Myers v. Stafford, 114 N. C. 234, 19 S. E. 764.

Effect of Discharge.—After the defendant who had served a twenty day sentence for failure to pay under former § 276 had been discharged he could not be resentenced to the house of correction at a subsequent term. State v. Burton, 113 N. C. 655, 18 S. E. 657.

Appeal.—Where judgment has been awarded in bastardy proceedings in conformity with former § 273, and upon defendant's motion in the superior court the judge has set the judgment aside upon sufficient evidence, the facts found accordingly are not reviewable on appeal to the Supreme Court. Baker v. West, 190 N. C. 335, 129 S. E. 804.

§ 49-9. Bond for future appearance of defendant.—At the preliminary hearing of any case arising under this article it shall be the duty of the court, if it finds reasonable cause for holding the accused for a further hearing, to require a bond in the sum of not less than one hundred dollars, conditioned upon the reappearance of the accused at the further hearing under this article. This bond and all other bonds provided for in this article shall be justified before, and approved by, the court or the clerk thereof. (1933, c. 228, s. 8.)

Art. 2. Legitimation of Illegitimate Children.

§ 49-10. Legitimation.—The putative father of any illegitimate child may apply by petition in writing to the superior court of the county in which he resides, praying that such child may be declared legitimate; and if it appears that the petitioner is reputed the father of the child, the court may thereupon declare and pronounce the child legitimated; and the clerk shall record the decree. (Rev., s. 263; Code, s. 39; C. S. 277.)

Cross Reference.—As to constitutional provision regarding private laws to legitimate persons, see the North Carolina Constitution, Article II, section 11.

Petition Addressed Directly to Judge.—The action of the judge of the court having jurisdiction in passing upon the matter is within the intent and meaning of the statute, and his decree is not void upon the ground that the petition should have been originally addressed to the clerk of the court. Dunn v. Dunn, 199 N. C. 535, 155 S. E. 165.

Presumption.—There exists a rebuttable presumption that child born in wedlock is legitimate. West v. Redmond, 171 N. C. 742, 88 S. E. 341.

Cited in Williamson v. Cox, 218 N. C. 177, 10 S. E. (2d) 662.

§ 49-11. Effects of legitimation.—The effect of such legitimation shall extend no further than to impose upon the father all the obligations which fathers owe to their lawful children, and to enable the child to inherit from the father only his real estate, and also to entitle such child to the personal estate of his father, in the same manner as if he had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall be transmitted and distributed according to the statute of descents and distribution among those who would be his heirs and next of kin in case he had been born in lawful wedlock. (Rev., s. 264; Code, s. 40; C. S. 278.)

In General.—The plain intent and language of former section 185 and this section is that a child so adopted, or legitimated, shall inherit his father's real estate, and be entitled to the personal estate of his father "in the same manner as if it had been born in lawful wedlock." Love v. Love, 179 N. C. 115, 116, 101 S. E. 562.

"The word 'only' as used in this section qualifies the words 'inherit from the father,' and not the words 'real estate,' thereby limiting the right of inheritance to the properties of the adopting father, and this is emphasized by the fact that the remaining part of the sentence provides that the adopted child is also entitled to the personal estate of his father." Love v. Love, 179 N. C. 115, 117, 101 S. E. 562.

Right of Inheritance.—In Love v. Love, 179 N. C. 115, 117, 101 S. E. 562, it was said: "This statute seems to be clear enough on its face. It limits the right to inherit to the properties of the adopting father, and so clearly that it would seem unnecessary to cite authorities; but if authorities are necessary, it will appear that this Court has construed this and other statutes on all-fours to the effect that the legitimated child can only inherit from the adopting father, and cannot inherit from the father's ancestors or other kindred, or be representative of them. Such adopted child cannot be issue or heir general. The word 'only' as used in this statute qualifies the words 'inherit from the father,' and not the word 'real estate,' thereby limiting the right of inheritance to the properties of the adopting father, and this is emphasized by the fact that the remaining part of the sentence provides that the adopted child is also entitled to the personal estate of his father."

§ 49-12. Legitimation by subsequent marriage.—When the mother of any illegitimate child and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall in all respects after such intermarriage be deemed and held to be legitimate and entitled to all the rights in and to the estate, real and personal, of its father and mother that it would have had had it been born in lawful wedlock. (1917, c. 219, s. 1; C. S. 279.)

Cross Reference.—As to change of birth certificate by state registrar of vital statistics on proof of marriage of unwed parents, see § 130-94.

Editor's Note.—Prior to the passage of this section in 1917, marriage of the parents did not legitimate the previous offspring. Ashe v. Cam. Mfg. Co., 154 N. C. 241, 70 S. E. 295.

But where, by the laws of the domicile of the parents at the time of the birth of their bastard child and of their marriage, their marriage legitimates him, the legitimacy attached at the time of the marriage, he being a minor, and follows him wherever he goes. Fowler v. Fowler, 131 N. C. 169, 42 S. E. 563.

Consitutionality.—Only those who would inherit, or have a vested right in the lands, may contest the constitutionality of this section, providing that a child born out of wedlock may inherit from her father who thereafter married the mother of the bastard. Bowman v. Howard, 182 N. C. 662, 110 S. E. 98.

Construed Strictly.—This section is strictly construed as being in derogation of the common law. In re Estate of Wallace, 197 N. C. 334, 148 S. E. 456.

Section Retroactive.—This section is, by its express terms, retroactive as well as prospective in effect; and upon the dying intestate of the father, under the facts of this case, the son is entitled to the balance of the proceeds of the sale of land to make assets to pay debts, subject to his mother's dower right, after paying creditors and court costs, as against the collateral heirs of the father. Stewart v. Stewart, 195 N. C. 476, 142 S. E. 577.

The provisions of this section are retroactive as well as prospective in effect, and a child born out of wedlock whose mother marries his reputed father prior to the enactment of the statute is the heir of his parents who die subsequent to its enactment. In re Estate of Wallace, 197 N. C. 334, 148 S. E. 456.

Irregularity in divorce proceedings is not, by virtue of

this section, ground for declaring children by a subsequent marriage illegitimate. Reed v. Blair, 202 N. C. 745, 164 S. E. 118.

Inheritance from Maternal Uncle.—The provisions of this section legitimizing a child born out of wedlock when his reputed father subsequently marries his mother for the purpose of inheritance from its father and mother, do not extend to such inheritance from a maternal uncle dying intestate after the death of the mother through whom the claim is made as next of kin. In re Estate of Wallace, 197 N. C. 334, 148 S. E. 456.

How Shown.—Where one claims lands of his father by descent by reason of the subsequent marriage of his parents, the child so born is recognized as legitimate for the purpose of inheriting, and this may be shown by evidence of the declaration of the parents or by family traditions ante litem motam, this being an exception to the rule excluding hearsay evidence. Bowman v. Howard, 182 N. C. 662, 110 S. E. 98.

"Reputed Father."—In Bowman v. Howard, 182 N. C. 662, 666, 110 S. E. 98, the Court said: " 'No contention as to the statute was made by the defendant except as the construction of the words "reputed father," which the defendant contended should be construed to mean "actual father." ' The exception is not meritorious. The word 'reputed' means considered, or generally supposed, or accepted by general or public opinion."

In Bowman v. Howard, 182 N. C. 662, 666, 110 S. E. 98, it was said: "In McBride v. Sullivan, 155 Ala. 166, 174, 45 So. 902, Simpson, J., says: 'The use of the word "reputed" was intended merely to dispense with absolute proof of paternity, so that, if the child is "regarded," "deemed," "considered," or "held in thought" by the parents themselves as their child, either before or after marriage, it is legitimate.' "

Cited in Williamson v. Cox, 218 N. C. 177, 10 S. E. (2d) 662.

Chapter 50. Divorce and Alimony.

§ 50-1. Jurisdiction.—The superior court shall have jurisdiction of complaints for divorce and alimony, or either. (Rev., s. 1557; Code, s. 1282; 1868-9, c. 93, s. 45; C. S. 1655.)

Cross Reference.—As to power of the general assembly to pass laws regulating divorce and alimony, see the North Carolina Constitution, Article II, section 10.

Editor's Note.—Divorces have been granted from the earliest time. In England, at the time our government was founded, the question of divorce was handled entirely by the ecclesiastical courts and there seems to have been no common law action of divorce. Since we have never established ecclesiastical courts in this country, the power has been conferred entirely by statute and is one of the powers which is exclusively reserved to the state governments.

The granting of alimony is based upon the duty of support which the husband owes to the wife.

On the general question of jurisdiction in divorce, see 1 N. C. L. Rev. 95.

Definition.—Divorce is the legal separation of man and wife, effected, for cause, by the judgment of a court, and either totally dissolving the marriage relation, or suspending its effects so far as concerns the cohabitation of the parties. Black's Law Dict. p. 382.

Power of Federal Courts to Grant Divorces.—All governments possess inherent power over the dissolution of marriages. Haddock v. Haddock, 201 U. S. 562, 569, 26 S. Ct. 525, 50 L. Ed. 867. See also Maynard v. Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654.

But in the United States the authority rests with the states entirely, and not with the federal government. Id.

The courts of the United States have no jurisdiction upon the subject of divorce, either as an original proceeding in chancery, or an incident of a divorce or separation, except the Supreme Court in the exercise of its appellate jurisdiction. De La Rama v. De La Rama, 201 U. S. 303, 308, 26 S. Ct. 485, 50 L. Ed. 765.

Superior Court Has Sole Original Jurisdiction.—The Legislature has conferred the sole original jurisdiction in all applications for divorce upon the superior courts. Williamson v. Williamson, 56 N. C. 446, 448; Barringer v. Barringer, 69 N. C. 179.

Faith and Credit Given to Decree.—No faith and credit should be given to a decree of divorce obtained in a state by service of publication in another state, where neither of the parties reside in the state where the decree is rendered. Bell v. Bell, 181 U. S. 175, 177, 21 S. Ct. 551, 45 L. Ed. 804; Atherton v. Atherton, 181 U. S. 155, 21 S. Ct. 544, 45 L. Ed. 794.

§ 50-2. Bond for costs unnecessary.—It shall not be necessary for either party to a proceeding for divorce or alimony to give any undertaking to the other party to secure such costs as such other party may recover. (Rev., s. 1558; Code, s. 1294; 1871-2, c. 193, s. 41; C. S. 1656.)

Cross References.—As to prosecution bonds generally, see § 1-109 et seq. As to costs generally, see § 6-21.

Husband Liable for Own Costs.—In actions for divorce the husband, whether successful or unsuccessful, is liable for his own costs, and whether he shall pay the wife's costs is in all cases left to the discretion of the court. Broom v. Broom, 130 N. C. 562, 565, 41 S. E. 673.

§ 50-3. Venue.—In all proceedings for divorce, the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides. (Rev., s. 1559; Code, s. 1289; 1871-2, c. 193, s. 40; 1915, c. 229, s. 1; C. S. 1657.)

Section Not Jurisdictional—Waiver.—The provision of this section is not jurisdictional and may be waived, and the failure therein must be taken advantage of by motion to remove the cause to the proper venue, and not to dismiss. Davis v. Davis, 179 N. C. 185, 102 S. E. 270.

Change in Common-Law Rule.—The common-law rule that the wife should bring her action for divorce in the domicile of her husband was changed by this section, as amended by chapter 229, Public Laws 1915, making the summons returnable to the county in which either the plaintiff or defendants reside. Wood v. Wood, 181 N. C. 227, 106 S. E. 753.

Where Wife Resides.—A demurrer to an action for divorce brought by the wife in the county of her own residence, when the husband resides in a different county, on the ground that the summons should have been made re-

turnable to the county of his residence, is bad. Wood v. Wood, 181 N. C. 227, 106 S. E. 753.

Same—Forced Residence.—When the acts and conduct of the husband make the wife's condition so intolerable and burdensome as to compel her to leave home, she may maintain her action in the county wherein she has been forced to reside by the conduct of her husband. Rector v. Rector, 186 N. C. 618, 120 S. E. 195.

§ 50-4. What marriages may be declared void on application of either party.—The superior court in term time, on application made as by law provided, by either party to a marriage contracted contrary to the prohibitions contained in the chapter entitled Marriage, or declared void by said chapter, may declare such marriage void from the beginning, subject, nevertheless, to the proviso contained in § 51-3. (Rev., s. 1560; Code, s. 1283; 1871-2, c. 193, s. 33; C. S. 1658.)

Cross References.—As to marriage generally, see § 51-1 et seq. As to void and voidable marriages, see § 51-3 and annotations.

Editor's Note.—It should be noted that the word "divorce" is frequently used in referring to a decree of nullity in cases where the parties were never validly married as well as in cases where the decree is granted to dissolve a valid marriage. At common law no divorce a vinculo could be granted except for cause existing previous to the marriage —causes which rendered the marriage a nullity. Thus the word divorce was regularly used in cases where there had never really been a marriage.

In Johnson v. Kincade, 37 N. C. 470, the marriage of the parties was declared a nullity because of the mental incapacity of one of the parties at the time of the marriage. In that decision the court declared that the "plaintiff ought to be, and is divorced from the defendant." See Lea v. Lea, 104 N. C. 603, 10 S. E. 488; Taylor v. White, 160 N. C. 38, 75 S. E. 941.

Procedure Similar to Divorce Action.—An action, under this section, to have a marriage declared void, so far as procedure is concerned, is an action for divorce. Johnson v. Johnson, 141 N. C. 91, 94, 53 S. E. 623; Lea v. Lea, 104 N. C. 603, 607, 10 S. E. 488.

While not technically actions for divorce they come under that heading, in a general way, in that alimony pendente lite may be allowed. Taylor v. White, 160 N. C. 38, 75 S. E. 941; Lea v. Lea, 104 N. C. 603, 10 S. E. 488.

Affidavit Not Necessary.—Actions for annulment under this section will not be dismissed because of failure to make the affidavit prescribed in section 50-8. Taylor v. White, 160 N. C. 38, 75 S. E. 941.

Marriage Not Void Until So Declared by Court. — The court has jurisdiction to declare a marriage in proper cases void ab initio, but they are not so ipso facto, and must be so declared by a decree of the court, for only in the instances set out in the second proviso to section 51-3 can they be treated as void in a collateral proceeding. Watters v. Watters, 168 N. C. 411, 414, 84 S. E. 703; State v. Setzer, 97 N. C. 252, 1 S. E. 558.

Formal Decree When Marriage Originally Void.—Though the marriage of a lunatic is absolutely void, without being so declared, yet the court will formally decree its nullity, as well for the sake of the good order of society as the quiet and relief of the party seeking the relief. Johnson v. Kincade, 37 N. C. 470, cited in notes in 40 L. R. A. 737, 744; Lea v. Lea, 104 N. C. 603, 10 S. E. 488.

How Action Brought.—A suit for nullity of marriage on the ground of insanity may be brought either in the name of the lunatic, by her guardian, or in the name of the guardian, though the former is, for some reasons, the preferable course. Crump v. Morgan, 38 N. C. 91, 40 Am. Dec. 447.

What Marriages Absolutely Void.—The only marriages (under section 51-3) which are absolutely void are those between a white person and one of negro or Indian blood (or descent to the third generation, inclusive,) and bigamous marriages. The others need to be "declared void." State v. Parker, 106 N. C. 711, 712, 11 S. E. 517.

Effect of Twenty Years Ratification.—Where a marriage is entered into by one under the legal age, but is followed by a cohabitation of twenty years, the parties acknowledging each other and being recognized as husband and wife, though such marriage in its inception is invalid, by reasons of such ratification by the parties, it will not be declared void. State v. Parker, 106 N. C. 711, 11 S. E. 517.

Former Void Marriage.—A former marriage, which has been decreed to have been void because induced by duress, was void ab initio, and hence does not afford ground for annulment of a later marriage between one of the parties and a third person, though such decree was rendered after the second marriage. Taylor v. White, 160 N. C. 38, 75 S. E. 941.

Subsequent Insanity.—Insanity afterwards afflicting a party to a contract of marriage is not a ground for annulment. Watters v. Watters, 168 N. C. 411, 84 S. E. 703.

Suit by Nonresident.—Under this section the courts of this State have jurisdiction of a suit to annul a marriage performed here, although the plaintiff was a nonresident of this State at the time of the commencement of the suit. Sawyer v. Slack, 196 N. C. 697, 146 S. E. 864.

License Issued upon Fraudulent Representations as to Age—Suit by Parent or Register of Deeds.—Where the register of deeds has been induced by fraudulent representations to issue a license for the marriage of a female between the ages of fourteen and sixteen without conforming with § 51-2, as to the written consent of her parent, the marriage is voidable only at the suit of the female, and neither the parent nor the register of deeds may maintain a suit to declare the marriage void, though the latter may at most maintain an action to revoke and cancel the license issued by him before the solemnization of the marriage. Sawyer v. Slack, 196 N. C. 697, 146 S. E. 864. [This case was decided prior to the 1939 amendment to § 51-2 which amendment makes the parents of the female proper parties plaintiff to an action to annul the marriage.]

Effect of Decree.—A decree annulling a marriage is final and conclusive and not open to collateral impeachment, although it may be vacated or set aside for good cause on proper application. Its effect is to make the supposed or pretended marriage as if it had never existed, and hence it restores both parties to their former status and to all rights of property as before the marriage. Taylor v. White, 160 N. C. 38, 41, 75 S. E. 941, 26 Cyc. 920.

Same—Children Legitimate.—The children of a marriage which is subsequently annuled are made legitimate by section 50-11. Taylor v. White, 160 N. C. 38, 75 S. E. 941.

Appeal from Judgment.—If either party to an action to annul a marriage contract desires to move to set aside the judgment rendered, it must be done in an adversary proceeding after due notice is served upon the other party, and notice to counsel of record in the original action is not sufficient. Johnson v. Johnson, 141 N. C. 91, 53 S. E. 623.

Same Counsel Cannot Represent Both Parties.—A proceeding to set aside a judgment in an action of annulment will be dismissed where the same counsel jointly make the motion representing both parties to the action. Johnson v. Johnson, 141 N. C. 91, 53 S. E. 623.

§ 50-5. Grounds for absolute divorce. — Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided, in the following cases:

Divorce Is Entirely Statutory.—It has always been the policy of this state to regard marriage as indissoluble except for the causes named in the statute. Long v. Long, 77 N. C. 304. See also Alexander v. Alexander, 165 N. C. 45, 80 S. E. 890, citing many cases.

Legislative Control.— Subject to the constitutional restriction that "it may not grant a divorce nor secure alimony in any individual case," the question of divorce is a matter exclusively of legislative cognizance. Cooke v. Cooke, 164 N. C. 272, 274, 80 S. E. 178.

When Legislature Will Grant a Divorce.—In some states in the absence of constitutional prohibition, when the object of the marriage relation has been defeated by any cause, physical, moral or intellectual, and no jurisdiction is vested in the judicial tribunals to grant a divorce, the legislature itself may put an end to the relation in the interest of the parties as well as of society. Maynard v. Hill, 125 U. S. 190, 205, 8 S. Ct. 723, 31 L. Ed. 654.

Facts Must Be Pleaded and Proved.—Divorces are granted only when the facts constituting a sufficient cause, under a proper construction of the law, are pleaded, proved and found by the jury. Steel v. Steel, 104 N. C. 631, 634, 10 S. E. 707; McQueen v. McQueen, 82 N. C. 471.

Decree a Mensa Not a Bar.—Decree of divorce a mensa does not bar subsequent action for absolute divorce under this section. Cooke v. Cooke, 164 N. C. 272, 80 S. E. 178.

Recrimination.—The general principle which governs in a case where one party recriminates is that the recrimination must allege a cause which the law declares sufficient for divorce. House v. House, 131 N. C. 140, 142, 42 S. E. 546.

Cited in Hyder v. Hyder, 210 N. C. 486, 187 S. E. 798; Burrowes v. Burrowes, 210 N. C. 788, 188 S. E. 648.

1. If the husband or wife commits adultery.

Plaintiff Need Not Set Up His Innocence.—A party seeking divorce is not bound to set forth or prove that he has not himself been guilty of adultery or is not in fault. Steel v. Steel, 104 N. C. 631, 637, 10 S. E. 707; Edwards v. Edwards, 61 N. C. 534; Toms v. Fite, 93 N. C. 274.

Adultery Even after Abandonment Sufficient Cause.—Adultery by the wife committed after her husband had wrongfully abandoned her is ground for divorce. Ellett v. Ellett, 157 N. C. 161, 72 S. E. 861. This case overrules Tew v. Tew, 80 N. C. 316.

Both Parties Guilty.—Where both parties are found guilty of adultery and no condonation is proven, the petition will be dismissed. Horne v. Horne, 72 N. C. 530.

Effect of Plaintiff's Death Pending Trial.—Where the plaintiff in a suit for divorce on the ground of adultery dies pending the trial, after it has been entered upon and before the retirement of the jury, if all issues are found by the jury in favor of the plaintiff, judgment of divorce will be entered as of the first day of the term, while the plaintiff was still alive. Webber v. Webber, 83 N. C. 280.

2. If either party at the time of the marriage was and still is naturally impotent.

Editor's Note.—Since the passage of section 51-3 impotency of either of the contracting parties renders the marriage void, and prior to the passage of that section it was a ground for annulment of the marriage. Smith v. Morehead, 59 N. C. 360.

Husband Competent Witness.—The husband is a competent witness to prove the impotency of his wife. Barringer v. Barringer, 69 N. C. 179.

3. If the wife at the time of the marriage is pregnant, and the husband is ignorant of the fact of such pregnancy and is not the father of the child with which the wife was pregnant at the time of the marriage.

Pregnancy Must Result.—Unknown illicit intercourse, even though incestuous, prior to marriage will not authorize a decree for divorce under this section unless pregnancy resulted. Steel v. Steel, 104 N. C. 631, 10 S. E. 707.

False Representations.—Where a man is induced to marry a woman by her false representation that she is pregnant by him, he cannot secure a divorce under this section. Bryant v. Bryant, 171 N. C. 746, 88 S. E. 147.

Cited in State v. Williams, 220 N. C. 445, 17 S. E. (2d) 769.

4. If there has been a separation of husband and wife, whether voluntary or involuntary, provided such involuntary separation is in consequence of a criminal act committed by the defendant prior to such divorce proceeding, and they have lived separate and apart for two successive years, and the plaintiff in the suit for divorce has resided in this state for six months.

Editor's Note.—In the case Cooke v. Cooke, 164 N. C. 272, 80 S. E. 178, the court held that this subsection, which was first added to the grounds for divorce in 1907, was a new and independent cause and should not be construed in connection with the main part of the section which provides that the suit can only be brought by the injured party. In Sanderson v. Sanderson, 178 N. C. 339, 100 S. E. 590 the court practically overrules this part of the Cooke case, supra, and construes this subsection to mean that one who has caused the separation by his own misconduct cannot later use that separation to obtain a divorce. And this construction was refuted in the recent case of Lee v. Lee, 182 N. C. 61, 108 S. E. 352.

A five year provision was put in by chapter 63, Public Laws 1921, the original paragraph providing for ten years.

The Act of 1929 inserted the following words "whether voluntary or involuntary, provided such involuntary separation is in consequence of a criminal act committed by defendant prior to such divorce proceedings."

The period of required living apart for five successive years was changed to two successive years and the requirement that the plaintiff has resided in the state for five successive years was changed to one year by Public Laws of 1933, c. 71.

The 1943 amendment substituted, at the end of subsection 4, "six months" for "one year."

In General.—Under this section a divorce upon the ground of desertion cannot be granted unless there be a continuous separation of the parties for time required preceding the beginning of the case and unless the plaintiff has been a resident of the state for the requisite period of time. These provisions are jurisdictional, and, when they are not complied with, the state court is without authority to grant a divorce. Sears v. Sears, 92 F. (2d) 530, 532.

In Smithdeal v. Smithdeal, 206 N. C. 397, 174 S. E. 118, it was held that two years' separation as a ground for divorce need not have existed six months prior to the commencement of the action under either this subsection or under § 50-6. See also discussion in 11 N. C. L. Rev. 223.

Separation Defined.—The word "separation" as used in this section means a voluntary separation by mutual agreement with the intent on the part of at least one of the parties to discontinue all the marital privileges and responsibilities, or a separation under judicial decree, or a separation caused by the abandonment or wrongful act of the party sued. Woodruff v. Woodruff, 215 N. C. 685, 3 S. E. (2d) 5.

A physical separation caused by the commitment of one of the parties for insanity is not a "separation" constituting ground for divorce, nor may the party committed consent to a separation during the continuance of the mental incapacity. Id.

The word "separation" as used in matrimonial law is defined in Black's Law Dictionary 1073 as "a cessation of cohabitation of husband and wife by mutual agreement" or in the case of a judicial separation "under decree of court." This statute contemplates the addition of "separation" caused by desertion or abandonment, or other wrongful act of the party sued. It certainly does not intend to give an action to one for driving the other from home or who has voluntarily deserted it for the specified period. Lee v. Lee, 182 N. C. 61, 108 S. E. 352.

An action can be maintained under this section only by the party injured. Reeves v. Reeves, 203 N. C. 792, 794, 167 S. E. 129.

Abandonment Not Implied.—In an action for divorce a vinculo brought by the husband against the wife, an allegation in his complaint that the adultery was committed without the husband's procurement and without his knowledge or consent, and that he has not cohabited with her since he discovered her acts of adultery, does not imply his abandonment of her or put that matter at issue. Kinney v. Kinney, 149 N. C. 321, 63 S. E. 97.

Abandonment as Defense Must Be Set up in Answer.—In an action for divorce a vinculo brought by the husband against the wife, the defense of abandonment, if relied on, should be set up in the answer, as it is not required of the plaintiff to plead and prove that he has not abandoned his wife. Kinney v. Kinney, 149 N. C. 321, 63 S. E. 97.

Necessary Residence Must Be Established.—For the granting of a divorce for the separation of husband and wife under the provisions of this section, there must not only be evidence but a determinative issue answered in the affirmative as to the necessary period of residence, and a judgment rendered upon an issue establishing a lesser period of residence in this State by the plaintiff is insufficient, and a judgment signed thereon is improvidently rendered. Ellis v. Ellis, 190 N. C. 418, 130 S. E. 7.

Allegation of Separation Works Estoppel.—If a wife petitions for a divorce from the bonds of matrimony, and alleges in her petition that she separated herself from her husband she is estopped by this averment, and a verdict, that her husband separated himself from her, will not be regarded by the court, unless, upon a proper issue, circumstances of outrage or violence, justifying such separation, be found by a jury. Wood v. Wood, 27 N. C. 674.

Appeal and Error. — Where a husband appeals from a judgment under this section in favor of his wife and assigns error, only in the court's refusing his motion to nonsuit upon the evidence, on the ground that he was insane for a part of the time, it is necessary that the evidence should appear in the record and not in the assignment merely. Brown v. Brown, 182 N. C. 42, 108 S. E. 380.

Where a judgment has been entered granting a divorce under this section, in the absence of finding of the necessary issue as to the plaintiff's residence, a motion in the cause to correct this error or omission is proper, and where such appears to be the only and unrelated error committed, the case will be remanded for the submission of this issue only. Ellis v. Ellis, 190 N. C. 418, 130 S. E. 7.

Separation without Fault.—It certainly was not intended that this statute should apply to cases where the separation was without fault on either side. While it is in the power of the Legislature to make the misfortune of either party a ground for divorce it has not done so, and the court cannot by judicial construction extend the grounds of divorce beyond the statute. The misconduct of the parties and not their misfortunes are the causes which will justify a divorce. Lee v. Lee, 182 N. C. 61, 63, 64, 108 S. E. 352.

Stated in Shore v. Shore, 220 N. C. 802, 18 S. E. (2d) 353 (dis. op.)

Cited in Keys v. Tuten, 199 N. C. 368, 369, 154 S. E. 631; Nelson v. Nelson, 197 N. C. 465, 466, 149 S. E. 585.

5. If any person shall commit the abominable and detestable crime against nature, with mankind, or beast.

It shall not be necessary to set forth in the affidavit filed with the complaint in suits brought under subsection four of this section that the grounds for divorce have existed at least six months prior to the filing of the complaint, nor to allege or prove such fact. (Rev., s. 1561; Code, s. 1285; 1871-2, c. 193, s. 35; 1879, c. 132; 1887, c. 100; 1889, c. 442; 1899, c. 29; 1903, c. 490; 1905, c. 499; 1907, c. 89; 1911, c. 117; 1913, c. 165; 1917, cc. 25, 57; 1921, c. 63; 1929, c. 6; 1931, c. 397; 1933, c. 71, ss. 1, 2; 1943, c. 448, s. 2; C. S. 1659.)

Cross Reference.—As to effect of absolute divorce on right to administer, see §§ 28-10, 52-19.

Editor's Note.—The Act of 1931 added the fifth ground for divorce. The last paragraph was added by Public Laws of 1933, c. 71.

§ 50-6. Divorce after separation of two years on application of either party.—Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in the state for a period of six months. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorce. (1931, c. 72; 1933, c. 163; 1937, c. 100, ss. 1, 2; 1943, c. 448, s. 3.)

Cross Reference.—As to effect of absolute divorce on right to administer, see §§ 28-10, 52-19.

Editor's Note.—This section is not made an amendment to § 50-5, which gives the right of action to the injured party, but either party may maintain the action without regard to the cause for separation. 9 N. C. Law Rev. 368.

By Public Laws of 1933, c. 163, the time of living apart was changed from five to "two" years, and the required residence of the defendant in the State was changed from five years to "one" year. The 1933 amendment also struck out the provision "and no children having been born to the marriage," formerly appearing in this section.

In Parker v. Parker, 210 N. C. 264, 186 S. E. 346, the supreme court ruled that no divorce could be obtained under this section unless a separation agreement, express or implied, existed. The 1937 amendment, apparently intended to avoid this construction requiring the existence of a separation agreement, amends the statute by striking out the phrase, "either under deed of separation or otherwise." 15 N. C. Law Rev. 348. See Byers v. Byers, 222 N. C. 298, 303, 22 S. E. (2d) 902.

The 1943 amendment substituted, at the end of the first sentence, "six months" for "one year."

Either party may secure an absolute divorce under this section even though the applicant is the party who commits the wrong, as granting divorces is exclusively statutory and this is an independent act of the General Assembly. Long v. Long, 206 N. C. 706, 708, 175 S. E. 85; Byers v. Byers, 222 N. C. 298, 22 S. E. (2d) 902.

Either party may bring an action for absolute divorce under this section and the jury's finding that defendant did not abandon plaintiff without cause does not preclude judgment in plaintiff's favor. Campbell v. Campbell, 207 N. C. 859, 176 S. E. 250.

This section automatically reduces the time from ten to two years, in § 50-11; the two are cognate statutes dealing with similar questions and are to be construed in pari materia. Howell v. Howell, 206 N. C. 672, 675, 174 S. E. 921; Dyer v. Dyer, 212 N. C. 620, 622, 194 S. E. 278.

This section does not contemplate, as essential, a repudiation of all marital obligations, and that husband has supported wife will not defeat his action. Byers v. Byers, 222 N. C. 298, 22 S. E. (2d) 902.

Jurisdictional Averments.—In an action for divorce on the ground of two years separation, brought by either party under this section, as amended, it is not required that the jurisdictional affidavit, required by § 50-8, contain the averment that the facts set forth in the complaint, as grounds for divorce, have existed to the knowledge of plaintiff at least six months prior to the filing of the complaint, the legislative intent to this effect being apparent from the proviso in § 50-8, dispensing with the necessity that the cause of action should have existed for six months when the grounds for divorce is separation, the period of separation then being prescribed as five years, which was reduced to two years by this section. Smithdeal v. Smithdeal, 206 N. C. 397, 174 S. E. 118.

In order to be entitled to a divorce on the ground of separation, plaintiff must show the fact of marriage, that the parties have lived separate and apart for two years, and that plaintiff has been a resident of the state for one year (now six months). Oliver v. Oliver, 219 N. C. 299, 13 S. E. (2d) 549.

"Living Apart."—For note on "living apart" where both parties live in the same house, see 18 N. C. Law Rev. 247.

Meaning of "Separation."—The word "separation," as applied to the legal status of a husband and wife, means more than "abandonment"; it means a cessation of cohabitation of husband and wife, by mutual agreement. Parker v. Parker, 210 N. C. 264, 266, 186 S. E. 346, citing Lee v. Lee, 182 N. C. 61, 108 S. E. 352.

A charge by the court to the jury that the living separate and apart means living separate and apart under mutual agreement only, was erroneous entitling plaintiff to a new trial. Byers v. Byers, 222 N. C. 298, 22 S. E. (2d) 902, distinguishing Parker v. Parker, supra, as decided under prior wording of section.

Intention.—The bare fact of living separate and apart for the period of two years, standing alone, will not constitute a cause of action for divorce. There must be at least an intention on the part of one of the parties to cease cohabitation, and this must be shown to have existed at the time alleged as the beginning of the separation period; it must appear that the separation is with that definite purpose on the part of at least one of the parties. The exigencies of life and the necessity of making a livelihood may sometimes require that the husband shall absent himself from the wife for long periods—a situation which was not contemplated by the law as a cause of divorce in fixing the period of separation. Byers v. Byers, 222 N. C. 298, 304, 22 S. E. (2d) 902.

Section Did Not Apply Where Separation Was without Cause and without Agreement.—While the applicant need not be the injured party, the statute did not authorize a divorce where the husband has separated himself from his wife, or the wife has separated herself from her husband, without cause and without agreement, express or implied. Parker v. Parker, 210 N. C. 264, 186 S. E. 346; Reynolds v. Reynolds, 210 N. C. 554, 187 S. E. 768; Hyder v. Hyder, 210 N. C. 486, 187 S. E. 798, decided prior to the 1937 amendment.

Question of Resumption of the Conjugal Relation after Separation Is for Jury.—Reynolds v. Reynolds, 210 N. C. 554, 187 S. E. 768, decided prior to 1937 amendment.

Husband Not Entitled to Divorce on His Own Criminal Conduct.—A husband may not ground an action for divorce under this section on his own criminal conduct towards his wife. Reynolds v. Reynolds, 208 N. C. 428, 181 S. E. 338; Campbell v. Campbell, 207 N. C. 859, 176 S. E. 250; Long v. Long, 206 N. C. 706, 175 S. E. 85, distinguished. Followed in Hyder v. Hyder, 210 N. C. 486, 187 S. E. 798.

Applied in Hyder v. Hyder, 215 N. C. 239, 1 S. E. (2d) 540.

Quoted in State v. Williams, 220 N. C. 445, 17 S. E. (2d) 769.

Cited in Goodman v. Goodman, 208 N. C. 416, 181 S. E. 328; State v. Henderson, 207 N. C. 258, 176 S. E. 758; Teasley v. Teasley, 205 N. C. 604, 172 S. E. 197; Brown v. Brown, 213 N. C. 347, 196 S. E. 333.

§ 50-7. Grounds for divorce from bed and board.—The superior court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases:

Evidence of Acts Occurring "More than Ten Years Ago."—Where the wife sues the husband for divorce a mensa et thoro, under this section, it is not error to admit on the trial evidence of his misconduct occurring "more than ten years ago" when it is a part of the whole course of his dealings coming down to "within six months of the beginning of the action." Page v. Page, 167 N. C. 346, 347, 83 S. E. 625.

Plaintiff Must Petition for Divorce a Mensa.—A decree of divorce a mensa will not be granted in an action where plaintiff petitioned for absolute divorce. Morris v. Morris, 75 N. C. 168.

Allegations in the cross action for divorce a mensa et thoro, set up by defendant wife in the husband's action for divorce, held sufficient. Ragan v. Ragan, 214 N. C. 36, 197 S. E. 554.

Effect of Delay in Bringing Action.—An unreasonable delay by one party, after a probable knowledge of the criminal conduct of the other, will, if unaccounted for, preclude such party from obtaining a decree for a separation from bed and board. Whittington v. Whittington, 19 N. C. 64.

But a delay of seven years in filing a petition is sufficiently accounted for by the allegations that at the happening of the matters relied upon for divorce, the petitioner was a nonresident of the State, and is now a pauper. Schonwald v. Schonwald, 62 N. C. 215.

Condonation.—Evidence merely of forgiveness by the plaintiff, in her action for divorce a mensa et thoro against her husband, is insufficient to establish condonation. Page v. Page, 167 N. C. 346, 347, 83 S. E. 625; Jones v. Jones, 173 N. C. 279, 91 S. E. 960.

For condonation is forgiveness upon condition, and the condition is, that the party forgiven will abstain from like offenses afterwards. If the condition is violated, the original offense is revived. Lassiter v. Lassiter, 92 N. C. 130.

Repetition of the offence nullifies the previous condonation. Collier v. Collier, 16 N. C. 352; Gordon v. Gordon, 88 N. C. 45; Page v. Page, 167 N. C. 346, 83 S. E. 625.

Grounds Available to Husband as Well as Wife.—The grounds for divorce a mensa given by this section are available to the husband as well as to the wife, or as stated by the express language of the statute to "the injured party." Brewer v. Brewer, 198 N. C. 669, 153 S. E. 163.

Only the party injured is entitled to a divorce under this section. Vaughan v. Vaughan, 211 N. C. 354, 358, 190 S. E. 492, citing Carnes v. Carnes, 204 N. C. 636, 169 S. E. 222; Albritton v. Albritton, 210 N. C. 111, 185 S. E. 762.

Applied in Albritton v. Albritton, 210 N. C. 111, 185 S. E. 762.

Cited in Brown v. Brown, 205 N. C. 64, 70, 169 S. E. 818.

1. If either party abandons his or her family.

Acts Constituting Abandonment.—Where husband drives his wife from his house, or obtains her removal by stratagem or withholds from her support while there, he is deemed to have abandoned her. Setzer v. Setzer, 128 N. C. 170, 172, 38 S. E. 731.

To constitute abandonment it is not necessary that the husband should leave the state. Witty v. Barham, 147 N. C. 479, 61 S. E. 372.

2. Maliciously turns the other out of doors.

This Section an Instance of Abandonment in Sec. 1.—The ground for divorce a mensa given the wife under this section, because of being maliciously turned out of doors by her husband, is but an instance of wrongful abandonment provided by subsection 1, and the basic facts of these two suits are the same. Medlin v. Medlin, 175 N. C. 529, 95 S. E. 857.

Adverse Ruling in Previous Action.—A denial of alimony in an independent action under sec. 50-16 brought by the wife, on the ground that her husband maliciously turned her out of doors, will conclude her upon her cross-bill setting up the same matter in an action thereafter brought by her husband against her for divorce a vinculo. Medlin v. Medlin, 175 N. C. 529, 95 S. E. 857.

3. By cruel or barbarous treatment endangers the life of the other.

Revival of Cause.—Much less cruelty or indignity is sufficient to revive a transaction occurring before the condonation, than to support an original suit for divorce. Lassiter v. Lassiter, 92 N. C. 130.

Whipping wife, held cause for divorce in Taylor v. Taylor, 76 N. C. 433. For further examples, see Jackson v. Jackson, 105 N. C. 433, 11 S. E. 173; Griffith v. Griffith, 89 N. C. 113.

Communication of Disease.—The communication of an infectious disease by the husband to the wife is not sufficient ground under this subsection. Long v. Long, 9 N. C. 189.

Acts Committed More Than Ten Years before.—A divorce will not be granted for cruel and barbarous treatment where it appears the acts complained of were committed more than ten years before the commencement of the action, and in the meanwhile the parties had continued to reside together. O'Connor v. O'Connor, 109 N. C. 140, 13 S. E. 887.

Causes within Six Months.—Nor will a divorce be granted under this section for causes arising within six months before the commencement of the action. O'Connor v. O'Connor, 109 N. C. 140, 13 S. E. 887; Green v. Green, 131 N. C. 533, 42 S. E. 954.

4. Offers such indignities to the person of the other as to render his or her condition intolerable and life burdensome.

This Section Remedial.—It would seem that the Legislature purposely omitted to specify the particular acts of indignity for which divorces may in all cases be obtained. The matter is left at large under general words, thus leaving the courts to deal with each particular case and to determine it upon its own peculiar circumstances, so as to carry into effect the purpose and remedial object of the statute. Sanders v. Sanders, 157 N. C. 229, 234, 72 S. E. 876; Taylor v. Taylor, 76 N. C. 433, 437.

Facts in Each Case Determined.—The acts of the husband which will render the wife's condition intolerable and her life burdensome so as to entitle her to a divorce a mensa are largely dependant on the facts in each particular case, such as the station in life, temperament, state of health, habits and feelings of the plaintiff. Sanders v. Sanders, 157 N. C. 229, 72 S. E. 876.

Complaint Must Show Plaintiff's Innocence.—The complaint must aver, and facts must be found upon which it can be seen that the plaintiff did not by her own conduct contribute to the wrongs and abuses of which she complains. Garsed v. Garsed, 170 N. C. 672, 673, 87 S. E. 45; White v. White, 84 N. C. 340.

Same—General Allegation Insufficient.—It is essential that the plaintiff shall specifically set forth in her complaint the circumstances under which the violence was committed, what her conduct was, and especially what she had done to provoke such conduct on the part of her husband. A general allegation that such conduct was "without cause or provocation on her part" is insufficient. O'Connor v. O'Connor, 109 N. C. 140, 13 S. E. 887; Martin v. Martin, 130 N. C. 27, 40 S. E. 822; Everton v. Everton, 50 N. C. 202.

Examples of Sufficient Cause.—Where a drunken husband cursed his wife and drove her from his house, and by demonstrations of violence caused her to leave the bedside of a dying child, and seek safety and protection at a distance of several miles, this is sufficient cause for divorce under this section. Scoggins v. Scoggins, 85 N. C. 348.

A persistive charge of adultery against a virtuous woman, accompanied by a contemptuous declaration that she was no longer his wife, and by an abandonment of her bed, is such an indignity to her person as would entitle her to a partial divorce and to alimony. Everton v. Everton, 50 N. C. 202, 210.

To entitle a wife to a divorce from bed and board under this section, the indignity offered by the husband must be such as may be expected seriously to annoy a woman of ordinary sense and temper, and must be repeated, or continued, so that it may appear to have been done willfully and intentionally or at least consciously by the husband to the annoyance of the wife. Miller v. Miller, 78 N. C. 102.

When in an action by the wife for divorce a mensa there is evidence tending to show that the plaintiff, in her married life, was free from blame and that the defendant's conduct was a long course of neglect, cruelty, humiliation, and insult, repeated and persisted in, it is sufficient to bring the cause within the words of this section, that he had offered "such indignities to her person as to render her condition intolerable and her life burdensome." Sanders v. Sanders, 157 N. C. 229, 230, 72 S. E. 876.

Where a petitioner alleges that her husband had become jealous of her without cause, had shook his fist in her face and threatened her, and declared to her face and published to the neighborhood that the child with which she was pregnant was not his; that her condition had from such treatment become intolerable and her life burdensome, and that she had been compelled to quit his house and seek the protection of her father: It was held that she had set out enough to entitle her to alimony pendente lite. Erwin v. Erwin, 57 N. C. 82.

A divorce from bed and board will be granted the wife if it is shown that the husband made foul and injurious accusations, and refused to bed with her and denied that she was his wife. Green v. Green, 131 N. C. 533, 42 S. E. 954.

5. Becomes an habitual drunkard. (Rev., s. 1562; Code, s. 1286; 1871-2, c. 193, s. 36; C. S. 1660.)

Cross References.—As to effect of divorce a mensa et thoro on right to administer, see § 28-12. As to effect of divorce a mensa et thoro on wife's right to administer and

interest in property, see § 52-20. As to effect of divorce a mensa et thoro on husband's right to administer and interest in property, see § 52-21.

§ 50-8. Affidavit to be filed with complaint; affidavit of intention to file complaint.—The plaintiff in a complaint seeking either divorce or alimony, or both, shall file with his or her complaint an affidavit that the facts set forth in the complaint are true to the best of affiant's knowledge and belief, and that the said complaint is not made out of levity or by collusion between husband and wife; and if for divorce, not for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in the complaint. The plaintiff shall also set forth in such affidavit, either that the facts set forth in the complaint, as grounds for divorce, have existed to his or her knowledge at least six months prior to the filing of the complaint, and that complainant has been a resident of the state for six months next preceding the filing of the complaint; or, if the wife be the plaintiff, that the husband is removing, or about to remove, his property and effects from the state, whereby she may be disappointed in her alimony: Provided, however, that if the cause for divorce is two years separation then it shall not be necessary to set forth in the affidavit that the grounds for divorce have existed at least six months prior to the filing of the complaint, it being the purpose of this proviso to permit a divorce after a separation of two years without waiting an additional six months for filing the complaint. If any wife files in the office of the superior court clerk of the county where she resides an affidavit, setting forth the fact that she intends to file a petition or bring an action for divorce against her husband, and that she has not had knowledge of the facts upon which the petition or action will be based for six months, she may reside separate and apart from her husband. If she fails to file her petition or bring her action for divorce within ninety days after the six months have expired since her knowledge of the facts upon which she intends to file her said petition or bring her said action, then she shall not be entitled any longer to the benefit of this section. (Rev., s. 1563; Code, s. 1287; 1868-9, c. 93, s. 46; 1869-70, c. 184; 1907, c. 1008, s. 1; 1925, c. 93; 1933, c. 71, ss. 2, 3; 1943, c. 448, s. 1; C. S. 1661.)

Editor's Note.—The requirement that the complainant has been a resident of the state for "two years" was changed to "one year" by Public Laws 1933, c. 71.

The 1943 amendment substituted in line sixteen "six months" for "one year."

Purpose of Section.—The affidavit was intended to prevent bad faith and collusion on the part of the parties to the action, and is an indispensable part of the complaint and application, and, if it is wanting, there is no jurisdiction in the courts. Holloman v. Holloman, 127 N. C. 15, 16, 37 S. E. 68; State v. Williams, 220 N. C. 445, 17 S. E. (2d) 769.

Requirements Mandatory.—All the requisites mentioned in the affidavit required by this section are mandatory and a failure to set out these averments in the affidavit prevents the superior court from having jurisdiction. Nichols v. Nichols, 128 N. C. 108, 38 S. E. 296; Johnson v. Johnson, 141 N. C. 91, 94, 53 S. E. 623.

General Terms Permitted.—The matters in the jurisdictional affidavit in an action for divorce a mensa brought by the wife may be stated in general terms following the language of the statute. Sanders v. Sanders, 157 N. C. 229, 72 S. E. 876. Jones v. Jones, 173 N. C. 279, 285, 91 S. E. 960.

Verification According to Statute.—In an application for alimony pendente lite the affidavit and petition must be verified as required by this section. Clark v. Clark, 133 N. C. 28, 45 S. E. 342. Hopkins v. Hopkins, 132 N. C. 22, 43 S. E. 508. And verification of a pleading that it was "sworn and subscribed to" is not sufficient. Martin v. Martin, 130 N. C. 27, 40 S. E. 822.

Verification of Answers Setting Up Cross Action.—In the husband's action for divorce a vinculo, the wife's answer setting up a cross action must be verified under this section, as a jurisdictional prerequisite, and when the answer is not so verified the granting of permanent alimony is erroneous. Silver v. Silver, 220 N. C. 191, 16 S. E. (2d) 834.

Six Months Prior Knowledge.—By chapter 93, Pub. Laws of 1925, this section was amended so that in cases where the cause for divorce is five years (now two years) separation, then the six months prior knowledge need not be alleged in the affidavit, it being the purpose of sec. 50-5, par. 4, to permit a divorce after a separation of five years (now two years) without waiting an additional six months for filing the complaint. Ellis v. Ellis, 190 N. C. 418, 422, 130 S. E. 7.

In all other cases the affidavit must state that the action was not brought within six months from the time the plaintiff first acquired knowledge of the facts stated therein. Clark v. Clark, 133 N. C. 28, 45 S. E. 342.

And unless so stated the divorce will not be granted. O'Connor v. O'Connor, 109 N. C. 140, 13 S. E. 887; Green v. Green, 131 N. C. 533, 42 S. E. 954.

But this need not be alleged in the complaint. Kinney v. Kinney, 149 N. C. 321, 63 S. E. 97.

The proviso, in this section, eliminating the necessity of waiting six months after the expiration of the requisite period of separation, when the ground for divorce is that of separation, still applies with the reduction in time from five to two years. Smithdeal v. Smithdeal, 206 N. C. 397, 398, 174 S. E. 118.

Actual Residence.—The residence means actual residence, and a nonresident wife in suing for divorce cannot avail herself of the maxim that "her domicile is that of her husband" where she has not actually satisfied the residence requirement. Schonwald v. Schonwald, 55 N. C. 367.

Where husband and wife establish a residence in the State, the wife, by leaving the State for a temporary purpose, without any intention of changing her residence, does not thereby lose her citizenship. Moore v. Moore, 130 N. C. 333, 41 S. E. 943.

It is not required that the two years (now six months) residence in the State of the plaintiff in an action for absolute divorce be alleged in the complaint to confer jurisdiction, but it is sufficient if it is set out in the accompanying affidavit. Williams v. Williams, 180 N. C. 273, 104 S. E. 561.

Removal of Property by Husband.—In an action by the wife for divorce a mensa, when the allegations are necessary that the defendant is about to remove himself and property from the State to jeopardize the plaintiff's right to alimony, it is not presumed that the wife would have personal knowledge of her husband's plans or purpose in this regard, and an averment thereof in positive terms and of her personal knowledge is not required. Sanders v. Sanders, 157 N. C. 229, 230, 72 S. E. 876. White v. White, 179 N. C. 592, 103 S. E. 216.

Where the necessary affidavit is made under this section, in reference to the husband's removal of his property from the State, it is not necessary, in order to get a decree for such separation, to file another complaint six months after the time the facts (upon which alone the decree could be made) are alleged to have occurred. Scoggins v. Scoggins, 85 N. C. 348; Sanders v. Sanders, 157 N. C. 229, 72 S. E. 876.

Supplementary Affidavits.—No order should be made to deprive the defendant of his property unless the facts appear upon which the plaintiff's information and belief are founded, and it is proper and sufficient to show such facts in supplementary or additional affidavits. Sanders v. Sanders, 157 N. C. 229, 230, 72 S. E. 876.

Amendment to Affidavit.—It is discretionary with the trial judge to allow an amendment to the affidavit in an action for divorce. Moore v. Moore, 130 N. C. 333, 41 S. E. 943. When allowed the facts shown in the amendment must be verified. Foy v. Foy, 35 N. C. 90.

Proof Must Correspond to Allegations.—As the allegations in a petition for a divorce are directed by statute to be sworn to, it is more emphatically required in such a case than in others that the allegations and proofs should correspond; otherwise the court cannot decree a divorce. Foy v. Foy, 35 N. C. 90.

Action to Annul Marriage.—The affidavit required under this section is not necessary in an action to annul a marriage upon statutory grounds. Sawyer v. Slack, 196 N. C. 697, 699, 146 S. E. 864.

Cited in Keys v. Tuten, 199 N. C. 368, 369, 154 S. E. 631.

§ 50-9. Effect of answer of summons by de-

fendant.—In all cases upon an action for a divorce absolute, where the plaintiff had caused to be served upon the defendant in person a legal summons, whether by verified complaint or unverified complaint, and such defendant answered such summons, and where the trial of said action was duly and legally had in all other respects and judgments rendered by a Judge of the Superior Court upon issues answered by a judge and jury, in accordance with law, such judgments are hereby declared to have the same force and effect as any judgment upon an action for divorce otherwise had legally and regularly. (1929, c. 290, s. 1.)

Cross Reference.—As to procedure in trial generally, see § 1-170 et seq.

§ 50-10. Material facts found by jury; parties cannot testify to adultery.—The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, and on such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact. (Rev., s. 1564; Code, s. 1288; 1868-9, c. 93, s. 47; C. S. 1662.)

Cross Reference.—As to competency of spouse as witness in civil actions, see § 8-56.

Purpose of Section.—The object of this section was to prevent a judgment from being taken by default, or by collusion, and to require the facts to be found by a jury. Campbell v. Campbell, 179 N. C. 413, 415, 102 S. E. 737; Moss v. Moss, 24 N. C. 55, 58; Hooper v. Hooper, 165 N. C. 605, 81 S. E. 933.

Presumption of Denial.—The provisions of this section that the allegation of the complaint in an action for divorce "are deemed to be denied," applies only to the trial upon the merits, since the facts must be found by a jury. Zimmerman v. Zimmerman, 113 N. C. 433, 18 S. E. 334.

The denial by the statute of the plaintiff's allegations in an action for divorce, presumes, as a matter of law, a meritorious defense, and does not require that this be found by the judge in passing upon a motion to set aside a judgment rendered in an action. Campbell v. Campbell, 179 N. C. 413, 102 S. E. 737.

Same—Applies to Cross Action.—The defendant in an action for divorce a vinculo, may file a cross action for the same relief, and where no reply has been filed by the plaintiff, and no evidence offered by him, an issue is raised by our statute, and upon a verdict on the required issues, a judgment may be rendered upon the cross action if the pleadings and the evidence are sufficient. Ellis v. Ellis, 190 N. C. 418, 130 S. E. 7.

Same—Time for Answering Not Affected.—The provision of this section, putting in a denial of the plaintiff's allegations in an action for divorce, does not affect the defendant's right to twenty days after completion of the service of summons by publication, in which to answer or demur, etc. Campbell v. Campbell, 179 N. C. 413, 102 S. E. 737.

Applies to Cross-Action.—This section is applicable to a defendant who files a cross-action, and prays for divorce therein from the plaintiff. Saunderson v. Saunderson, 195 N. C. 169, 172, 141 S. E. 572; citing Cook v. Cook, 159 N. C. 46, 47, 74 S. E. 639.

Where the wife's cross-action for divorce a mensa is sustained by the verdict of the jury, a judgment rendered must accord therewith, and if entered for a divorce absolute upon consent of the parties, the judgment is a nullity. Saunderson v. Saunderson, 195 N. C. 169, 141 S. E. 572.

Verdict of Jury.—In a proceeding for a divorce the issues submitted and the verdict found should be as specific and certain as the facts alleged in the petition. Wood v. Wood, 27 N. C. 674.

Same—Eleven Jurors.—In an action for divorce, a verdict by eleven jurors, consented to by both parties, is valid if for the defendant, but invalid if for plaintiff. Hall v. Hall, 131 N. C. 185, 42 S. E. 562.

Witnesses in Actions on Ground of Adultery.—The statutory inhibition that the husband and wife will not be permitted to testify for or against each other prevails whether under the circumstances of any particular case it would seemingly appear that there was no collusion or otherwise; and the inhibition extends to any and all admissions or confessions by the other, tending to establish the acts of adultery, either in the pleadings or otherwise. Hooper v. Hooper, 165 N. C. 605, 81 S. E. 933.

It is incompetent for the husband to testify that the wife had a certain contagious venereal disease, of which he had been free, under circumstances tending necessarily to establish her improper relations with other men. Hooper v. Hooper, 165 N. C. 605, 81 S. E. 933.

Instruction Not at Variance with Section.—In an action for absolute divorce a charge in reference to the admissions of counsel that the evidence was sufficient to support an affirmative answer to the issues of marriage, separation and residence is held not equivalent to a directed verdict and not to be at variance with the provisions of this section. Nelson v. Nelson, 197 N. C. 465, 149 S. E. 585.

Evidence.—In an action for divorce on the ground of adultery of the wife, evidence that she offered to pay the cost of a criminal prosecution against her alleged paramour was competent, not in any sense as a confession of her guilt, but was tending to show interest in and association with him, and as corroborating other testimony as to adulterous intercourse between the parties. Toole v. Toole, 112 N. C. 153, 16 S. E. 912.

In Vickers v. Vickers, 188 N. C. 448, 450, 124 S. E. 737, the court said:—"On perusal of the record it appears that the affidavit of the wife, charging adultery on the husband, is submitted as part of her evidence pertinent to the inquiry. As an independent fact, such evidence seems to be absolutely forbidden by the statutes and public policy controlling in the matter."

Declaration—Presence of Third Person.—A declaration made by a husband to his wife in the presence of a third party is not such a confidential communication, as is privileged. Toole v. Toole, 112 N. C. 153, 16 S. E. 912.

Same—Of Alleged Paramour.—The declarations of an alleged paramour, made to or in the presence of a party to a suit for divorce a vinculo matrimonii, tending to show that improper familiarities had been or were about to be indulged in between them, and such party's reply to the declarations is admissible as evidence and does not come within the prohibition of this section. Toole v. Toole, 112 N. C. 153, 16 S. E. 912.

Stated in State v. Williams, 220 N. C. 445, 17 S. E. (2d) 769.

§ 50-11. Effects of absolute divorce.—After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again unless otherwise provided by law: Provided, that no judgment of divorce shall render illegitimate any children in esse, or begotten of the body of the wife during coverture; and, Provided further, that a decree of absolute divorce upon the ground of separation for two successive years as provided in § 50-5 or § 50-6 shall not impair or destroy the right of the wife to receive alimony under any judgment or decree of the court rendered before the commencement of the proceeding for absolute divorce. (Rev., s. 1569; Code, s. 1295; 1871-2, c. 193, s. 43; 1919, c. 204; C. S. 1663.)

Time Reduced to Two Years.—Section 50-6, as amended, reduced the time in this section from ten to two years. Howell v. Howell, 206 N. C. 672, 174 S. E. 921; Dyer v. Dyer, 212 N. C. 620, 194 S. E. 278.

No Permanent Alimony.—Upon the granting of an absolute divorce all rights arising out of the marriage cease and determine and hence the court has no power in such cases to allow permanent alimony. Duffy v. Duffy, 120 N. C. 346, 27 S. E. 28.

Consent Judgment Not Affected.—Where a consent judgment has been entered, a condition of which is that the wife remain unmarried, the subsequent decreeing of a divorce a vinculo to the wife is not a violation of the terms of the consent judgment, and the judge has no authority to modify it upon that ground. Lentz v. Lentz, 193 N. C. 742, 138 S. E. 12.

Cited in Dyer v. Dyer, 212 N. C. 620, 194 S. E. 278.

§ 50-12. Resumption of maiden name authorized; adoptions of name of prior deceased husband validated.—Any woman at any time after the bonds of matrimony theretofore existing between herself and her husband have been dissolved by a decree of absolute divorce, may resume the use of her maiden name or the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband upon application to the clerk of the court of the county in which she resides, setting forth her intention so to do. Said application shall be addressed to the clerk of the court of the county in which such divorced woman resides, and shall set forth the full name of the former husband of the applicant, the name of the county in which said divorce was granted, and the term of court at which such divorce was granted, and shall be signed by the applicant in her full maiden name. The clerks of court of the several counties of the state shall provide a permanent book in which shall be recorded all such applications herein provided for, which shall be indexed under the name of the former husband of the applicant and under the maiden name of such applicant. The clerk of the court of the county in which said application shall be recorded shall charge a fee of one ($1.00) dollar for such registration. In every case where a married woman has heretofore been granted a divorce and has, since the divorce, adopted the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband, the adoption by her of such name is hereby validated. (1937, c. 53; 1941, c. 9.)

Editor's Note.—Public Laws of 1941, chapter 9, inserted in the first sentence of this section the words "or the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband." The amendment also added the words "or a name composed of her given name and the surname of a prior deceased husband," in the last sentence.

§ 50-13. Custody of children in divorce.—After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, and may commit their custody and tuition to the father or mother, as may be thought best; or the court may commit the custody and tuition of such infant children, in the first place, to one parent for a limited time, and after the expiration of that time, then to the other parent; and so alternately: Provided, that no order respecting the children shall be made on the application of either party without five days notice to the other party, unless it shall appear that the party having the possession or control of such children has removed or is about to remove the children, or himself, beyond the jurisdiction of the court.

Provided, custody of children of parents who have been divorced outside of North Carolina may be determined in a special proceeding instituted by either of said parents in the superior court of the county wherein the petitioner, or the respondent or child at the time of filing said petition, is a resident. The resident judge of the district wherein the petition is filed may hear the facts and determine the custody of said children at any place that may be designated in his district after five days notice of said proceedings to the defendant. Notice of the summons and petition in said proceedings may be served on a nonresident defendant by publishing a notice thereof setting forth the grounds and nature of the proceedings in a newspaper published in the county wherein the petitioner resides once a week for a period of four successive weeks and by posting a copy thereof at the courthouse door of said county for a period of thirty days. Service as aforesaid in said action will be deemed complete thirty days after the date of the first publication of said notice.

In any case where either parent institutes a divorce action when there is a minor child or children, the complaint in such action shall set forth the name and age of such child or children; and if there be no minor child, the complaint shall so state. (Rev., s. 1570; Code, ss. 1296, 1570; 1871-2, c. 193, s. 46; 1939, c. 115; 1941, c. 120; 1943, c. 194; C. S. 1664.)

Cross Reference.—As to habeas corpus proceeding to determine custody of children of parents who are separated without being divorced, see §§ 17-39, 17-40.

Editor's Note.—The 1939 amendment added the second paragraph of this section.

The 1941 amendment inserted the words "or the respondent or child" in the first sentence of the second paragraph.

The 1943 amendment added the last paragraph.

For comment on the 1939 amendatory act, see 17 N. C. L. Rev. 352.

In General.—The superior court, in which a suit for divorce is pending, has exclusive jurisdiction as to the care or custody of the children of the marriage, before and after the decree of divorcement has been entered, by this section, and though by proceedings in habeas corpus under the provisions of sec. 17-39, the custody of a child of the marriage may be awarded as between parents each of whom claim it, this applies only when the parents are living in a state of separation, without being divorced, or are suing for a decree of divorcement; and where the decree of divorcement has been granted without awarding the custody of minor children of the marriage, the exclusive remedy is by motion in that cause. Quaere, whether the statutes relating to the juvenile courts, sec. 110-21 et seq., confer jurisdiction in such instances. In re Blake, 184 N. C. 278, 114 S. E. 294.

Upon institution of a divorce action the court acquires jurisdiction over any child born of the marriage and may hear and determine questions both as to the custody and as to the maintenance of such child either before or after final decree of divorce. Story v. Story, 221 N. C. 114, 19 S. E. (2d) 136.

Habeas Corpus Is Not Appropriate Writ When Parties Are Divorced.—Although statutory habeas corpus is an appropriate writ to determine the custody of children as between married parents living in a state of separation under § 17-39, it is not appropriate when they are divorced. McEachern v. McEachern, 210 N. C. 98, 185 S. E. 684.

Court May Disregard Agreement between Husband and Wife Regarding Custody of Child.—A deed of separation between husband and wife containing an agreement for the custody of their minor child does not preclude the court, upon granting a decree for absolute divorce in a suit brought subsequent to the deed of separation, from awarding the custody of the child in accordance with this section. In re Albertson, 205 N. C. 742, 172 S. E. 411.

No agreement or contract between husband and wife will serve to deprive the court of its inherent as well as statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by separate agreement or by a consent judgment; but they cannot thus withdraw children of the marriage from the protective custody of the court. The child is not a party to such agreement and the parents cannot contract away the jurisdiction of the court which is always alert in the discharge of its duty towards its ward—the children of the state whose personal or property interests require protection. State v. Duncan, 222 N. C. 11, 21 S. E. (2d) 822.

Father Primarily Liable for Support.—The liability of the

father primarily to support the children remains after the divorce, as well as before such divorce, and even where the custody of the children has been awarded to the mother. Sanders v. Sanders, 167 N. C. 319, 83 S. E. 490. And the order may be made a lien on his land. Ibid. Bailey v. Bailey, 127 N. C. 474, 37 S. E. 502.

Consent Judgments.—Where consent judgment in a suit a mensa et thoro has been entered in the action, without providing for the children, upon motion in the original cause the court has power to make such further orders as it deems proper requiring the father to provide for the support of his children, whether born before or after the rendition of the consent judgment. Sanders v. Sanders, 167 N. C. 317, 83 S. E. 489.

Same—Award of Custody Does Not Affect.—Where consent judgment in an action for a divorce a mensa operates as a gift to the wife of an estate in the husband's land, the fact that the court awards custody of the children does not affect it. Morris v. Patterson, 180 N. C. 484, 105 S. E. 25.

Without the consent of the parties to vacate or moderate a properly entered consent judgment, the court is without power to do so. Lentz v. Lentz, 193 N. C. 742, 138 S. E. 12.

Consent Judgment on Issue of Divorce Does Not Divest Jurisdiction as to Custody of Child.—Upon the institution of an action for divorce from bed and board the court acquires jurisdiction of the minor children of the parties which is not divested by a consent judgment on the issue of divorce entered in the cause with approval of the court, especially where such consent judgment expressly provides that either party might thereafter make a motion in the cause for the custody of the children, the court having the power in an action for divorce, either absolute or from bed and board, before or after final judgment, to enter orders respecting the care and custody of the children under this section. Tyner v. Tyner, 206 N. C. 776, 175 S. E. 144.

Judgment out of Term.—Where an absolute divorce has been decreed in an action and a motion is made respecting the custody of a minor child, and the parties agree that the judge should render judgment on the motion out of term and outside the county of trial, the judgment rendered under the terms of the agreement is valid, the judge having authority under this section to render such judgment. Pate v. Pate, 201 N. C. 402, 160 S. E. 450.

Modification of Decree.—Where, in a decree of divorce the father is ordered to pay a certain sum monthly for the support of his infant daughter, and by its first order the court has retained the cause subject to the right of either party at any time to apply for a modification of the order, and pursuant to this provision the court later, upon the father's insolvency, made the sums assessed a charge on the plaintiff's homestead and personal property exemptions when allotted, the modification is authorized by this section as well as by the order of the courts. Walker v. Walker, 204 N. C. 210, 212, 167 S. E. 818.

The superior court has jurisdiction under this section to modify an order for the support of a child of the marriage entered in the husband's action for absolute divorce, and may do so upon the wife's motion in the cause made subsequent to the rendition of the decree of absolute divorce. Story v. Story, 221 N. C. 114, 19 S. E. (2d) 136.

Five Days' Notice Is for Protection of Parent Who Does Not Have Control of Child.—The provision in the statute dispensing with the notice of five days, when it appears that the parent having possession or control of the infant child of the parties to the action has removed or is about to remove such child from the jurisdiction of the court is applicable only where the application or motion is made by the parent who does not have possession or control of the child, and is for the protection of the rights of such parent, and not of the parent who has possession or control of the child at the time the application or motion is made. In such case, no notice to the adverse party is required. Burrowes v. Burrowes, 210 N. C. 788, 794, 188 S. E. 648.

Appeals by Both Wife and Children.—Upon appeals by the wife and children in separate actions, the appeal of the children will be considered as improvidently taken if the relief sought is identical with that afforded under the judgment obtained in the action of the mother. Sanders v. Sanders, 167 N. C. 317, 83 S. E. 489.

§ 50-14. Alimony on divorce from bed and board.—When any court adjudges any two married persons divorced from bed and board, it may also decree to the party upon whose application such judgment was rendered such alimony as the circumstances of the several parties may render necessary; which, however, shall not in any case exceed the one-third part of the net annual income from the estate, occupation or labor of the party against whom the judgment shall be rendered. (Rev., s. 1565; Code, s. 1290; 1871-2, c. 193, s. 37; C. S. 1665.)

Alimony Defined.—See Rogers v. Vines, 28 N. C. 293, 294; Taylor v. Taylor, 93 N. C. 418.

Nature of Alimony.—A decree awarding alimony to the wife or children, or both, is not a debt which has been put in the form of a judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children. Wetmore v. Markoe, 196 U. S. 68, 74, 25 S. Ct. 172, 49 L. Ed. 390.

But alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money. Barber v. Barber, 21 How. 582, 595, 16 L. Ed. 226.

The alimony allowed under this section is incident to and dependent upon a decree of divorce a mensa, and where no divorce a mensa was granted on the verdict no permanent alimony could be allowed. Silver v. Silver, 220 N. C. 191, 16 S. E. (2d) 834.

Permanent alimony under this section may be allowed only upon decree for divorce a mensa, and is erroneously granted in the wife's cross action in which divorce a mensa is neither prayed nor decreed. Silver v. Silver 220 N. C. 191, 16 S. E. (2d) 834.

Not Permanent.—Alimony is in its nature a provision for a wife separated from her husband, and it cannot continue after reconciliation or the death of either party. Rogers v. Vines, 28 N. C. 293, 297.

Effect of Decree upon Defendant's Property.—The order of a court for alimony operates in personam, by compelling the defendant to pay the alimony or to convey the property accordingly, and does not of itself transfer any title in real estate unless allowed that effect by the law of the place in which the real estate is situated. Barrett v. Failing, 111 U. S. 523, 525, 4 S. Ct. 598, 28 L. Ed. 505.

One-Third of Husband's Estate.—Decree of divorce à mensa may assign one-third of husband's estate to the wife. Davis v. Davis, 68 N. C. 180.

Effect of Wife's Abandonment.—The voluntary abandonment by the wife of her husband without legal justification will not entitle her to alimony in her suit for divorce from bed and board. McManus v. McManus, 191 N. C. 740, 133 S. E. 9.

Appeal.—Whether the wife is entitled to alimony is a question of law upon the facts found and is reviewable upon the appeal by either party. Moore v. Moore, 130 N. C. 333, 41 S. E. 943.

Cited in Dyer v. Dyer, 212 N. C. 620, 194 S. E. 278; Story v. Story, 221 N. C. 114, 19 S. E. (2d) 136.

§ 50-15. Alimony pendente lite; notice to husband.—If any married woman applies to a court for a divorce from the bonds of matrimony, or from bed and board, with her husband, and sets forth in her complaint such facts, which upon application for alimony shall be found by the judge to be true and to entitle her to the relief demanded in the complaint, and it appears to the judge of such court, either in or out of term, by the affidavit of the complainant, or other proof, that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof, the judge may order the husband to pay her such alimony during the pendency of the suit as appears to him just and proper, having regard to the circumstances of the parties; and such order may be modified or vacated at any time, on the application of either party or of any one interested: Provided, that no order allowing alimony pendente lite shall be made unless the husband shall have had five days notice thereof, and in all cases of application for alimony pendente lite under this or § 50-16, whether in or out of term, it shall be admissible for the husband to be heard

by affidavit in reply or answer to the allegations of the complaint: Provided further, that if the husband has abandoned his wife and left the state or is in parts unknown, or is about to remove or dispose of his property for the purpose of defeating the claim of his wife, no notice is necessary. (Rev., s. 1566; Code, s. 1291; 1871-2, c. 193, s. 38; 1883, c. 67; C. S. 1666.)

I. IN GENERAL.

Editor's Note.—It was formerly held that alimony pendente lite could not be awarded in the absence of a statute conferring this power. Wilson v. Wilson, 19 N. C. 377; Reeves v. Reeves, 82 N. C. 348. In 1852 the Legislature passed an act authorizing the courts upon a petition for divorce and alimony, to decree the petitioner a sum sufficient for her support during the pendency of the suit. See Everton v. Everton, 50 N. C. 202, 206. In the case of Medlin v. Medlin, 175 N. C. 529, 95 S. E. 857, the court overruled the former doctrine mentioned supra, and stated that the courts possessed the right to grant alimony pendente lite by virtue of the common law—the practice having come down from the English Ecclesiastical Courts.

This holding has an important bearing on the construction of this statute, making it remedial in its nature, affirmative in its terms and cumulative in its effect and not abrogating the common law existent on the subject nor withdrawing from the court any powers already possessed in administering its principles. Medlin v. Medlin, supra, overruling Reeves v. Reeves, supra, on this point.

Purpose of the Section.—The purpose of this section is to afford the wife present pecuniary relief pending the progress of the action and to afford the husband some measure of protection in a motion so important, which is made and to be determined before the merits of the controversy are ascertained and the rights of the parties settled regularly by final judgment. Morris v. Morris, 89 N. C. 109, 111.

Alimony When the Wife Is Defendant.—When the wife is the defendant she has a right to claim alimony pendente lite under this section. Webber v. Webber, 79 N. C. 572; Barker v. Barker, 136 N. C. 316, 48 S. E. 733.

And this is true although she may be concluded by the judgment against her in her former and independent action for divorce à mesna under the provisions of the statute. Medlin v. Medlin, 175 N. C. 529, 95 S. E. 857.

Cited in Dyer v. Dyer, 212 N. C. 620, 194 S. E. 278.

II. APPLICATION AND PROCEEDINGS THEREON.

An application for alimony pendente lite can be made by motion in the cause. Reeves v. Reeves, 82 N. C. 348.

A motion for alimony pendente lite may be heard anywhere in the judicial district. Moore v. Moore, 130 N. C. 333, 41 S. E. 943. Also a motion to reduce alimony. Moore v. Moore, 131 N. C. 371, 42 S. E. 822.

But a resident judge holding court in another district can not hear a motion to reduce alimony pendente lite in a suit pending in the district in which he resides. Moore v. Moore, 131 N. C. 371, 42 S. E. 822.

In the husband's suit for divorce, in which the wife files answer demanding alimony pendente lite and alimony without divorce, it is error for the court, upon the hearing for alimony pendente lite under this section, to issue an order for alimony without divorce under § 50-16. Adams v. Adams, 212 N. C. 373, 193 S. E. 274.

Kind of Divorce Warranted Immaterial.—Upon an application for alimony pendente lite, it is unnecessary to decide whether the petition warrants a divorce a vinculo, or only a divorce à mensa et thoro. Little v. Little, 63 N. C. 22.

III. PREREQUISITES TO AWARD.

A. Entitled to Relief.

Prima Facie Case.—Under this section a petitioner for divorce is entitled to alimony pendente lite upon making out a prima facie case. Sparks v. Sparks, 69 N. C. 319.

Finding Facts as Alleged Sufficient.—Upon a motion for alimony it is sufficient for the court to find that the facts are as alleged in the answer and the affidavits filed in support of the motion. Barker v. Barker, 136 N. C. 316, 48 S. E. 733; Lea v. Lea, 104 N. C. 603, 10 S. E. 488; Vaughan v. Vaughan, 211 N. C. 354, 190 S. E. 492; Ragan v. Ragan, 214 N. C. 36, 197 S. E. 554.

Upon application for alimony pendente lite the trial court is required to find the facts in order that the correctness of its ruling may be determined on appeal, and the granting of the application solely upon a finding that defendant was the owner of certain properties is error. Dawson v. Dawson, 211 N. C. 453, 190 S. E. 749.

In an application for alimony it need not be found as a fact that the plaintiff was a faithful, dutiful and obedient wife. Lassiter v. Lassiter, 92 N. C. 130.

Where the wife's action is for a divorce à mensa on the ground of abandonment, stating that she was compelled to leave home by the conduct of her husband, the judge, in allowing alimony pendente lite, must find such facts that would justify her in law for so doing, at the time she left her husband, and those that occurred thereafter are insufficient. Horton v. Horton, 186 N. C. 332, 119 S. E. 490.

In an application for alimony pendente lite under this section, it is required that the court find the facts in determining whether the wife is entitled to alimony, her right thereto being a question of law, and it is error for the court to refuse applicant's request for a finding of facts upon which the court denies the application. Caudle v. Caudle, 206 N. C. 484, 174 S. E. 304.

Superior Judge May Leave Charges Open.—Where the allegations of the complaint are sufficient under the terms of this section, and are found to be true and sufficient by the judge of the superior court, in the wife's action for a divorce a mensa et thoro, the court may leave open the charges made by each of the parties against the other, and award alimony pendente lite, including a reasonable attorney's fee, taking into consideration the circumstances of the case. Hennis v. Hennis, 180 N. C. 606, 105 S. E. 274.

Sufficient Grounds.—Where the facts as found by the judge would, if found by the jury on the final hearing, warrant a divorce from bed and board, they per se constitute sufficient ground to award alimony pendente lite. Lassiter v. Lassiter, 92 N. C. 130.

In an action by a wife for a divorce a mensa, where acts of cruelty were alleged as the ground of separation, and also an estimate was made of the value of the defendant's estate, it was held to be sufficient evidence to decree alimony and fix the amount. Pain v. Pain, 80 N. C. 322. Also where acts were alleged which were well calculated to make her condition intolerable and her life burdensome and the bill set forth an estimate of the amount of the defendant's property. Gaylord v. Gaylord, 57 N. C. 74.

B. Necessity for Alimony.

Alimony Granted.—Where the complaint of a feme plaintiff seeking a divorce alleges facts which, if believed, entitled her to the relief demanded, and is supplemented by an affidavit that the husband is trying to dispose of his property and has offered his land for sale with the avowed purpose of leaving the State, and that the children are small and need the mother's care, it is proper to grant an order for alimony pendente lite, and it is also competent for the court to award to the mother the custody of the younger children. Scroggins v. Scroggins, 80 N. C. 319.

A married woman is entitled to alimony pendente lite from her husband's estate, when the income from her separate estate is not sufficient for her support and to defray the necessary expenses in prosecuting her suit. Miller v. Miller, 75 N. C. 70.

Where, in the husband's action for divorce on the ground of adultery, the wife files answer denying the charges and sets up a cross action for divorce from bed and board, the finding by the court that the wife denied the charge of adultery under oath, that the court did not find that she was guilty of adultery, and that the husband had abandoned her and that she was financially unable to defray the necessary and proper expenses of the action, was without means of support and that the husband was financially able to make the payments ordered, is sufficient to support the court's order of alimony pendente lite. Covington v. Covington, 215 N. C. 569, 2 S. E. (2d) 558.

Whether the wife is entitled to alimony, is a question of law, upon the facts found, and reviewable on appeal by either party. Morris v. Morris, 89 N. C. 109; Moore v. Moore, 130 N. C. 333, 41 S. E. 943; Barker v. Barker, 136 N. C. 316, 48 S. E. 733.

Where Wife Has Ample Means.—The right of alimony pendente lite, both under this section and under the common law, is predicated upon the justice of affording the wife

sufficient means to cope with her husband in presenting their case before the court, and a finding, supported by evidence, that the wife has earnings and means of support equal to that of her husband, sustains the court's order denying her motion for alimony pendente lite. Oliver v. Oliver, 219 N. C. 299, 13 S. E. (2d) 549.

IV. NOTICE.

Sufficiency.—An order of court continuing the motion for alimony to a future term of court made in the presence of counsel for both parties is sufficient notice, under the statute, of such motion. Lea v. Lea, 104 N. C. 603, 10 S. E. 488.

Time of Hearing Not Specified.—The fact that a notice of a motion for alimony pendente lite, duly served upon the defendant, did not specify the time of hearing, will not invalidate the order allowing the same, it having been heard at a term of court at which the cause stood regularly for trial. Zimmerman v. Zimmerman, 113 N. C. 433, 18 S. E. 334.

When Five Days Required.—The provision requiring five days' notice applies only when the motion is heard out of term, and parties are fixed with notice of all motions or orders made during the term of the court. Coor v. Smith, 107 N. C. 431, 11 S. E. 1089; Jones v. Jones, 173 N. C. 279, 91 S. E. 960; Zimmerman v. Zimmerman, 113 N. C. 433, 18 S. E. 334.

When Dispensed with.—An affidavit of the wife that husband had left the State the day after the filing of the complaint, and that she had good reason to believe that he had left to defeat her claim for alimony, having been selling his property for several months with that purpose in view, dispenses with the necessity for notice. Barker v. Barker, 136 N. C. 316, 48 S. E. 733.

Before Return Term.—Alimony pendente lite may be allowed before the return term if the complaint has been filed. Moore v. Moore, 130 N. C. 333, 41 S. E. 943.

V. THE ORDER.

A. In General.

Effect of Insufficient Finding.—An order allowing the wife alimony pendente lite may be declared erroneous on appeal for insufficiently full findings of fact therein, but not void. White v. White, 179 N. C. 592, 103 S. E. 216; Moody v. Moody, 118 N. C. 926, 23 S. E. 933.

If Allegations Not Controverted.—If the allegations in the complaint are not controverted, it is sufficient if the judge finds that no answer was filed and adjudges alimony to be paid. Zimmerman v. Zimmerman, 113 N. C. 433, 18 S. E. 334.

Enforcement.—An order to pay alimony may be enforced by imprisonment for contempt. Zimmerman v. Zimmerman, 113 N. C. 433, 18 S. E. 334; Pain v. Pain, 80 N. C. 322.

B. Amount.

Discretion of Court.—While the right to alimony involves a question of law, the amount of alimony and counsel fees is a matter of judicial discretion. Davidson v. Davidson, 189 N. C. 625, 127 S. E. 682, 683; Schonwald v. Schonwald, 62 N. C. 215; Barker v. Barker, 136 N. C. 316, 48 S. E. 733. Subject to the limitation that it is not in excess of the net income of the defendant. Davidson v. Davidson, 189 N. C. 625, 127 S. E. 682. See also, Wright v. Wright, 216 N. C. 693, 6 S. E. (2d) 555.

Usually One-Third Net Income.—Excepting attorney's fees and expenses, the amount ordinarily allowed pendente lite under this section is not in excess of the amount prescribed by sec. 50-14 upon a final judgment for divorce from bed and board; that is, one-third part of the net annual income from the estate and occupation or labor of the party against whom the judgment is rendered. 19 C. J. 222 (532). But this rule is not inflexible, and the amount to be allowed is not arbitrarily fixed by the statute. Davidson v. Davidson, 189 N. C. 625, 127 S. E. 682, 683.

Amount May Be Altered by Court.—Alimony regularly ordered to be paid a wife pendente lite may be increased or reduced in amount by the court from time to time, but that which she has already received in the course and practice of the courts may not be ordered to be given up by her. White v. White, 179 N. C. 592, 103 S. E. 216.

Allowance for Children.—Where in passing upon a motion of feme plaintiff in her action for divorce à mensa for alimony, etc., pendente lite, if the trial judge has found facts sufficient upon the evidence, he may award the custody of the minor children, who have been removed by the defendant from the State, to the plaintiff, with an additional allowance for them from the time they may be placed in her custody. Jones v. Jones, 173 N. C. 279, 91 S. E. 960.

Not Reviewable Unless Abuse Shown.—The question of the amount allowed, in proper instances, by the superior court judge to the wife, in her action for divorce à mensa et thoro, is addressed to his sound judgment and discretion, and not reviewable on appeal, unless his discretion is abused. Hennis v. Hennis, 180 N. C. 606, 105 S. E. 274; Jones v. Jones, 173 N. C. 279, 91 S. E. 960.

VI. PLEADING AND PRACTICE.

In application for alimony pendente lite, it is competent for the husband to controvert the allegations of the complaint by affidavit or answer. Lassiter v. Lassiter, 92 N. C. 130; Easeley v. Easeley, 173 N. C. 530, 92 S. E. 353; Griffith v. Griffith, 89 N. C. 113.

Finding of Facts.—On a motion for alimony pendente lite and counsel fees in an action instituted by a wife against her husband under the provisions of this section, whether the wife is entitled to alimony is a question of law upon the facts found, and the court below must find the facts, upon request. Holloway v. Holloway, 214 N. C. 662, 663, 200 S. E. 436.

Where Husband Appeals, Injunction Should Issue.—Where alimony pendente lite is allowed the wife, and the husband appeals from such order, an injunction should be granted to stay execution against the property of the husband pending the appeal. Barker v. Barker, 136 N. C. 316, 48 S. E. 733.

Alimony May Be a Lien.—Where alimony pendente lite has been regularly granted to the wife in her action for divorce against her nonresident husband, who has abandoned her, the court may decree it a lien upon his lands described in the complaint and situated here, and order the sale thereof for its payment; and it is not necessary that the defendant should have had notice of the wife's application therefor. White v. White, 179 N. C. 592, 103 S. E. 216; Bailey v. Bailey, 127 N. C. 474, 37 S. E. 502.

When Husband Denies Having Property.—Where the husband denies having any property but admits that he is an able-bodied man, the court may order an allowance without inquiry into the value of his property. Muse v. Muse, 84 N. C. 35.

Deed of Separation May Be Bar.—A deed of separation, in conformity with §§ 52-5, 52-12, and 52-13, approved by a consent judgment, may be pleaded as complete bar to the wife's application for alimony pendente lite and for reasonable counsel fees, as provided by this section. Brown v. Brown, 205 N. C. 64, 169 S. E. 818.

New Motion After Failure of Original.—Where a motion to reduce alimony pendente lite has been disallowed, another motion for the same purpose should not be heard unless a different state of facts is shown and a receipt exhibited for a reasonable proportion of the allowance made at the former hearing. Moore v. Moore, 131 N. C. 371, 42 S. E. 822.

Appeal and Error.—The superior court judge, in allowing alimony to the wife pendente lite, under the provisions of this section, must find the essential and issuable facts and set them out in full for the purpose of the appeal, so that the Supreme Court may determine therefrom whether the order appealed from should be upheld, and his general and inconclusive estimate of such facts is insufficient. Horton v. Horton, 186 N. C. 332, 119 S. E. 490; Easeley v. Easeley, 173 N. C. 530, 92 S. E. 353; Morris v. Morris, 89 N. C. 109.

Same—Effect of Demurrer.—In an action for divorce a vinculo, the admissions of parties are not competent evidence; but a demurrer to the petition for divorce admits that the facts alleged are true and can and will be proved, so as to secure the verdict of a jury. Steel v. Steel, 104 N. C. 631, 10 S. E. 707.

§ 50-16. Alimony without divorce.—If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action in the superior court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband. Pending the trial and final determination of the issues involved in such action, and also after they are determined, if finally deter-

mined, in favor of the wife, such wife may make application to the resident judge of the superior court, or the judge holding the superior courts of the district in which the action is brought, for an allowance for such subsistence and counsel fees, and it shall be lawful for such judge to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of his said wife and the children of the marriage, having regard also to the separate estate of the wife. Such application may be heard in or out of term, orally or upon affidavit, or either or both. No order for such allowance shall be made unless the husband shall have had five days notice thereof; but if the husband shall have abandoned his wife and left the state, or shall be in parts unknown, or shall be about to remove or dispose of his property for the purpose of defeating the claim of his wife, no notice shall be necessary. The order of allowance herein provided for may be modified or vacated at any time, on the application of either party or of any one interested. In actions brought under this section, the wife shall not be required to file the affidavit provided in § 50-8, but shall verify her complaint as prescribed in the case of ordinary civil actions: Provided further, that in all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony, and if the wife shall deny such plea, and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony, or for her support, but only her reasonable counsel fees. (Rev., s. 1567; Code, s. 1292; 1919, c. 24; 1871-2, c. 193, s. 39; 1921, c. 123; 1923, c. 52; C. S. 1667.)

Cross References.—As to the criminal aspect of abandonment of family by husband, see §§ 14-322, 14-323, 14-324, 14-325. As to abandonment by husband as forfeiture of right and interest in wife's property and estate, see § 52-21.

Editor's Note.—Prior to the year 1872 there was no statute regulating the question of alimony without divorce and in this state it was held that this relief in proper cases could be granted by courts of equity. See Crews v. Crews, 175 N. C. 168, 170, 95 S. E. 149. By ch. 193, Laws 1872 the Legislature provided for this relief but in that act there was no provision whereby the wife could obtain alimony during the determination of the issues involved in her suit. In 1919 however an amendment was added whereby the wife might apply for an allowance for her subsistence during the pendency of her main action. Laws of 1919, ch. 24.

In considering this section therefore it must be noted that two distinct remedies are therein provided—first the action for alimony without divorce—second the application for an allowance for subsistence pendente lite. See McFetters v. McFetters, 219 N. C. 731, 14 S. E. (2d) 833.

Chapter 24, Laws of 1919 made other radical changes in this section. In addition to adding the last four sentences in toto, this amendment added the clauses allowing subsistence for failure to support the children of the marriage or for guilty conduct which would constitute grounds for divorce.

Chapter 52, Laws of 1923 amended this section by allowing the husband to plead the adultery of the wife in bar of her right to such alimony. This amendment is certainly a proper one and protects the husband who abandons his wife because of her adultery. 1 N. C. L. Rev. 294.

Allowance of Subsistence Pendente Lite Is Constitutional.—Defendant's contention that the provisions of this section empowering the court to allow subsistence and counsel fees pendente lite to plaintiff in her action for alimony without divorce are unconstitutional as depriving him of a property right without trial by jury is untenable, since he is under duty to support plaintiff until the adjudication of issues relieving him of that duty, and since such allowance by the court does not form any part of the ultimate relief sought nor affect the final rights of the parties. Peele v. Peele, 216 N. C. 298, 4 S. E. (2d) 616.

This section is one solely for support. It provides a remedy for an abandoned wife to obtain support from the estate or earnings of her husband. Shore v. Shore, 220 N. C. 802, 804, 18 S. E. (2d) 353.

Independent Suits.—This section only applies to independent suits for alimony. Reeves v. Reeves, 82 N. C. 348, 352; Skittletharpe v. Skittletharpe, 130 N. C. 72, 40 S. E. 851; Dawson v. Dawson, 211 N. C. 453, 190 S. E. 749.

It may not be used by the wife as the basis of a cross action in a suit for divorce instituted by the husband. Shore v. Shore, 220 N. C. 802, 18 S. E. (2d) 353; Silver v. Silver, 220 N. C. 191, 16 S. E. (2d) 834.

The phrase "may institute an action" as used in this section is permissive and not mandatory. Miller v. Miller, 205 N. C. 753, 754, 172 S. E. 493.

Section Applies Only to Actions Instituted by Wife.—A child of divorced parents is not entitled to an allowance of counsel fees and suit money pendente lite in her action against her father to force him to provide for her support, this section and § 50-15 applying only to actions instituted by the wife, and such right not existing at common law. Green v. Green, 210 N. C. 147, 185 S. E. 651.

Section 50-14, may be considered in an action under this section, in determining the allowance of reasonable subsistence to the wife and children and the allowance of counsel fees based on the defendant's means and condition in life. Kiser v. Kiser, 203 N. C. 428, 166 S. E. 304.

Jurisdiction Not Affected.—The fact that the summons, in a proceeding under this section, of which a judge of the superior court has jurisdiction, was made returnable at term, does not affect the jurisdiction of the judge to hear and determine the matter. Cram v. Cram, 116 N. C. 288, 21 S. E. 197.

Venue of Action.—A wife who has been forced by her husband to leave his home at night and take refuge elsewhere may acquire a separate domicile, and may sue him for alimony without divorce in the county of her residence, and the husband is not entitled to removal to the county of his residence as a matter of right under the provisions of this section and §§ 1-82, 50-3. Miller v. Miller, 205 N. C. 753, 172 S. E. 493.

The provision that a wife may institute action for alimony without divorce in the county in which the cause of action arose does not prescribe the exclusive venue, but the wife may institute the action in the county in which she resides at the commencement of the action. Dudley v. Dudley, 219 N. C. 765, 14 S. E. (2d) 787.

What Facts Material.—Under this section the only material facts at issue in the action for alimony without divorce are the questions of the existence of the marriage relation and whether the husband abandoned the wife. Skittletharpe v. Skittletharpe, 130 N. C. 72, 40 S. E. 851; Hooper v. Hooper, 164 N. C. 1, 80 S. E. 64.

The effect of this section has been changed by chapter 24, Public Laws of 1919, and thereunder it is not now required that an issue involving the validity of the marriage be first determined before the wife may sustain her civil action against her husband for an allowance for a reasonable subsistence and counsel fees pending the trial and final determination of the issue relating to the validity of the marriage. Barbee v. Barbee, 187 N. C. 538, 122 S. E. 177.

Issue of Fact for Jury.—In actions under this section, when there are issues of fact raised, they should be found by a jury. Crews v. Crews, 175 N. C. 168, 95 S. E. 149. See also, Barber v. Barber, 217 N. C. 422, 8 S. E. (2d) 204.

And the trial judge may not pass upon the issuable facts in proceedings for alimony without divorce, under this section, upon evidence introduced before him theretofore upon a trial of the husband for criminal abandonment, etc., of which he was acquitted, when the witnesses are present and ready to testify. Crews v. Crews, 175 N. C. 168, 95 S. E. 149; Cooper v. R. R., 170 N. C. 490, 87 S. E. 322, cited and distinguished.

Where in his answer defendant alleged that he separated himself from his wife at her bidding after an altercation to avoid continual abuse, nagging and assaults by plaintiff, and that he had provided plaintiff and their children with a furnished house, paid bills for necessaries and given them cash weekly, and had therefore furnished them with necessary subsistence in accordance with his means in life, the answer raises issues of fact determinative of the right to the relief sought, which issues must be submitted to the jury, and the granting of plaintiff's motion for judgment on the pleadings was error. Masten v. Masten, 216 N. C. 24, 3 S. E. (2d) 274.

Finding of Facts by Judge Unnecessary.—In the wife's application for alimony without divorce, it is not required

that the judge hearing the matter shall find the facts as a basis for his judgment, as in proceedings for alimony pendente lite (sec. 50-15), although it is necessary that she allege sufficient facts to constitute a good cause of action thereunder. Price v. Price, 188 N. C. 640, 125 S. E. 264; Vincent v. Vincent, 193 N. C. 492, 137 S. E. 426.

On motion for alimony pendente lite and counsel fees made in an action instituted by the wife against her husband under provisions of this section, the judge is not required to find the facts as a basis for an award of alimony unless the adultery of the wife is pleaded in bar, though the better practice would be to do so. Holloway v. Holloway, 214 N. C. 662, 663, 200 S. E. 436.

Where the complaint alleges facts sufficient to entitle plaintiff to alimony pendente lite under this section, it is not error for the court to grant plaintiff's motion therefor and refuse to find the facts upon which the order is based, since it will be presumed that the court found the facts as alleged in the complaint for the purposes of the hearing. Southard v. Southard, 208 N. C. 392, 180 S. E. 665.

Complaint Must Allege Good Cause.—The complaint must allege facts sufficient to constitute a good cause of action under the provision of this section, when the wife proceeds thereunder, for the court to allow her from the estate or earnings of her husband a reasonable support and counsel fees, and when the wife alleges only that she has left her husband because he failed to fulfill his promise to supply certain conveniences, it is insufficient. McManus v. McManus, 191 N. C. 740, 133 S. E. 9.

Plaintiff must meet the requirements of the statute for divorce from bed and board, and must allege with particularity the acts of defendant constituting the basis of the charge that he offered such indignities to her person as to render her condition intolerable, and allege that such acts were without adequate provocation on her part. Pollard v. Pollard, 221 N. C. 46, 19 S. E. (2d) 1.

Indefinite Allegations in Answer.—Vague and indefinite allegations of infidelity on the part of a wife made by a husband in his answer to her complaint in a proceeding for support and maintenance, will not be allowed to affect the question of the husband's liability in such proceedings. Cram v. Cram, 116 N. C. 288, 21 S. E. 197.

Counter Charges Immaterial.—Under the provisions of ch. 24, Laws of 1919, amending this section, it is immaterial what counter charges the defendant makes against the plaintiff, his wife, in her application for necessary "subsistence" pendente lite, for if he has separated from her, he must support her according to his means and condition in life, taking into consideration the separate estate of his wife, until the issue has been submitted to the jury. Allen v. Allen, 180 N. C. 465, 105 S. E. 11.

Previous Contract of Separation.—Where the defendant resists his wife's application for alimony without divorce under this section, upon the ground that there was still in effect a valid contract of separation they both had executed, and appeals from an adverse decision of the trial judge hearing the matter, the record on appeal should set out the written contract of separation so that the Supreme Court may determine whether it was reasonable, just and fair to the wife, and whether in taking her acknowledgment the officer had properly certified that it was not unreasonable or injurious to her, as the statute requires. Moore v. Moore, 185 N. C. 332, 117 S. E. 12.

Where, by an agreement for a separation between husband and wife, the former agreed to pay a certain monthly allowance, and the husband, after paying several installments discontinued the payments, he cannot set up the agreement in bar of her action for a support under this section even though he discontinued the payments because she demanded that the allowance be increased. Cram v. Cram, 116 N. C. 288, 21 S. E. 197.

Where the parties by reason of this section entered into a consent judgment, approved by the court, providing for the payment to the wife of a certain sum monthly and making such sums a lien upon the husband's real estate, and the husband failed to make payments in accordance with the judgment and the wife brought a separate action alleging abandonment, it was held that plaintiff's rights were remitted to the prior judgment. Turner v. Turner, 205 N. C. 197, 170 S. E. 646.

Validity of Separation Agreement Need Not Be First Determined.—Where in proceedings by the wife to secure her subsistence and reasonable counsel fees under this section it is alleged that a separation agreement was procured by fraud, sufficiently pleaded, objection that the validity of the separation contract must be first determined in an independent action is untenable, the statute expressly providing that alimony may be granted "pending the trial and final determination of the issues." Taylor v. Taylor, 197 N. C. 197, 148 S. E. 171.

Wrongful Abandonment of Husband.—This section does not contemplate that a wife who wrongfully abandons and separates herself from her husband should be awarded subsistence and counsel fees. Byerly v. Byerly, 194 N. C. 532, 533, 140 S. E. 158.

Same—Presumption on Appeal.—Where, in an action by the wife under this section, she has duly moved the court for alimony pendente lite and an allowance for counsel fees, and the husband has answered and offered evidence to the effect that the plaintiff had abandond him, and that he had not abandoned her, and the record on appeal does not disclose any findings of fact upon the question but only that the trial judge had refused the plaintiff's motion until the jury should determine the issue, the presumption is that the trial judge had held adversely to the plaintiff as to the fact. Byerly v. Byerly, 194 N. C. 532, 140 S. E. 158.

Effect of Prior Divorce in Another State.—No action will lie under this section where it appears that the court of a state having jurisdiction over the parties has declared them not husband and wife. Bidwell v. Bidwell, 139 N. C. 402, 52 S. E. 55.

Effect of Decree of Divorce.—Where the husband's action for divorce on the ground of two years' separation was consolidated for trial with the wife's subsequent action for alimony without divorce, and the decree of divorce was granted in the first action and judgment entered against the wife in the second action upon the verdict of the jury and the wife appealed in both actions, the decree of absolute divorce terminates all the rights arising out of marriage, including the right to alimony, and upon dismissal of the appeal from the judgment of divorce, the judgment in the action for alimony will be affirmed. Hobbs v. Hobbs, 218 N. C. 468, 11 S. E. (2d) 311.

Does Not Affect Prior Order for Alimony.—A decree of absolute divorce on the ground of separation as provided in § 50-6 will not affect a prior order for alimony without divorce rendered under this section. Howell v. Howell, 206 N. C. 672, 174 S. E. 921.

Effect of Sec. 14-322.—Section 14-322 requiring the State to show the husband's willful abandonment of his wife, etc., beyond a reasonable doubt, does not deprive the wife of her civil remedies under the provisions of this section. State v. Falkner, 182 N. C. 793, 108 S. E. 756.

Amount.—The amount allowed for the reasonable subsistence, cost and attorneys' fees to the wife in her proceedings against her husband under the provisions of this section, is within the sound discretion of the judge hearing the same and having jurisdiction thereof. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863; Cram v. Cram, 116 N. C. 288, 21 S. E. 197.

And the limitation to one-third of the net annual income from the estate, (provided by sec. 50-14) which applies when the court adjudges the parties divorced from bed and board, does not apply when the wife institutes the proper proceeding for alimony pendente lite under sec. 50-15 nor when she applies for a reasonable subsistence under this section. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863; Hodges v. Hodges, 82 N. C. 122, 124.

The allowance made under this section is not such a "debt" as will give the husband the right to claim his homestead or personal property exemptions. Anderson v. Anderson, 183 N. C. 139, 143, 110 S. E. 863. See also, Wright v. Wright, 216 N. C. 693, 6 S. E. (2d) 555.

Allowance for Attorney's Fees.—Chapter 24, Laws of 1919, amended this section in regard to "subsistence" of the wife pendente lite. The effect of this amendment was held to be that it superseded the allowance for alimony and hence no allowance for attorney's fees was permissible. Allen v. Allen, 180 N. C. 465, 105 S. E. 11.

By chapter 123, Laws of 1921, the section was further amended. And now, while the allowance to be made by the judge for the "subsistence" of the wife from the earnings or estate of her husband, in her application for alimony without divorce, is not regarded as synonymous with "alimony" and does not in terms include the allowance for attorney's fees, by this amendment the court may now allow her attorney's fees. Moore v. Moore, 185 N. C. 332, 117 S. E. 12.

In an action under this section, for alimony and counsel fees pendente lite and for alimony without divorce, plaintiff, on the day set for hearing of the motion for alimony and counsel fees pendente lite, filed "certificate and affidavit" stating that there had been a reconciliation between plaintiff and defendant and that plaintiff "withdraws and renounces the complaint" and "takes a voluntary nonsuit . . . and prays the court to dismiss" the action as of

nonsuit. Plaintiff's attorneys filed petition for counsel fees against defendant, and defendant's attorney filed plaintiff's "certificate and affidavit" as an affidavit in support of defendant's resistance to judgment allowing counsel fees against him. After the petition was filed and after the court had announced its intention of allowing same, judgment as of nonsuit was tendered and signed by the court. It was held that at the time the petition for counsel fees was filed, the complaint was still a part of the record and the action was still pending, and the petition amounted to a motion to have the court act upon the prayer as made by plaintiff in her complaint, and the action of the court in allowing counsel fees to plaintiff's attorneys against defendant was affirmed. McFetters v. McFetters, 219 N. C. 731, 14 S. E. (2d) 833.

Establishing of One Cause for Divorce Is Sufficient Although Three Alleged.—In a suit for alimony without divorce where three separate grounds for divorce a mensa et thoro were alleged in the complaint, it was held not necessary for the plaintiff to establish all of them in order to sustain her action, it being sufficient under this section if she established the defendant's guilt of any of the acts that would constitute a cause for divorce from bed and board as enumerated in § 50-7. Albritton v. Albritton, 210 N. C. 111, 116, 185 S. E. 762. See also, Hagedorn v. Hagedorn, 211 N. C. 175, 189 S. E. 507.

Modification or Vacation of Order.—Where, within the exercise of his sound discretion, the superior court judge, having jurisdiction, has allowed the wife a reasonable subsistence, attorney's fees, etc., in her proceedings under the provisions of this section, the order of allowance may be thereafter modified or vacated as the statute provides upon application to the proper jurisdiction for the circumstances to be inquired into and the merits of the case determined. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863.

The amounts allowed for reasonable subsistence and counsel fees upon application for alimony pendente lite are determined by the trial court in his discretion and are not reviewable, although either party may apply for a modification before trial. Tiedmann v. Tiedmann, 204 N. C. 682, 169 S. E. 422.

Amendment of Prior Orders.—The court may reopen and amend prior orders awarding subsistence to wife and children. Wright v. Wright, 216 N. C. 693, 6 S. E. (2d) 555.

Amount Due under Prior Orders May Be Determined upon Motion.—The wife may have the amount of alimony due under prior orders determined by the court upon motion in the cause. Barber v. Barber, 217 N. C. 422, 8 S. E. (2d) 204.

An action is not ended by the rendition of a judgment, but is still pending until the judgment is satisfied for the purpose of motions affecting the judgment but not the merits of the original controversy, especially judgments allowing alimony with or without divorce, and where the defendant makes a general appearance in the original action for subsistence without divorce in which judgment is duly rendered for plaintiff, the court acquires jurisdiction over defendant by the proper service of notice of plaintiff's subsequent petition to recover past due installments, and defendant may not challenge the court's jurisdiction to hear plaintiff's motion and petition for such recovery by special appearance. Barber v. Barber, 216 N. C. 232, 4 S. E. (2d) 447.

The husband's "estate," from which the court may secure its order allowing a reasonable subsistence, etc., to the wife in her proceedings under the provisions of this section, includes within its meaning income from permanent property, tangible or intangible, or from the husband's earnings. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863; Crews v. Crews, 175 N. C. 168, 95 S. E. 149.

Technical alimony is the allowance made to the wife in suits for divorce, and may be secured by a proportionate part of the husband's estate judicially declared; or if he have no estate, it may be "made a personal charge against him," and it materially differs from a reasonable subsistence, etc., allowable in the wife's proceedings under the provisions of this section, where a divorce is not contemplated, and where, in accordance with this section, the order allowing her such subsistence may secure the same out of the husband's estate. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863.

"Alimony without Divorce."—While as to technical alimony the ordinary rule is that the title to the property designated to enforce the order of the court remains in the husband, and it will revert to him upon reconciliation with or the death of the wife, this rule does not apply to an allowance for the reasonable support of the wife, etc., under the provisions of this section, and the words used in the beginning of this section, "alimony without divorce," will not be construed to give the word "reasonable subsistence" for the wife, the meaning of technical alimony. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863.

Husband's Interest in Estate by Entireties Chargeable.—Where husband and wife own land by entireties, the rents and profits of the husband therein may be charged with the support of the wife and the minor children of the marriage upon his abandonment of her, under the provisions of this section, and for her counsel fees by chapter 123, Public Laws of 1921, in these proceedings; and to enforce an order allowing her alimony and attorney's fees, according to the statutes, a writ of possession may issue (sec. 50-17) to apply thereto the rents and profits as they shall accrue and become personalty; and an order for the sale of land conveying the fee simple title for the purpose of paying the allowance is erroneous. Holton v. Holton, 186 N. C. 355, 119 S. E. 751.

Defeasible Fee in Part of Husband's Land.—Where the judge, in the proceedings of the wife for an allowance of reasonable subsistence has impressed a trust upon the husband's land for the enforcement of the decree, the fact that in a part of the land he has only a defeasible fee, cannot prejudice him, and his exception on that ground cannot be sustained. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863.

Corpus of Husband's Estate May Be Assigned to Secure Allowance.—The court is authorized to assign the corpus of the husband's property to secure the allowance, and therefore it is immaterial to defendant whether the home place is taken and rents and profits therefrom used to provide a suitable residence for the wife and children or whether they are granted the right of occupancy of the home place, and it being found that such arrangement is most feasible and appropriate, the order will not be disturbed. Wright v. Wright, 216 N. C. 693, 6 S. E. (2d) 555.

Attachment Will Lie.—An attachment against the husband's land will lie in favor of the wife, abandoned by him, for a reasonable subsistence or allowance adjudged by the court, under the implied contract, that he support and maintain her, under the statute declaring and enforcing it and under the order of court; and attachment of the husband's land is a basis for the publication of summons. Walton v. Walton, 178 N. C. 73, 100 S. E. 176.

Wife's Claim Prior.—The wife's inchoate right to alimony makes her a creditor of her husband, enforceable by attachment, in case of her abandonment, which puts every one on notice of her claim and her priority over other creditors of her husband. Walton v. Walton, 178 N. C. 73, 100 S. E. 176.

Intervenor in Another Jurisdiction.—Where the wife has obtained an order for support from her husband, declared a lien on his property, under this section, in order for her to intervene in an action in another jurisdiction and claim priority over an attachment therein issued, it is necessary that she should show some valid service of process, or waiver by her husband in an appropriate civil action against him. Whether the lien of the wife will in any event prevail as against the lien of a valid attachment first levied in another court of equal concurrent jurisdiction, Quaere? Mitchell v. Talley, 182 N. C. 683, 109 S. E. 882.

No Decree before Final Hearing.—When the application is for alimony without divorce it cannot be decreed before the final hearing. Hodges v. Hodges, 82 N. C. 122.

No Final Judgment under Section.—A final judgment cannot be entered under this section as the necessity of such provisions for the wife and children will cease if the parties resume the marriage relation, and cannot properly be continued if the husband procures a divorce for the fault of the wife. Skittletharpe v. Skittletharpe, 130 N. C. 72, 40 S. E. 851; Hooper v. Hooper, 164 N. C. 1, 80 S. E. 64; Crews v. Crews, 175 N. C. 168, 95 S. E. 149.

An order for the payment of alimony is res judicata between the parties, but is not a final judgment, since the court has the power, upon application of either party, to modify the orders for changed conditions of the parties. Barber v. Barber, 217 N. C. 422, 8 S. E. (2d) 204.

Infant's Guardian May Subsequently Attack Consent Judgment.—Where the court in proceedings under this section approves a consent judgment, providing for the support and subsistence of the defendant's wife and child, the validity of such consent judgment may be later attacked by the child's authorized guardians on the ground of irregularity and that it is not binding on the minor. In re Reynolds, 206 N. C. 276, 173 S. E. 789.

Contempt.—In Little v. Little, 203 N. C. 694, 166 S. E. 809, the defendant was held in contempt for disobedience of the court's order for him to pay certain weekly sums to his wife under this section.

Under a consent judgment, entered in an action by a husband against his wife where no pleadings were filed, providing for certain money payments in lieu of alimony by the

husband to the wife and that it should be more than a simple judgment for debt and as binding upon plaintiff as if rendered under this section, and, upon proper cause shown, should subject him to such penalties as the court may require in case of contempt of its orders, the court may commit the plaintiff upon his failure to make the payments required. Edmundson v. Edmundson, 222 N. C. 181, 22 S. E. (2d) 576.

The mere fact that a defendant ordered to pay a certain sum monthly for the necessary subsistence of his wife and child has a right to move at any time for modification of the order does not support the conclusion that defendant's failure to comply with the order is willful. Smithwick v. Smithwick, 218 N. C. 503, 11 S. E. (2d) 455.

In contempt proceedings for willful failure to comply with an order of court, it is required that the court find facts supporting the conclusion of willfulness, and findings of fact that defendant had been ordered to pay, under the provisions of this section, a certain sum monthly for the necessary subsistence of his wife and child, and that defendant had failed to comply with the order, without findings as to the property possessed by defendant or his earning capacity, will not support a judgment attaching defendant for contempt. Id.

Habeas corpus after commitment for contempt, see In re Adams, 218 N. C. 379, 11 S. E. (2d) 163.

Cited in Jeffreys v. Hocutt, 195 N. C. 339, 343, 142 S. E. 226; Rodman v. Rodman, 198 N. C. 137, 150 S. E. 874; fees based on the defendant's means and condition in life. Black v. Black, 198 N. C. 809, 810, 150 S. E. 925; Brown v. Brown, 205 N. C. 4, 169 S. E. 818; Caudle v. Caudle, 206 N. C. 484, 485, 174 S. E. 304; Reynolds v. Reynolds, 208 N. C. 578, 182 S. E. 341; Hagedorn v. Hagedorn, 210 N. C. 164, 185 S. E. 768; Adams v. Adams, 212 N. C. 373, 193 S. E. 274; Dyer v. Dyer, 212 N. C. 620, 194 S. E. 278; Story v. Story, 221 N. C. 114, 19 S. E. (2d) 136.

§ 50-17. Alimony in real estate, writ of possession issued. — In all cases in which the court grants alimony by the assignment of real estate, the court has power to issue a writ of possession when necessary in the judgment of the court to do so. (Rev., s. 1568; Code, s. 1293; 1868-9, c. 123, s. 1; C. S. 1668.)

Title to Specific Property Remains in Husband.—Where alimony is alloted to the wife in specific property of the husband, the title to such property remains in him, and will revert at the death of the wife or upon a reconciliation. Taylor v. Taylor, 93 N. C. 418.

Chapter 51. Marriage.

Art. 1. General Provisions.

Art. 2. Marriage License.

Art. 1. General Provisions.

§ 51-1. Requisites of marriage; solemnization. —The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination, minister authorized by his church, or of a justice of the peace, and the consequent declaration by such minister or officer that such persons are man and wife, shall be a valid and sufficient marriage: Provided, that the rite of marriage among the Society of Friends, according to a form and custom peculiar to themselves, shall not be interfered with by the provisions of this chapter: Provided further, marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation. (Rev., s. 2081; Code, s. 1812; 1871-2, c. 193, s. 3; 1908, c. 47; 1909, c. 704, s. 2; 1909, c. 897; C. S. 2493.)

Cross References.—As to statutes concerning married women, see § 52-1 et seq. As to divorce and alimony, see § 50-1 et seq.

Editor's Note.—For article on common-law marriage in North Carolina, see 16 N. C. L. Rev. 259.

History of Marriage Laws in the State.—In State v. Bray, 35 N. C. 290, Ruffin C. J., in an interesting discussion tracing our marriage law shows that, originally in this colony, valid marriages could only be solemnized by ministers of the Church of England with the result, as we now know from the "Colonial Records," that a large part of the population were not legally married, owing to the scarcity of such ministers. See State v. Wilson, 121 N. C. 650, 656, 28 S. E. 416.

In 1715, ch. 1 of the Colonial Records, reciting the inconvenience from scarcity of ministers of the established Church, authorized the Governor of the colony to solemnize marriages, then, in 1741, Chapter 1, empowered justices of the peace to perform the ceremony. In 1766 by ch. 9, the privilege was extended to ministers of the Presbyterian Church, and at last, in 1778, ch. 7, to ministers of all other denominations and marriages according to the custom of the Society of Friends were also made valid. This list, made a little broader, is now in this section. See State v. Parker, 106 N. C. 711, 11 S. E. 517; State v. Wilson, 121 N. C. 650, 656, 28 S. E. 416.

Common Law Marriage Invalid.—"There is no such thing as marriage simply by consent in this State," said Ruffin, C. J., in State v. Samuel, 19 N. C. 177, and State v. Bray, 35 N. C. 290; Gaston, J., in State v. Patterson, 24 N. C. 346; Pearson, C. J., in Cooke v. Cooke, 61 N. C. 583. And the same is recognized as the law in the more recent cases of State v. Parker, 106 N. C. 711, 11 S. E. 517; State v. Melton, 120 N. C. 591, 26 S. E. 933; State v. Wilson, 121 N. C. 650, 656, 28 S. E. 416.

Celebration Essential.—No celebration was required by the Cannon Law prior to the Council of Trent, nor by the Civil Law, nor by the law in Scotland, nor in many states in this Union. In some states the question has never been decided. In other states celebration before some person authorized by law is held essential, as (after some hesitation) has been held to be the common law in England. Stewart

Marriage and Div., section 90; 14 Am. & Eng. Enc. 515. In the latter class is North Carolina. State v. Wilson, 121 N. C. 650, 656, 28 S. E. 416.

Same—Section Must Be Followed.—While consent is essential to marriage in this State, it is not the only essential, but it must be acknowledged in the manner and before some person prescribed by this section. State v. Wilson, 121 N. C. 650, 28 S. E. 416.

When Marriage Complete.—Marriage is in law complete when parties able to contract and willing to contract have actually contracted to be man and wife, in the forms and with the solemnities required by law. Consummation by carnal knowledge is not necessary to its validity. State v. Patterson, 24 N. C. 346.

Elder in Colored Church Can Celebrate.—An elder in the colored Methodist Church is "an ordained minister" of the Gospel within the meaning of the statute, and, as such, can celebrate the rites of matrimony. State v. Parker, 106 N. C. 711, 11 S. E. 517.

Indian Custom Not Valid Marriage.—There is but one law of marriage for all the residents of this State. Hence cohabitation between an Indian man and woman according to the customs of their tribe, by which the parties are at liberty to dissolve the connection at pleasure, does not constitute a marriage. State v. Ta-cha-na-tah, 64 N. C. 614, cited in notes in L. R. A. 1915E, 67; 57 L. R. A. 160.

"'A marriage procured by force or fraud is void ab initio, and may be treated as null by every court in which its validity may be incidently drawn in question.' 2 Kent Com., 66." Scroggins v. Scroggins, 14 N. C. 535, 538.

Marriage during Seduction Proceedings Valid.—A marriage contracted while one is under arrest for seduction is not contracted under duress. State v. Davis, 79 N. C. 603, cited in note in 43 L. R. A. 816.

Sham Marriage a Nullity.—A marriage pretendedly celebrated before an unauthorized person is a nullity and not capable of being legalized by consent. State v. Wilson, 121 N. C. 650, 28 S. E. 416.

Personating a Minister Not Criminal.—A private citizen who personates an ordained minister and, with the consent of the parties, solemnizes a marriage between a man and woman is not guilty of any criminal offense known to the common or statute law. State v. Brown, 119 N. C. 825, 25 S. E. 820.

Evidence of Marriage.—It is sufficient evidence of a marriage that it was solemnized by one in the known enjoyment of the office of justice of the peace, and acting as such. His commission need not be produced. State v. Robbins, 28 N. C. 23, 44 Am. Dec. 64, cited in note in 14 L. R. A. 541.

Retroactive Legislation.—It is competent for the Legislature by retrospective legislation to give validity to a marriage which is invalid by reason of the non-observance of some solemnity required by statute, aliter, where such marriage is a nullity. Cooke v. Cooke, 61 N. C. 583, cited in note in L. R. A. 1915E, 18.

§ 51-2. Capacity to marry.—All unmarried male persons of sixteen years, or upwards, of age, and all unmarried females of sixteen years, or upwards, of age, may lawfully marry, except as hereinafter forbidden: Provided, that females over fourteen years of age and under sixteen years of age may marry under a special license to be issued by the register of deeds, which said special license shall only be issued after there shall have been filed with the register of deeds a written consent to such marriage, signed by one of the parents of the female or signed by that person standing in loco parentis to such female, and the fact of the filing of such written consent shall be set out in said special license: Provided, that when the special license is procured by fraud and misrepresentation, the parent or person standing in loco parentis of the female shall be a proper party plaintiff in an action to annul said marriage: Provided, that all couples resident of the state of North Carolina who marry in another state must file a copy of their marriage certificate in the office of the register of deeds of the home county of the groom within thirty days from the date of their return to the state, as residents, which certificate shall be indexed on the marriage license record of the office of the register of deeds and filed with marriage license in his office; the fee for the filing and indexing said certificate shall be fifty cents: Provided, the failure to file said certificate shall not invalidate the marriage. (Rev., s. 2082; Code, s. 1809; R. C., c. 68, s. 14; 1871-2, c. 193; 1923, c. 75; 1933, c. 269, s. 1; 1939, c. 375; C. S. 2494.)

Cross References.—As to penalty for marrying female under fourteen, see § 14-319. As to what marriages may be declared void on application of either party, see § 50-4. As to requirement that persons married outside the state file with register of deeds a certificate showing compliance with §§ 51-9 to 51-14 on their return, see § 51-14.

Editor's Note.—Formerly, the legal age of marriage for males was placed at sixteen and for females at fourteen. This was amended by c. 75 Public Laws, 1923, which changes the legal age of marriage for females to sixteen, thus making it lawful for a female at sixteen to marry, but making it unlawful for a female under sixteen and over fourteen to marry, unless a special license shall be issued upon filing with the register of deeds a written consent to such marriage by one of the parents of the female or by one standing in loco parentis. Since the amendment provides for the marriage of female minors over fourteen and under sixteen, it looks as if the Legislature did not intend to change the age of consent to sixteen in section 51-3, which provides that the marriage of a female under fourteen and any male shall be void. See 1 N. C. L. R. 295.

Public Laws of 1933, c. 269, added the proviso, at the end of this section, relating to filing certificates by those marrying in another state. The 1939 amendment inserted the second proviso.

Annulment.—As to annulment under the 1939 amendment, see 17 N. C. Law Rev. 353.

Effect of Lack of Special License.—The marriage of a female between the ages of fourteen and sixteen without the written consent of her parent and without the special license required by this section is not void but voidable. Sawyer v. Slack, 196 N. C. 697, 146 S. E. 864.

Male of Marriageable Age Indictable for Seduction.—A male at the marriageable age of eighteen years is indictable for seduction. State v. Creed, 171 N. C. 837, 88 S. E. 511.

§ 51-3. Want of capacity; void and voidable marriages.—All marriages between a white person and a negro or indian, or between a white person and person of negro or indian descent to the third generation, inclusive, or between a Cherokee indian of Robeson county and a negro, or between a Cherokee indian of Robeson county and a person of negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under fourteen years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void: Provided, double first cousins may not marry; and Provided further, that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or indian, or of negro or indian descent to the third generation, inclusive, and for bigamy. (Rev., s. 2083; Code, s. 1810; R. C., c. 68, ss. 7, 8, 9; 1871-2, c. 193, s. 2; 1887, c. 245; 1911, c. 215, s. 2; 1913, c. 123; 1917, c. 135; C. S. 2495.)

Cross References.—As to suits to nullify marriages which were entered into contrary to the provisions of this section, see § 50-4. As to penal provisions for miscegenation, see §§ 14-181, 14-182. As to penal provisions for bigamy, see § 14-183. As to penal provisions for incest, see §§ 14-178, 14-179. As to penalty for marrying female under fourteen, see § 14-319.

Editor's Note.—Chapter 215, Laws 1911, amended this sec-

tion by striking out the words "Croatan Indians" wherever those words occurred in the section, and inserting in lieu thereof the words "Indians of Robeson County." Chapter 123, Laws 1913, amended the last named act by striking out the words "Indians of Robeson County" and inserting in lieu thereof the words "Cherokee Indians of Robeson County." See Goins v. Trustees, 169 N. C. 736, 738, 86 S. E. 629.

Power of Legislature.—The competency of the General Assembly to impose, implies the right to remove, the restraints and conditions incident to the formation of the marriage relation and the contract which creates it. Baity v. Cranfill, 91 N. C. 293, 297.

Section Expresses Public Policy.—During the existence of slavery, no marriage was recognized as binding when had between slaves, and marriage was prohibited by positive law when had between whites and free persons of color, who are within the specified degrees, and between the latter and slaves, and this in pursuance of a general public policy growing out of the slavery of a part of the population owned by masters. This policy still prevails in this section and inhibits the intermarriage of white and free persons of color into which the slave population had been immerged. Woodard v. Blue, 103 N. C. 109, 113, 9 S. E. 492.

Section Not Repugnant to U. S. Constitution. — This interdict is held not to be repugnant to the Constitution of the United States, or legislation under it. State v. Hairston, 63 N. C. 451.

Foreign Marriages Valid Here.—The relation, if legally created elsewhere, is recognized as a valid subsisting relation, when the parties come into this State from that of their former residence. State v. Rose, 76 N. C. 242; Woodard v. Blue, 103 N. C. 109, 114, 9 S. E. 492.

Attempt to Evade Provisions of Section.—The validity of a foreign marriage is not recognized here when parties having their domicile here, to evade our laws, go to a State which allows such marriage, with intent to return and keep up their domicile. State v. Kennedy, 76 N. C. 251. Woodard v. Blue, 103 N. C. 109, 114, 9 S. E. 492.

What Marriages Void Ab Initio.—Construing this section and section 50-4 together, it is held that the only marriages that are void ab initio are those within the last proviso of this section i. e., where one of the parties was a white person and the other a negro or an Indian or of negro or Indian descent to the third generation, inclusive, or bigamous marriages. And any other marriage need to be "declared void." Watters v. Watters, 168 N. C. 411, 84 S. E. 703. See also, Parks v. Parks, 218 N. C. 245, 10 S. E. (2d) 807.

Effect of Attempted Marriage between White and Negro.—A white person and a person of color cannot intermarry in North Carolina, and if an invalid marriage is contracted between persons of the two races and the parties cohabit together they are guilty of fornication. State v. Reinhardt, 63 N. C. 547; State v. Hairston, 63 N. C. 451.

What "Negro Descent" Includes.—In order to have a marriage annulled on the ground that it is "between a white person and a person of negro descent to the third generation inclusive," etc., it must be shown the ancestor of the generation stated must have been of pure negro blood. Ferrall v. Ferrall, 153 N. C. 174, 69 S. E. 60.

Bigamous Marriages Always Void.—The fact that a presumption which had arisen at the death of a woman's husband shields her from prosecution for bigamy upon marrying another, does not render the last marriage any the less bigamous or void if the first husband be, in fact, alive. Ward v. Bailey, 118 N. C. 55, 23 S. E. 926.

Where a wife attempts to marry again when no valid divorce a vinculo has been obtained from her living husband, such second attempted marriage is absolutely void and may be annulled by the husband of the second attempted marriage in an action instituted for that purpose. Pridgen v. Pridgen, 203 N. C. 533, 166 S. E. 591.

Impotency Renders Marriage Voidable.—Impotency in a husband does not render a marriage by him void ab initio, but only voidable by sentence of separation, and until such sentence, it is deemed valid and subsisting. Smith v. Morehead, 59 N. C. 360.

Marriage of Female under Fourteen Voidable.—This section provides that a marriage by a female under fourteen years of age, or a male person under sixteen, is void, but the proviso speaks of its being "declared void," and the construction of the statute by the courts has always been that the meaning is that such marriages are voidable. State v. Parker, 106 N. C. 711, 712, 11 S. E. 517.

Same—Ratification.—"If the parties, after arriving at the specified age of consent, continue to cohabit and live together as man and wife, this is a ratification." Coke on Littleton, 79; 1 Black. Com., 436; 1 Bish. Marriages and Divorce, 150 (4th Ed.), and Pearson, C. J., in Koonce v. Wallace, 52 N. C. 194; State v. Parker, 106 N. C. 711, 713, 11 S. E. 517.

The Proviso as to Death of Party.—The last proviso is broad and comprehensive in its declaration. Baity v. Cranfill, 91 N. C. 293, 300. It applies to marriages contracted before its enactment as well as those contracted thereafter. Baity v. Cranfill, 91 N. C. 293, 49 Am. Rep. 641. It has been applied to an incestuous marriage between an uncle and a niece. Baity v. Cranfill, 91 N. C. 293.

Same—Purpose.—The intention of the Legislature was to confine the power conferred upon the court in section 50-4, to declare void, or in a judicial proceeding to treat as void, except where the intermarriage is between the specified races or involves the offense of bigamy, to cases, whenever the power is exercised, during the lifetime of the parties, or after death, only when there has been no issue born to them. That is, after the death of one of the parties, a marriage must then stand with all its legal consequences, and its validity no longer open to controversy. Baity v. Cranfill, 91 N. C. 293, 300.

Same—Effect of Proviso.—The effect of the proviso is in the nature of a statute of limitation upon the delegated or recognized judicial power, confining its exercise with a single exception to the lifetime of the parties, and, if cohabitation and offspring followed, withholding it afterwards, so as not to operate as a posthumous bastardizing of children born to them. Baity v. Cranfill, 91 N. C. 293, 297.

Same—What Must Be Proven.—To bring a case of unlawful marriage within the last proviso to this section, it must be shown not only that one of the parties is dead but that cohabitation and the birth of issue followed the unlawful marriage. Ward v. Bailey, 118 N. C. 55, 23 S. E. 926.

§ 51-4. Prohibited degrees of kinship. — When the degree of kinship is estimated with a view to ascertain the right of kinspeople to marry, the half-blood shall be counted as the whole-blood: Provided, that nothing herein contained shall be so construed as to invalidate any marriage heretofore contracted in case where by counting the half-blood as the whole-blood the persons contracting such marriage would be nearer of kin than first cousins; but in every such case the kinship shall be ascertained by counting relations of the half-blood as being only half so near kin as those of the same degree of the whole-blood. (Rev., s. 2084; Code, s. 1811; 1879, c. 78; C. S. 2496.)

§ 51-5. Marriages between slaves validated. — Persons, both or one of whom were formerly slaves, who have complied with the provisions of section five, chapter forty, of the acts of the general assembly, ratified March tenth, one thousand eight hundred and sixty-six, shall be deemed to have been lawfully married. (Rev., s. 2085; Code, s. 1842; 1866, c. 40, s. 5; C. S. 2497.)

Cross Reference.—As to inheritance of children born of certain colored parents, see § 29-1, rule 13.

Section Is Valid.—The validity of this section in creating retroactively a legal marriage relation between slaves is upheld in Cooke v. Cooke, 61 N. C. 583; State v. Harris, 63 N. C. 1; State v. Adams, 65 N. C. 537; State v. Whitford, 86 N. C. 636; Long v. Barnes, 87 N. C. 329; Baity v. Cranfill, 91 N. C. 293, 298.

Provisions of the Act of 1866.—Sections 5, c. 40, 1866, reads: "That in all cases where man and woman, both or one of whom were lately slaves and are now emancipated, now cohabit together in the relation of husband and wife, the parties shall be deemed to have been lawfully married, as man and wife, at the time of the commencement of such cohabitation, although they may not have been married in due form of law." State v. Whitford, 86 N. C. 636, 637.

Power of Legislature.—The substance of marriage, the consent of the parties, existing, it was as clearly within the power of the Legislature to dispense with any particular formality as it was to prescribe such. State v. Whitford, 86 N. C. 636, 639; citing State v. Harris, 63 N. C. 1.

Relation Made Legal from Beginning.—This section legalized a cohabitation among those who were lately slaves, when still continued, and validates the relation as a marriage from its commencement; and, to give the act full force, directs the parties to go before the clerk or justice in

acknowledgment of assent, and to state the time when it began. Woodard v. Blue, 103 N. C. 109, 114, 9 S. E. 492.

Continuing Cohabitation Supplies Consent.—The necessary consent to marriage thereto is supplied under this section by continuing cohabitation. Battis v. Avery, 140 N. C. 184, 186, 52 S. E. 584; State v. Whitford, 86 N. C. 636, 639.

By force of the original consent of the parties while they were slaves, renewed after they became free, and by the performance of what was required by the statute, they became to all intents and purposes man and wife. State v. Harris, 63 N. C. 1, 5.

Same—Old Rule Adopted.—Our statute of 1866, owing to the peculiar status of slave marriages, adopted as to such marriages the rule which has long prevailed in Scotland, New York and several other states (and which was the rule of the civil law and of the Canon law till the Council of Trent), that consent, followed by cohabitation, constitutes a legal marriage. State v. Melton, 120 N. C. 591, 595, 26 S. E. 933.

Provision for Recordation.—Section 6 made the failure to have the acknowledgment recorded, in a specified time, a misdemeanor punishable at the discretion of the court. State v. Whitford, 86 N. C. 636, 638.

Same—Directory Only.—The provision as to acknowledgment was considered to be directory, so that a failure to comply with it, though a misdemeanor, did not affect the validity of the marriage. Bettis v. Avery, 140 N. C. 184, 186, 52 S. E. 584.

Same—Noncompliance Does Not Effect Marriage. — It has been held that an entry of the acknowledgment is not essential to the consummation of the marriage, and that a marriage constituted by operation of the act can not be avoided by a failure to have the acknowledgment entered of record. State v. Adams, 65 N. C. 537, 539; State v. Whitford, 86 N. C. 636, 639.

Art. 2. Marriage License.

§ 51-6. Solemnization without license unlawful.—No minister or officer shall perform a ceremony of marriage between any two persons, or shall declare them to be man and wife, until there is delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place, or by his lawful deputy. (Rev., s. 2086; Code, s. 1813; 1871-2, c. 193, s. 4; C. S. 2498.)

Actual Delivery Required.—This section requires an actual delivery, and constructive delivery will not suffice. So performance of the ceremony by a justice after a telephone communication informing him that the license has been mailed subjects him to the penalty prescribed by the next section. Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628.

Marriage without License Valid.—The failure to procure a license to marry will not invalidate a marriage otherwise good. State v. Parker, 106 N. C. 711, 11 S. E. 517; Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919; Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628.

Effect of Illegal License.—A marriage is not invalid because solemnized under an illegal license. Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919; Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628.

Same—Officer Penalized.—The only effect of marrying a couple without a legal license is to subject the officer or minister to the penalty of $200 prescribed by the next section. State v. Parker, 106 N. C. 711, 11 S. E. 517; State v. Robbins, 28 N. C. 23; Maggett v. Roberts, 112 N. C. 71, 74, 16 S. E. 919.

§ 51-7. Penalty for solemnizing without license.—Every minister or officer who marries any couple without a license being first delivered to him, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within two months after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars to any person who sues therefor, and he shall also be guilty of a misdemeanor. (Rev., ss. 2087, 3372; Code, s. 1817; R. C., c. 68, ss. 6, 13; 1871-2, c. 193, s. 8; C. S. 2499.)

In General.—The failure to comply with the requirements as to the license subjects the officer or minister to the penalty under this section, but the marriage is, notwithstanding, good to every intent and purpose. State v. Robbins, 28 N. C. 23; State v. Parker, 106 N. C. 711, 713, 11 S. E. 517.

Statute of Limitations.—A summons was issued to recover the penalty against a justice of the peace, under this section, for performing the marriage ceremony without the delivery of the license therefor to him, within less than a year from the time he had performed it: Held, that the plea of the statute of limitations, sec. 1-54, par. 2, could not be sustained. Wooley v. Bruton, 184 N. C. 438, 114 S. E. 628.

§ 51-8. License issued by register of deeds.—Every register of deeds shall, upon application, issue a license for the marriage of any two persons, if it appears to him probable that there is no legal impediment to such marriage. Where either party to the proposed marriage is under eighteen years of age, and resides with the father, or mother, or uncle, or aunt, or brother, or elder sister, or resides at a school, or is an orphan and resides with a guardian, the register shall not issue a license for such marriage until the consent in writing of the relation with whom such infant resides, or, if he or she resides at a school, of the person by whom said infant was placed at school, and under whose custody and control he or she is, is delivered to him, and such written consent shall be filed and preserved by the register. When it appears to the register of deeds that it is probable there is a legal impediment to the marriage of any person for whom a license is applied, he has power to administer to the person so applying an oath touching the legal capacity of said parties to contract a marriage. (Rev., s. 2088; Code, s. 1814; 1887, c. 331; 1871-2, c. 193, s. 5; C. S. 2500.)

Cross Reference.—As to penalty for issuing license unlawfully, see § 51-17.

Editor's Note.—Section 51-17 which provides the penalty for violation of the provisions of this section should be read along with this section and the annotations under the two sections should be considered together.

The two sections are in pari materia and should be construed together. Joyner v. Harris, 157 N. C. 295, 297, 72 S. E. 970; Bowles v. Cochran, 93 N. C. 398. The editor has deemed it expedient to place all constructions of the two sections under section 51-17.

§ 51-9. Health certificates required of applicants for licenses.—No license to marry shall be issued by the register of deeds of any county to a male or female applicant therefor except upon the following conditions: The said applicant shall present to the register of deeds a certificate executed within thirty days from the date of presentation showing that, by the usual methods of examination made by a regularly licensed physician, no evidence of any venereal disease in the infectious or communicable stage was found. Such certificate shall be accompanied by the original report from a laboratory approved by the state board of health for making such tests showing that the Wassermann or any other approved test of this nature is negative, such tests to have been made within thirty days of the time application for license is made.

Furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, no evidence of tuberculosis in the infectious or communicable stage was found.

And, furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, the applicant was found to be not subject to epileptic attacks, an

idiot, an imbecile, a mental defective, or of unsound mind. (1939, c. 314, s. 1; 1941, c. 218, s. 1.)

Editor's Note.—The 1941 amendment substituted the words "thirty days" for "seven days" with reference to physician's certificate, and for "two weeks" with reference to laboratory report.

For comment on the 1939 law, see 17 N. C. L. Rev. 354.

Defense in Action for Breach of Promise.—The fact that at the time of the breach of promise of marriage, license for the marriage of the parties could not be lawfully issued under this section is a defense to an action for damages for breach of promise of marriage. Winders v. Powers, 217 N. C. 580, 9 S. E. (2d) 131.

§ 51-10. Exceptions to foregoing section.—Exceptions to the above section are permissible only under the conditions hereinafter named:

When the medical history and physical examination of either applicant shows syphilis to be present, or when the laboratory test for syphilis is positive, and provided both applicants are informed that syphilitic infection is present, certificate may be issued and license granted only in the following instances: (1) When the applicant with syphilis has been under continuous weekly treatment with adequate dosage of standard arsenical and bismuth preparation given by a regularly licensed physician for a period of one year, and when such applicant also signs an agreement to continue such treatment until cured or probated. It is specified that the condition stipulated in subparagraph one above may be waived in instances in which the female applicant is pregnant and it is necessary to protect the legitimacy of the offspring. In such a case certificate may be granted and license issued provided the applicant with syphilis signs an agreement to take adequate, approved treatment until cured or probated. (2) When the female applicant is past the childbearing age, and provided the applicant with syphilis signs an agreement to take adequate treatment until cured or probated. (1939, c. 314, s. 2.)

§ 51-11. Who may execute certificate; form; filing copy with department of health.—Such certificate, upon the basis of which license to marry is granted, shall be executed by any reputable physician licensed to practice in the state of North Carolina, whose duty it shall be to examine such applicants and to issue such certificate in conformity with the requirements of §§ 51-9 to 51-14. If applicants are unable to pay for such examination, certificate without charge may be obtained from the local health officer or county physician.

Such certificate form shall be designed by the state board of health and shall be obtained by the register of deeds from the state board of health upon request.

Every examining physician under the provision of §§ 51-9 to 51-14 shall make and immediately file with the department of health of North Carolina a true copy of such certificate. (1939, c. 314, s. 3.)

§ 51-12. Eugenic sterilization for persons adjudged of unsound mind, etc.—If either applicant has been adjudged by a court of competent jurisdiction as being an idiot, imbecile, mental defective, subject to epileptic attacks, or of unsound mind, unless the applicant previously adjudged of unsound mind has been adjudged of sound mind by a court of competent jurisdiction, upon the recommendation of one or more practicing physicians who specialize in psychiatry, license to marry shall be granted only after eugenic sterilization has been performed on the applicant in accordance with state laws governing eugenic sterilization. (1939, c. 314, s. 3; 1943, c. 641.)

The 1943 amendment inserted the provision relating to being adjudged of sound mind.

§ 51-13. Penalty for violation.—Any violation of §§ 51-9 to 51-14, or any part thereof, by any person charged herein with the responsibility of its enforcement shall be declared a misdemeanor and shall be punishable by a fine of fifty dollars ($50.00) or imprisonment for thirty days, or both. (1939, c. 314, s. 3.)

§ 51-14. Compliance with requirement by residents who marry outside of state. — Residents of the state who are married outside of North Carolina, shall, within sixty days after they return to said state, file with the register of deeds of the county in which they live, a certificate showing that they have conformed to the requirements of the examination required by §§ 51-9 to 51-14 for those who are married in the state. (1939, c. 314, s. 2½.)

§ 51-15. Obtaining license by false representation misdemeanor.—If any person shall obtain a marriage license for the marriage of persons under the age of eighteen years by misrepresentation or false pretenses, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days, or both, at the discretion of the court. (Rev., s. 3371; 1885, c. 346; C. S. 2501.)

Cross Reference.—As to false pretenses generally, see § 14-100 et seq.

§ 51-16. Form of license.—License shall be in the following or some equivalent form:

To any ordained minister of any religious denomination, minister authorized by his church, or to any justice of the peace for.....county: A. B. having applied to me for a license for the marriage of C. D. (the name of the man to be written in full) of (here state his residence), aged .....years (race, as the case may be), the son of (here state the father and mother, if known; state whether they are living or dead, and their residence, if known; if any of these facts are not known, so state), and E. F. (write the name of the woman in full) of (here state her residence), aged.....years (race, as the case may be), the daughter of (here state names and residences of the parents, if known, as is required above with respect to the man). (If either of the parties is under eighteen years of age, the license shall here contain the following:) And the written consent of G. H., father (or mother, etc., as the case may be) to the proposed marriage having been filed with me, and there being no legal impediment to such marriage known to me, you are hereby authorized, at any time within sixty days from the date hereof, to celebrate the proposed marriage at any place within the said county. You are required, within sixty days after you shall have celebrated such marriage, to return this license to me at my office with your signature subscribed to the certificate under this license, and with the blanks therein filled according to the facts, under

penalty of forfeiting two hundred dollars to the use of any person who shall sue for the same.

Issued this .... day of ....., 19.. L. M.,
Register of Deeds of.....County

Every register of deeds shall designate in every marriage license issued the race of the persons proposing to marry by inserting in the blank after the word "race" the words "white," "colored" or "indian," as the case may be. The certificate shall be filled up and signed by the minister or officer celebrating the marriage, and also be signed by one or more witnesses present at the marriage, who shall add to their names their place of residence, as follows:

I, N. O., an ordained or authorized minister of (here state to what religious denomination, or justice of the peace, as the case may be), united in matrimony (here name the parties), the parties licensed above, on the ..... day of ....., 19...., at the house of P. R., in (here name the town, if any, the township and county), according to law.

Witness present at the marriage: .....N. O.
S. T., of (here give residence). (Rev., 2089; Code, s. 1815; 1899, c. 541, ss. 1, 2; 1871-2, c. 193, s. 6; 1909, c. 704, s. 3; 1917, c. 38; C. S. 2502.)

Local Modification.—Bladen: 1941, c. 95.

License Not Issued Until Filled Out.—A blank marriage license, though signed by the register of deeds, is not issued until filled up and handed to the person who is to be married, or to some one for him, and, if at the time of such issuance the register has become functus officio, the failure to record it does not render him liable to the penalty imposed by sections 51-18 and 51-19, for failure to record the substance of each marriage license issued. Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919.

§ 51-17. Penalty for issuing license unlawfully.—Every register of deeds who knowingly or without reasonable inquiry, personally or by deputy, issues a license for the marriage of any two persons to which there is any lawful impediment, or where either of the persons is under the age of eighteen years, without the consent required by law, shall forfeit and pay two hundred dollars to any parent, guardian, or other person standing in loco parentis, who sues for the same. (Rev., s. 2090; Code, s. 1816; 1895, c. 387; 1901, c. 722; R. C., c. 68, s. 13; 1871-2, c. 193, s. 7; C. S. 2503.)

I. In General.
II. Duties of Register.
III. Diligence Required.
IV. Consent of Parent.
V. The Action.
A. In General.
B. Pleading and Practice.

I. IN GENERAL.

Editor's Note.—In connection with this section, see § 51-8 and the editor's note thereto.

Object of Section.—This section is a wise and beneficient one, the object being to protect the parties themselves, and the community as well, from hasty and improvident matrimonial alliances, which eventually produce discord and unhappiness in the family—one of the essential units of our republican household—and are hurtful to society in many ways. Joyner v. Harris, 157 N. C. 295, 297, 72 S. E. 970. See also, Trolinger v. Boroughs, 133 N. C. 312, 315, 45 S. E. 662; Gray v. Lentz, 173 N. C. 346, 350, 91 S. E. 1024.

The section is remedial in its nature. Gray v. Lentz, 173 N. C. 346, 350, 91 S. E. 1024.

Construed with Section 2500.—This section and section 2500 are in pari materia and should be construed together. Joyner v. Harris, 157 N. C. 295, 297, 72 S. E. 970; Bowles v. Cochran, 93 N. C. 398; Gray v. Lentz, 173 N. C. 346, 91 S. E. 1024.

II. DUTIES OF REGISTER.

Duty Highly Important.—To all persons who believe that the welfare of human society depends largely upon the family relation, and that the contract of marriage should be defended by careful and just laws for the purpose of guarding against legal impediments and to prevent the marriage of those under a certain age, when the parties are presumed not to be able to contract, the duty of the register of deeds, the officer in our State charged with the duty of issuing marriage licenses, seems most important and most solemn. That officer must exercise his duties carefully and conscientiously, and not as a mere matter of form. Trolinger v. Boroughs, 133 N. C. 312, 315, 45 S. E. 662; Agent v. Willis, 124 N. C. 29, 32 S. E. 322; Julian v. Daniels, 175 N. C. 549, 555, 95 S. E. 907.

Cannot Be Delegated.—A register of deeds can not delegate to another the duty of making the required reasonable inquiry into the legal competency of persons applying for a license to marry. Cole v. Laws, 108 N. C. 185, 12 S. E. 985.

Delivery to Third Party Prohibited.—This section prohibits the register from permitting the completed license to pass from the office and beyond his control into the hands of any applicant acting for a party to the proposed marriage. Coley v. Lewis, 91 N. C. 21, 24.

Where the register delivered a license complete in form to one with instructions not to give it to the parties until the mother's consent in writing was given and it was never presented to the mother or her consent obtained, but the marriage ceremony was performed under it, it was held that the register is liable to the penalty. Coley v. Lewis, 91 N. C. 21.

Inquiry by Deputy Will Not Excuse Register.—If a party to a marriage is under the age authorized by law, the register can not excuse himself from liability, because his deputy or agent made proper inquiry, if he did not make the inquiry himself. The trust is personal to him. Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919.

III. DILIGENCE REQUIRED.

Reasonable Inquiry.—The register violating these requirements is not liable to the penalty when he has made reasonable inquiry and has been deceived, without laches on his part. Agent v. Willis, 124 N. C. 29, 32 S. E. 322; Cole v. Laws, 104 N. C. 651, 656, 10 S. E. 172; Williams v. Hodges, 101 N. C. 300, 303, 7 S. E. 786; Laney v. Mackey, 144 N. C. 630, 633, 57 S. E. 386; Gray v. Lentz, 173 N. C. 346, 91 S. E. 1024.

Same—Not a Mere Formality.—The requirement of reasonable inquiry is not merely a formal matter, which is met by taking the oaths of the husband or other parties unknown to the register, but it is expressive of a sound principle of public policy designed to protect immature persons from hasty and ill-advised marriages, made without the consent of their parents or guardians or those having properly the care over them. Julian v. Daniels, 175 N. C. 549, 555, 95 S. E. 907.

Same—What Required.—By reasonable inquiry is meant such inquiry as renders it probable that no impediment to the marriage exists. Bowles v. Cochran, 93 N. C. 398.

It would seem that "reasonable inquiry" involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register. This is the rule upon which banks act in paying checks, and surely in the matter of such grave importance as issuing a marriage license the register should not be excused upon a less degree of care. Trolinger v. Boroughs, 133 N. C. 312, 317, 45 S. E. 662; Furr v. Johnson, 140 N. C. 157, 52 S. E. 664; Joyner v. Harris, 157 N. C. 295, 298, 72 S. E. 970.

Same—Register Not Required to Examine Witnesses.—Section 51-8 does not require that the register shall make inquiry by examination of the witnesses in such cases under oath, but merely declares that he shall have "the power to do so." His using, or failing to use, such discretionary power is merely a circumstance to be considered by the jury. Furr v. Johnson, 140 N. C. 157, 52 S. E. 664; Joyner v. Harris, 157 N. C. 295, 298, 72 S. E. 970.

Same—Sworn Statement of Stranger Insufficient.—It is not sufficient that he takes the sworn statement of the parties or their friends not known to him. Snipes v. Wood, 179 N. C. 349, 102 S. E. 619, citing Gray v. Lentz, 173 N. C. 346, 91 S. E. 1024.

Same—Question for Jury.—See "Pleading and Practice," this note.

Illustrations of Reasonable Inquiry.—When a man of good character and reliable applied for a license, and produced to the register a written statement purporting to give the age of the female as over eighteen years, and also the name and residence of the parents, and the person producing the statement said it was true, though no name was signed to it, it was held that the register had made such inquiry as was required of him, and was not liable for the penalty. Bowles

v. Cochran, 93 N. C. 398. For other cases where the inquiry was held reasonable, see Walker v. Adams, 109 N. C. 481, 13 S. E. 907; Harcum v. Marsh, 130 N. C. 154, 41 S. E. 6.

But when a register of deeds issues a license for the marriage of a woman under 18 years of age, without the assent of her parents, upon the application of one of whose general character for reliability he was ignorant, and who falsely stated the age of the woman, without making any further inquiry as to his sources of information, it was held, that he had not made such reasonable inquiry into the facts as the law required, and he incurred the penalty for the neglect of his duty in that respect. Cole v. Laws, 104 N. C. 651, 10 S. E. 172. Again, where the uncontradicted evidence showed that the register took the word of the prospective bridegroom and his friend, neither of whom he knew, the same rule applies. To the same effect are the following cases: Williams v. Hodges, 101 N. C. 300, 7 S. E. 786; Trolinger v. Boroughs, 133 N. C. 312, 45 S. E. 662; Laney v. Mackey, 144 N. C. 630, 57 S. E. 386; Morrison v. Teague, 143 N. C. 186, 55 S. E. 521; Joyner v. Harris, 157 N. C. 295, 301, 72 S. E. 970; Julian v. Daniels, 175 N. C. 549, 95 S. E. 907; Snipes v. Wood, 179 N. C. 349, 102 S. E. 619.

IV. CONSENT OF PARENT.

Consent Must Be Written.—A register of deeds is not permitted to issue a marriage license, where one of the parties is under eighteen years of age, until the consent in writing of the person under whose charge he or she is, shall be delivered to the register. The written consent is a condition precedent to the issue of the license. Coley v. Lewis, 91 N. C. 21.

Section Prescribes Order.—Section 51-8 fixes the order in importance of those from whom the register of deeds should obtain the written consent for the marriage of minors under eighteen years of age. Littleton v. Haar, 158 N. C. 566, 74 S. E. 12.

Same—Father's Consent if Possible.—The language of our statute requires the written consent of the father, if living and not unable or disqualified in some way to give it. Littleton v. Haar, 158 N. C. 566, 570, 74 S. E. 12.

Thus when a minor resides with the father, which the register could reasonably have ascertained, the written consent of the mother only indicates that the subject of the application for the license is under the age specified, and does not preclude her father from suing the register of deeds for the penalty provided for issuing a license without his consent. Littleton v. Haar, 158 N. C. 566, 74 S. E. 12.

Same—Stepfather Not Included.—The word "father" used in the section does not include stepfather, and the written consent of the mother, the father being dead, authorizes the issuing of the license. Owens v. Munden, 168 N. C. 266, 267, 84 S. E. 257.

Same—When Mother's Consent Sufficient.—It was held in Littleton v. Haar, 158 N. C. 566, 74 S. E. 12, that the consent of the persons named in section 51-8 and in the order named should be obtained, the effect of the decision being that if the child is living with father and mother, the written consent of the father is necessary, and if with the mother, the father being dead, that her consent is sufficient. Owens v. Munden, 168 N. C. 266, 267, 84 S. E. 257.

V. THE ACTION.

A. In General.

Jurisdiction.—A justice of the peace has jurisdiction of an action against a register of deeds for unlawfully issuing a marriage license. Dixon v. Haar, 158 N. C. 341, 74 S. E. 1.

When the action under this section is against the register and his sureties, it is therefore for the amount of the bond ($10,000) to be discharged upon payment of $200, and the superior court has jurisdiction. Joyner v. Roberts, 112 N. C. 111, 114, 16 S. E. 917.

Venue.—An action for the penalty against a register of deeds under this section should be tried in the county wherein the cause of action arises. Dixon v. Haar, 158 N. C. 341, 74 S. E. 1. And if brought in the wrong county, it should be removed and not dismissed. Id.

Action Abates upon Register's Death.—Under section 1-74, an action for a penalty, against a register of deeds and the surety on his official bond, abates on the death of the officer. Wallace v. McPherson, 139 N. C. 297, 51 S. E. 897.

Register Not Indictable.—The issuing of a marriage license by a register of deeds in violation of the section is not an indictable offense, unless the illegal act be done mala fide. State v. Snuggs, 85 N. C. 542.

B. Pleading and Practice.

Allegations in Complaint.—In an action under this section it is essential that the complaint should allege that the register issued the license knowingly or without reasonable inquiry. Maggett v. Roberts, 108 N. C. 174, 12 S. E. 890.

Presumption as to Time of Issuance.—The presumption is that a marriage license, signed by a register of deeds, was issued during his term of office. The burden of proving the contrary is on the party asserting it. Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919.

Burden of Proof.—The burden of proof is upon the plaintiff to show that the officer issued the license when he knew of the impediment to the marriage, or that it was forbidden by the law, or when he had not made reasonable inquiry. Furr v. Johnson, 140 N. C. 157, 52 S. E. 664; Trolinger v. Boroughs, 133 N. C. 312, 45 S. E. 662; Joyner v. Harris, 157 N. C. 295, 298, 72 S. E. 970.

Question for Jury as to Reasonable Inquiry. — Where there is a conflict of evidence, whether there has been "reasonable inquiry" is to be submitted to the jury upon all the evidence under proper instructions. Joyner v. Roberts, 114 N. C. 389, 19 S. E. 645; Harcum v. Marsh, 130 N. C. 154, 41 S. E. 6; Furr v. Johnson, 140 N. C. 157, 52 S. E. 664.

The fact that the register administered an oath to the applicant and his friend does not, of itself, exonerate him. He is permitted by the statute to do so, that he may better elicit the facts, and his doing so or failing to do so would be but a circumstance for the jury to consider. Gray v. Lentz, 173 N. C. 346, 354, 91 S. E. 1024.

Same—Nonsuit Erroneous.—If the evidence is conflicting as to the reasonableness of the inquiry made by the register, the question should be submitted to the jury, and a judgment as of nonsuit thereon is erroneously entered. Lemmons v. Sigman, 181 N. C. 238, 106 S. E. 764.

Reasonable Inquiry Question of Law When Facts Admitted.—It is well settled that the facts being admitted or found by the jury, the question as to what is "reasonable inquiry" is one of law for the court. Joyner v. Roberts, 114 N. C. 389, 19 S. E. 645; Trolinger v. Boroughs, 133 N. C. 312, 45 S. E. 662; Snipes v. Wood, 179 N. C. 349, 102 S. E. 619; Julian v. Daniels, 175 N. C. 549, 95 S. E. 907.

Same—Instructions to Jury.—If the facts are admitted, it is the duty of the court to instruct the jury whether they are sufficient to constitute reasonable inquiry; if they are in controversy, it is the duty of the court to instruct the jury that certain facts to be determined from the evidence do or do not constitute reasonable inquiry. Spencer v. Saunders, 189 N. C. 183, 126 S. E. 420.

Evidence.—In a civil suit against a register evidence of nolo contendere pleaded by the husband in a criminal action is not admissible. Snipes v. Wood, 179 N. C. 349, 102 S. E. 619.

Proof of the officer's failure to administer the oath to the applicant for the license is admissible to show a lack of reasonable inquiry. Laney v. Mackey, 144 N. C. 630, 57 S. E. 386.

The testimony of a witness as to the age of the woman depending solely upon her statements to him, which he repeated to the register when the license was applied for, is not substantive evidence of her age. Joyner v. Harris, 157 N. C. 295, 72 S. E. 970.

§ 51-18. Record of licenses and returns; originals filed.—Every register of deeds shall keep a book (which shall be furnished on demand by the board of county commissioners of his county) on the first page of which shall be written or printed:

Record of marriage licenses and of returns thereto, for the county of ....., from the ..... day of ....., 19...., to the ..... day of ....., 19....., both inclusive.

In said book shall be entered alphabetically, according to the names of the proposed husbands, the substance of each marriage license and the return thereupon, as follows: The book shall be divided by lines with columns which shall be properly headed, and in the first of these, beginning on the left, shall be put the date of issue of the license; in the second, the name in full of the intended husband, with his residence; in the third, his age; in the fourth, his race and color; in the fifth, the name in full of the intended wife, with her residence; in the sixth, her age; in the seventh, her race and color; in the eighth, the name and title of the minister or officer who celebrated the marriage; in the ninth, the day of the celebration; in the tenth, the place of the celebration; in the

eleventh, the names of all or at least three of the witnesses who signed the return as present at the celebration. The original license and return thereto shall be filed and preserved. (Rev., s. 2091; Code, s. 1818; 1899, c. 541, s. 3; 1871-2, c. 193, s. 9; C. S. 2504.)

§ 51-19. Penalty for failure to record.—Any register of deeds who fails to record, in the manner above prescribed, the substance of any marriage license issued by him, or who fails to record, in the manner above prescribed, the substance of any return made thereon, within ten days after such return made, shall forfeit and pay two hundred dollars to any person who sues for the same. (Rev., s. 2092; Code, s. 1819; 1871-2, c. 193, s. 10; C. S. 2505.)

Legislature May Relieve.—An act of the Legislature relieving the register from the penalty for failure to record passed after an action was brought to recover the penalty, but before judgment, is constitutional. Bray v. Williams, 137 N. C. 387, 49 S. E. 887.

Penalty Is in Alternative. — The penalty given by this section is in the alternative, either for the failure to record the substance of the license issued or for failure to record the substance of the return. Maggett v. Roberts, 108 N. C. 175, 178, 12 S. E. 890.

Jurisdiction.—Notwithstanding the penalties imposed do not exceed $200 (and if only one was sought to be recovered a justice of the peace would have jurisdiction), a plaintiff may unite several causes of action for several penalties against same party, in same complaint, and if the aggregate amount thereof exceeds $200 the superior court will have jurisdiction. Maggett v. Roberts, 108 N. C. 174, 12 S. E. 890.

Prosecution in Nature of Person. — An action against a register of deeds to recover the penalties imposed for a failure to comply with the provisions of the statute in relation to issuing marriage licenses under this section must be prosecuted in the name of the person who sues therefor, and not in the name of the State. Maggett v. Roberts, 108 N. C. 174, 12 S. E. 890.

Where Register Functus Officio.—If the filling up and handing the paper previously signed to the party proposing to be married was done, not by the register but by an agent, and at the time the register was functus officio, the paper would be equally invalid because lacking the signature of a de facto register, and there could be no penalty for not recording it. Maggett v. Roberts, 112 N. C. 71, 16 S. E. 919.

Chapter 52. Married Women.

Art. 1. Powers and Liabilities of Married Women.

Art. 2. Acts Barring Reciprocal Property Rights of Husband and Wife.

Art. 3. Free Traders.

Art. 1. Powers and Liabilities of Married Women.

§ 52-1. Property of married woman secured to her.—The real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried. (Rev., s. 2093; Const., Art. X, s. 6; C. S. 2506.)

Cross References.—See also the North Carolina Constitution, Article X, section 6. As to conveyances by husband and wife, see § 39-7 et seq. As to capacity to dispose of property by will, see § 31-2. As to curtesy, see § 52-16. As to dower, see § 30-4 et seq.

Editor's Note.—For a discussion of the history of this legislation and of many of the earlier cases construing it, see Ball v. Paquin, 140 N. C. 83, 52 S. E. 410. For a discussion of the early law regarding married women's contracts, see the notes under the following section.

It will be noted that this section is identical with the constitution, art. 10, sec. 6 and the annotations under that section should be referred to.

Common Law Rules.—At common law, marriage was an absolute gift to the husband of all the personal property of the wife in possession, and the same became his property instantly on the marriage; and it was a qualified gift of all the personal property adversely held, and all the choses in action of the wife, which became the husband's absolutely upon his reduction of the same into possession, during the coverture, with the right in case the wife die to administer on her estate, and in that character to collect, and after payment of her debts to hold the surplus to his own use, without obligation to distribute to any one. O'Connor v. Harris, 81 N. C. 279, 282.

It was also competent to the husband having choses in action "jure mariti" to assign the same for value, or as a security to pay his debts, and the assignment availed to pass the right to the assignee to collect and have the proceeds as his absolute property, if collected during coverture, just as the husband might have done if he had kept and

reduced it into possession himself. O'Connor v. Harris, 81 N. C. 279, 282.

When Provision Took Effect.—The Constitution of 1868, Art. 10, sec. 6, took effect for purposes of domestic policy, in April, 1868, and not when Congress approved it. Freeman v. Lide, 176 N. C. 434, 435, 97 S. E. 402, and cases cited.

Power of Legislature.—The Legislature may abolish all the incapacities of married women, and give them full power to contract as feme sole. Pippen v. Wesson, 74 N. C. 437, 445.

A Broad and Comprehensive Provision.—This provision is very broad, comprehensive and thorough in its terms, meaning and purpose, and plainly gives and secures to the wife the complete ownership and control of her property, as if she were unmarried, except in the single respect of conveying it. Walker v. Long, 109 N. C. 510, 512, 14 S. E. 299.

Effect of Section.—A married woman holds her separate real and personal property free from any debts, obligations, or engagements of her husband, according to the provisions of our constitution and this section. Graves v. Howard, 159 N. C. 594, 75 S. E. 998.

The real property of the wife, whether acquired before or after marriage, remains her sole and separate property (N. C. Const., Art. X, sec. 6), and therein the husband has no vested interest, but merely the power to refuse his written assent to her conveyance thereof. Kilpatrick v. Kilpatrick, 176 N. C. 182, 96 S. E. 988; Vann v. Edwards, 135 N. C. 661, 666, 47 S. E. 784.

In construing section six of article 10 of our Constitution and statutes passed on the subject, "it has been held that neither the constitutional provision nor the statutes referred to had the effect of enabling a married woman living with her husband to bind herself by contracts strictly in personam, but that the constitutional provision declaring her property, real and personal, to be her sole and separate estate was intended and operated to enable her to charge her personal estate by contracts on the principle by which, under recognized equitable principles, she was formerly allowed to charge her separate estate in the hands of a trustee and her real estate also by contract in which her husband joined and the wife's privy examination taken. Ball v. Paquin, 140 N. C. 83, 52 S. E. 410; Farthing v. Shields, 106 N. C. 289, 10 S. E. 998; Flaum v. Wallace, 103 N. C. 296, 9 S. E. 567; Pippen v. Wesson, 74 N. C. 437." Warren v. Dail, 170 N. C. 406, 409, 87 S. E. 126.

Same—Wife's Obligations. — The purpose of this section was to protect the estate of the wife from liability for her husband's debts arising under the common law by reason of the coverture, but it was not intended to protect the property from her own obligations. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784; Brinkley v. Ballance, 126 N. C. 393, 35 S. E. 631; Royal v. Southerland, 168 N. C. 405, 406, 84 S. E. 708.

Applies to Property Not Otherwise Secured.—This section does not apply to cases where the property is secured to the wife by marriage settlement, or deed of gift or will. The property is thereby secured to her by act of the parties. The object of the act is to secure the property to the wife by act of law when it has not been done by act of the parties, who may make restrictions and limitations over. Cooper v. Landis, 75 N. C. 526, 533.

Acquisition of Property Not Affected. — It is settled law in North Carolina that this section imposes no limit upon the wife's power to acquire property by contracting with her husband or any other person, but only operates to restrain her from, or protect her in, disposing of property already acquired by her. Osbourne v. Wilkes, 108 N. C. 661, 667, 13 S. E. 285, and cases cited.

Meaning of "Convey."—The word "convey" must be restricted in its operation to such property as is by law required to be transferred by a written instrument. The words "convey and devise" are technical terms, relating to the disposition of interests in real property. It would not be technically or legally correct to speak of conveying personal property by a verbal sale of it, or even by a writing, any more than it would be to speak of devising it by last will and testament. Vann v. Edwards, 135 N. C. 661, 669, 47 S. E. 784.

Conveyances of Personalty.—A married woman has the absolute power to dispose of her property by will, and she can convey it "with the written assent of her husband," which does not restrict her freedom in the disposition of her personal property, as conveyances apply only to realty. Everett v. Ballard, 174 N. C. 16, 17, 93 S. E. 385.

There is no restriction whatever upon the right of a married woman to dispose of her personalty as fully and freely as if she had remained unmarried, either in the Constitution or by any statute. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784; Ball v. Paquin, 140 N. C. 83, 91, 52 S. E. 410; Rea v. Rea, 156 N. C. 529, 532, 72 S. E. 873.

Statute of Limitations.—Since a wife may now maintain an action without the joinder of her husband, when it concerns her separate property, and against her husband, when it is between the husband and wife, and there being no exception in favor of the wife when she holds a claim against him, the statute of limitation will run against a note thus held by her. Graves v. Howard, 159 N. C. 594, 75 S. E. 998.

Money from Sale of Wife's Realty.—Money received by the husband from a sale of the wife's lands before the adoption of the Constitution in 1868 belonged to him absolutely, unless at the time he received it he agreed to invest it for her in some other way. Kirpatrick v. Holmes, 108 N. C. 206, 12 S. E. 1037.

But if the wife acquired the title and the marriage occurred prior to 1868, and the sale was made subsequent to that time, the proceeds would be her separate estate; and if the husband purchased other lands with such proceeds and took title in his own name, in the absence of any special agreement to the contrary, he would become a trustee for her. Kirpatrick v. Holmes, 108 N. C. 206, 12 S. E. 1037.

Vested Rights Protected.—The husband's right to receive and appropriate to his own use his wife's distributive share in her mother's estate was vested, under the law then in force, of which no subsequent legislation could deprive him, without his consent. Morris v. Morris, 94 N. C. 613, 616.

Separate Estate.—Prior to the adoption of the Constitution of 1868 it was held that deeds by which property was conveyed to a trustee for the sole and separate use of a married woman created an active trust in the trustee, and this was held because otherwise the statute would execute the use, and the husband would, as husband, become vested with rights in and control over his wife's property. But by the Constitution of 1868, as declared in Walker v. Long, 109 N. C. 510, 14 S. E. 299, the wife's property was rendered secure to her, and not subject to the control of, or to the debts or obligations of, her husband. So that it was no longer necessary to invoke the fiction of the law in order to protect the wife's property from the husband or his creditors in deeds made subsequent to the adoption of that Constitution. Freeman v. Lide, 176 N. C. 434, 438, 97 S. E. 402. See also Pippen v. Wesson, 74 N. C. 437, 443.

Since the adoption of the Constitution of 1868, she has or can have the legal as well as the equitable estate, but this of itself does not give her the unrestricted disposition of her property. Its only effect was to do away with the necessary concurrence of the trustee by vesting in her the legal title. Her common law disabilities still continue. Sanderlin v. Sanderlin, 122 N. C. 1, 3, 29 S. E. 55.

Lien on Married Woman's Property.—By construing sections 6 and 3 of Article X of the Constitution in connection with section 44-1, the conclusion is sustained that for all debts contracted for work and labor done, a lien is given upon the property of a married woman. Ball v. Paquin, 140 N. C. 83, 95, 52 S. E. 410.

Presumption as to Property Delivered to Husband.—Under the change made in the law of married women's property rights by this section and the Constitution, Article X, section 6: Held, where she receives checks from her parents as personal gifts to her which she endorses and delivers to her husband, there is a presumption that he receives the money in trust for her, and in the absence of evidence that it was a gift, she may recover the same in her action against him, or, after his death, against his personal representative. Etheredge v. Cochran, 196 N. C. 681, 146 S. E. 711.

What Is Sufficient Written Assent to Make Wife's Deed Valid.—Since the deed of the husband conveys no title to his wife's land, but evidences his written assent to her conveyance, upon reason and authority, subscribing his name under seal to her deed, and acknowledging his execution thereof as required by law, is a sufficient written assent to make her deed valid. Joiner v. Firemen's Ins. Co., 6 F. Supp. 103, 104.

Cited in Martin v. Bundy, 212 N. C. 437, 193 S. E. 831.

§ 52-2. Capacity to contract.—Subject to the provisions of § 52-12, regulating contracts of wife with husband affecting corpus or income of estate, every married woman is authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, but no conveyance of her real estate shall be valid unless made with the written assent of her husband as provided by section six of article ten of the constitution, and her

privy examination as to the execution of the same taken and certified as now required by law. (Rev., s. 2094; Code, s. 1826; 1871-2, c. 193, s. 17; 1911, c. 109; C. S. 2507.)

I. In General.
II. Powers Conferred.
III. Liabilities Incurred.
IV. The Action for Breach.

Cross Reference.

As to conveyances by husband and wife, see § 39-7 et seq.

I. IN GENERAL.

Editor's Note.—The common law, by which the contract of a married woman was void, continued to be the law in courts of law in this State until the adoption of the Constitution of 1868. Pippen v. Wesson, 74 N. C. 437, 441.

At common law the contract of a married woman was void, but it was held in equity that she might have an estate settled to her separate use, and, that although she had no power to bind herself personally, she might with the concurrence of the trustee specifically charge her separate estate, and the courts of equity would enforce the charge against the property. But her contracts, in order to create a charge must refer expressly, or by necessary implication, to the separate estate as a means of payment, this being in the nature of an appointment or appropriation. Knox v. Jordan, 58 N. C. 175; Frazier v. Brownlow, 38 N. C. 237; Sanderlin v. Sanderlin, 122 N. C. 1, 3, 29 S. E. 55; Pippen v. Wesson, 74 N. C. 437, 441.

Ch. 193, sec. 17, Public Laws 1871-2, known as the Marriage Act was the first legislation directly regulating the power of a married woman to make contracts. It seems that the only change made by this act was that the consent of the husband in writing was required in order to allow her to charge her separate estate. See Arrington v. Bell, 94 N. C. 247. This Marriage Act was in effect for about forty years and was frequently construed by the courts.

The present section known as the Martin Act was passed March 6, 1911 and has entirely changed the law. This renders obsolete the numerous constructions of the previous legislation. The general effect of these former provisions is discussed by Rodman, J., in Pippin v. Wesson, 74 N. C. 437.

See 13 N. C. Law Rev. 62.

Section Constitutional.—This section is constitutional and valid. Warren v. Dial, 170 N. C. 406, 87 S. E. 126.

The effect of this section is to take married women out of the classification which the law recognized, prior to its enactment, and to make them, with respect to capacity to contract, sui juris. This section is held to mean what it plainly says, that, except as to contracts with her husband, in which the forms required by § 52-12, must still be observed, and except in conveyances of her real estate, in which case her privy examination must still be taken and her husband's written consent had, a married woman can now make any and all contracts so far as "to effect her real and personal property," in the same manner and to the same effect as if she were unmarried. Taft v. Covington, 199 N. C. 51, 55, 153 S. E. 597. See Davis v. Cockman, 211 N. C. 630, 191 S. E. 322.

By virtue of this section, a married woman may make contracts affecting her personal and real property as though she were unmarried, except that her privy examination must be taken and her husband's written consent had to conveyances of her real property, and the requirements of § 52-12 must be met in contracts between her and her husband affecting her real property or the corpus of her personal property. Martin v. Bundy, 212 N. C. 437, 193 S. E. 831.

Operates Prospectively. — This section operates prospectively and does not apply to contracts made prior to its adoption. Stephens v. Hicks, 156 N. C. 239, 72 S. E. 313.

Section Does Not Apply to Estates in Entirety.—The doctrine of title by entireties between husband and wife as it existed at common law remains unchanged by statute in this State. And this section has been construed, in Jones v. Smith, 149 N. C. 318, 62 S. E. 1092, as not affecting estates held by husband and wife as tenants by the entirety. Davis v. Bass, 188 N. C. 200, 124 S. E. 566.

Cited in Etheredge v. Cochran, 196 N. C. 681, 146 S. E. 711.

II. POWERS CONFERRED.

Legislature Has Power to Remove Restraints.—The restraints upon a married woman's power to "contract" rest upon the statute, not upon the Constitution, and of course can be removed by statute. There is no prohibition upon the Legislature to do so, and indeed the court in many instances has indicated to the Legislature that justice might be facilitated by more liberal legislation in that regard. Finger v. Hunter, 130 N. C. 529, 530, 41 S. E. 890.

Effect of Section.—The effect of the Martin Act (this section) is to take married women out of the classification which the law recognized, prior to its enactment, and to make them, with respect to capacity to contract, sui juris. Dorsey v. Corbett, 190 N. C. 783, 130 S. E. 842; Satterwhite v. Gallagher, 173 N. C. 525, 92 S. E. 369; Thrash v. Ould, 172 N. C. 728, 90 S. E. 915; Warren v. Dail, 170 N. C. 406, 87 S. E. 126; Royall v. Southerland, 168 N. C. 405, 84 S. E. 708; Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820; Tise v. Hicks, 191 N. C. 609, 612, 132 S. E. 560.

This section should be held to mean what it plainly says, that, except as to contracts with her husband, in which the forms required by sec. 52-12, must still be observed, and except in conveyances of her real estate, in which case her privy examination must still be taken and her husband's written consent had, a married woman can now make any and "all contracts so far as to affect her real and personal property, in the same manner and to the same effect as if she were unmarried." Warren v. Dail, 170 N. C. 406, 410. 87 S. E. 126; Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820; Everett v. Ballard, 174 N. C. 16, 18, 93 S. E. 385.

Same—Practically Makes Free Traders.—This section practically constitutes married women free traders as to all their ordinary dealings. Price v. Charlotte Electric Railway Co., 160 N. C. 450, 452, 76 S. E. 502; Croom v. Goldsboro Lumber Co., 182 N. C. 217, 219, 108 S. E. 735.

Bound by Estoppel.—Since, in this state, the common law disabilities of a married woman to contract, with certain exceptions, have been removed, she is bound by an estoppel the same as any other person. Tripp v. Langston, 218 N. C. 295, 10 S. E. (2d) 916.

Conveyances of Personalty.—This section does not extend to conveyances of personalty by the wife to the husband, and certainly when it would lead to an absurd conclusion, as in instances of a gift from the wife to her husband. Rea v. Rea, 156 N. C. 529, 72 S. E. 573.

Section 52-12 Not Affected.—This section does not alter the effect of section 52-12, requiring certain findings and conclusions by the probate officer to a conveyance of her lands directly to her husband, and her deed not probated accordingly, is void. Singleton v. Cherry, 168 N. C. 402, 84 S. E. 698; Butler v. Butler, 169 N. C. 584, 86 S. E. 507.

III. LIABILITIES INCURRED.

Liable for Breach of Contract.—When the Legislature authorized a married woman "to contract and deal so as to affect her real and personal property in the same manner, and with the same effect, as if she were unmarried," it authorized contracts for breach of which they would be liable as fully as if they had remained unmarried. Everett v. Ballard, 174 N. C. 16, 18, 93 S. E. 385.

Same—Contract to Convey Realty.—On a breach of a married woman's contract to convey her land, she may be held responsible in damages, as in other contracts by which she is properly bound. Warren v. Dail, 170 N. C. 406, 410, 87 S. E. 126. Though the contract to convey is made without the written consent of the husband. Everett v. Ballard, 174 N. C. 16, 93 S. E. 385.

Same—No Specific Performance.—This section means that when a married woman makes an executory contract to convey land and her privy examination is not taken she can only be held in damages, and that specific performance may not, as formerly, be enforced. Warren v. Dail, 170 N. C. 406, 410, 87 S. E. 126.

Liability of Wife Where Husband Agent.—Under this section, a wife may appoint her husband as her agent for doing in her behalf work which may be of such dangerous character as to be a menace to the safety of others, and is liable with him for his negligence that, while acting as her agent, he proximately caused an injury to a child who found explosive caps negligently left by him while causing her lot to be blasted and excavated on a bordering street. Krachanake v. Mfg. Co., 175 N. C. 435, 95 S. E. 851; Barnett v. Cotton Mills, 167 N. C. 580, 83 S. E. 826, cited and applied in Richardson v. Libes, 188 N. C. 112, 123 S. E. 306.

Where Husband Is Alien.—A married woman whose husband is an alien and never visited or resided in the United States is personally liable on her contracts. Levi v. Marsha, 122 N. C. 656, 29 S. E. 832.

Liable When Partner or Surety.—Since the passage of the Martin Act, a wife has been held liable jointly and severally on her contracts whenever a partner or a surety. Bristol Grocery Co. v. Bails, 177 N. C. 298, 299, 98 S. E. 768.

A wife by becoming surety on the obligations of her husband creates a direct and separate liability to the creditor of the husband which makes her personally responsible, under this section, without requiring the statutory formali-

ties necessary to the validity of certain contracts made directly between the wife and her husband. Royal v. Southerland, 168 N. C. 405, 84 S. E. 708.

Assessments on Stock.—In Robinson v. Turrentine, 59 Fed. 554, construing the former provisions of this section, it was held that the purchase of stock by a married woman was not a "contract" within the terms of the section and that the wife was liable upon an assessment although the stock was purchased without the written consent of her husband.

Husband Still Liable for Funeral Expenses.—The common-law rule that the husband is liable for the funeral expenses of his deceased wife and for "necessaries" during their married life is not affected by this section, when there is nothing to show an express promise to pay on her part, or that the articles were sold on her credit or under such circumstances as to make her exclusively or primarily liable according to the equitable principles of indebitatus assumpsit. Bowen v. Daugherty, 168 N. C. 242, 84 S. E. 265.

IV. THE ACTION FOR BREACH.

Inability to Get Husband's Consent Immaterial.—The rule that a married woman is liable in damages for failure to specifically perform her contract to convey her lands under the Martin Act may not be successfully defeated upon the ground that she may be unable to get the consent of her husband to the conveyance, in the absence of any bad faith. Warren v. Dail, 170 N. C. 406, 87 S. E. 126.

Wife May Claim Personal Property Exemption.—Under the provisions of Article X, section 1 of our Constitution, and of this section, the wife may claim her personal property exemption from the assets of a partnership with her husband when the validity of the partnership contract is not questioned by them under the provisions of section 52-12, and each has consented that such exemption should be allowed to the other therefrom. Bristol Grocery Co. v. Bails, 177 N. C. 298, 98 S. E. 768.

Estoppel of Wife.—As to the doctrine of title by estoppel applying to a married woman under the provisions of this section, who has joined with her husband in a deed to his lands with warranty, the wife's interest not appearing on the face of the instrument, but which title the wife afterwards acquired, Quaere? Builders, etc., Co. v. Joyner, 182 N. C. 518, 109 S. E. 259.

Judgment against Wife as Surety.—In Royal v. Southerland, 168 N. C. 405, 81 S. E. 708, it was held that under this section a judgment could be rendered against a wife upon her obligation as surety to her husband. Thrash v. Ould, 172 N. C. 728, 731, 90 S. E. 915.

Judgment Enforced by Execution.—It was held in Lipinsky v. Revell, 167 N. C. 508, 83 S. E. 820, Brown, J., construing this section, that judgment could be rendered against a married woman upon her contracts and enforced by execution, though she had not specifically charged her property with payment thereof. Thrash v. Ould, 172 N. C. 728, 730, 90 S. E. 915.

Where Specific Performance May Be Decreed.—Since the wife's contracts are valid without the written assent of her husband, and she is liable in damages for a breach thereof, specific performance may be decreed where the husband has subscribed his name under seal to her deed. Joiner v. Firemen's Ins. Co., 6 F. Supp. 103.

§ 52-3. Capacity to draw checks.—Bank deposits made by or in the name of a married woman shall be paid only to her or on her order, and her check, receipt or acquittance shall be valid in law to fully discharge the bank from any and all liability on account thereof. (Rev., s. 2095; 1891, c. 221, s. 30; 1893, c. 344; C. S. 2508.)

§ 52-4. Conveyance or lease of wife's land requires husband's joinder.—No lease or agreement for a lease or sublease or assignment by any married woman of her lands or tenements, or chattels real, to run for more than three years, or to begin in possession more than six months after its execution, or any conveyance of any freehold estate in her real property, shall be valid, unless the same be executed by her and her husband, and proved or acknowledged by them, and her free consent thereto appear on her examination separate from her husband, as is now or may hereafter be required by law in the probate of deeds of femes covert. (Rev., s. 2096; Code, s. 1834; 1871-2, c. 193, s. 26; C. S. 2509.)

Cross References.—As to the formalities necessary in married women's conveyances, see § 39-7 et seq. As to exceptions, see §§ 35-12, 52-5, and 52-6. As to title to swamp lands reclaimed vesting in board of education by written consent without privy examination of feme covert, see § 151-81.

Written Assent of Husband Required.—The power of a married woman to convey her property is regulated by the Constitution, Art. X, sec. 6, and must be exercised by the written assent of her husband. Walton v. Bristol, 125 N. C. 419, 34 S. E. 544; Stallings v. Walker, 176 N. C. 321, 97 S. E. 25; Kilpatrick v. Kilpatrick, 176 N. C. 182, 96 S. E. 988.

Same—How Expressed.—His assent need not be by deed, for he has nothing to convey; and his joining with her in the instrument is sufficient. Jones v. Craigmiles, 114 N. C. 613, 19 S. E. 638, and cases there cited. His signing the instrument merely as a witness is a sufficient "written assent." Jennings v. Hinton, 126 N. C. 48, 35 S. E. 187. A letter written by him is also sufficient. Brinkley v. Ballance, 126 N. C. 393, 35 S. E. 631; Stallings v. Walker, 176 N. C. 321, 324, 97 S. E. 25.

Husband's Indorsement Does Not Validate Deed. — The written assent of her husband indorsed on the deed does not meet with the constitutional and statutory requirements necessary for her to make a valid conveyance. Council v. Pridgen, 153 N. C. 443, 69 S. E. 404; Jackson v. Beard, 162 N. C. 105, 107, 78 S. E. 6.

Privy Examination Required.—In order to convey a married woman's separate real estate or fix a charge upon it, her privy examination is required. Council v. Pridgen, 153 N. C. 443, 69 S. E. 404; Jackson v. Beard, 162 N. C. 105, 107, 78 S. E. 6.

Deed Made in Foreign State.—A deed executed by a married woman in another state, according to the laws of such state, for realty in this State, without privy examination of the wife, as required by section 39-7, is void. Smith v. Ingram, 130 N. C. 100, 40 S. E. 984.

Conveyance as Executrix.—It is not necessary that a married woman should be privily examined as to the execution by her of a lease for land, as executrix under the will of a former husband, and when she was a feme sole. Darden v. Neuse, etc., Steamboat Co., 107 N. C. 437, 12 S. E. 46.

Action for Damages for Breach.—A married woman may be held in damages for the breach of her contract in the lease of her separate lands for more than three years, though her husband has not joined therein or given his written consent thereto Miles v. Walker, 179 N. C. 479, 102 S. E. 884. The opinion in this case draws the distinction between suits for specific performance on the leases mentioned in this section and actions for damages on same. Ed. Note.

§ 52-5. Separation by divorce or deed; husband non compos.—Every woman who is living separate from her husband, either under a judgment of divorce by a competent court or under a deed of separation executed by said husband and wife and registered in the county in which she resides, or whose husband has been declared an idiot or a lunatic, shall be deemed and held, from the docketing of such judgment, or from the registration of such deed, or from the date of such idiocy or lunacy and during its continuance, a free trader, and may convey her personal estate and her real estate without the assent of her husband. (Rev., s. 2116; Code, s. 1831; 1871-2, c. 193, s. 23; 1880, c. 35; C. S. 2529.)

Cross Reference.—As to alternative method by which wife of lunatic may convey real estate, see § 35-12.

Editor's Note on Separation Agreements.—Separation deeds have been rare in this State, and, for a long period of time, they were declared absolutely void in North Carolina, as they were in England. This was the conclusion reached in Collins v. Collins, (1866) 62 N. C. 153. The decision was based upon the intention expressed in the Code to regard man and wife as one, upon the decisions of the English courts regarding the marital bond as inseparable, and upon the general grounds of public policy in preserving the marriage bond.

After the case of Collins v. Collins, supra, decided in 1866, and before the next case involving separation agreements, decided twenty years later, Sparks v. Sparks (1886) 94 N.

C. 527, the legislature had enacted, in furtherance of the constitutional provisions guaranteeing married women's rights, this section.

In the Sparks case, supra, on page 532 the court says: "This section, passed in February, 1872, in furtherance of the constitutional provision, by which the property of the woman, on her marriage, is secured to her as separate estate, implies a possible legal separation of the parties, by voluntary agreements, and defines her condition and rights resulting therefrom."

Later in Smith v. King, (1890) 107 N. C. 273, 12 S. E. 57, the court states that separation deeds are not regarded with favor in North Carolina. In that case, the deed had been rescinded by a subsequent cohabitation, and therefore the court did not decide what the effect of that deed would have been, if not so rescinded. In a subsequent case, Cram v. Cram (1895) 116 N. C. 288, 21 S. E. 197, there is an intimation that separation deeds are not looked upon with favor.

The leading case in North Carolina, Archbell v. Archbell, 158 N. C. 408, 74 S. E. 327, was decided in 1912. Although the separation deed in that case was held to be void because of an invalid certificate of the probate officer, Justice Hoke said, that due to the "distinct recognition of deeds of this character . . . we are constrained to hold that public policy with us is no longer peremptory on this question, and that under certain conditions these deeds are not void as a matter of law."

From these decisions it clearly appears that separation deeds are valid "under certain conditions." In North Carolina, there is no direct decisions which would show these necessary "certain conditions." However there is general agreement as to requisites in practically all jurisdictions. As stated in the Archbell case, 158 N. C. 408, 74 S. E. 327, supra, these requisites are as follows: (1) That there must be a separation already existing or immediately to follow the execution of the deed; (2) that the separation deed must be made for an adequate reason, of such a kind that it is necessary for the health or happiness of one or the other; (3) that it must be reasonable and fair to the wife, considering the condition of the parties. In North Carolina, in addition, the separation deed must conform to the statutory requirements, concerning deeds between husband and wife. See 2 N. C. L. R. 193, 194.

Section Constitutional.—This section is a valid exercise of the legislative power. Lancaster v. Lancaster, 178 N. C. 22, 23, 100 S. E. 120.

When Husband's Assent Unnecessary.—The husband's assent cannot be required when either by reason of mental incapacity he is unable to give assent, or by his conduct in abandoning his wife or maliciously turning her out of doors he has practically emancipated her, for in both cases she must rely upon her property or her labor for her support. Lancaster v. Lancaster, 178 N. C. 22, 23, 100 S. E. 120.

This section has been referred to in a number of cases as an exception to the constitutional provision which requires the assent of the husband, though not directly construed. In these cases it is stated that the husband's assent to the conveyance of the realty is required except in cases under secs. 52-5 and 52-6. Council v. Pridgen, 153 N. C. 443, 69 S. E. 404; Harvey v. Johnson, 133 N. C. 352, 45 S. E. 644; Sanderlin v. Sanderlin, 122 N. C. 1, 29 S. E. 55; Farthing v. Shields, 106 N. C. 289, 295, 10 S. E. 998; Hodges v. Hill, 105 N. C. 130, 10 S. E. 916; Flaum v. Wallace, 103 N. C. 296, 304, 9 S. E. 567; Sparks v. Sparks, 94 N. C. 527; Lancaster v. Lancaster, 178 N. C. 22, 23, 100 S. E. 120.

Declaration of Insanity Necessary.—In order for a wife to become a free trader because of insanity of her husband it is necessary that he shall be declared insane. Abbott v. Hancock, 123 N. C. 99, 102, 31 S. E. 268.

Section 35-12 an Alternative Method.—Section 35-12 is not in contradiction of this section, but is an optional alternative method to which the wife can resort if for any reason it should be desirable that in the future the record of the deed should show that at the time of the conveyance the husband had been adjudged a lunatic. Lancaster v. Lancaster, 178 N. C. 22, 23, 100 S. E. 120.

Cited in Fisher v. Fisher, 217 N. C. 70, 6 S. E. (2d) 812.

§ 52-6. Abandonment by husband. — Every woman whose husband abandons her, or maliciously turns her out of doors, shall be deemed a free trader, so far as to be competent to contract and be contracted with, and to bind her separate property, but the liability of her husband for her reasonable support shall not thereby be impaired. She may also convey her personal estate and her real estate without the assent of her husband. (Rev., s. 2117; Code, s. 1832; 1871-2, c. 193, s. 24; C. S. 2530.)

Section Constitutional.—This section was held constitutional in Hall v. Walker, 118 N. C. 377, 24 S. E. 6; Brown v. Brown, 121 N. C. 8, 27 S. E. 998, 38 L. R. A. 242; Finger v. Hunter, 130 N. C. 529, 531, 41 S. E. 890.

There is no constitutional inhibition on the Legislature to declare by statute when and how a wife may become a free trader, and notwithstanding the provisions of Article X, § 6, to the effect that a married woman may convey her separate realty with the written consent of her husband, the provision of this section is valid, and in such cases § 52-4, requiring the execution of her deed by her husband and her separate examination taken, does not apply. Keys v. Tuten, 199 N. C. 368, 154 S. E. 631.

When Husband an Alien.—In Troughton v. Hill, 3 N. C. 406, it was held that when the husband became an alien the wife became a feme sole for the purpose of contracting, and might acquire and transfer property. Hall v. Walker, 118 N. C. 377, 381, 24 S. E. 6.

An action to recover possession of land may be sustained against a married woman alone, whose husband is an alien, resides abroad, or has abandoned his wife. Finley v. Saunders, 98 N. C. 462, 4 S. E. 516.

Where Husband Fugitive from Justice.—In an action against a married woman where the husband is a nonresident and a fugitive from justice, the husband is not a necessary party. Heath, etc., Co. v. Morgan, 117 N. C. 504, 23 S. E. 489.

Departure from State Not Required.—This section does not require the departure of the husband from the State to enable the wife to use her property for her support. Vandiford v. Humphrey, 139 N. C. 65, 51 S. E. 893.

Abandonment Sufficient.—Abandonment of the wife by the husband is sufficient for her to execute a valid conveyance of her lands without his joinder. Bachelor v. Norris, 166 N. C. 506, 82 S. E. 839; Pardon v. Paschal, 142 N. C. 538, 55 S. E. 365; Campbell v. Campbell, 221 N. C. 257, 20 S. E. (2d) 53; Nichols v. York, 219 N. C. 262, 13 S. E. (2d) 565.

Same—Tort Actions.—Under a reasonable construction of the Constitution and this section, a wife abandoned by her husband may maintain an action in tort, in her own name, against a third person. Brown v. Brown, 121 N. C. 8, 27 S. E. 998.

Same—Wife Need Not Wait Six Months.—Under this section a wife is not required to wait six months (the time required to elapse before entitling her to bring an action for divorce) before she is permitted to make contracts. Vandiford v. Humphrey, 139 N. C. 65, 51 S. E. 893.

Evidence of Abandonment to Be Submitted to Jury.—In order for a wife abandoned by her husband to become a free trader under this section, it is not necessary that the wife be abandoned for the statutory time necessary to constitute grounds for divorce, and where, in an action by her to set aside her deed executed without the written consent of her husband, the defense is set up that at the time of its execution she had been abandoned by her husband, and pleadings in her action for divorce alleging abandonment at the time are introduced in evidence, the issue of abandonment should be submitted to the jury even though abandonment was not an issue in the divorce proceedings, and the granting of a judgment on the pleadings in her favor is error. Keys v. Tuten, 199 N. C. 368, 154 S. E. 631.

Cited in Hudson v. Hudson, 208 N. C. 338, 180 S. E. 597.

§ 52-7. Husband cannot convey, etc., wife's land without her consent; not liable for his debts.— No real estate belonging at the time of marriage to females, married since the third Monday of November, one thousand eight hundred and forty-eight, nor any real estate by them subsequently acquired, nor any real estate acquired on and since the first day of March, one thousand eight hundred and forty-nine, by femes covert, who were such on the said third Monday of November, one thousand eight hundred and forty-eight, shall be subject to be sold or leased by the husband for the term of his own life or any less term of years, except by and with the consent of his wife first had and obtained, to be ascertained and ef-

fectuated by deed and privy examination, according to the rules required by law for the sale of lands belonging to femes covert. And no interest of the husband whatever in such real estate shall be subject to sale to satisfy any execution obtained against him; and every such sale is hereby declared null and void. (Rev., s. 2097; Code, s. 1840; R. C., c. 56; 1848, c. 41; C. S. 2510.)

Editor's Note.—See 8 N. C. Law Rev. 476.

Formerly Husband Could Lease and Convey.—At common law the husband, upon the marriage, was seized in right of his wife of a freehold interest in her lands during their joint lives. After the birth of issue he was seized of an estate in his own right, called tenancy by the curtesy initiate. Coke Lit., 67 A. This estate, if he survived his wife, was called tenancy by the curtesy consummate, and inured to his benefit for life. Either as tenant by marital right or as tenant by curtesy initiate, the husband was entitled to the rents and profits and might lease or convey his estate, and it might be sold under execution against him. Taylor v. Taylor, 112 N. C. 134, 135, 16 S. E. 1019.

Former Right to Rents and Profits. — Where a man was married, and the land was acquired by his wife before the adoption of the Constitution of 1868, and the act called the "Marriage Act," he was a tenant by the curtesy initiate, notwithstanding the Act of 1848. Houston v. Brown, 52 N. C. 161. If he was the tenant by the curtesy initiate, he was necessarily entitled to the possession. Wilson v. Arentz, 70 N. C. 670. And if entitled to the possession, he had a right to the pernancy of the rents and profits, etc. Morris v. Morris, 94 N. C. 613, 618.

In General.—This section expressly provides that a husband shall not have power to dispose of his wife's land for his own life or any less term of years without her assent, nor can the same be subject to sale to satisfy any execution obtained against him. Bruce v. Nicholson, 109 N. C. 202, 206, 13 S. E. 790.

Purpose and Effect of Section.—Neither this section nor the Constitution of 1868 abolished tenancy by the curtesy initiate, but since the passage of this section such tenancy confers no right which the husband can assert against the wife as respects her real estate acquired after that act took effect—the intention and effect of the act being to provide for the wife a home which she can not be deprived of either by her husband or his creditors. Taylor v. Taylor, 112 N. C. 134, 16 S. E. 1019.

Same—Tenancy by Curtesy Limited.—It has been decided that neither this section nor the Constitution of 1868 destroyed such tenancy, although the husband was stripped almost entirely of his common law rights therein during the coverture. Walker v. Long, 109 N. C. 510, 14 S. E. 299; Taylor v. Taylor, 112 N. C. 134, 137, 16 S. E. 1019.

The tenancy by the curtesy initiate is stripped of its common law attributes till there only remains the husband's bare right of occupancy with his wife, with the right of ingress and egress (Manning v. Manning, 79 N. C. 293), and the right to the curtesy consummate contingent upon his surviving her. * * * The husband is still seized in law of the realty of his wife, shorn of the right to take the rents and of the power to lease her lands. * * * He has by the curtesy initiate, a freehold interest, but not an estate in the property. Taylor v. Taylor, 112 N. C. 134, 137, 16 S. E. 1019. See Walker v. Long, 109 N. C. 510, 14 S. E. 299.

Vested Rights Not Impaired.—By this section the husband's vested rights as tenant by the curtesy initiate to the rents and profits were not impaired. Cobb v. Rasberry, 116 N. C. 137, 21 S. E. 176.

Same—Sufficient Complaint.—A complaint by a husband which states that he was married to his wife in 1841, that he had by her several living children, and that she acquired the land in question by a deed executed to her in 1864, is sufficient to show his title as tenant by the courtesy initiate of the land. Wilson v. Arentz, 70 N. C. 670. And where this curtesy exists the fact that this section deprives the husband of the power to lease the land without the consent of his wife, will not prevent his recovery of the land by an action without joining his wife as a party. Wilson v. Arentz, 70 N. C. 670.

Curtesy Consummate Can Be Sold.—A tenant by the curtesy consummate may sell his estate, notwithstanding this section. Long v. Graeber, 64 N. C. 431.

Lease Not Complying with Section Is Void.—A written lease of land for a term of five years, made subsequent to the passage of this section, without the privy examination of the wife, is void as to the wife and passes no interest to the husband in the rents and profits thereof. Richardson v. Richardson, 150 N. C. 549, 64 S. E. 510.

Who Can Sue to Recover Possession.—A tenant, by the curtesy initiate, could have sued alone for and recovered possession of the lands and the rents and profits, in this State, before the adoption of the present constitution. Walker v. Long, 109 N. C. 510, 511, 14 S. E. 299. But since the passage of the section the husband cannot maintain an action in his name alone to recover lands of which he is tenant by the curtesy initiate, but the wife can maintain such action, either by joining her husband or suing alone. Walker v. Long, 109 N. C. 510, 14 S. E. 299; Thompson v. Wiggins, 109 N. C. 508, 14 S. E. 301.

Same—Where Husband Conveys Land to Wife.—A conveyance of land from husband to wife will pass the legal estate of the vendor and enable the vendee to sustain an action to declare title and recover possession. Walker v. Long, 109 N. C. 510, 14 S. E. 299.

Statute of Limitations Not Applicable.—A tenant by the curtesy initiate has not such estate in the land of his wife that will put in operation the statute of limitations against either the husband or wife in favor of one claiming title by adverse possession. Jones v. Coffey, 109 N. C. 515, 14 S. E. 84.

Husband Can Surrender Curtesy.—Since the section was enacted a husband has the right to surrender his estate as tenant by the curtesy initiate and let it merge in the reversion of his wife, who, with the assent of her husband may sell the same and receive the whole of the purchase money. Teague v. Downs, 69 N. C. 280.

Land Purchased with Wife's Money.—Where land is purchased by a husband with his wife's money, the proceeds of the sale of her real estate, and title is taken to the husband alone, a resulting trust is created in favor of the wife, and a purchaser from the husband with notice stands affected by the same trust. Lyon v. Akin, 78 N. C. 258.

§ 52-8. Capacity to make will.—Every married woman has power to devise and bequeath her real and personal estate as if she were a feme sole; and her will shall be proved as is required of other wills. (Rev., s. 2098; Code, s. 1839; 1871-2, c. 193, s. 31; C. S. 2511.)

Cross Reference.—See also, § 31-2.

May Defeat Curtesy by Will.—Since the Constitution of 1868 a married woman may by will deprive her husband of curtesy in her separate estate. Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655; Freeman v. Lide, 176 N. C. 434, 97 S. E. 402; Tiddy v. Graves, 126 N. C. 620, 36 S. E. 127. And she can so devise her separate estate whether the trust is active or passive. Freeman v. Lide, supra.

§ 52-9. May insure husband's life.—Any feme covert in her own name, or in the name of a trustee with his assent, may cause to be insured for any definite time the life of her husband, for her sole and separate use, and she may dispose of the interest in the same by will, notwithstanding her coverture. (Rev., s. 2099; C. S. 2512.)

Cross Reference.—As to right of husband to insure life for the benefit of wife and children, see the North Carolina Constitution, Article X, section 7.

§ 52-10. Earnings and damages from personal injury are wife's property.—The earnings of a married woman by virtue of any contract for her personal service, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried. (1913, c. 13, s. 1; C. S. 2513.)

Editor's Note.—In the concurring opinion in Patterson v. Franklin, 168 N. C. 75, 79, 84 S. E. 18, Clark, C. J. states that this section was passed as a result of the decision in Price v. Charlotte Electric Co., 160 N. C. 450, 76 S. E. 502. The same is mentioned in Kirkpatrick v. Crutchfield, 178 N. C. 348, 352, 100 S. E. 602.

Former Provisions.—The law formerly prevailing allowed the husband the earnings of his wife and the proceeds of her labor but the husband could confer upon the wife the right to her earnings, upon which they became her separate estate, giving her a right of action to recover them in her own name. Patterson v. Franklin, 168 N. C. 75, 84 S. E. 18.

In General.—This section and C. S. § 454 give to a married woman the fullest and most untrammeled power to bring actions, even against her husband and in all cases whatever. Crowell v. Crowell, 180 N. C. 516, 105 S. E. 206; In re Will of Witherington, 186 N. C. 153, 119 S. E. 11. And her right to sue her husband extends to tort actions. Crowell v. Crowell, 181 N. C. 66, 106 S. E. 149.

Nonresident Wife Has Right of Action for Husband's Tort.—The right of a married woman to maintain an action against her husband to recover for negligent injury is not limited to residents of this state, and a nonresident wife may maintain an action here against her nonresident husband on a transitory cause of action which arises in this state, and she is entitled to any recovery as her separate property. Bogen v. Bogen, 219 N. C. 51, 12 S. E. (2d) 649.

Recovery for Loss of Consortium.—It is now well settled in practically every jurisdiction that the wife has a right to the consortium of her husband and can recover when there has been an intentional and direct invasion or breach of the marital relations. Brown v. Brown, 124 N. C. 19, 32 S. E. 320. In every case, however, the recovery was allowed only where there was an intentional invasion. The right of the wife to recover in North Carolina for a direct and intentional invasion is clearly settled. Id. See also, 3 N. C. Law Rev. 100.

Effect on Rights of Husband.—By virtue of the statutes giving married women separate property rights and the right to sue for injuries, the husband is deprived of his former rights in her property and choses in action. Hinnant v. Tidewater Power Co., 189 N. C. 120, 126 S. E. 307.

Joinder of Husband Unnecessary.—Since the passage of this section a married woman may sue without joining her husband to recover damages she has sustained by reason of a personal injury wrongfully inflicted. Kirkpatrick v. Crutchfield, 178 N. C. 348, 100 S. E. 602.

Same—Not Improper.—While the husband is not a necessary party to his wife's action to recover for the value of her services rendered upon a quantum meruit, under this section, his joinder therein as a party plaintiff is not improper; and where he has alleged an independent cause of action upon a quantum meruit, the Supreme Court, on appeal, in the exercise of its discretion, may remand the cause with direction that the allegations of the complaint as to the statement of the husband's cause to be stricken out and the action of the wife proceeded with. Shore v. Holt, 185 N. C. 312, 117 S. E. 165.

Action against Seducer.—Under the provisions of this section, a married woman who has been seduced may, in proper instances, maintain her action for damages against her seducer without joinder of her husband as a party. Hyatt v. McCoy, 194 N. C. 25, 138 S. E. 405.

Action of Wife for Tort to Husband.—In Hipp v. Dupont, 182 N. C. 9, 13, 108 S. E. 318, the court said: "It follows therefore (from this section) that the husband cannot sue to recover his wife's earnings, or damages for tort committed on her and there is no reason why she can sue for tort or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband."

Husband and Wife Employed Together.—Since the passage of the Martin Act, section 52-2, and this section, the separate earnings of a married woman belong to her, and she may sue and recover them alone; and where the evidence tends only to establish the fact that the employer was to pay a husband and wife each a certain and different amount for services, the husband may not recover the whole upon the theory that the amount he was to receive was augmented by what she was to receive for her separate services. Croom v. Goldsboro Lumber Co., 182 N. C. 217, 108 S. E. 735.

Services Rendered to Husband.—For wife to recover for services rendered to her husband in his business, or outside of her domestic duties, while living together under the marital relation, there must be either an express or an implied promise on his part to pay for them; and the relationship of marriage, nothing else appearing, negatives an implied promise on his part to do so. Dorsett v. Dorsett, 183 N. C. 354, 111 S. E. 541.

Cited in Earle v. Earle, 198 N. C. 411, 151 S. E. 884.

§ 52-11: Repealed by Session Laws 1943, c. 543.

§ 52-12. Contracts of wife with husband affecting corpus or income of estate.—No contract between a husband and wife made during coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, unless such contract is in writing, and is duly proved as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband, as is now or may hereafter be required by law in the probate of deeds of femes covert, it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be. (Rev., s. 2107; Code, s. 1835; 1871-2, c. 193, s. 27; C. S. 2515.)

I. In General.
II. Transactions Included.
III. The Certificate.
IV. Effect of Non-Compliance.

Cross References.

See also, § 52-2 and notes. As to conveyances by husband and wife, see 39-7 et seq. As to separation agreement, see §§ 52-5, 52-13 and notes thereto.

I. IN GENERAL.

Editor's Note.—All transactions of the wife with her husband in regard to her separate property were held void at common law. Sims v. Ray, 96 N. C. 87, 2 S. E. 443. This was because at common law the husband and wife were deemed one person, and it was necessary to convey to a third person, as a conduit, in order to pass the title to property from one to the other. Sydnor v. Boyd, 119 N. C. 481, 485, 25 S. E. 92.

Section Passed to Protect Wife.—This section was passed to protect the wife from the influence and control which the husband is presumed to have over her by reason of the marital relation. Sims v. Ray, 96 N. C. 87, 89, 2 S. E. 443. The law presumes that contracts between husband and wife affecting her real estate are executed under the influence and coercion of the husband, and to rebut this presumption and render the contract valid, an officer of the law must examine the contract, and be satisfied that she is doing what is reasonable and not hurtful to her, and so certify, and we do not think it was the purpose of the Legislature to abrogate these requirements. Kearney v. Vann, 154 N. C. 311, 319, 70 S. E. 747; Caldwell v. Blount, 193 N. C. 560, 562, 137 S. E. 578.

The purpose of this section was to prevent frauds by the husband upon the wife, and to give validity to transactions, invalid at common law, between husband and wife, of the nature described, provided they are executed with the prescribed formality. Sims v. Ray, 96 N. C. 87, 2 S. E. 433; Long v. Rankin, 108 N. C. 338, 12 S. E. 987; Stout v. Perry, 152 N. C. 312, 313, 67 S. E. 757.

Section Constitutional.—This section has been held to be constitutional and valid in Sims v. Ray, 96 N. C. 87, 2 S. E. 443; Long v. Rankin, 108 N. C. 338, 12 S. E. 987; Kearney v. Vann, 154 N. C. 311, 319, 70 S. E. 747; Butler v. Butler, 169 N. C. 584, 586, 86 S. E. 507.

Strict Construction.—This section is an enabling statute and must be strictly construed. Caldwell v. Blount, 193 N. C. 560, 137 S. E. 578.

It is necessary that it should affirmatively appear that the provisions of this section have been strictly complied with. Sims v. Ray, 96 N. C. 87, 2 S. E. 443; Butler v. Butler, 169 N. C. 584, 586, 86 S. E. 507.

Same—Requirements Necessary.—No deed from a wife to her husband, conveying her land to him, is valid, unless the officer who certifies that he privately examined the wife, as required by statute, shall also state in his certificate his conclusions that said deed is not unreasonable or injurious to her. The statute requires that both conclusions, to-wit, that the deed is reasonable and not hurtful or injurious to the wife, shall be stated by the officer in his certificate attached or annexed to the deed. Caldwell v. Blount, 193 N. C. 560, 563, 137 S. E. 578.

Section Does Not Apply to Confession of Judgment in

Favor of Creditors.—A judgment by confession in favor of creditors against a husband and wife is valid and the private examination of the wife is not necessary under this section which is applicable only to contracts between husband and wife. Davis v. Cockman, 211 N. C. 630, 191 S. E. 322.

II. TRANSACTIONS INCLUDED.

Parol Transfer for Less Than Three Years Valid.—A wife can upon a fair consideration give land by parol to the husband for a period less than three years under this section. Wells v. Batts, 112 N. C. 283, 289, 17 S. E. 417.

Section Applies to Contracts Only.—An examination of this section shows that it applies solely to contracts and not to conveyances; indeed, the word "contract" is used five times. The object of the Legislature was clearly to prevent the wife from making any contract with her husband whereby she should incur a liability against her estate which in the future might prove a burden or charge upon it, or cause a change or impairment of her income or personalty. Rea v. Rea, 156 N. C. 529, 531, 72 S. E. 573.

If this section extended to conveyances, it would be a violation of that provision of the Constitution by adding the requirement that some third party, a magistrate or other official, must give his wise approval before she can do what the Constitution guarantees that she may do "with the approval of her husband." Concurring opinion Clark, C. J. in Frisbee v. Cole, 179 N. C. 469, 475, 102 S. E. 890.

Same—Personalty.—As to conveyances of personalty there is no restriction whatever upon the right of a wife to dispose of her personalty as fully and as freely as if she had remained unmarried. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784; Deese v. Deese, 176 N. C. 527, 528, 97 S. E. 475.

Same—Conveyance in Trust is an Exception.—This section however applies to conveyances by the wife of her land in trust to another for her husband. Best v. Utley, 189 N. C. 356, 361, 127 S. E. 337; Davis v. Bass, 188 N. C. 200, 124 S. E. 566; Garner v. Horner, 191 N. C. 539, 540, 132 S. E. 290.

Notes Payable to Husband and Wife Jointly.—Where the wife has conveyed her lands with her husband's written consent, and with the consent of all parties takes a mortgage back on the same day and as a part of the same transaction to secure notes given in part payment of the purchase price, payable to herself and husband jointly, it is not evidence that she made him an unqualified gift, either of the notes or a half thereof, and they remain her property as fully as the land for which consideration alone they were given; and the transaction comes within the express letter as well as the spirit of this section. Kilpatrick v. Kilpatrick, 176 N. C. 182, 96 S. E. 988.

Conveyance by Entirety.—When land is purchased by the wife with money belonging to her separate estate, with conveyance to the husband and wife by entirety, it is not a gift by the wife to her husband of her personal property and though thus conveyed at her request creates a resulting trust in the lands in her favor. Deese v. Deese, 176 N. C. 527, 97 S. E. 475.

Deeds of separation, though not favored by law, are under certain circumstances recognized by this section and §§ 52-5 and 52-13, when signed in conformity thereto. Taylor v. Taylor, 197 N. C. 197, 148 S. E. 171. See also Brown v. Brown, 205 N. C. 64, 169 S. E. 818.

Consent Judgment Must Conform.—A consent judgment, that transfers the wife's title in her separate realty to her husband, must be in conformity with this section. Ellis v. Ellis, 193 N. C. 216, 136 S. E. 350.

Applicable to Wife's Interest in Estates by Entireties. — During the continuance of the joint lives of the husband and wife, who have acquired an estate by entireties, the wife's interest in the lands is such as is contemplated by this section; and where the estate has been conveyed to one in trust for them both, and the officer in taking the acknowledgment of the wife has failed to make the certificate required by this section, requiring him, as a prerequisite to its validity, to certify that the instrument was not unreasonable or injurious to her, the instrument itself is void, and the husband may not, by will or otherwise, dispose of her interest thereunder. Davis v. Bass, 188 N. C. 200, 124 S. E. 566.

A deed by husband and wife conveying lands held by them by entireties to a trustee for the use and benefit of the husband is a conveyance of land by a wife to her husband within the meaning of this section. Fisher v. Fisher, 217 N. C. 70, 6 S. E. (2d) 812.

Policy on Husband's Life Included.—An insurance policy on the life of her husband, payable to a married woman, being a vested interest, is embraced in the word "body" as used in this section, which requires all contracts between husband and wife affecting "the body or capital" of the latter's estate to be in writing and accompanied by the privy examination of the wife. Sydnor v. Boyd, 119 N. C. 481, 26 S. E. 92.

Agreement by husband and wife to pool their respective lands for division among their children is not an agreement under which any interest in his wife's lands moves to the husband, and it is not required that such agreement be executed in accord with this section. Coward v. Coward, 216 N. C. 506, 5 S. E. (2d) 537.

III. THE CERTIFICATE.

Certificate Must Be Annexed to Deed.—It has been uniformly held that the deed of a wife, conveying land described therein to her husband, is void, unless there is attached or annexed to said deed the certificate of the probate officer as required by statute. Caldwell v. Blount, 193 N. C. 560, 562, 137 S. E. 578, and numerous cases cited.

Certificate Must Show Deed Not Unreasonable and Injurious.—A conveyance of land by a wife to her husband is void when the acknowledgment fails to comply with this section, and the acknowledgment is fatally defective if the probating officer fails to certify that, at the time of its execution and the wife's privy examination, the deed is not unreasonable and injurious to her. Fisher v. Fisher, 217 N. C. 70, 6 S. E. (2d) 812.

Certificate Conclusively Presumed to Be True.—This section only requires that the officer taking the probate of a deed to lands from a wife to her husband shall state his conclusions that the contract or deed "is not unreasonable or injurious to her," and it will be conclusively presumed that it was upon sufficient evidence, and where the statutory requirements have been followed, the action of the officer taking the probate is not open to inquiry in a collateral attack in impeachment of it, except "for fraud, as other judgments may be" so attacked. Frisbee v. Cole, 179 N. C. 469, 102 S. E. 890.

Amendment of Defective Certificate.—Where the certificate required by this section is defective, it cannot be subsequently amended so as to render a deed valid, at least after the death of the wife. Best v. Utley, 189 N. C. 356, 127 S. E. 337.

Same—Evidence.—Where the defendants allege that certain of the requirements were observed by the officer but omitted by mistake from his certificate, testimony of the wife and the probate officer as to what transpired at the time is competent in rebuttal of the defendant's evidence, if he had introduced any, and immaterial if he did not do so. Anderson v. Anderson, 177 N. C. 401, 99 S. E. 106.

Evidence is not admissible to show that the facts stated in the certificate are not true. Best v. Utley, 189 N. C. 356, 127 N. C. 337.

Defective Acknowledgment Not Cured by Prior Separation Agreement.—A defective acknowledgment of a deed conveying the wife's interest in land to her husband is not cured by a prior deed of separation properly executed. Fisher v. Fisher, 217 N. C. 70, 6 S. E. (2d) 812.

Probate or Acknowledgment—Proof of Deed.—Where the husband joins with his wife in the execution of a deed to her lands, and it is certified that he had assented thereto at that time, the objection to the probate of the husband that it was taken after his wife's death is untenable, for the probate or acknowledgment is not the execution of the deed, but the proof thereof. Frisbee v. Cole, 179 N. C. 469, 102 S. E. 890.

Where a deed to lands from the wife to her husband has not been properly probated before her death under the provisions of this section, the probate may not thereafter be amended so as to make the conveyance a valid one which otherwise is void. Butler v. Butler, 169 N. C. 584, 86 S. E. 507.

IV. EFFECT OF NONCOMPLIANCE.

Noncompliance Renders Deed Void.—The failure on the part of the probate officer to observe the requirements of the statute renders a deed absolutely void. Davis v. Bass, 188 N. C. 200, 124 S. E. 566; Wallin v. Rice, 170 N. C. 417, 89 S. E. 239; Barbee v. Bumpass, 191 N. C. 521, 522, 132 S. E. 275; Best v. Utley, 189 N. C. 356, 361, 127 S. E. 337; Whitten v. Peace, 188 N. C. 298, 124 S. E. 571; Garner v. Horner, 191 N. C. 539, 540, 132 S. E. 290; Foster v. Williams, 182 N. C. 632, 109 S. E. 834.

Where the husband has conveyed to his wife his title to lands held by them by the entireties, and the wife thereafter conveys her title by deed to the husband and herself, which deed is not probated under the requirements of this section, with respect to the finding of the probate officer that the instrument was not unreasonable or injurious to her, the wife's conveyance is void in law, and does not operate as an estoppel by deed to her during her life or her heirs at law after her death. Capps v. Massey, 199 N. C. 196, 154 S. E. 52.

The failure of the certificate of a deed to lands from a wife to her husband to state that the conveyance was "not unreasonable or injurious to her" renders the instrument void. Farmers Bank v. McCullers, 201 N. C. 440, 160 S. E. 494.

Same—Partial Omission.—The deed of a wife to her husband, duly acknowledged and with private examination properly certified, was held invalid in Singleton v. Cherry, 168 N. C. 402, 84 S. E. 698, by the unanimous opinion of the court, because of the fact that the officer taking the probate failed to certify that the making of the deed was not unreasonable and not injurious to the wife. Butler v. Butler, 169 N. C. 584, 586, 86 S. E. 507.

Same—Oral Declarations Incompetent.—Oral declarations of the wife are incompetent to give validity to her deed to her husband of her separate realty, which is void for noncompliance with this section. Shermer v. Dobbins, 176 N. C. 547, 97 S. E. 510.

Under Void Deed Husband Takes Only Curtesy.—Where the husband has had children by the wife of his first marriage, and he has received an invalid deed from her of her separate lands, after her death he has only an estate for life therein as tenant by the curtesy, and under foreclosure sale under a mortgage given by himself and his second wife, only such life estate may be conveyed to the purchaser. Caldwell v. Blount, 193 N. C. 560, 137 S. E. 578.

Defective Paper Good as Color of Title.—A paper writing void for failure of compliance with this section is good as color of title. Best v. Utley, 189 N. C. 356, 127 S. E. 337; Whitten v. Peace, 188 N. C. 298, 124 S. E. 571.

If such deed is not color of title, it is at least some evidence, under the ancient document rule, to be submitted to the jury on the question of adverse possession for 20 or 30 years. Owens v. Blackwood Lbr. Co., 210 N. C. 504, 184 S. E. 804.

Same—Title by Adverse Possession.—It seems well settled that, owing to the unity of husband and wife, adverse possession cannot exist between them so long as the coverture continues. And this is true though the husband holds a deed to the land executed by his wife to him but which is void for failure of certificate required by this section. The possession of the husband of land conveyed to him by the wife under a void deed becomes adverse only after her death and against her heirs. There are authorities which hold that the possession of the husband does not become adverse against the wife's heirs until a demand is made for possession. Kornegay v. Price, 178 N. C. 441, 100 S. E. 883. See Norwood v. Totten, 166 N. C. 648, 82 S. E. 951.

Estoppel of Heirs.—The land in question was held by tenants in common. The husband of one of the tenants bought the interest of another tenant, and thereafter the husband and the heirs entered into a parol agreement, and pursuant thereto deeds were exchanged between each of the heirs and the husband to effect a partition, but in the deed to the husband, signed by his wife as one of the heirs, the wife's privy examination was not taken and the certificate of the clerk was not executed as required by this section. Thereafter the wife, prior to the effective date of the Martin Act (G. S. § 52-2), with the written consent of her husband, conveyed the share alloted to her in the partition. It was held that upon the death of the wife, her husband surviving her, her inchoate dower in the share allotted to him was terminated, and even conceding her joinder in the partition deed to him was inoperative under this section, her heirs may be estopped under the doctrine of estoppel by laches as existing prior to the Martin Act, from setting up any interest in the share alloted to him, since her valid conveyance of the share allotted to her prevents the parties from being placed in statu quo. Martin v. Bundy, 212 N. C. 437, 193 S. E. 831.

Estoppel of Husband.—Where a husband and wife conveyed lands owned by them by entireties to a trustee for the benefit of the husband, which deed was void because not acknowledged as required by this section, the void deed did not estop the husband or his heirs from claiming a one-half undivided interest in the lands vesting in him as tenant in common upon the rendition of an absolute divorce. Fisher v. Fisher, 218 N. C. 42, 9 S. E. (2d) 493.

§ 52-13. Contracts between husband and wife generally; releases.—Contracts between husband and wife not forbidden by § 52-12 and not inconsistent with public policy are valid, and any persons of full age about to be married, and, subject to § 52-12, any married person, may release and quitclaim dower, tenancy by the curtesy, and all other rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estates so released. (Rev., s. 2108; Code, s. 1836; 1871-2, c. 193, s. 28; C. S. 2516.)

Cross References.—See also, §§ 52-5, 52-12, and notes thereto. As to renouncement of rights of dower and curtesy by minors, see § 30-10.

At the common law the husband and wife were regarded as so entirely one as to be incapable of either contracting with or suing one another, but in equity, it was always otherwise, and there, many of their contracts with each other were recognized and enforced. George v. High, 85 N. C. 99, 101.

What Contracts Included.—This section clearly refers throughout to contracts between the husband and the wife, and does not and was not intended to affect the contracts between the husband and the wife and third parties. Jackson v. Beard, 162 N. C. 105, 110, 78 S. E. 6.

Separation Agreement Valid.—A deed of separation executed by the husband and wife is not against our policy, when properly made in accordance with section 52-12. Archbell v. Archbell, 158 N. C. 408, 74 S. E. 327.

Mutual Releases Do Not Bar Wife's Right to Alimony.—Mutual releases between husband and wife of their interests in the separate property of one another does not bar the wife from making application for temporary alimony and attorney's fee in a subsequent suit for divorce. Bailey v. Bailey, 127 N. C. 474, 37 S. E. 502.

Rent Notes Given Wife by Husband Valid.—Where a husband occupies his wife's land for nine years, during the whole of which period he received the rents therefrom, under an express agreement with his wife to account to her for such rents, and each year gave his wife a note for the rent, it was held that the notes constitute a valid indebtedness on the part of the husband to his wife. Battle v. Mayo, 120 N. C. 413, 9 S. E. 384.

Money Lent to Husband Recoverable.—In a suit brought by a wife against the administrator of her deceased husband for money "advanced and lent" to him during the coverture, where the marriage took place since the adoption of the Constitution of 1868, it was held that the contract between them was not inconsistent with public policy, and was, therefore, valid. George v. High, 85 N. C. 99.

§ 52-14. Wife's antenuptial contracts and torts.—The liability of a feme sole for any debts owing, or contracts made or damages incurred by her before her marriage shall not be impaired or altered by such marriage. No man by marriage shall incur any liability for any debts owing, or contracts made, or for wrongs done by his wife before the marriage. (Rev., ss. 2101, 2106; Code, ss. 1822, 1823; 1871-2, c. 193, ss. 13, 14; C. S. 2517.)

Justice Has Jurisdiction.—A justice of the peace has jurisdiction of an action against a married woman to recover a debt contracted prior to her marriage. Hodges v. Hill, 105 N. C. 130, 10 S. E. 916; Neville v. Pope, 95 N. C. 346; Beville v. Cox, 109 N. C. 265, 13 S. E. 800. And the justice also has jurisdiction where the action is on a contract made or a wrong done by her before the marriage. Neville v. Pope, 95 N. C. 346, 348.

Wife May Appoint Husband as Agent.—A wife may appoint her husband to act as her agent to settle her antenuptial debts in the same manner as one sui juris may appoint an agent, and compliance with the requirements of section 52-12 is not necessary. Stout v. Perry, 152 N. C. 312, 67 S. E. 757.

Where prior to their marriage the wife incurs liability for a negligent injury to the husband the subsequent marriage does not affect her liability. Shirley v. Ayers, 201 N. C. 51, 158 S. E. 840.

§ 52-15. For wife's torts, husband not liable.—No husband shall be liable for damages accruing from any tort committed by his wife, or for any costs or fines incurred in any criminal proceeding against her. (Rev., s. 2105; Code, s. 1833; 1871-2, c. 193, s. 25; 1921, c. 102; C. S. 2518.)

Editor's Note.—The present section, abolishing the husband's liability for the torts of his wife was substituted for the former provision by ch. 102, Public Laws, 1921.

At common law the husband was liable for the tort of his wife, although committed without his knowledge or

consent and in his absence, and although living separate at the time, on the ground that "as her legal existence was incorporated in that of her husband, she could not be sued alone, and if the husband was protected from responsibility the injured party would be without redress." Roberts v. Lisenbee, 86 N. C. 136. This principle was modified by the Act of 1871-2, (this section as it was formerly) so that the husband could only be held liable for torts committed while the husband was living with the wife. Young v. Newsome, 180 N. C. 315, 316, 104 S. E. 660. The case of Roberts v. Lisenbee, 86 N. C. 136, supra, gives a good discussion of the common law and statutory liability of the husband for the contracts and torts of the wife, by Ashe, J. The following cases were decided under the former provision.

Liability for Slander.—Under the former provisions of this section it has been held that "a husband is liable for slanderous words spoken by his wife in his absence and without his knowledge or consent." Presnell v. Moore, 120 N. C. 390, 27 S. E. 27; Young v. Newsome, 180 N. C. 315, 316, 104 S. E. 660.

Negligence of Clerk in Wife's Store.—The husband living with his wife is jointly liable with her for damages resulting from an injury received by a customer through the negligence of a clerk in her store, if she is liable therefor. Brittingham v. Stadiem, 151 N. C. 299, 66 S. E. 128.

Upon Death of Wife Action Abated.—Where husband and wife are jointly sued for the wrong of the wife and the wife dies, the action abates. Roberts v. Lisenbee, 86 N. C. 136.

§ 52-16. Estate by the curtesy.—Every man who has married or shall marry a woman, and by her has issue born alive, shall, after her death intestate as to the lands, tenements and hereditaments hereinafter mentioned, be entitled to an estate as tenant by the curtesy during his life, in all the lands, tenements and hereditaments whereof his said wife was beneficially seized in deed during the coverture, wherein the said issue was capable of inheriting, whether the said seizin was of a legal or of an equitable estate; except that when the wife has obtained a divorce a mensa et thoro, and is not living with her husband at her death, or when the husband has abandoned his wife, or has maliciously turned her out of doors, and they are not living together at her death; or if the husband has separated himself from his wife, and is living in adultery at her death, he shall not be tenant by the curtesy of her lands, tenements and hereditaments. (Rev., s. 2102; Code, s. 1838; 1871-2, c. 193, s. 30; C. S. 2519.)

Cross References.—As to divorce a mensa et thoro and grounds therefor, see § 50-7. As to dower, see § 30-4 et seq.

This section retains curtesy consummate in practically its common law form, but the rights of the husband in his wife's property have been so cut down by the Constitution, by statutes, and by pronouncements of the court, that his estate by curtesy initiate is of little value. See 11 N. C. Law Rev. 273.

Where the court finds that a wife died intestate seized in fee of certain lands, and left her husband surviving and a child by such husband, the husband is entitled to an estate by the curtesy in the lands. Stockton v. Maney, 212 N. C. 231, 193 S. E. 137.

Actual Seizure Necessary at Common Law.—At the common law, it was essential that the wife, or the husband in the right of the wife, should have seizin in deed—that is, actual seizin—actual possession of the estate, to entitle the husband as tenant by the curtesy. Nixon v. Williams, 95 N. C. 103, 104.

Incidents of Common Law Curtesy Initiate Drastically Limited.—The common law estate of the husband as tenant by the curtesy initiate in the lands of his wife was abolished by sec. 6, Art. X, of the Constitution, and now, by virtue of that provision and the statutes passed in pursuance thereof, while the husband has an interest, the right to enter upon and occupy the land with the wife, he has no estate therein until her death. Walker v. Long, 109 N. C. 510, 14 S. E. 299.

When Right Attaches.—After a child of the marriage has been born alive and capable of inheriting, the husband is tenant by curtesy initiate in his wife's lands, and as such has a valuable right. Jackson v. Beard, 162 N. C. 105, 78 S. E. 6.

Husband Has a Freehold Interest.—A husband has, by the curtesy initiate, a freehold interest, but not an estate, in the property. Thompson v. Wiggins, 109 N. C. 508, 510, 14 S. E. 301.

A Bare Right of Occupancy.—The only right attaching to tenancy by the curtesy initiate in the wife's real estate is the bare right of joint occupancy with the wife with the right of ingress and egress. Thompson v. Wiggins, 109 N. C. 508, 14 S. E. 301.

A tenant by curtesy has an insurable interest in buildings and structures on the lands. Stockton v. Maney, 212 N. C. 231, 193 S. E. 137.

Nothing else appearing, a policy of fire insurance which a tenant by the curtesy procures to be issued to him, insures only his interest in the dwelling insured, and upon its destruction by fire, the life tenant is entitled to the entire proceeds of the policy, and the remainderman has no interest in other property bought by the life tenant with the proceeds thereof. Id.

Curtesy Consummate Is Not Changed.—Tenancy by the curtesy consummate, remains as at common law. The husband may sell such interest, Long v. Graeber, 64 N. C. 431. And it is liable to sale under execution against him after his wife's death. McCaskill v. McCormac, 99 N. C. 548, 6 S. E. 423; Thompson v. Wiggins, 109 N. C. 508, 509, 14 S. E. 301.

Husband a Necessary Party.—A husband, tenant by curtesy, has an interest in his wife's land and is a necessary party to a suit concerning it. Jackson v. Beard, 162 N. C. 105, 110, 78 S. E. 6; McGlennery v. Miller, 90 N. C. 215.

Joinder of Minor Husband.—It was formerly held that when the husband, being a minor, joins in the deed to lands of his wife, the conveyance is voidable, subject to his affirmance or ratification when he becomes of age; and where the deed has been disapproved in apt time by him, the conveyance, requiring his valid or statutory consent, is void. Jackson v. Beard, 162 N. C. 105, 78 S. E. 6. However, in view of § 30-10, a minor spouse is now empowered to renounce dower or curtesy or to consent to a conveyance of real property with the same effect as though of age.

Effect of Divorce a Mensa.—Where a wife has obtained a divorce a mensa et thoro, whatever rights the husband had in her lands are suspended until a reconciliation shall be effected, or until by her death he may become tenant by the curtesy consummate, and therefore she is entitled to recover from him the possession and use of her lands. Taylor v. Taylor, 112 N. C. 134, 16 S. E. 1019.

Applied in Caskey v. West, 210 N. C. 240, 186 S. E. 324.

§ 52-17: Repealed by Session Laws 1943, c. 543.

§ 52-18: Repealed by Session Laws 1943, c. 543.

Art. 2. Acts Barring Reciprocal Property Rights of Husband and Wife.

§ 52-19. Divorce a vinculo and felonious slaying a bar.—When a marriage is dissolved a vinculo, the parties respectively, or when either party is convicted of the felonious slaying of the other or of being accessory before the fact of such felonious slaying, the party so convicted, shall thereby lose all his or her right to an estate by the curtesy, or dower, and all right to any year's provision or distributive share in the personal property of the other, and all right to administer on the estate of the other, and every right and estate in the real or personal estate of the other party, which by settlement before or after marriage was settled upon such party in consideration of the marriage only. (Rev., s. 2109; Code, s. 1843; 1871-2, c. 193, s. 42; C. S. 2522.)

Cross References.—As to absolute divorce, see § 50-5. See also § 28-10.

Editor's Note.—In the case of Owens v. Owens, 100 N. C. 240, 6 S. E. 794, a wife who murdered her husband was held to be entitled to her right of dower irrespective of her

crime. The Legislature the following year adopted this section.

Application to Estates by Entireties. — This and the following section deal with the rights of husband and wife growing out of the marriage relation, such as dower, curtesy, and the like, and has no application to estate by entireties. McKinnon, etc., Co. v. Caulk, 167 N. C. 411, 83 S. E. 559.

In Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188, it was held that where husband and wife hold estate by entireties, and the husband has murdered the wife, and her expectancy of life has been legally determined to have been longer than his own, equity will decree that he hold the legal title to lands held by them in entireties in trust for her heirs at law until his death, subject to his right of management and the use of the rents and profits for his own life. As this decision was based upon equitable principles, it was not necessary to determine whether the provision of this section, in reference to the felonious slaying of the husband or wife, which was enacted after the decision in Owens v. Owens, 100 N. C. 240, 6 S. E. 954, embraces estates held by entireties.

For comment on Bryant v. Bryant, see 5 N. C. L. Rev. 374.

Husband's Rights Terminated by Divorce. — Personal choses in action which belong to the wife, reduced into possession by the husband, in the words of a recent author, "remain his, but as to rights dependent on marriage, and not actually vested, a full divorce or the legal annihilation ends them." Schouler's Dom. Rel., section 221, and authorities cited in the notes; Arrington v. Arrington, 102 N. C. 491, 514, 9 S. E. 200.

Effect of Valid Foreign Divorce.—Where a wife who had resided here, bona fide removed to Illinois, and instituted an action for divorce in one of the courts of that state and the husband, in this State, appeared by attorney and defended the action there, it was held that he was bound by a decree for divorce on a verdict rendered in that action, and that his property rights in her estate here were terminated from its date. Arrington v. Arrington, 102 N. C. 491, 9 S. E. 200.

When a spouse is beneficiary, the effect of a subsequent divorce on his right to take might be controlled by this section. See 12 N. C. Law Rev. 376.

When Homicide Is Admitted.—The provisions of this section do not require a conviction of the offense where it is admitted that the homicide had been committed. Parker v. Potter, 200 N. C. 348, 349, 157 S. E. 68.

§ 52-20. Wife's elopement or divorce a mensa at husband's suit a bar.—If a married woman elopes with an adulterer, or willfully and without just cause abandons her husband and refuses to live with him, and is not living with her husband at his death, or if a divorce from bed and board is granted on the application of the husband, she shall thereby lose all right to dower in the lands and tenements of her husband, and also all right to a year's provision, and to a distributive share from the personal property of her husband, and all right to administration on his estate, and also all right and estate in the property of her husband, settled upon her upon the sole consideration of the marriage, before or after marriage; and such elopement may be pleaded in bar of any action, or proceeding, for the recovery of such rights and estates; and in case of such elopement, abandonment, or divorce, the husband may sell and convey his real estate as if he were unmarried, and the wife shall thereafter be barred of all claim and right of dower therein. (Rev., s. 2110; Code, s. 1844; 1893, c. 153, ss. 1, 2, 3; 1871-2, c. 193, s. 44; C. S. 2523.)

Cross References.—See also § 30-4. As to forfeiture of wife's right to administer and to distributive share in personal estate, see § 28-11.

Wife Deprived of Dower.—A wife who commits adultery and is not living with her husband at the time of his death is thereby deprived of her dower. Phillips v. Wiseman, 131 N. C. 402, 42 S. E. 861.

§ 52-21. Husband's living in adultery, etc., or divorce a mensa at wife's suit a bar.—If a husband separates from his wife and lives in adultery, or willfully and without just cause abandons his wife and refuses to live with her, and such conduct on his part is not condoned by her, or if a divorce from bed and board is granted on the application of the wife, he shall thereby lose all right to curtesy in the real property of the wife, and also all right and estate of whatever character in and to her personal property, as administrator, or otherwise; and also any right and estate in the property of the wife which may have been settled upon him solely in consideration of the marriage by any settlement before or after marriage, and in case of such adultery and abandonment or divorce, the wife may sell and convey her real property as if she were unmarried, and the husband, if there has been no condonation at the time of the conveyance, shall thereafter be barred of all claim and right to curtesy in such real property. (Rev., s. 2111; Code, s. 1845; 1893, c. 153, s. 4; 1871-2, c. 193, s. 45; C. S. 2524.)

Cross References.—As to estate by curtesy and forfeiture, see § 52-16. See also § 28-12.

Possibility of Condonation Recognized.—This section recognizes the possibilites of condonation and the resumption of the marriage relation. Joyner v. Joyner, 151 N. C. 181, 183, 65 S. E. 896.

Art. 3. Free Traders.

§ 52-22. Requisites of writing to make her free trader.— Every married woman of the age of twenty-one years or upwards, with the consent of her husband, may become a free trader in the manner following:

1. By antenuptial contract, proved and registered, as hereinafter required; or,

2. By her and her husband signing a writing in the following or some equivalent form:

A. B., of the age of twenty-one years or upwards, wife of C. D., of ..... county, with his consent, testified by his signature hereto, enters herself as a free trader from the date of the registration hereof.

(Signed)

A. B.
C. D.

Witness: E. F.

Registered this ..... day of ....., 19....

The said writing may be proved by the subscribing witness or acknowledged by the parties before any officer authorized to take the probate of deeds, and shall be filed and registered in the office of the register of deeds for the county in which the woman proposes to have her principal or only place of business. (Rev., s. 2112; Code, s. 1827; 1871-2, c. 193, ss. 18, 19; C. S. 2525.)

Effect of Martin Act.—That the Martin Act practically constitutes a married woman a free trader, see under section 52-2, analysis line, "Powers Conferred," catchline, "Practically Makes Free Traders."

Legislature Has Broad Powers.—In Hall v. Walker, 118 N. C. 377, 380, 24 S. E. 6, the court said: "There is no constitutional inhibition on the power of the Legislature to declare where and how the wife may become a free trader. Const., Art. X, sec. 6, was not intended to disable but to protect her." Lancaster v. Lancaster, 178 N. C. 22, 23, 100 S. E. 120.

Section for Benefit of Married Women.—This section was passed for the benefit of married women who wish to engage in business, in order to give them credit, and it was not intended for the benefit of their debtors. Wilkes v. Allen, 131 N. C. 279, 281, 42 S. E. 616.

Does Not Make Wife Free to Convey.—By becoming a registered free-trader, a married woman is not enabled to convey her real property, without joinder of her husband and without her privy examination. Council v. Pridgen, 153

N. C. 443, 449, 69 S. E. 404. However, conveyances executed by a free trader without privy examination and the written assent of her husband prior to Sept. 24, 1913, were validated by P. L. Ex. Sess. 1913, c. 54.

§ 52-23. Writing effective from registration.—From the time of the registration of the writing mentioned in § 52-22, the married woman therein mentioned shall be a free trader, and authorized to contract and deal as if she were a feme sole. (Rev., s. 2113; Code, s. 1828; 1871-2, c. 193, s. 20; C. S. 2526.)

Cross Reference.—As to Martin Act and its effect, see § 52-2 et seq. and annotations.

Section Does Not Include Conveyance.—The words "free-trader," "contract" and "deal," refer to contracts and trades in some business enterprises, and are restricted under this section to the dealings of the wife as a free-trader with reference to her contracts in the pursuit of the business she is engaged in; and the word "deal," taken in its legal significance, does not enlarge this meaning so as to confer upon a married woman power to convey her real estate. Council v. Pridgen, 153 N. C. 443, 69 S. E. 404.

Justice Has Jurisdiction.—A justice of the peace has jurisdiction of an action against a married woman in regard to liabilities incurred by her while she is a free trader. Hodges v. Hill, 105 N. C. 130, 131, 10 S. E. 916; Neville v. Pope, 95 N. C. 346.

§ 52-24. Certified copy as evidence.—A copy of such writing, duly proved and registered and certified by the register of the county in which the same is registered, is admissible in evidence as certified copies of registered deeds are or may be allowed to be. (Rev., s. 2114; Code, s. 1829; 1871-2, c. 193, s. 21; C. S. 2527.)

Evidence of Being Free Trader.—Where it is averred, and not denied, that a married woman is a free trader, and the judgment fastens no personal liability upon her it was held that she was bound by the judgment. Roseman v. Roseman, 127 N. C. 494, 497, 37 S. E. 518. In this case Montgomery, J. dissented holding that the only evidence competent to prove that a married woman is a free trader is the registered writing or a duly certified copy.

§ 52-25. Revocation by entry on record and publication.—The right of a married woman to act as a free trader may be ended at any time by an entry by her, or by her attorney, in the margin of the registration of the writing above mentioned, to the effect that from the date of such marginal entry she ceases so to act, and by publication to that effect weekly for three weeks in some newspaper published in the county in which she had her principal or only place of business, or if there is none so published, then in any other convenient newspaper. But such entry and publication shall not impair any liabilities incurred previously thereto, nor prevent such married woman from becoming liable afterwards to any person whom she may fraudulently induce to deal with her as a free trader. (Rev., s. 2115; Code, s. 1830; 1871-2, c. 193, s. 22; C. S. 2528.)

Division X. Corporations and Associations.

Chapter 53. Banks.

Art. 1. Definitions.

§ 53-1. "Bank," "surplus," "undivided profits," and other words defined.—The following definitions shall be applied to the terms used in this chapter:

The term "bank" shall be construed to mean any corporation, partnership, firm, or individual receiving, soliciting, or accepting money or its equivalent on deposit as a business: Provided, however, this definition shall not be construed to include building and loan associations, Morris plan companies, industrial banks or trust companies not receiving money on deposit.

The term "surplus" means a fund created pursuant to the provisions of this chapter by a bank

from payments by stockholders or from its net earnings or undivided profits which, to the amount specified and by any additions thereto set apart and designated as such, is not available for the payment of dividends, and cannot be used for the payment of expenses or losses so long as such bank has undivided profits.

The term "undivided profits" means the credit balance of the profit and loss account of any bank.

The term "net earnings" means the excess of the gross earnings of any bank over the expenses and losses chargeable against such earnings during any dividend period.

The term "time deposits" means all deposits, the payment of which cannot be legally required within thirty days.

The term "demand deposits" means all deposits, the payment of which can be legally required within thirty days.

The term "insolvency" means: (a) when a bank cannot meet its deposit liabilities as they become due in the regular course of business; (b) when the actual cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors; (c) when its reserve shall fall under the amount required by this chapter, and it shall fail to make good such reserve within thirty days after being required to do so by the commissioner of banks; (d) whenever the undivided profits and surplus shall be inadequate to cover losses of the bank, whereby an impairment of the capital stock is created. (1921, c. 4, s. 1; 1927, c. 47, s. 1; 1931, c. 243, s. 5; C. S. 216(a).)

Cross References.—As to definitions of "commercial and business paper" and "trade acceptance," see § 53-55. As to definition of "bank acceptance," see § 53-56. As to definition of "goods," see § 53-56. As to definition of "reserve," see § 53-51. As to definition of "Federal Reserve Act," "Federal Reserve Board," "Federal Reserve Banks," and "member banks," see § 53-61. As to definition of "banks" as used in the Negotiable Instruments Law, see § 25-1. As to definition of "demand and time deposits" under the prior law, see C. S. 226. As to demand deposits under present law, see § 53-65. As to definition of "available funds" and "cash" under the prior law, see C. S. 226.

Editor's Note.—In 1921 the legislature passed an act which was intended, it would seem, to supplement the provisions of chapter five of the Consolidated Statutes by enlarging the corporation commission's powers of supervision over banks and making more specific regulations for the business of banking. This statute did not supersede or repeal any of chapter five of the Consolidated Statutes except those provisions which are in conflict with or repugnant to it. Mr. Justice Adams, in speaking of the effect of the banking act of 1921 in Litchfield v. Roper, 192 N. C. 202, 205, 134 S. E. 651, said: "A revision or codification of statutes as generally understood signifies a written expression of the entire body of the law on the particular subject; but, where the scheme of the revision is intended as a continuation of existing laws together with such changes as are necessary to make them more effective or to harmonize them, the revised laws will not usually operate as a repeal. The mere enactment of a part of a former statute will not necessarily repeal the part which is not included in the subsequent act. * * * After comparing the act of 1921 with chapter 5 of the Consolidated Statutes we are by no means convinced that the later statutes were intended by the Legislature as a repeal of the old law." He construed the act of 1921 as a supplement to the prior law.

Editor's notes citing corresponding section of the prior law have been placed under the sections of this chapter, and, in many cases, comparisons have been made of old and new.

It should be borne in mind that in many instances this act is a copy of the National Banking Act and that in such cases the constructions of the National Act by the courts of the United States are persuasive authority as to the proper construction of this act in such cases.

There is no section in the prior law which corresponds to this section although various terms are defined here and there throughout the law.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" in the last sentence of this section.

The definition of "insolvency" of a bank as set forth in this section is correct. State v. Shipman, 202 N. C. 518, 163 S. E. 657.

Art. 2. Creation.

§ 53-2. How incorporated. — Any number of persons, not less than five, who may be desirous of forming a company and engaging in the business of establishing, maintaining, and operating banks of discount and deposit to be known as commercial banks, or engaging in the business of establishing, maintaining, and operating offices of loan and deposits to be known as savings banks, or of establishing, maintaining, and operating banks having departments for both classes of business, or operating banks engaged in doing a trust, fiduciary, and surety business, shall be incorporated in the manner following and in no other way; that is to say, such persons shall, by a certificate of incorporation under their hands and seals set forth:

1. The name of the corporation; no name shall be used already in use by another existing corporation organized under the laws of this state or of the congress, or so nearly similar thereto as to lead to uncertainty or confusion.

2. The location of its principal office in this state.

3. The nature of its business, whether that of a commercial bank, savings bank, trust company, or a combination of two or more or all of such classes of business.

4. The amount of its authorized capital stock which shall be divided into shares of ten, twenty, twenty-five, fifty or one hundred dollars each; the amount of capital stock with which it will commence business, which shall not be less than twenty-five thousand dollars in cities or towns of three thousand population or less; nor less than thirty thousand dollars in cities and towns whose population exceeds three thousand, but does not exceed ten thousand; nor less than fifty thousand dollars in cities and towns whose population exceeds ten thousand but does not exceed twenty-five thousand; nor less than one hundred thousand dollars in cities and towns having a population of more than twenty-five thousand; the population to be ascertained by the last preceding national census: Provided, that this subsection shall not apply to banks organized and doing business prior to its adoption. Provided, further, that fractional shares may be issued for the purpose of complying with the requirements of § 53-88.

5. The names and postoffice addresses of subscribers for stock, and the number of shares subscribed by each; the aggregate of such subscriptions shall be the amount of the capital with which the company will commence business.

6. Period, if any, limited for the duration of the company. (1921, c. 4, s. 2; 1927, c. 47, s. 2; 1929, c. 72, s. 1; C. S. 217(a).)

Cross References.—As to incorporation of a general corporation, see §§ 55-2 et seq. As to power to issue non par bank stock, see § 55-73 et seq.

Editor's Notes.—With the exception of a few changes which will be pointed out, this section is a substantial reenactment of C. S. Sec. 216.

Formerly three or more persons could incorporate for the purpose of establishing and operating banks.

There was a provision in subsection 2 that no branch office or business could be established and maintained without

the approval of the corporation commission. This requirement has not been done away with but an entire section providing for the establishment of branches has been inserted (sec. 53-62) so that such a provision in this section would be superfluous.

The next changes came in the provision as to the amount each share of stock should represent; in raising the minimum capital stock and the population of the cities and towns in which such minimum might be maintained; and in changing the minimum of capital stock in cities and towns having a certain population. The Act of 1929 inserted in paragraph four the words: "ten, twenty, twenty-five."

The prior provision requiring that if more than one class of stock was created, the certificate must describe the different classes and state the terms upon which each was created, was not inserted in this section.

The proviso at the end of the fourth subsection of this section was added by the 1927 amendment.

The word "corporation" appearing in the sixth subsection of the prior section was changed to the word "company" as used in this section.

Cited in Cocke v. Hood, 205 N. C. 832, 170 S. E. 637.

§ 53-3. Certificate of incorporation; how signed, proved, and filed.—The certificate of incorporation shall be signed by the original incorporators, or a majority of them, and shall be proved or acknowledged before an officer duly authorized under the laws of this state to take proof or acknowledgment of deeds, and shall be filed in the office of the secretary of the state. The secretary of state shall forthwith transmit to the commissioner of banks a copy of said certificate of incorporation, and shall not issue or record the same until duly authorized so to do by the commissioner of banks as hereinafter provided. (1921, c. 4, s. 3; 1931, c. 243, s. 5; C. S. 217(b).)

Editor's Note. — The first sentence of this section is identical in meaning with the first part of C. S. sec. 217. However the latter part of this section makes a radical departure from the provisions of the prior section. Formerly it was the duty of the secretary of state to record the certificate in the corporation book in his office if the certificate was in accordance with law, and then, upon the payment of the required fees, it became his duty to issue two certified copies of the certificate of incorporation and probate, one to be filed in the office of the clerk of the superior court and the other in the office of the corporation commission (now the commissioner of banks). Under this arrangement the secretary did not have power to inquire into the facts and circumstances connected with the formation of the proposed corporation and pass upon the bona fide character thereof. His power was limited to inspecting the certificate to ascertain if it complied with the requirements of the law. Nor did the corporation commission or any other officer or agency have power to inquire into the good faith etc., of the incorporators. Thus, it was not necessary for the Secretary of State to transmit a copy of the certificate to the corporation commission and await its action upon the merits of the certificate before issuing the certified copies to the superior court clerk and the corporation commission (now the commissioner of banks). Thus, under the prior law, upon the performance of the ministerial duties of inspecting the certificate and issuing the copies, the proposed corporation became a corporate entity.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Refusal to Issue Charter.—Where plaintiffs applied for an industrial bank charter, under this and § 53-145, and their application was not passed upon by the secretary of state on the advice and recommendation of the commissioner of banks, acting in accordance with the statutes, and plaintiffs sued to compel the issuance of a charter, alleging no capricious acts, bad faith or disregard of law by the state officers, the complaint did not state a cause of action and was not sufficient as a petition for certiorari or as an application for mandamus. Pue v. Hood, 222 N. C. 310, 22 S. E. (2d) 896.

§ 53-4. Examination by commissioner; when certification to be refused.—Upon receipt of a copy of the certificate of incorporation of the proposed bank, the commissioner of banks shall at once examine into all the facts connected with the formation of such proposed corporation, including its location and proposed stockholders, and if it appears that such corporation, if formed, will be lawfully entitled to commence the business of banking, the commissioner of banks shall so certify to the secretary of state, who shall thereupon issue and record such certificate of incorporation. But the commissioner of banks may refuse to so certify to the secretary of state, if upon examination and investigation he has reason to believe that the proposed corporation is formed for any other than legitimate banking business, or that the character, general fitness, and responsibility of the persons proposed as stockholders in such corporation are not such as to command the confidence of the community in which said bank is proposed to be located; or that the public convenience and advantage will not be promoted by its establishment, or that the name of the proposed corporation is likely to mislead the public as to its character or purpose; or if the proposed name is the same as one already adopted, or appropriated by an existing bank in this state, or so similar thereto as to be likely to mislead the public. (1921, c. 4, s. 4; Ex. Sess. 1921, c. 56, s. 1; 1931, c. 243, s. 5; C. S. 217(c).)

Editor's Note. — There was no section in the prior banking laws corresponding to this section. As was stated in the editor's note under the preceding section, the proposed corporation was entitled to become a body corporate upon filing a certificate, conforming to the requirements of the law, with the secretary of state, and no investigation into the purposes, qualifications, etc., of the incorporators was necessary.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Duty of Commissioner.—This section was complete in every respect when it left the hands of the legislature and the duty imposed upon and the discretion vested in the commissioner of banks bears only upon the question whether certain conditions exist justifying the creation of the proposed bank under the terms and procedure laid down in the statute. His action and the certificate issued thereon merely constitute the prescribed procedure to determine whether the franchise applied for was grantable under the law. Pue v. Hood, 222 N. C. 310, 314, 22 S. E. (2d) 896.

§ 53-5. Certificate of incorporation, when certified.—Upon receipt of such certificate from the commissioner of banks, the secretary of state shall, if said certificate of incorporation be in accordance with law, cause the same to be recorded in his office in a book to be kept for that purpose, and known as the corporation book, and he shall, upon the payment of the organization tax and fees, certify under his official seal two copies of the said certificate of incorporation and probates, one of which shall forthwith be recorded in the office of the clerk of the superior court of the county where the principal office of said corporation in this state shall or is to be located, in a book to be known as the record of incorporations, and the other certified copy shall be filed in the office of the commissioner of banks, and thereupon the said persons shall be a body politic and corporate under the name stated in such certificate. The said certificate of incorporation, or a copy thereof, duly certified by the secretary of state or the clerk of the superior court of the county in which the same is recorded, or by the commissioner of banks, under their respective seals, shall be evidence in all courts and places,

and shall, in all judicial proceedings, be deemed prima facie evidence of the complete organization and incorporation of the company purporting thereby to have been established. The charter of any bank which fails to complete its organization and open for business to the public within six months after the date of filing its certificate of incorporation with the secretary of state shall be void: Provided, however, the commissioner of banks may for cause extend the limitation herein imposed. (1921, c. 4, s. 5; 1931, c. 243, s. 5; C. S. 217(d).)

Editor's Note. — With the exception of the requirement that the secretary must await the receipt mentioned before issuing the certified copies, and the last sentence and the proviso which were added by the present act, this section is identical with the similar provisions of C. S. sec. 217. The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Who May Take Advantage of Defect in Organization.— A defect in the organization of a bank because of a failure to begin business within the specified time can be taken advantage of only by a direct proceeding by the state for that purpose. Boyd v. Redd, 120 N. C. 335, 27 S. E. 35. This case was decided under the law prior to this section. The time limit within which to begin business was incorporated in the charter.—Ed. Note.

So it was held in the Boyd case that such a failure could not affect the validity of whatever lien a bank had upon the shares of stock of a stockholder indebted to it. [Only in case of a debt previously contracted in good faith may a bank purchase or receive pledge of its own stock under the present law. See sec. 53-64.]

§ 53-6. Payment of capital stock.—The capital stock of every bank shall be fully paid in, in cash, before it shall be authorized by the commissioner of banks to commence business and the full payment in cash of the capital stock shall be certified to the commissioner of banks under oath by the president and cashier of the said bank. Provided, that the stock sold by any bank in process of organization, or for an increase of the capital stock, shall be accounted for to the bank in the full amount paid for the same. No commission or fee shall be paid to any person, association, or corporation for selling such stock. The commissioner of banks shall refuse authority to commence business to any bank if commissions or fees have been paid, or have been contracted to be paid by it, or by any one in its behalf, to any person, association, or corporation for securing subscriptions for or selling stock in such bank. (1921, c. 4, s. 6; 1927, c. 47, s. 3; 1931, c. 243, s. 5; C. S. 217(e).)

Cross Reference.—As to the similar provision relating to industrial banks, see § 53-140.

Editor's Note. — The corresponding section of the former law, C. S. sec. 218, was confined to the subject-matter now contained in the first sentence. However it was provided that at least one half of the capital stock which should not be less than $5,000 should be paid in. The section also contained provisions regulating the payment of the balance. While the $5,000 provision was not inserted in the section as re-enacted in 1921, the requirement that only one-half of the capital stock need be paid in was not changed until the 1927 amendment, and this was the only change made by the amendment. Prior to the 1927 enactment the section, and this applies to the prior law as well, contained provisions regulating the payment of the balance of the capital stock. There is no occasion for such provisions since the 1927 amendment and they were therefore omitted by it. C. S., sec. 218 was clearly superseded, being in conflict with the present law.

The remaining part of the section is new with the act of 1921, and is intended to prevent a payment of commissions to the promoters for the sale of stock, or an impairment of capital by reserving a part of the sum paid in as compensation for the sale of stock. Thus the proviso requires that the full amount for which the stock was sold shall be accounted for to the bank, and the following sentences specifically provides that no commissions shall be paid for the sale of stock. The authority to commence business is denied if the provisions are violated.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-7. Statement filed before beginning business. — Before such company shall begin the business of banking, banking and trust, fiduciary, or surety business, there shall be filed with the commissioner of banks a statement under oath by the president or cashier, containing the names of all the directors and officers, with the date of their election or appointment, term of office, residence, and postoffice address of each, the amount of capital stock of which each is the owner in good faith and the amount of money paid in on account of the capital stock. Nothing shall be received in payment of capital stock but money. (1921, c. 4, s. 7; 1931, c. 243, s. 5; C. S. 217(f).)

Editor's Note. — This section is identical in meaning with the first two sentences of sec. 219 of the Consolidated Statutes. Section 53-8 covers the subject matter of the remaining part of sec. 219, except for one sentence which is repeated in the Editor's Note to sec. 53-8.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-8. Authorized to begin business. — Upon filing of such statement, the commissioner of banks shall examine into its affairs, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each director, the amount of capital stock of which each is the owner in good faith, and whether such corporation has complied with all the provisions of law required to entitle it to engage in business. If upon such examination it appears to the commissioner of banks that it is lawfully entitled to commence the business of banking, banking and trust, fiduciary, or surety business, he shall give to such corporation a certificate signed by the commissioner of banks, that such corporation has complied with all the provisions of the law required to be complied with, before commencing the business of banking, and that such corporation is authorized to commence business. (1921, c. 4, s. 8; 1931, c. 243, s. 5; C. S. 217(g).)

Editor's Note. — This section covers the same subject-matter as the latter part of section 219 of the Consolidated Statutes, except for the last sentence of sec. 219 which reads as follows: "The corporation commission may withhold from any such corporation its certificate authorizing the commencement of business whenever it has reason to believe that the stockholders have formed the same for any other purpose than the legitimate objects contemplated by this chapter."

This section requires a stricter investigation than was formerly required. Under the prior law, an examination into the affairs of the organization was discretionary; now it is made a duty. This strictness is further manifested by the fact that the prior law did not enumerate, as does this section, the particulars to which especial attention should be given.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" or "commission" wherever these words appeared in this section.

§ 53-9. Transactions preliminary to beginning business.—No such corporation shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized to do so by the commissioner of banks. (1921, c. 4, s. 9; 1931, c. 243, s. 5; C. S. 217(h).)

Editor's Note. — There was no express provision corresponding to this section in the prior law.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-10. Increase of capital stock.—A corporation doing business under the provisions of this chapter may increase its capital stock as provided by law for other corporations upon a vote in favor of the increase of two-thirds in interest of each class of stockholders in its voting powers. (1921, c. 4, s. 10; C. S. 217(i).)

Cross Reference.—As to the manner of increasing the capital stock of corporations generally, see § 55-31.

Editor's Note. — While there was no express provision in the prior law which corresponds to this section, section 236 of the Consolidated Statutes provided that the general corporation law so far as applicable and not inconsistent with the banking laws should apply to banks, and it is probable that under that section the capital stock could be increased just as it is under this section.

§ 53-11. Decrease of capital stock.—A corporation doing business under the provisions of this chapter may reduce its capital stock in the manner provided for other corporations upon a vote in favor of the decrease of two-thirds in interest of each class of stockholders with voting powers: Provided, that no bank shall reduce its capital stock to an amount less than the minimum required by law. Such reduction shall not be valid or warrant the cancellation of stock certificates until it has been approved by the commissioner of banks. Such approval shall not be given except upon a finding by the commissioner of banks that the security of existing creditors of the corporation will not be impaired. (1921, c. 4, s. 11; 1931, c. 243, s. 5; C. S. 217(j).)

Cross Reference.—As to manner of decreasing stock of corporations generally, see § 55-66.

Editor's Note. — While there was no corresponding section in the prior law, it is very probable that a bank could decrease its stock under the provisions of sec. 236 of the Consolidated Statutes which made applicable all the general corporation law which was not in conflict with the banking laws.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-12. Consolidation of banks. — A bank may consolidate with or transfer its assets and liabilities to another bank. Before such consolidation or transfer shall become effective, each bank concerned in such consolidation or transfer shall file, or cause to be filed, with the commissioner of banks, certified copies of all proceedings had by its directors and stockholders, which said stockholders' proceedings shall set forth that holders of at least two-thirds of the stock voted in the affirmative on the proposition of consolidation or transfer. Such stockholders' proceedings shall also contain a complete copy of the agreement made and entered into between said banks, with reference to such consolidation or transfer. Upon the filing of such stockholders' and directors' proceedings as aforesaid, the commissioner of banks shall cause to be made an examination of each bank to determine whether the interests of the depositors, creditors, and stockholders of each bank are protected, and that such consolidation or transfer is made for legitimate purposes, and his consent to or rejection of such consolidation or transfer shall be based upon such examination. No such consolidation or transfer shall be made without the consent of the commissioner of banks. The expense of such examination shall be paid by such banks. Notice of such consolidation or transfer shall be published for four weeks before or after the same is to become effective, at the discretion of the commissioner of banks, in a newspaper published in a city, town, or county in which each of said banks is located, and a certified copy thereof shall be filed with the commissioner of banks. In case of either transfer or consolidation the rights of creditors shall be preserved unimpaired, and the respective companies deemed to be in existence to preserve such rights for a period of three years. (1921, c. 4, s. 12; 1931, c. 243, s. 5; C. S. 217(k).)

Cross References.—As to merger of corporations generally, see § 55-165 et seq. As to liquidation of banks, see § 53-20 and notes thereto.

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Presumption of Approval by Corporation Commission.—Where under the provisions of this section a State bank under jurisdiction of the Corporation Commission has transferred its assets to another State bank, the latter assuming the former's liabilities under a consolidation agreement, it will be presumed that the Corporation Commission had notice or knowledge of the transaction coming within the scope of its duties, and had approved of the transaction as the statute requires. Corporation Commission v. Stockholders, 199 N. C. 586, 155 S. E. 445.

§ 53-13. Consolidated banks deemed one bank.—In case of consolidation when the agreement of consolidation is made, and a duly certified copy thereof is filed with the secretary of state, together with a certified copy of the approval of the commissioner of banks to such consolidation, the banks, parties thereto, shall be held to be one company, possessed of the rights, privileges, powers, and franchises of the several companies, but subject to all the provisions of law under which it is created. The directors and other officers named in the agreement of consolidation shall serve until the first annual meeting for election of officers and directors, the date for which shall be named in the agreement. On filing such agreement, all and singular, the property and rights of every kind of the several companies shall thereby be transferred and vested in such new company, and be as fully its property as they were of the companies parties to the agreement. (1921, c. 4, s. 13; 1931, c. 243, s. 5; C. S. 217(l).)

Cross References.—As to substitution of consolidated bank as executor or trustee under will, see § 31-19. As to fiduciary powers and liabilities of merged banks, see § 53-17. See note to § 53-12.

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-14. Reorganization.—Whenever any bank under the laws of this state or of the United States is authorized to dissolve, and shall have taken the necessary steps to effect dissolution, it shall be lawful for a majority of the directors of such bank, upon authority in writing of the owners of two-thirds of its capital stock, with the approval of the commissioner of banks, to execute articles of incorporation as provided in this chapter, which articles, in addition to the requirements of law, shall further set forth the authority derived from the stockholders of such national bank or state bank, and

upon filing the same as hereinbefore provided for the organization of banks, the same shall become a bank under the laws of this state, and thereupon all assets, real and personal, of the dissolved national or state bank shall by operation of law be vested in and become the property of such state bank, subject to all liabilities of such national or state bank not liquidated under the laws of the United States or this State before such reorganization. (1921, c. 4, s. 14; 1931, c. 243, s. 5; C. S. 217(m).)

Editor's Note. — This section is identical in its provisions to C. S. sec. 235, the prior law, except that the references to state banks in the last lines of this section have been inserted.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-15. Consolidation of banks and insurance corporations.—Banking corporations, with the approval of the commissioner of banks, and in conformity with such requirements and regulations as the state banking commissioner may prescribe, and insurance corporations, with the approval of the insurance commissioner, and in conformity with such requirements and regulations as he may prescribe may merge and consolidate under the provisions of §§ 55-165 through 55-170. (1925, c. 77, s. 2; 1931, c. 243, s. 5; 1939, c. 91, s. 2; 1943, c. 450, s. 2.)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Prior to the 1943 amendment this section also applied to building and loan corporations.

§ 53-16. Consolidation of state banks or trust companies with national banking associations.—Any bank or trust company incorporated under the laws of North Carolina may be consolidated with any national banking association, or associations, under the charter of such national banking association or under a new charter issued to such consolidated association, upon such terms and conditions as may be lawfully agreed upon, provided that the laws of North Carolina governing the consolidation of State banks shall be first complied with as to the consolidation of such bank or trust company. When such consolidation shall have been effected and approved, as provided by law, all the rights, franchises and interests of such bank or trust company so consolidated with the national banking association, or national banking associations, in and to every species of property, real, personal and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association into which it is consolidated, without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises and interests, including the right of succession as trustee, executor, administrator, or in any other fiduciary capacity, in the same manner, and to the same extent, as was held and enjoyed by such bank or trust company so consolidated. In case of such consolidation the rights of creditors of such bank or trust company shall be preserved unimpaired and all lawful debts and liabilities of such bank or trust company shall be deemed to have been assumed by such consolidated national banking association. (1929, c. 148, s. 1.)

§ 53-17. Fiduciary powers and liabilities of banks or trust companies merging or transferring assets and liabilities.—Whenever any bank or trust company, organized under the laws of North Carolina or the Acts of Congress, and doing business in this state, shall consolidate or merge with or shall sell to and transfer its assets and liabilities to any other bank or trust company doing business in this state, as provided by the laws of North Carolina or the Acts of Congress, all the then existing fiduciary rights, powers, duties and liabilities of such consolidating or merging or transferring bank or banks and/or trust companies, including the rights, powers, duties and liabilities as executor, administrator, guardian, trustee, and/or any other fiduciary capacity, whether under appointment by order of court, will, deed, or other instrument, shall, upon the effective date of such consolidation or merger or sale and transfer, vest in, devolve upon, and thereafter be performed by, the transferee bank or the consolidated or merged bank or trust company, and such latter bank or trust company shall be deemed substituted for and shall have all the rights and powers of the transferring bank or trust company. (1931, c. 207; 1941, c. 80.)

Cross Reference.—As to powers and liabilities of merged corporations generally, see §§ 55-169, 55-170 and 55-172.

Editor's Note.—The 1941 amendment added the provisions relating to sale and transfer of assets and liabilities. For comment on this amendment, see 19 N. C. L. Rev. 457. See also, 9 N. C. L. Rev. 398.

A distinction is drawn between "consolidation" and "merger." See Braak v. Hobbs, 210 N. C. 379, 186 S. E. 500.

Consolidated Bank Succeeds to Power as Trustee under Deed of Trust.—A bank, created as a result of a consolidation of several state banks, may properly exercise the power of sale contained in a deed of trust in which one of its constituent banks was named trustee, upon default by the trustor, since under this section, the consolidated bank succeeds to such power. Braak v. Hobbs, 210 N. C. 379, 186 S. E. 500.

This section, although in form an independent statute, is in reality an amendment of chapter 77, Public Laws of North Carolina, 1925, and is therefore applicable in the instant case, although the deed of trust involved was executed prior to its enactment. Braak v. Hobbs, 210 N. C. 379, 384, 186 S. E. 500. See Bateman v. Sterrett, 201 N. C. 59, 159 S. E. 14.

Art. 3. Dissolution and Liquidation.

§ 53-18. Voluntary liquidation. — A bank may go into voluntary liquidation and be closed, and may surrender its charter and franchise as a corporation of this state by the affirmative votes of its stockholders owning two-thirds of its stock, such vote to be taken at a meeting of the stockholders duly called by resolution of the board of directors, written notice of which, stating the purpose of the meeting, shall be mailed to each stockholder, or in case of his death, to his legal representative or heirs at law, addressed to his last known residence ten days previous to the date of said meeting. Whenever stockholders shall by such vote at a meeting regularly called for the purpose, notice of which shall be given as herein provided, decide to liquidate such bank, a certified copy of all proceedings of the meeting at which said action shall have been taken, verified by the oath of the president and cashier, shall be transmitted to the commissioner of banks for his

approval. If the commissioner of banks shall approve the same, he shall issue to the said bank, under his seal, a permit for such purpose. No such permit shall be issued by the commissioner of banks until said commissioner of banks shall be satisfied that provision has been made by such bank to satisfy and pay off all depositors and all creditors of such bank. If not so satisfied, the commissioner of banks shall refuse to issue a permit, and shall be authorized to take possession of said bank and its assets and business, and hold the same and liquidate said bank in the manner provided in this chapter. When the commissioner of banks shall approve the voluntary liquidation of a bank, the directors of said bank shall cause to be published in a newspaper in the city, town, or county in which such bank is located, a notice that the bank is closing up its affairs and going into liquidation, and notify its depositors and creditors to present their claims for payment. When any bank shall be in process of voluntary liquidation, it shall be subject to examination by the commissioner of banks, and shall furnish such reports from time to time as may be called for by the commissioner of banks. All unclaimed deposits and dividends remaining in the hands of such bank shall be subject to the provisions of this chapter as hereinafter provided. Whenever the commissioner of banks shall approve it, any bank may sell and transfer to any other bank, either State bank or national bank, all of its assets of every kind upon such terms as may be agreed upon and approved by the commissioner of banks and by two-thirds vote of its board of directors. A certified copy of the minutes of any meeting at which such action is taken, under the oath of the president and cashier, together with a copy of the contract of sale and transfer, shall be filed with the commissioner of banks. Whenever voluntary liquidation shall be approved by the commissioner of banks or the sale and transfer of the assets of any bank shall be approved by the commissioner of banks, a certified copy of such approval under seal of the commissioner of banks, filed in the office of the secretary of state, shall authorize the cancellation of the charter of such bank, subject, however, to its continued existence, as provided by this chapter and the general law relative to corporations. (1921, c. 4, s. 15; 1927, c. 47, s. 4; 1929, c. 73; 1931, c. 243, s. 5; C. S. 218(a).)

Cross Reference.—As to voluntary dissolution of corporations generally, see § 55-121 et seq.

Editor's Note.—For article discussing the statutory changes made in the North Carolina banking law, see 11 N. C. Law Rev. 194 et seq.

While there was no specific provision in the prior banking law which corresponded to this section, dissolution was probably effected under sec. 55-121 et seq. the general corporation law, by virtue of C. S. § 236, providing that where applicable and not inconsistent with the banking laws the general corporation law should apply.

The 1927 amendment added the last four sentences to this section.

It has been the policy of the legislature to continue the corporate existence upon a dissolution for a period of three years for the purpose of winding up the affairs of the corporation and to bring and defend suits. See sec. 55-132. The provisions of this section are in keeping with this general policy.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

When Receiver Has Title to Assets. — Upon the appointment of a receiver under the statute, whether voluntary or by act of the Commission, the title to all of its assets vests in the receiver to be administered for the benefit of its depositors, etc., alike, and where the directors are individually sued for having published false statements as to its solvency, and in the bank's report to the Corporation Commission, without alleging any damage peculiar to himself therefrom, as distinguished from a loss among the creditors generally, the action is maintainable only by the receiver or upon his refusal to so act upon application. Douglass v. Dawson, 190 N. C. 458, 130 S. E. 195. This case is not applicable to a suit by a depositor for damage or loss incurred because of a violation of § 53-132. Bayne v. Powell, 192 N. C. 389, 391, 118 S. E. 118.

Enforcement of Statutory Liability of Stockholders by Bank Purchasing Another Bank for Purpose of Liquidation.—Under the provisions of this section, either a state or national bank may purchase the assets of another bank, including the statutory liability of the stockholders of the selling bank, upon such terms as are agreed upon and approved by the Commissioner of Banks, and suit on the statutory liability of the stockholders of the selling bank may be instituted in the name of the purchasing bank to the use of the selling bank within three years from the date of the transfer, and § 53-20 does not repeal this section, as amended, and is inapplicable when the liquidation is under its provisions, and the amendment of the act of 1921 by chapter 73, Public Laws of 1929, being only to correct a typographical error, does not affect the right of action accruing prior to its enactment, it being significant only as legislative construction that the act of 1921 was not repealed by the act of 1927. Peoples Bank and Trust Co. v. Roscower, 199 N. C. 653, 155 S. E. 560.

Approval of Stockholders Not Necessary for Sale to Bank.—For a valid sale of assets to another bank the approval of the stockholders of the selling bank is not required by this section and the section is not invalid for that reason. Planters' Sav. Bank v. Earley, 204 N. C. 297, 299, 168 S. E. 225.

Cited in In re Lafayette Bank, etc., Co., 198 N. C. 783, 787, 153 S. E. 452.

§ 53-19. Commissioner of banks may take charge, when.—The commissioner of banks may forthwith take possession of the business and property of any bank to which this chapter is applicable whenever it shall appear that such bank:

1. Has violated its charter or any laws applicable thereto;
2. Is conducting its business in an unauthorized or unsafe manner;
3. Is in an unsafe or unsound condition to transact its business;
4. Has an impairment of its capital stock;
5. Has refused to pay its depositors in accordance with the terms on which such deposits were received, or has refused to pay its holders of certificates of indebtedness or investment in accordance with the terms upon which such certificates of indebtednesss or investment were sold;
6. Has become otherwise insolvent;
7. Has neglected or refused to comply with the terms of a duly issued lawful order of the commissioner of banks;
8. Has refused, upon proper demand, to submit its records, affairs, and concerns for inspection and examination to a duly appointed or authorized examiner of the commissioner of banks;
9. Its officers have refused to be examined upon oath regarding its affairs.
10. Has made a voluntary assignment of its assets to trustees;

Such banks may resume business as provided in § 53-37. (1911, c. 25, s. 4; 1921, c. 4, s. 16; 1931, c. 243, s. 5; C. S. 218(b), 242.)

Editor's Note. — There was no section in the prior law which corresponded to this section. It was true however that the bank examiner could take possession where so

authorized by the corporation commission and hold it until a receiver could be appointed. See C. S. sec. 253.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

See 3 N. C. Law Rev. 79, discussing this section.

Commissioner May Be Restrained from Taking Control of Assets of Reorganized Bank Where Assets Sufficient to Pay Claims.—Where a banking corporation, organized and doing business under the laws of this State, and for that reason subject to the jurisdiction of the Commissioner of Banks, has transferred, assigned and conveyed all its assets to another banking corporation, also organized and doing business under the laws of this State, in consideration of the agreement of the latter corporation to pay and fully discharge the claims of all the depositors and other creditors of the former corporation, and the Commissioner of Banks had consented to such transfer, assignment and conveyance (section 53-12, Corporation Commission v. Stockholders, 199 N. C. 586, 155 S. E. 445), but thereafter, before the latter corporation has fully performed its agreement with the former corporation, files notice that he has taken into his possession the former corporation, under the provisions of this section, for purposes of liquidation, the said former corporation, its depositors, and stockholders may restrain the Commissioner of Banks from taking into his possession the assets of the former corporation, which are then in the possession of the latter corporation, upon showing that said assets are sufficient in value for the payment in full of the claims of all its depositors and other creditors. Pending the trial of the issue involving the value of said assets, the Commissioner of Banks may also be restrained from levying and collecting assessments on the stockholders of the former corporation, because of their statutory liability. Stanly Bank, etc., Co. v. Hood, 206 N. C. 543, 545, 174 S. E. 503.

Presumption Exists That Bank Complied with Prerequisites before Resuming Operation.—See People's Bank v. Fidelity, etc., Co., 4 F. Supp. 379, 382.

§ 53-20. Liquidation of banks.—(1) When Commissioner of Banks to Take Possession.—Whenever any State bank shall neglect or refuse for a period of sixty days to make a report to the commissioner of banks, as he may demand, or shall, after demand under seal of the commissioner of banks fail, neglect or refuse to comply with any of the rules, regulations or requirements of the state banking commission, or the provisions of the banking law, or if at any time the commissioner of banks shall find a bank subject to the supervision of the commissioner of banks, in an insolvent, unsafe or unsound condition to transact the business for which it was organized, or in an unsafe, or unsound condition to continue its business, or if such institution shall neglect or refuse to correct any irregularity which may be called to the attention of the president, cashier or board of directors, by the commissioner of banks, or any of his assistants; then, in either of such events, the commissioner of banks, or any duly authorized agent of the commissioner of banks appointed under seal of the commissioner of banks, shall forthwith take possession of such bank, and all of its assets and business and shall retain possession thereof until such bank shall be authorized by the commissioner of banks to resume business, or its affairs shall be fully liquidated as herein provided, or possession thereof shall have been surrendered under order of a judge of the Superior Court under the provisions of this section.

(2) Directors May Act.—Any bank may place its assets and business under the control of the commissioner of banks for liquidation by resolution of a majority of its directors upon notice to the said commissioner of banks, and, upon taking possession of said bank, the commissioner of banks, or duly appointed agent, shall retain possession thereof until such bank shall be authorized by the commissioner of banks to resume business or until the affairs of said bank shall be fully liquidated as herein provided, and no bank shall make any general assignment for the benefit of its creditors save and except by surrendering possession of its assets to the commissioner of banks, as herein provided. Whenever any bank for any reason shall suspend operations for any length of time, said bank shall, immediately upon such suspension of operations, be deemed in the possession of the commissioner of banks and subject to liquidation hereunder.

(3) Notice of Seizure to Court Bar to Attachment, etc.; Transfers Void.—When the commissioner of banks, or duly appointed agent, shall take possession of any bank under paragraph (1) or (2) hereof he shall, within forty-eight hours, file with the Clerk of the Superior Court in the county where said bank is located, a notice of his action which shall state the reason therefor: and such notice shall be deemed the equivalent of a summons and complaint against said bank in an action in the Superior Court except that it shall not be necessary to make service thereof, and the taking possession of any bank shall thereupon date from the time when such authority was exercised and from and after such time all assets and property of such bank, of whatever nature shall be deemed to be in possession of the commissioner of banks, and the exercise of such authority shall operate as a bar to any attachment, or other legal proceeding, against such bank or its assets and, after such exercise of authority, no lien shall be acquired, in any manner binding or affecting any of the assets of such bank and every transfer or assignment made thereafter by such bank, or by its authority, of the whole or any part of its assets, shall be null and void; and the commissioner of banks shall be substituted in place of the bank in all actions in the State or Federal Courts, pending at the time of the exercise of such authority.

(4) Notice to Banks; Corporation and Persons Holding Assets; Liens Not to Accrue.—On taking possession of the assets and business of any bank, the commissioner of banks, or duly appointed agent, shall forthwith give notice, by mail or otherwise, of such action to all banks or other persons or corporations holding, or having in possession, any assets of such bank. No bank or other person or corporation shall have a lien or charge for any payment, advance or clearance made, or liability incurred against any of the assets of said bank after possession has been taken as provided under this section, except as hereinafter provided.

(5) Permission to Resume Business.—After the commissioner of banks has taken possession of any bank, such bank may resume business as provided in § 53-37.

(6) Remedy by Bank for Seizure; Answer to Notice; Injunction, etc., Appeal.—Whenever any bank, of whose assets and business the commissioner of banks has taken possession as aforesaid, except where possession is taken under paragraph (2) hereof, shall deem itself aggrieved thereby, it may, at any time within ten (10) days after the filing of the notice with the clerk

of the Superior Court, file an answer to said notice and may also upon notice to the commissioner of banks, apply to the resident or the presiding judge of the district for an injunction to enjoin further proceedings by the said commissioner of banks, and the said judge may cite the said commissioner of banks to show cause within ten days thereafter why further proceedings should not be enjoined, and after hearing the allegations and proof of the parties with respect to the condition of said bank, may dismiss such application for injunction or may enjoin further proceedings under this section by the commissioner of banks. If the judge shall enjoin further action of the commissioner of banks and permit the reopening of the bank, he shall have authority to require of the bank such surety bond as he may deem necessary to insure its solvency, payable to the commissioner of banks for the sole benefit of the general creditors of the bank, and upon such terms as said judge may deem proper. Either party shall have the right to appeal to the Supreme Court as in other actions.

(7) Collection of Debts and Claims; Sale or Compromise of Debts, Claims; Commissioner Succeeds to All Property of Bank.—Upon taking possession of the assets and business of any bank by the commissioner of banks, the commissioner of banks, or the duly appointed agent, is authorized to collect all money due such bank, and to do such other acts as are necessary to conserve its assets and property, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The commissioner of banks, or the duly appointed agent, shall collect all debts due and claims belonging to such bank, by suit, if necessary; and, by motion in the pending action, and upon authority of an order of the presiding or resident judge of the district may sell, compromise or compound any bad or doubtful debt or claim, and may upon such order, sell the real and personal property of such bank on such terms as the order may provide or direct, except that, where the sale is made under power contained in any mortgage or lien bond or other paper wherein the title is retained for sale and the terms of sale set out, sale may be made under said authority. Upon taking possession of any bank under this section, the commissioner of banks and/or the duly appointed agent shall have the possession and the right to the possession of all the property, assets, choses in action, rights and privileges of the said bank, including the right to resign the trust or exercise the power in all mortgages, deeds of trust, and all other papers executed to secure the payment of money in any form in which the said bank shall have been named as trustee and/or pledgee, and such property rights and privileges shall vest in the said commissioner and/or duly appointed liquidating agent absolutely, for the purpose of liquidating, and sales and conveyance of the same, together with any and all other incidental rights, privileges, and powers necessary and convenient for the enjoyment of the right of conveyance and sale and for the exercise of the same. Upon the motion made, the bank or any person interested, may be heard, but the judge hearing the motion shall enter his order as in his discretion will best serve the parties interested.

The powers granted by the second preceding sentence shall be in addition to and not in derogation of any existing acts ratified at the 1931 session of the General Assemby.

The officers and directors of any bank, or any bank that is in liquidation as provided by law, shall not hereafter exercise any powers herein declared to be vested in the North Carolina commissioner of banks, and/or the duly appointed liquidating agent.

(8) Bond of Commissioner of Banks; Surety; Condition; Minimum Penalty.—Upon taking possession of any bank, the commissioner of banks, or the duly appointed agent, shall execute and file a bond payable to the State of North Carolina, with some surety company as surety thereon, with the clerk of the Superior Court of the county where the bank is located, conditioned upon the faithful performance of all duties imposed by reason of the liquidation of such bank by the said commissioner of banks, or the duly appointed agent, or any agent or assistant assisting in the liquidation of the said bank, the penal sum of said bond to be fixed by order of the commissioner of banks, which in no case shall be less than five thousand ($5,000) dollars. Any person interested, by motion in the pending action, shall be heard by the resident or presiding judge as to the sufficiency of the bond; the judge hearing the motion may thereupon fix the bond; provided, that where such bank under this section is taken possession of by the commissioner of banks, he may, in his discretion with the approval of the state banking commission, appoint as his agent with the powers, duties and responsibilities of such agent under this section, the Federal Deposit Insurance Corporation or any corporation or agency established under and by virtue of the laws of the United States of America which is established for the purposes for which the said Federal Deposit Insurance Corporation was created under the banking act of one thousand nine hundred and thirty-three enacted by congress; and provided further that such appointment may be made when and only when the liabilities of such bank to its depositors are insured by said corporation or agency, either in whole or in part. In the event of such appointment such corporation or agency, with the approval of the commissioner of banks, may serve as such agent without giving the bond required under all other circumstances in this subsection.

(9) Inventory Necessary.—Within thirty days after the filing of the notice of the taking possession of any bank in the office of the clerk of the Superior Court, the commissioner of banks, or the duly appointed agent, shall make and state an inventory of the assets and liabilities of the said bank, and shall file one copy thereof with the clerk of the Superior Court in the pending action and shall keep one copy on file in the said bank. Such inventory shall be open for inspection during the usual banking hours, provided, that nothing herein shall require said bank to remain open unnecessarily.

(10) Notice and Time for Filing Claims; Copies Mailed.—Notice shall be given by advertisement for four weeks in a newspaper published in said county; if no newspaper is published in said county, then in some newspaper having a general circulation in said county, calling on all persons who may have claims against the bank to

present the same to the commissioner of banks at the office of the bank, and within the time to be specified in the notice, not less, however, than ninety (90) days from the date of the first publication. A copy of this notice shall be mailed to all persons whose names appear as creditors upon the books of the bank. Affidavit by the commissioner of banks, or agent mailing the notice, to the effect that said notice was mailed shall be conclusive evidence thereof.

(11) Power to Reject Claims; Notice; Affidavit of Service; Action on Claim.—If the commissioner of banks, or the duly appointed agent, doubts the justice and validity of any claim or deposit, he may reject the same and serve notice of such rejection upon the claimant or depositor, either personally or by registered mail, and an affidavit of the service of such notice shall be filed in the office of the Clerk of the Superior Court in the pending action, and shall be conclusive evidence of such notice. Any action or suit upon such claim so rejected must be brought by the claimant against the commissioner of banks in the proper court of the county in which the bank is located within ninety days after such service, or the same shall be barred. Objections to any claim or deposit not rejected by the commissioner of banks, or the duly appointed agent, may be made by any person interested by filing such objection in the pending action and by serving a copy thereof on the commissioner of banks, or duly appointed agent, and the commissioner of banks or duly appointed agent, after investigation, shall either allow such objection and reject the claim or deposit, or disallow the objection. If the objection is not allowed and the claim or deposit not rejected, the commissioner of banks or the duly appointed agent, shall file a notice to this effect in the pending action; and within ten days thereafter, the person filing objection by motion in the pending action, a copy of which notice shall be served upon the person whose claim or deposit is objected to, may present to the court the question of the validity of said claim or deposit; and the questions of law and issues of fact shall thereupon be determined as in other civil actions.

(12) List of Claims Presented and Deposits; Copies; Proviso.—Upon the expiration of the time fixed for presentation of claims, the commissioner of banks, or the duly appointed agent, shall make a full and complete list of the claims presented and of the deposits as shown, including and specifying any claims or deposits which have been rejected by him, and shall file one copy in the office of the clerk of the superior court in the pending action, and shall keep one copy on file with the inventory in the office of the bank for examination. Any indebtedness against any bank which has been established or recognized as a valid liability of said bank before it went into liquidation, for which no claimant has filed claim, and/or any liability for which claim has been filed and disapproved, shall be listed in the office of the clerk of the superior court of the county in which the bank is located, by the liquidating agent, and the dividends accruing thereto shall be paid into the said office and shall be held for a period of three months after said liquidation is completed, and shall then be paid to the escheator of the University of North Carolina. Any claim which may be presented after the expiration of the time fixed for the presentation of claims in the notice hereinbefore provided shall, if allowed, share pro rata in the distribution only of those assets of the bank in the hands of the commissioner of banks, and undistributed at the time the claim is presented: Provided, that when it is made to appear to the judge of the superior court, resident or presiding in the county, that the claim could not have been filed within said period, said judge may permit those creditors or depositors who subsequently file their claim to share as other creditors.

(13) Declaration of Dividends; Order of Preference in Distribution.—At any time after the expiration of the date fixed by the commissioner of banks, or the duly appointed agent, for the presentation of claims against the bank, and from time to time thereafter, the commissioner of banks, out of the funds in his hands, after the payment of expenses and priorities, may declare and pay dividends to the depositors and other creditors of such bank in the order now or hereafter provided by law; and a dividend shall be declared when and as often as the funds on hand subject to the payment of dividends shall be sufficient to pay ten (10) per centum of all claims entitled to share in such dividends. In paying dividends and calculating the same, all disputed claims and deposits shall be taken into account, but no dividend shall be paid upon such disputed claims and deposits until the same shall have been finally determined. The following shall be the order and preference in the distribution of the assets of any bank liquidated hereunder: (1) Taxes and fees due the commissioner of banks for examination or other services; (2) wages and salaries due officers and employees of the bank, for a period of not more than four months; (3) expenses of liquidation; (4) certified checks and cashier's checks in the hands of a third party as a holder for value and amounts due on collections made and unremitted for or for which final actual payment has not been made by the bank; (5) amounts due creditors other than stockholders. The word "asset" used herein shall not be deemed to include bailments or other property to which such bank has no title. Provided, that when any bank, or any officer, clerk, or agent thereof, receives by mail, express or otherwise, a check, bill of exchange, order to remit, note, or draft for collection, with request that remittance be made therefor, the charging of such item to the account of the drawer, acceptor, indorser, or maker thereof, or collecting any such item from any bank or other party, and failing to remit therefor, or the non-payment of a check sent in payment therefor, shall create a lien in favor of the owner of such item on the assets of such bank making the collection, and shall attach from the date of the charge, entry or collection of any such funds. A statement of all dividends paid shall be filed in the office of the clerk of the Superior Court in the pending action, and said statements shall show the expenses deducted and the disputed claims and deposits considered in determining said dividend.

(14) Deposit of Funds Collected.—All funds

collected by the commissioner of banks, in liquidating any bank, shall be deposited from time to time in such bank or banks as may be selected by him, and shall be subject to the check of the commissioner of banks. The payment of interest on the net average of such sums on deposit shall be controlled by the governor and council of state, who shall have full power and authority to determine for what periods of time payment of interest on such deposits shall or shall not be required, and to fix the rate of interest to be paid thereon.

(15) Employment of Local Attorneys; Expert Accountants and Other Experts; Compensation.—The commissioner of banks, for the purpose of liquidating banks as herein provided, shall employ such liquidating agents, competent local attorneys, accountants and clerks as may be necessary to properly liquidate and distribute the assets of said bank, and shall fix the compensation for all such agents, attorneys, accountants and clerks, and shall pay the same out of the funds derived from the liquidation of the assets of said bank: Provided, that all expenditure for the purpose herein provided shall be approved by the resident or presiding judge in the pending action at such time as the same may be reported, and such charges shall be a proper charge and lien on the assets of such bank until paid.

(16) Unclaimed Dividends Held in Trust.—The unclaimed dividends remaining in the hands of the commissioner of banks for six months after the order for final distributions shall be held in trust for the several depositors and creditors of the liquidated bank; and the money so held by him shall be paid over to the persons respectively entitled thereto as and when satisfactory evidence of their right to the same is furnished. In case of doubtful or conflicting claims the commissioner of banks shall have authority to apply to the superior court of the county, by motion in the pending action, for an order from the resident or presiding judge of the superior court directing the payment of the moneys so claimed. When issues of fact are raised by said motion, the same may, upon request of any claimant, be submitted to the jury for determination as other issues of fact are determined. The interest earned on the unclaimed dividend so held shall be applied toward defraying the expenses incurred in the distribution of such unclaimed dividends. The balance of interest, if any, shall be deposited and held as other funds of the banking department to the credit of the commissioner of banks.

(17) Report by Commissioner of Banks. — If the assets of any bank when fully collected by the commissioner of banks are not more than sufficient to pay the depositors and creditors of said bank, the commissioner of banks after he shall have fully distributed as herein provided the sums so collected, then he shall cause to be filed in the office of the Clerk of the Superior Court in the pending action a full and complete report of all his transactions in said liquidation; and the filing of such report shall act as a full and complete discharge of the commissioner of banks from all further liabilities by reason of the liquidation of the bank.

(18) Action by Commissioner of Banks after Full Settlement.—Whenever the commissioner of banks shall have paid all the expenses of liquidation and shall have paid to each and every depositor and creditor of such bank, whose claims shall have been duly proven and allowed, the full amount of such claims, and shall have made proper provision for unclaimed and unpaid deposits and disputed claims and deposits, and shall have in hand other assets of said bank, he shall call a meeting of the stockholders of said bank by giving notice thereof by publication once a week for four weeks in a newspaper published in said county, or if no newspaper is published in said county, then in a newspaper having general circulation in said county, and by mailing a copy of such notice to each stockholder addressed to him at his address as the same shall appear upon the books of the bank. Affidavit of the officer mailing the notice herein required and of the printer as to the publication shall be conclusive evidence of notice hereunder. At such meeting any stockholders may be represented by proxy and the stockholders shall elect, by a majority vote of the stock present, an agent or agents who shall be authorized to receive from the commissioner of banks all the assets of said bank, then remaining in his hands; and the commissioner of banks shall cause to be transferred and delivered to the said agent, or agents, all such assets of said bank. The commissioner of banks shall thereupon cause to be filed in the office of the clerk of the superior court in the pending actions a full and complete report of all his transactions, showing the assets of said bank so transferred, together with the name of the agent or agents receipting for the same; and the filing of such report shall act as a full and complete discharge of the commissioner of banks from all further liabilities by reason of the liquidation of the bank. Such agent, or agents, shall convert the assets coming into his hands, or their hands, into cash, and shall make distribution to the stockholders of said bank as herein provided. Said agent, or agents, shall file semi-annually a report of all transactions with the superior court of the county in which the bank is located, and with the commissioner of banks, and shall be allowed for such services such fees not in excess of five per cent, as may be fixed by the court. In case of death, removal or refusal to act, of any agent or agents elected by the stockholders, the commissioner of banks shall, upon report of such action on the part of such agent or agents to the superior court of the county in which the bank is located, turn over to said superior court for the stockholders of said bank, all the remaining assets of the bank, file his report and be discharged from any and all further liability to the stockholders as herein provided. Said assets, when turned over to the superior court hereunder, shall remain in the hands of the superior court until such time as, by order of Court or by action of the stockholders, distribution shall be provided for.

(19) Annual Report of Commissioner of Banks; Items in Report of; Publication.—The commissioner of banks shall file, as a part of his annual report to the governor, a list of the names of the banks so taken possession of and liquidated; and the commissioner of banks shall, from

time to time, compile and make available for public inspection, reports showing the condition of each and all the banks so taken possession of; and the annual report of the commissioner of banks shall show the sum of unclaimed and unpaid deposits, with respect to each bank and shall show all depositories of all sums coming into the hands of the commissioner of banks under the provisions of this section.

(20) Compensation of Commissioner of Banks.—The commissioner of banks, for his services rendered in connection with the liquidation of banks hereunder, shall be entitled to actual expenses incurred in connection with the liquidation of each bank, including therein a reasonable sum for the time of the bank examiners and other agents of the commissioner of banks, which expenses shall be a prior lien on the assets of such bank so liquidated until paid in full; and the commissioner of banks shall have authority to prescribe reasonable rules and regulations for fixing such expenses.

(21) Exclusive Methods of Liquidation.—No bank created under the banking act or the industrial banking act, and under the supervision of the commissioner of banks, shall be liquidated in any other way or manner than that provided herein.

(22) Application of Act.—The applicable provisions of this section as enacted by chapter 113 of the Public Laws of 1927 shall apply to all banks which on March 7, 1927, have suspended operations or are in the process of liquidation but for which no permanent receiver has been appointed by the court.

(23) Liquidation by Commissioner of Banks of All Banks in Receivership Required.—On and after the first day of January, one thousand nine hundred and thirty-six, the provisions of this section shall apply to all banks included in the definition or classification of banking institutions under this chapter, and/or any amendment thereto, which at said time shall be in receivership in the State courts; and the said banks shall be liquidated exclusively in accordance with the provisions of this section and by said banking commissioner. The liquidation of said banks shall be made strictly in accordance with the terms of this section and the words "competent local attorneys," as set forth in subsection sixteen of this section shall be defined to be any attorney or attorneys resident of the county in which the bank is being liquidated. (1921, c. 4, s. 17; 1927, c. 113; 1931, c. 243, s. 5, cc. 385, 405; 1933, c. 175, s. 2, c. 546; 1935, c. 81, s. 4, c. 231, s. 1, c. 277; 1939, c. 91; C. S. 218(c).)

Local Modification.—Buncombe: 1933, c. 27; Rutherford: 1933, c. 567.

Cross References.—See Editor's Note to § 53-18. As to conditions upon which closed banks may re-open, see § 53-37. As to escheats generally, see § 116-20 et seq.

Editor's Note.—Prior to the 1927 amendment, the Supreme Court held in Litchfield v. Roper, 192 N. C. 202, 205, 134 S. E. 651, that this section did not supersede or repeal the provisions of C. S. section 240, but that it was supplemental to that section and should be construed in conjunction with it.

Prior to this amendment the superior court had exclusive jurisdiction over the affairs of an insolvent bank incorporated under the laws of this state. See Trust Co. v. Leggett, 191 N. C. 362, 131 S. E. 752. It was therefore the duty of the court to ascertain the amount of liability and assess the stockholders. By virtue of the amendment these duties, and all the others formerly performed by the court as well, were devolved upon the corporation commission.

Prior to the amendment it was held that a justice of the peace had no jurisdiction over an action of the receiver to collect an overpayment of dividends to a stockholder, where the amount of indebtedness had not been fixed by the superior court. Trust Co. v. Leggett, supra.

Public Laws of 1931-1933-1935.—This section was amended three times by Public Laws 1931. Chapter 405 rewrote subsection (16). Chapter 385, effective May 11, 1931, and excepting pending litigation, added the second paragraph to subsection (7), and provided that "the powers herein granted shall be in addition to and not in derogation of any existing acts ratified at this session of the General Assembly."

Chapter 243 substituted "commissioner of banks" for "corporation commission" and "chief state bank examiner" formerly appearing in this section.

By c. 546 of Public Laws 1933 subsection (12) of this section was amended by the addition of the second sentence relating to dividends on unclaimed deposits in closed banks. Prior to the second 1933 amendment, chapter 175, subsection (15) required deposits should return interest on the net average sum on deposit at a rate of not less than three per cent per annum.

The proviso at the end of subsection (8) of this section was added by the 1935 amendment. The act also added subsection (24) in its entirety. §§ 2-5½ of the amendatory act provide for the procedure by receivers in charge of liquidation in effecting the change required by subsection (24).

In General.—The functions of the Commissioner of Banks are not limited to the provisions of this section, and the courts of equity have inherent power to permit the Commissioner of Banks to exercise the functions of a chancery receiver in matters which are not inconsistent with his statutory duties. Blades v. Hood, 203 N. C. 56, 164 S. E. 828.

The corresponding section of the general corporation law is not applicable to banks, see § 55-125.

Does Not Affect Right to Restrain Commission.—The jurisdiction of the Superior Courts of this State, in a proper case, to restrain the Commissioner of Banks, is not affected by the provisions of this section. The Commissioner of Banks is an administrative officer of the State, and in the performance of his duties as prescribed by statute, is subject to the jurisdiction of the Superior Courts, in the exercise of their equitable jurisdiction. Stanly Bank, etc., Co. v. Hood, 206 N. C. 543, 546, 174 S. E. 503; Hood v. Burrus, 207 N. C. 560, 178 S. E. 362.

When the commissioner is made a party, he succeeds to the rights of the bank in the litigation pending and comes into the pending case for the purpose of protecting the rights of creditors in the recovery, not for the purpose of asserting a new and independent cause of action. Fidelity, etc., Co. v. People's Bank, 72 F. (2d) 932, 936.

Necessity of Closing Bank's Doors. — Among other powers conferred by statute, the Corporation Commission may, without taking possession of the business and property of a state bank, upon its appearing to the commission to be in imminent danger of insolvency, direct upon what conditions its officers may continue in its management and control, and thus, upon the banks complying therewith, avoid losses to depositors, creditors, and stockholders, necessarily incident to the closing of its doors. Taylor v. Everett, 188 N. C. 247, 124 S. E. 316.

Preferences. — It will be noted that under subsection 13 of this section claims against the estate of an insolvent bank for amounts due on collection made and unremitted for, or for which final actual payment has not been made by the bank, are given preference, in the final distribution of the assets of said bank. Braswell v. Citizens Nat. Bank, 197 N. C. 229, 233, 148 S. E. 236.

The words "or otherwise" in subsec. 13 of this section, are to be construed in connection with the other parts of the statute, meaning any mode of transportation analogous to those specified in the statute, requiring "remitting" or "sending" the money to the payee of the check. Morecock v. Hood, 202 N. C. 321, 162 S. E. 730.

Where a check was purchased from a bank, which a few days later became insolvent and the bank on which the check was drawn refused to honor it, it was held that the purchaser could not claim a preference under this section. The transaction was that of debtor and creditor. If it were otherwise in every transaction involving the relationship of debtor and creditor, near to a bank's going into liquidation on account of insolvency, it would be claimed a preference—thus destroying the well recognized maxim that "equality is equity." Great Atlantic, etc., Tea Co. v. Hood, 205 N. C. 313, 316, 171 S. E. 344.

It is well settled that the purchase of a bank draft, a

cashier's check or a certified check creates the relation of debtor and creditor between the bank and the purchaser, and that the purchaser is not entitled to a preference over other general creditors of the bank from which it was purchased. Id.

Where a depositor drew a draft on his local bank against a general deposit and the payee forwarded the draft to the drawee bank for collection and it was returned with notice of the bank's insolvency, it was held that the drawer's claim was not entitled to a statutory preference under this section for the reason that the bank did not charge the draft to the account of the drawer; and if the bank's failure to return the draft within twenty-four hours after its receipt by mail implied an acceptance under the provisions of sections 25-143 and 25-144, such acceptance did not ipso facto create a preference. Lamb v. Hood, 205 N. C. 409, 410, 171 S. E. 359.

Where a national bank received a draft for collection and remitted for the collection of the draft a draft drawn on one of its correspondents, but failed before this draft could be paid, it was held that the owner of the draft collected had no lien on the assets of the insolvent bank in the hands of the receiver. There was no augmentation of the assets of the bank as a result of the collection, but merely a shifting of credits, and consequently no basis for the declaration of a trust. Spradlin v. Royal Mfg. Co., 73 F. (2d) 776.

It is clear, that even if this proviso be construed as having relation to solvent banks as distinguished from those in liquidation, it cannot affect national banks. Id.

The lien created, although it is to attach from the date of the charge, entry or collection, arises only upon "failing to remit" or "the non-payment of a check sent in payment;" and it is manifest that a solvent bank will not fail to remit collections or permit a check sent in payment of a collection to remain unpaid. It is only in case of banks which have failed, therefore, that the statute can have any practical application; and the lien which it creates is of such a character that it can be enforced only by a liquidation of the bank. Id.

Same—Cashier's Check.—Where a bank debits an account with the amount of a check drawn by the depositor and issues its cashier's check for the amount but is placed in a receiver's hands before remitting the proceeds to a third person as instructed to do by the depositor, the cashier's check does not constitute a preference as defined by this section. Board of Education v. Hood, 204 N. C. 353, 168 S. E. 522.

If a depositor in a bank takes a cashier's check for his deposit, and thereafter surrenders the cashier's check, purchasing with the proceeds, a draft for the purchase price of Liberty Bonds, and the bank is closed before the draft is paid, such transaction does not constitute a preference as defined by this section. In re Bank of Pender, 204 N. C. 143, 144, 167 S. E. 561.

Same—Draft on Another Bank.—Under subsec. 13 of this section a depositor who presents his check for payment over the counter of a bank which charges his account with the amount thereof and gives him a draft drawn on another bank which he deposits in a third bank, and the draft is returned unpaid, is not entitled to a preference in assets of the bank drawing the draft, the transaction not coming within the provisions of the statute for a preference when a bank receives a check by "mail," express or otherwise . . . with request that remittance be made therefor. Morecock v. Hood, 202 N. C. 321, 162 S. E. 730.

Taxes Held to Constitute Preferred Claim.—A bank, owning the land upon which the bank building was situate, closed its doors and the Commissioner of Banks took possession for purposes of liquidation by virtue of the statute. At the time of closing there was an outstanding mortgage securing an indebtedness of $25,000, all of which was unpaid and in default. The mortgagee took possession of the real estate and collected the rents and thereafter the liquidating agent of the bank listed the real property for taxation. County and town taxes were duly assessed and subsequently the mortgagee duly exercised the power of sale and became the purchaser of the property. It was held that as the bank, the mortgagor, was the real owner it was liable for taxes unpaid at the time of the sale and by subdivision (13) of this section taxes constitute a preferred claim against the assets of the insolvent bank. Hood v. McGill, 206 N. C. 83, 85, 173 S. E. 20.

Payment of Dividends to Clerk of Court.—In In re Bank of Ayden, 206 N. C. 821, 175 S. E. 177, dividends declared by Commissioner were paid to clerk of court to hold for three months, during which time conflicting contentions of creditors and depositors were heard and decided.

"Assets" Defined.—C. S. sections 239 and 240, providing for the assessment of the stockholders, were a recognition of the distinction between ordinary assets of the corporation and the statutory liability, and was substantially a legislative construction that the former does not include the latter. Hill v. Smathers, 173 N. C. 642, 649, 92 S. E. 607.

The term "assets" is broad enough to cover anything which is now or may be available to pay creditors, but as usually understood it refers to the tangible property of the corporation and not to the liability of stockholders, contingent upon insolvency. It does not include rights and property which do not belong to the corporation, and the current of opinion is that the statutory liability is not for the benefit of the corporation, but is an additional security for creditors. Hill v. Smathers, 173 N. C. 642, 648, 92 S. E. 607.

"Creditors" and "Claimants" — Subd. 10. — In regard to bonds left for safe-keeping in the bank, it was held that the bank was a trustee of an express trust and plaintiffs were not "creditors" or "claimants" as contemplated by subdivision 10 of this section and therefore the provisions of this subdivision as to filing claims was inapplicable to the action, and further, that even if the subdivision were applicable it would be inequitable for defendant to set up the defense since defendant's agent had told plaintiff that claims need not be filed. Bright v. Hood, 214 N. C. 410, 199 S. E. 630.

Personal Liability of Directors as Asset.—The right of action by the bank, and by its receiver (now Bank Examiner or agent) in case of insolvency for loss or depreciation of the bank's assets, due to their wilfud or negligent failure to perform their official duties, is one enforceable for the benefit of the bank as well as for its creditors, and where the receiver has sued the shareholders of its stock for their additional or personal liability, the defendants, setting up this defense as an asset of the bank, are entitled to have the officer's or director's liability determined before the amount of their liability by assessment may be fixed. Corporation Comm. v. Merchants Bank, etc., Co., 193 N. C. 113, 114, 136 S. E. 362.

Purchase Price of Sale of Insolvent Bank's Property Must Be Paid to Corporation Commission. — Where the Corporation Commission takes possession of the assets of an insolvent bank under the provisions of this section, it is a statutory receiver and it is required by statute to collect the assets of the bank and to distribute them to the creditors and depositors, and the court having jurisdiction is without power to authorize the sale of an insolvent bank's property in bulk to purchasers under an agreement that the purchasers organize another bank and pay to it the purchase price for distribution to the creditors and depositors and thus relieve the Commission of its duty to collect and distribute the assets. As to whether the court might authorize the sale of the assets in bulk is not decided, though it would seem that under the statutory provision that he shall make such order as in his discretion will best serve the parties interested he has the power to authorize a sale in bulk, which would not be reviewable on appeal except on the ground of abuse of discretion. In re Lafayette Bank & Trust Co., 198 N. C. 783, 153 S. E. 452.

The Commissioner of Banks Acts in a Capactiy Equivalent to a Receiver.—See Hood v. North Carolina Bank, etc., Co., 209 N. C. 367, 184 S. E. 51.

The commissioner of banks acts as receiver under inherent power of court only in matters which are not provided for by statute, and his powers and duties in the collection and distribution of the assets of an insolvent bank are derived from the statute. Hoft v. Mohn, 215 N. C. 397, 2 S. E. (2d) 23.

And the bank as a legal entity is not dissolved and does not cease to exist, but its powers are exercised by the commissioner (formerly the Corporation Commission) for the purpose of converting the assets, paying its liabilities, and distributing the surplus, if any, among the stockholders. People's Bank v. Fidelity, etc., Co., 4 F. Supp. 379, 383.

No New Cause of Action Is Created Where Commissioner Is Made a Party to Previous Action by Bank.—See People's Bank v. Fidelity, etc., Co., 4 F. Supp. 379, 383.

An order authorizing the liquidating agent to sell a stock assessment judgment affects only the liquidating agent and whoever purchases by virtue thereof, and so far as stockholders are concerned, the order is res inter alios acta. In re Carolina State Bank, 208 N. C. 509, 181 S. E. 621.

An action on a note by the Commissioner of Banks, etc., is properly brought in the county in which the insolvent bank is situate and of which the liquidating agent is a resident, and defendants' motion for change of venue to the county of their residence is properly refused. Hood v. Progressive Stores, 209 N. C. 36, 182 S. E. 694.

The manifest purpose of subdivision (13) is to place the out of town holder of a check or draft on a footing as favorable as the one occupied by the local depositor. The local depositor can present his check and get the cash. If the bank collects the out of town check or draft received through the mails by charging it to the account of its customer, it is the bank's duty, under this statute, to remit the proceeds to the owner, and the owner has a lien thereon. The proceeds of the collection rightfully belong to the owner of the draft; thereafter they are not the property of the bank, and the general creditors have no right to participate therein. Royal Mfg. Co. v. Spradlin, 6 F. Supp. 98, 100.

This subdivision clearly supersedes the law as declared by the supreme court in Corporation Comm. v. Merchant's, etc., Bank, 137 N. C. 697, 50 S. E. 308, and similar decisions. The statute embodies what was declared to be the law by the United States Supreme Court in Dakin v. Bayly, 290 U. S. 143, 54 S. Ct. 113, 78 L. Ed. 229, 90 A. L. R. 999, where it was held that the forwarding bank of a draft for collection is nothing but the agent of the drawer, and that this agency continues until the proceeds are remitted, and that the forwarding bank is not a creditor of the collecting bank and for this reason cannot offset such items against its debt to the collecting bank. Id.

It Is Applicable to National Banks.—See Spradlin v. Royal Mfg. Co., 73 F. (2d) 776, overruling Royal Mfg. Co. v. Spradlin, 6 F. Supp. 98.

The lien provided in subdivision (13) is in no wise contingent upon the insolvency of the bank. It attaches, in all cases, "from the date of the charge, entry or collection of any such funds." The lien exists before insolvency and subsequent insolvency does not invalidate it. Royal Mfg. Co. v. Spradlin, 6 F. Supp. 98, 101.

The proviso in subdivision (13) does not create a preference; it creates a statutory lien. The legislature used the word "preference" everywhere in the act preceding the proviso, but it used the word "lien" advisedly and to make it apply without regard to preferences. Id.

Upon collection, the agency relation ceases, in the absence of agreement to the contrary, and the position of the bank from then on is that of a mere debtor. Citizens Nat. Bank v. Fidelity, etc., Co., 86 F. (2d) 4, 6, citing Jennings v. United States Fidelity, etc., Co., 294 U. S. 216, 55 S. Ct. 394, 395, 79 L. Ed. 869, 99 A. L. R. 1248.

Where a certificate of deposit sent to the insolvent collecting bank was used in clearance, a draft for the balance on the clearance transaction being received by the insolvent collecting bank, it was held that a debtor and creditor relationship arose and that the creditor's successor was not entitled to preference. Citizens Nat. Bank v. Fidelity, etc., Co., 86 F. (2d) 4.

It makes no difference that, instead of collecting cash on the certificate of deposit, the collecting bank used it in a clearance and received a draft for the balance due upon the clearance, which was ultimately collected in cash. If a bank accepts anything other than cash in payment of a negotiable instrument which it holds for collection, it becomes, under the rules of the common law, liable as a debtor for the amount of the instrument, the reason for the rule being that, as the instrument is payable only in cash, the collecting bank by accepting something other than cash assumes the risk incident to such method of collection and is estopped to deny payment. Citizens Nat. Bank v. Fidelity, etc., Co., 86 F. (2d) 4, 6, citing Cleve v. Craven Chemical Co., 18 F. (2d) 711, 713, 52 A. L. R. 980; Federal Reserve Bank v. Malloy, 264 U. S. 160, 44 S. Ct. 296, 68 L. Ed. 617, 31 A. L. R. 1261.

The agency to collect is coupled with an authority in the collecting bank to use the proceeds for its own purposes; and where the collecting bank, in accordance with the usual custom of the banking business, makes a collection in what it chooses to accept as money's worth and thereupon becomes in law liable as a debtor for the amount of the collection, there is no reason to hold that the trust relationship is extended beyond such collection. Citizens Nat. Bank v. Fidelity, etc., Co., 86 F. (2d) 4, 6.

Applied, as to former subd. (13), in In re Carolina State Bank, 208 N. C. 509, 181 S. E. 621; as to subd's (10), (11), in Hood v. Elder Motor Co., 209 N. C. 303, 183 S. E. 529; as to former subd. (13), in Hood v. Hewitt, 209 N. C. 810, 185 S. E. 161; as to present subd. (13) in In re Champion Bank, etc., Co., 207 N. C. 802, 178 S. E. 555; as to preference in Williams v. Hood, 207 N. C. 737, 178 S. E. 669; Dixie Mercerizing Co. v. Hood, 207 N. C. 135, 176 S. E. 285.

Cited in Braswell v. Citizens' Nat. Bank, 197 N. C. 229, 233, 148 S. E. 236; State v. Davidson, 205 N. C. 735, 172 S. E. 489; Pritchard v. Hood, 205 N. C. 790, 172 S. E. 485; Edgerton v. Hood, 205 N. C. 816, 172 S. E. 481; In re Central Bank, etc., Co., 205 N. C. 822, 172 S. E. 484; Hood v. Mitchell, 206 N. C. 156, 173 S. E. 61; Hood v. Johnson, 208 N. C. 77, 178 S. E. 855; Briley v. Crouch, 115 F. (2d) 443; as to subd. (3) in Hood v. Burrus, 207 N. C. 560, 178 S. E. 362; Stanly Bank, etc., Co. v. Hood, 206 N. C. 543, 174 S. E. 503; as to subd. (9) in Underwood v. Hood, 205 N. C. 399, 171 S. E. 364; as to former subd. (13) in In re Bank of Murphy, 205 N. C. 840, 172 S. E. 181; as to subdivisions (17) and (21), in Windley v. Lupton, 212 N. C. 167, 193 S. E. 213; In re United Bank, etc., Co., 209 N. C. 389, 184 S. E. 64; Hood v. Clark, 211 N. C. 693, 191 S. E. 732.

§ 53-21. Sale of stocks of defunct banks validated.—All private sales of stocks in resident corporations, joint stock companies and limited partnerships, made prior to March 20, 1935, by the commissioner of banks or a duly appointed agent in the course of the liquidation of a defunct bank, where such sale was made by and with the approval of a liquidation board duly selected by the creditors and stockholders of such bank and upon authority of an order of the presiding or resident judge of the district in which the principal office of such bank was located, are hereby in all respects validated, ratified and confirmed. (1935, c. 113.)

§ 53-22. Statute relating to receivers applicable to insolvent banks.—Article thirteen, chapter fifty-five relating to receivers, when not inconsistent with the provisions of § 53-20, shall apply to liquidation of insolvent banks. (1921, c. 4, s. 19; 1923, c. 148, s. 4; 1931, c. 215; C. S. 218(e).)

Editor's Note.—The 1931 amendment rewrote the section.

Effect in General.—This section serves to confer upon the Commissioner of Banks possession and the right to possession of all property, rights, etc., with certain enumerated powers together with such incidental powers as are necessary to a sale of the insolvent bank's assets. Blades v. Hood, 203 N. C. 56, 164 S. E. 828.

Cited in Hoft v. Mohr, 215 N. C. 397, 2 S. E. (2d) 23.

§ 53-23. Books, records, etc., disposition of.—All books, papers, and records of a bank which has been finally liquidated shall be deposited by the receiver in the office of the clerk of the superior court for the county in which the office of such bank is located, or in such other place as in his judgment will provide for the proper safekeeping and protection of such books, papers, and records. The books, papers, and records herein referred to shall be held subject to the orders of the commissioner of banks and the clerk of the superior court for the county in which such bank was located. (1921, c. 4, s. 20; 1931, c. 243, s. 5; C. S. 218(f).)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-24. Destruction of records of liquidated insolvent banks.—After the expiration of ten years from the date of filing in the office of the clerk of the superior court of a final order approving the liquidation by the banking department of any insolvent bank and the delivery to the clerk or into his custody of the records of such bank, the said records may be destroyed by the clerk of the superior court holding said records by burning the same in the presence of the register of deeds and the sheriff of said county, who shall join with the clerk in the execution of a certificate as to the destruction of said records. The certificate shall be filed by the clerk in the court records of the liquidation of the bank whose records are thus destroyed.

After ten years from the filing by the commissioner of banks of a final report of liquidation of any insolvent bank, the said commissioner, by

and with the consent of the state banking commission or its successor, may destroy by burning the records of any insolvent bank held in the department of the commissioner of banks in connection with the liquidation of such bank: Provided, that in connection with any unpaid dividends the commissioner of banks shall preserve the deposit ledger or other evidence of indebtedness of the bank with reference to the unpaid dividend until the dividend shall have been paid.

Nothing in this section shall be construed to authorize the destruction by the clerk of the superior court of any county or by the commissioner of banks of any of the formal records of liquidation, nor shall the commissioner of banks have authority under this section to destroy any of the records made in his office with reference to the liquidation of any insolvent bank. (1939, c. 91, s. 1; 1939, c. 135.)

§ 53-25. Trust terminated on insolvency of trustee bank.—Whenever any bank or trust company created under the laws of this State, which has heretofore been, or shall hereafter be, appointed trustee in any indenture, deed of trust or other instrument of like character, executed to secure the payment of any bonds, notes or other evidences of indebtedness, has been or shall be by reason of insolvency, or for any other cause provided by law, taken over for liquidation by the commissioner of banks of this State or by any other legally constituted authority, the powers and duties of such bank or trust company as trustee in any such instrument shall, upon the entry of an order of the Clerk of the superior court appointing a successor trustee, upon a petition as hereinafter provided, immediately cease and determine. (1931, c. 250, s. 1.)

§ 53-26. Petition for new trustee; service upon parties interested.—In all cases of such insolvency and liquidation mentioned in § 53-25, the clerk of the superior court of any county in which such indenture, deed of trust or other instrument of like character is recorded shall, upon the verified petition of any person interested in any such trust, either as trustee, beneficiary or otherwise, which interest shall be set out in said petition, enter an order directing service on all interested parties either personally or by the publication in some newspaper published in the county, or in some adjoining county if no newspaper is published in the county where such application is made, of a notice directed to all persons concerned, commanding and requiring all persons having any interest in said trust, to be and appear at his office at a day designated in said order and notice, not less than thirty days from the date thereof, and show cause why a new trustee shall not be appointed. (1931, c. 250, s. 2.)

§ 53-27. Publication and contents of notice.—Such notice shall be published in the manner required by law for service of summons by publication, and shall set forth the names of the parties to the indenture, deed of trust or other such instrument, the date thereof, and the place or places where the same is recorded. (1931, c. 250, s. 3.)

§ 53-28. Appointment where no objection made.—If, upon the day fixed in said notice, no person shall appear and object to the appointment of a substitute trustee, the clerk shall, upon such terms as he deems advisable to the best interest of all parties, appoint some competent person, or corporation authorized to act as such, substituted trustee, who shall be vested with and shall exercise all the powers conferred upon the trustee named in said instrument. (1931, c. 250, s. 4.)

§ 53-29. Hearing where objection made; appeal from order.—If objection shall be made to the appointment of a new trustee, the clerk shall hear and determine the matter, and from his decision an appeal may be prosecuted as in case of special proceedings generally. (1931, c. 250, s. 5.)

§ 53-30. Registration of final order.—The final order of appointment of such new trustees shall be certified by the clerk of the superior court in which such order is entered and shall be recorded in the office of the register of deeds in the county or counties in which the instrument under which such appointment has been made is recorded, and a minute of the same shall be entered by the register of deeds on the margin of the record where said original instrument is recorded. (1931, c. 250, s. 6.)

§ 53-31. Petition and order applicable to all instruments involved.—The petition and the order appointing such new trustee may include and relate and apply to any number of indentures, deeds of trust or other instruments, wherein the same trustee is named. (1931, c. 250, s. 7.)

§ 53-32. Additional remedy.—Sections 53-25 to 53-31 shall be in addition to and not in substitution for any other remedy provided by law. (1931, c. 250, s. 8.)

Editor's Note.—As the remedy provided is cumulative, the statute should be read in connection with §§ 45-10 to 45-16. 9 N. C. Law Rev. 403.

§ 53-33. Validation of acts of officers of insolvent banks as trustees in deeds of trust.—Whenever any state bank, prior to January first, one thousand nine hundred and thirty-one, shall have become insolvent and its assets and business been placed in the hands of the corporation commission or taken control of by the corporation commission for liquidation, and the board of directors of said bank shall have thereafter by resolution authorized or directed the officers of said bank or some of them to perform or exercise in the name of the bank as trustee any power or duty of such bank as trustee under any deed in trust to it recorded in any county in this State, provided said resolution was passed prior to the eleventh day of May, one thousand nine hundred and thirty-one, the performance or exercise of any such power or duty heretofore or hereafter by any officer or officers so authorized shall be effective and binding on all parties concerned as the act of such bank as trustee as aforesaid, to the same extent and in the same manner as if such bank had not become insolvent and its assets and business had not been placed in the hands of the corporation commission or taken control of by the corporation commission for liquidation. (1931, c. 403.)

§ 53-34. Validation of sales by corporation commission under mortgages, etc., giving banks power of sale.—Whenever it appears that either the North Carolina corporation commission, the chief state bank examiner, or any liquidating agent ap-

pointed pursuant to the provisions of § 53-20, has undertaken to exercise the power of sale set up in any mortgage, deed of trust, or other written instrument for the security of the payment of money in which any bank then in liquidation was named trustee, the said acts including the acts of resigning the trust, of the North Carolina corporation commission and/or chief state bank examiner, and/or liquidating agent appointed as aforesaid, are hereby validated and declared to be of the same force and effect as if done by the bank named as trustee in the mortgage, deed of trust, or other instrument. (1931, c. 132.)

Editor's Note.—This section, which validates sales by the commission and its representatives in the course of liquidation of insolvent banks, when the power of sale was originally granted to such a bank before the state took it over, appears to have been intended to overcome the effect of the case of Mitchell v. Shuford, 200 N. C. 321, 156 S. E. 513, which held that the commission had no such authority. In view, however, of this case, and of Booth v. Hairston, 193 N. C. 278, 136 S. E. 879; s. c., 195 N. C. 8, 141 S. E. 480, doubt is cast upon the constitutionality of the validating act. Upon the rehearing of the latter case, Justice Brogden said: "* * * but the power to cure a crippled instrument, having at least a spark of legal life, does not extend to raising a legal corpse from the dead." It is believed, however, that if more emphasis is placed upon the need for a dependable device for translating the security into a satisfaction of the debt, which is all the deed of trust or mortgage amounted to, than upon questions of title or contracts, that the facts of the situation aimed at by the validating act can be distinguished.

The future policy is stated in § 53-25 et seq., and in the 1931 amendment to § 53-20, subsection 7. 9 N. C. Law Rev. 401, 402.

§ 53-35. Foreclosures and execution of deeds by commissioner of bank, validated.—Whereas, the commissioner of banks, created by chapter two hundred forty-three of the Public Laws of 1931, was given general supervision over the banks of this state; and

Whereas, the commissioner of banks, under authority of chapter three hundred and eighty-five of the Public Laws of 1931, succeeded to all the property of banks in liquidation, including fiduciary powers under the mortgages and deeds of trust; and

Whereas, the commissioner of banks, in his own name and in the name of a number of conservators or liquidating agents of banks in the process of liquidation under his supervision, has foreclosed a large number of deeds of trust in which such banks were the named trustee, and has executed under the powers contained therein a large number of trustee's deeds under authority thereof: Now, therefore,

All the deeds and acts of the commissioner of banks and/or conservators or liquidating agents of such banks in the process of liquidation, as in the preamble to this section described, are hereby in all respects ratified, validated and confirmed.

This section shall not effect litigation pending April 3, 1939. (1939, c. 368.)

§ 53-36. Commissioner to report to secretary of state certain matters relative to liquidation of closed banks; publication.—The commissioner of banks of the state of North Carolina shall on or before the first day of June, 1933, and on the first day of January and July of each year thereafter file with the secretary of the state of North Carolina a report showing all banks under liquidation in the state of North Carolina, and the names of any and all auditors together with the amounts paid to them for auditing each of said banks, and the names of any and all attorneys employed in connection with the liquidation of said banks together with the amount paid or contracted to be paid to each of said attorneys. If any attorney has been employed on a fee contingent upon recovery said report must state in substance the contract.

Within five days from the receipt of said report the secretary of the state of North Carolina shall cause same to be published one time in some newspaper published in each county in which a bank or banks are under liquidation, if there be a newspaper published in said county. If not, the secretary of the state of North Carolina shall cause a copy of said report to be posted at the courthouse door in said county. (1933, c. 483.)

Art. 4. Reopening of Closed Banks.

§ 53-37. Conditions under which banks may reopen.—Whenever the commissioner of banks has taken in possession any bank, such bank may, with the consent of the commissioner of banks, resume business upon such terms and conditions as may be approved by the state banking commission. When such banks have been taken in possession under the provisions of § 53-20, paragraphs one or two, such conditions shall be fully stated in writing and a copy thereof shall be filed with the clerk of the superior court in the action required to be commenced in such cases against said bank under the provisions of § 53-20, paragraph three: Provided, however, no bank or banking institution which has been taken in possession by the commissioner of banks under the provisions of the state banking laws shall be reopened to receive deposits or for the transaction of a banking business unless and until:

(a) The bank has been completely restored to solvency;

(b) The capital stock, if impaired, has been entirely restored in cash;

(c) It shall clearly appear to the commissioner of banks that such bank may be reopened with safety to the public and such reopening is necessary to serve the business interests of the community. (1921, c. 4, s. 16; 1927, c. 113, s. 1; 1931, c. 243, s. 5; 1931, c. 388, s. 1; 1939, c. 91, s. 2; C. S. 218(q).)

Cross References.—As to liquidation, see § 53-20. As to when commissioner takes charge, see § 53-19.

Liability of Directors under Agreement.—The agreement of directors to make good the impairment of the capital stock of a state bank as a condition precedent to the management of its business by its own officers, and at the instance of the state bank examiner, acting according to the power conferred by statute upon the corporation commission, renders such directors, as stockholders liable to the extent of the obligations they have thus assumed, and this liability is independent of the former statute creating an additional liability to the amount of stock held by them in the banking corporation. (C. S. § 219(a).) Taylor v. Everett, 188 N. C. 247, 124 S. E. 316.

§ 53-38. Certain contracts not affected.—Nothing in § 53-37 shall impair or affect any contracts made by banks and depositors of banks reopened prior to May 12, 1931, under the permission of the state banking department. (1931, c. 388, s. 4.)

Art. 5. Stockholders.

§ 53-39. New state banks to set up surplus fund.—The common stockholders of any bank organized after March 17, 1933, under the laws of the state of North Carolina shall pay in, in cash, a

surplus fund equal to fifty per centum of its common capital stock before the bank shall be authorized to commence business. (1933, c. 159, s. 2; 1935, c. 79, s. 1.)

Editor's Note.—For a discussion of history and scope of this section, see 11 N. C. Law Rev. 200. For an interesting article discussing the law of contracts, and referring to provisions of the instant section, see 13 N. C. Law Rev. 91.

The amendment of 1935 added the word "common" wherever it appears in the section preceding the words "stockholders" and "capital stock."

§ 53-40. Executors, trustees, etc., not personally liable.—Persons holding stock as executors, administrators, guardians, or trustees shall not personally be subject to any liabilities as stockholders, but the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be if living and competent to hold stock in his own name. (1921, c. 4, s. 23; C. S. 219(c).)

Editor's Note.—This section is a substantial re-enactment of the latter part of C. S. sec. 237.

Extent of Section.—This provision is held to refer not only to trustees appointed by will, or by order of a court or of a judge, but to any trust relation, however created. But the exemption is limited to cases of express and active trusts, where there is a probability of some estate to respond to the liability. American Trust Co. v. Jenkins, 193 N. C. 761, 765, 138 S. E. 139.

In Smathers v. Western Carolina Bank, 155 N. C. 283, 71 S. E. 345, it was held that by reason of this statute, a person to whom a certificate for shares of the capital stock in a bank was issued, showing on its face that he held the said shares as trustee for a cestui que trust, also named in the certificate, is not liable personally as a stockholder in an action by the receiver of the bank to recover judgment upon the statutory liability of stockholders. American Trust Co. v. Jenkins, 193 N. C. 761, 764, 138 S. E. 139. See Corporation Comm. v. Latham, 201 N. C. 342, 343, 160 S. E. 295.

Assignee of Judgment for Stock Assessment against Executor Is Not Entitled to Set Up Personal Liability of Executor.—Plaintiff assignee of a judgment against an executor in his representative capacity for a stock assessment made on shares of stock of a bank in liquidation, sought by subsequent proceedings to charge the executor personally with liability upon allegations that the executor personally owned the bank stock, legally or equitably. The mere assignment of the judgment, without more, was held to transfer only the rights of the assignor of the judgment in his status of judgment creditor and not his personal rights not incident to such status, and plaintiff was not entitled to set up the personal liability of the executor. Jones v. Franklin's Estate, 209 N. C. 585, 183 S. E. 792.

Liability Attaches to Estate or Funds in Hands of Trustees, etc.—By this provision an administrator, executor, guardian, or trustee is not personally liable for the statutory liability on bank stock held in their representative capacities, but such liability attaches to the estate or funds in their hands. Hood v. North Carolina Bank, etc., Co., 209 N. C. 367, 184 S. E. 51.

And where a trustee breached its duty in failing to sell bank stock for reinvestment, its wrongful act will not relieve the estate of the statutory liability to the prejudice of depositors and creditors of the bank. Id.

A trust estate is liable for assessment on bank stock owned regardless of the method by which the trust is established, and where shares of bank stock appear on the books of the bank in the name of "executors," the statutory liability thereon of the estate may not be defeated by showing that the stock was held by the executors as executors and trustees under the will for the benefit of minor ulterior beneficiaries, the beneficiaries of the income from the trust estate being of age, and there being nothing on the books of the bank to disclose the trusteeship. Hood v. North Carolina Bank, etc., Co., 209 N. C. 367, 184 S. E. 51.

Liability of Bank Trustee to Trust Estate Can Not Be Set Up as Counterclaim against Liability of Estate.—The liability of a bank trustee to the trust estate for its negligent failure to sell for reinvestment shares of stock of the bank belonging to the trust estate cannot be set up as a counterclaim or set-off against the statutory liability of the estate upon the insolvency of the bank. In re United Bank, etc., Co., 209 N. C. 389, 184 S. E. 64.

Former Liability of Stockholders Individually.—The amendment of 1935 to C. S. § 219(a)—1935, c. 99, s. 1—abolished the statutory liability of stockholders in the banks of this state, and it is made applicable to all shares of stock, issued or to be issued. Hood v. Richardson Realty, 211 N. C. 582, 191 S. E. 410.

Where since the levy of the assessment the holders of bank stock have been relieved of their double liability by the 1935 enactment, unless the defendants were rendered liable by the prior original assessment, they cannot now be made liable therefor. Fidelity Security Co. v. Hight, 211 N. C. 117, 189 S. E. 174.

§ 53-41. Stock sold if subscription unpaid. — Whenever any stockholder, or his assignee, fails to pay any installment on the stock, when the same is required by law to be paid, the directors of the bank shall sell the stock of such delinquent stockholder at public or private sale, as they may deem best, having first given the delinquent stockholder twenty days notice, personally or by mail, at his last known address. If no party can be found who will pay for such stock the amount due thereon to the bank with any additional indebtedness of such stockholder to the bank, the amount previously paid shall be forfeited to the bank, and such stock shall be sold, as the directors may order, within thirty days of the time of such forfeiture, and if not sold, it shall be canceled and deducted from the capital stock of the bank. (1921, c. 4, s. 25; C. S. 219(e).)

Cross Reference.—As to liability for unpaid stock under general corporation law, see § 55-65.

Editor's Note.—This section is a substantial re-enactment of C. S. sec. 243, the prior law, except that the sale limit allowed the directors was changed from six months to thirty days.

§ 53-42. Impairment of capital; assessments, etc.—The commissioner of banks shall notify every bank whose capital shall have become impaired from losses or any other cause, and the surplus and undivided profits of such bank are insufficient to make good such impairment, to make the impairment good within sixty days of such notice by an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made: Provided, that such bank may reduce its capital to the extent of the impairment, as provided in § 53-11. If any stockholder of such bank neglects or refuses to pay such assessment as herein provided, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such stockholder or stockholders to be sold at public auction, upon thirty days notice given by posting such notice of sale in the office of the bank and by publishing such notice in a newspaper in the place where the bank is located, and if none therein, a newspaper circulating in the county in which the bank is located, to make good the deficiency, and the balance, if any, shall be returned to the delinquent shareholder or shareholders. If any such bank shall fail to cause to be paid in such deficiency in its capital stock for three months after receiving such notice from the commissioner of banks, the commissioner of banks

may forthwith take possession of the property and business of such bank until its affairs be finally liquidated as provided by law. A sale of stock, as provided in this section, shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the certificate null and void, and a new certificate shall be issued by the bank to the purchaser of such stock; but in the event the stock of any stockholder be sold as hereinbefore provided, and the said stock when sold fails to bring the amount of the assessment against said stockholder, then, and in such event, the said stockholder shall be personally liable for the difference between the amount of said assessment and the price brought by the sale of said stock. (Ex. Sess. 1921, c. 56, s. 3; 1925, c. 117; 1931, c. 243, s. 5; C. S. 219(f).)

Cross Reference.—As to the amount of reserve required, see §§ 53-50 and 53-51.

Editor's Note.—This section first appeared in the act of 1921, ch. 56, amending the act of 1921, ch. 4. Its provisions are substantially similar to the national banking act which was designed principally for the purpose of strengthening banks whose capital has become impaired. See Elon Banking, etc. v. Burk, 189 N. C. 69, 126 S. E. 163.

The 1925 amendment added the last lines, beginning with the word "but" after the semicolon. This was added to overcome the construction placed upon this section by the case cited above. See annotations following in this note.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Rules of Construction.—This statute creates a new liability and provides a special remedy for its enforcement, viz., the sale of stock if the stockholder fails to pay assessment. This remedy is exclusive and actions or proceedings ordinarily available may not be resorted to. So a personal action against the stockholder for the difference between the price for which the stock sold and the amount of the assessment cannot be maintained. Elon Banking, etc., Co., v. Burke, 189 N. C. 69, 126 S. E. 163.

The effect of the holding that a personal action for the difference cannot be maintained was destroyed by the 1925 amendment which specifically provides for such an action, but the general rules laid down for the construction of this section remain applicable.—Ed. Note.

Laws 1925, c. 117, amending this section, was passed to meet the decision in Elon Bkg., etc., Co. v. Burke, 189 N. C. 69, 126 S. E. 163. Bank of Pinehurst v. Derby, 218 N. C. 653, 12 S. E. (2d) 260.

Amendatory Act of 1925 Cannot Be Given Retroactive Effect.—The act of 1925, amending this section by providing for personal liability of stockholders for the amount by which the sale of their stock failed to realize a sum sufficient to pay the assessment, provided a new remedy, and to permit the bank to maintain the action against a stockholder who purchased his stock prior to the enactment of the amendment of 1925 would violate due process of law, and would impair the obligations of the contract, and hence the act of 1925 cannot be given retroactive effect. Bank of Pinehurst v. Derby, 218 N. C. 653, 12 S. E. (2d) 260.

"Payable in Cash" Construed.—The expression "payable in cash" merely means that the account is presently due, and its payment may be presently enforced, but only by the methods the statute specifies. Elon Banking, etc., Co. v. Burke, 189 N. C. 69, 126 S. E. 163.

Art. 6. Powers and Duties.

§ 53-43. General powers.—In addition to the powers conferred by law upon private corporations, banks shall have the power:

1. To exercise by its board of directors, or duly authorized officers and agents, subject to law, all such powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of indebtedness, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security or real and personal property. Such corporations at the time of making loans or discounts may take and receive interest or discounts in advance.

2. To adopt regulations for the government of the corporation not inconsistent with the constitution and laws of this state.

3. To purchase, hold, and convey real estate for the following purposes:

(a) Such as shall be necessary for the convenient transaction of its business, including furniture and fixtures, with its banking offices and other apartments to rent as a source of income, which investment shall not exceed fifty per cent of its paid-in capital stock and permanent surplus: Provided, that this provision shall not apply to any such investment made before the ninth day of March, one thousand nine hundred and twenty-one. Provided further, that the commissioner of banks may in his discretion authorize the continuance of investments made prior to the first day of February, one thousand nine hundred and twenty-five, of the character described in this paragraph. Provided, further, that the commissioner of banks may, in his discretion, authorize any bank located in a city having a population of more than ten thousand, according to the last United States census, to invest more than fifty per cent of its capital and permanent surplus in its banking houses, furniture, and fixtures.

(b) Such as is mortgaged to it in good faith by way of security for loans made or moneys due to such banks.

(c) Such as has been purchased at sales upon foreclosures of mortgages and deeds of trust held or owned by it, or on judgments or decrees obtained and rendered for debts due to it, or in settlements affecting security of such debts. All real property referred to in this subsection shall be sold by such bank within one year after it is acquired, unless, upon application by the board of directors, the commissioner of banks extends the time within which such sale shall be made. Any and all powers and privileges heretofore granted and given to any person, firm, or corporation doing a banking business in connection with a fiduciary and insurance business, or the right to deal to any extent in real estate, inconsistent with this chapter, are hereby repealed.

4. Nothing contained in this section shall be deemed to authorize banking corporations to engage in the business of dealing in investment securities, either directly or through subsidiary corporations: Provided, however, that the term "dealing in investment securities" as used herein, shall not be deemed to include the purchasing and selling of securities without recourse, solely upon order, and for the account of, customers; and provided further, that "investment securities," as used herein, shall not be deemed to include obligations of the United States, or general obligations of any state or of any political subdivision thereof, or of cities, towns, or other corporate municipalities of any state or obligations issued under authority of the Federal Farm Loan Act, as amended, or issued by the Federal Home Loan Banks or the Home Owners' Loan Corporation.

Any provision in conflict with this subsection contained in the Articles of Incorporation hereto-

fore issued to any banking corporation is hereby revoked.

5. Subject to the approval of the commissioner of banks and on the authority of its board of directors, or a majority thereof, to enter into such contracts, incur such obligations and generally to do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or inure to banking institutions, or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section eight of the Federal Banking Act of one thousand nine hundred and thirty-three (section twelve B of the Federal Reserve Act as amended) which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or any other act or resolution of congress to aid, regulate or safeguard banking institutions and their depositors, including any amendments of the same or any substitutions therefor; also, to subscribe for and acquire any stock, debentures, bonds or other types of securities of the Federal Deposit Insurance Corporation and to comply with the lawful regulations and requirements from time to time issued or made by such corporation.

6. Any commercial bank, savings bank, or trust company, heretofore or hereafter organized under any general or special laws of this state and any national bank doing business in this state, shall have power, in addition to such other powers as it may have:

(a) Upon the making of a loan or discount, to deduct in advance, from the proceeds of such loan, interest at a rate not exceeding six per centum (6%) per annum upon the amount of the loan from the date thereof until the maturity of the final installment, notwithstanding that the principal amount of such loan is required to be repaid in installments: Provided, any commercial bank may exercise and enjoy all the powers now or hereafter provided in paragraph 3 of section 53-141.

(b) Nothing in subsection 6 shall be construed as in any wise extending or increasing or decreasing the powers of commercial banks, savings banks, or trust companies or national banks to make loans or discount notes other than as herein or by other laws expressly provided.

7. Maintain separate departments and deposit in its commercial department to the credit of its trust department all uninvested fiduciary funds of cash and secure, under rules and regulations of the state banking commission, all such deposits in the name of the trust department whether in consolidated deposits or for separate fiduciary accounts, by segregating and delivering to the trust department such securities as may be eligible for the investment of the sinking funds of the state of North Carolina, equal in market value to such deposited funds, or readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five per centum of such deposits. Such securities shall be held by the trust department as security for the full payment or repayment of all such deposits, and shall be kept separate and apart from other assets of the trust department. Until all of such deposits shall have been accounted for to the trust department or to the individual fiduciary accounts, no creditor of the bank shall have any claim or right to such security. When fiduciary funds are deposited by the trust department in the commercial department of the bank, the deposit thereof shall not be deemed to constitute a use of such funds in the general business of the bank and the bank in such instance shall not be liable for interest on such funds. To the extent and in the amount such deposits may be insured by the Federal Deposit Insurance Corporation, the amount of security required for such deposits by this section may be reduced.

The banking commission shall have power to make such rules and regulations as it may deem necessary for the enforcement of the provisions of the preceding paragraph, and such authority shall exist and is hereby conferred under the general authority heretofore conferred upon said commission as well as by this paragraph. (1921, c. 4, s. 26; 1923, c. 148, s. 5; Ex. Sess. 1924, c. 67; 1925, c. 279; 1927, c. 47, s. 5; 1931, c. 243, s. 5; 1933, c. 303; 1935, c. 81, s. 1, c. 82; 1937, c. 154; 1941, c. 77; 1943, c. 234; C. S. 220(a).)

Cross References.—As to powers conferred upon private corporations, see § 55-26 et seq. As to form for corporate conveyances, see § 47-41. As to license of commercial banks to act in a fiduciary capacity, see § 58-114.

Editor's Note. — This section is a substantial re-enactment of C. S., sec. 220. However there are several material changes. Subsection 2 was inserted; the date beyond which investments are exempt from the section as now provided in clause (a) of subsection 3 was changed from 1903 to 1921, the second proviso permitting the commission to authorize the continuance of investments made prior to 1923 being inserted in 1924 and amended in 1925 by changing the date from 1923 to 1925, and the third proviso added by the 1927 amendment; a clause providing that real estate conveyed to a bank in satisfaction of debts previously contracted in the course of the dealings might be purchased, held and conveyed was not brought forward; and in clause (c) of subsection 3 the requirement that all real estate acquired under the subsection should be disposed of within one year was incorporated in 1921 when the section was passed, and the 1923 amendment inserted the words "and deeds of trust held or" in the second line of the clause. Otherwise the prior law is re-enacted in this section.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

The amendment of 1935 changed the list of obligations excepted in paragraph four which was added by the 1933 amendment. Formerly all obligations of the state instead of "general" obligations were excepted. Obligations issued under Farm Loan Act or by Home Loan Banks and Home Owners' Loan Corporation were added to the list. Subdivision 5 was added by the 1935 amendment in its entirety.

The 1937 amendment added subsection 6.

The 1941 amendment added subsection 7. For comment on this amendment, see 19 N. C. L. Rev. 544.

Prior to the 1943 amendment the proviso to paragraph (a) of subsection 6 provided: "no loan made under the provisions of subsection 6 shall exceed fifteen hundred dollars ($1,500.00) to any one person, firm, partnership or corporation."

Similarity of Section to Federal Act. — The words used in the statute relative to the powers of corporations engaged in the banking business under the laws of this State are almost identical with those used in the Federal statute, relative to the powers of National Banks. U. S. Comp. Stat. 1918, sec. 9661, subsec. 7. Indiana Quarries Co. v. Angier Bank, etc., Co., 190 N. C. 277, 283, 129 S. E. 619.

Power to Become Surety or Lend Credit.—In the absence of an express grant of authority, a banking corporation, as a rule, has not the power to become the guarantor or surety of the obligation of another person, or to

lend its credit to any person. Indiana Quarries Co. v. Angier Bank, etc., Co., 190 N. C. 277, 283, 129 S. E. 619.

A bank is not authorized to become a guarantor, except where it is necessary to protect its rights where the guaranty relates to commercial paper and is an incident to the purchase and sale thereof, or when the guaranty is especially authorized by law. Indiana Quarries Co. v. Angier Bank, etc., Co., 190 N. C. 277, 283, 129 S. E. 619.

Negotiations of Evidences of Debt.—In the course of its dealings and for a lawful purpose a bank may negotiate notes, drafts, bills of exchange, and other evidences of indebtedness embraced by this section; and where there is more than one transfer of the same security, and the equities are equal, the first in time will prevail. Richmond County v. Page Trust Co., 195 N. C. 545, 132 S. E. 786.

§ 53-44. Investment in bonds guaranteed by United States.—(1) Any bank, building and loan association, land and loan association, savings and loan association, insurance company, title insurance company, land mortgage company, fraternal order or benevolent association, or any other corporation incorporated under the laws of this state, and operating under the supervision of the commissioner of banks, insurance commissioner, or superintendent of savings and loan associations; the state treasurer, as custodian of the assurance fund provided under the Torrens Act, or any officer charged with the investment of sinking funds of the State, any county, city, town, incorporated village, township, school district, school taxing district, or other district or political subdivision of government of the State; the North Carolina State Thrift Society, any clerk of the court holding money by color of his office or as receiver; and any person, firm or corporation acting as executor, administrator, guardian, trustee, or other person acting in a fiduciary capacity may invest in bonds issued, or in bonds which are fully and unconditionally guaranteed as to principal and interest by the United States, to the same extent as the same are now or may be hereafter authorized to invest in any obligation of the United States: Provided that all investments authorized hereunder shall be guaranteed, both as to the payment of principal and interest thereon, by the United States treasury.

(2) Security for Loans and Deposits.—No bank shall be required to maintain a reserve against deposits secured by any of the above mentioned bonds equal in market value to the amount of such deposits, and such bonds shall be valid security for all loans and deposits to the same extent as are any obligations of the United States.

(3) Bonds Deemed Cash in Settlements by Fiduciaries.—In settlements by guardians, executors, administrators, trustees and others acting in a fiduciary capacity, the bonds and securities herein mentioned shall be deemed cash to the amount actually paid for same, including the premium, if any, paid for such bonds, and may be paid as such by the transfer thereof to the persons entitled and without any liability for a greater rate of interest than the amount actually accruing from such bonds. (1935, c. 164; 1937, c. 433.)

Cross References.—As to investment of funds held by bank for investment or distribution, see § 36-27. As to banks holding stock as fiduciary, see § 36-32.

Editor's Note.—The 1937 amendment struck out the words "not exceeding par value thereof" formerly appearing in subsection (3) of this section.

For an analysis of this section, see 13 N. C. Law Rev. 362.

§ 53-45. Banks, fiduciaries, etc., authorized to invest in mortgages of federal housing administration, etc.—(1) Insured Mortgages and Obligations of National Mortgage Associations.—It shall be lawful for all commercial and industrial banks, trust companies, building and loan associations, insurance companies, and other financial institutions engaged in business in this state, and for guardians, executors, administrators, trustees or others acting in a fiduciary capacity in this state to invest, to the same extent that such funds may be invested in interest-bearing obligations of the United States, their funds or the moneys in their custody or possession which are eligible for investment, in bonds or notes secured by a mortgage or deed of trust insured by the federal housing administrator, in mortgages on real estate which have been accepted for insurance by the federal housing administrator, and in obligations of national mortgage associations.

(2) Insured Loans. — All such banks, trust companies, building and loan associations and insurance companies, and other financial institutions, and also all such guardians, executors, administrators, trustees or others acting in a fiduciary capacity in this state, may make such loans, secured by real estate, as the federal housing administrator has insured or has made a commitment to insure, and may obtain such insurance.

(3) Eligibility for Credit Insurance.—All banks, trust companies, building and loan associations, insurance companies and other financial institutions, on being approved as eligible for credit insurance by the federal housing administrator, may make such loans as are insured by the federal housing administrator.

(4) Certain Securities Made Eligible for Collaterals, etc.—Wherever, by statute of this state, collateral is required as security for the deposit of public or other funds; or deposits are required to be made with any public official or department; or an investment of capital or surplus, or a reserve or other fund, is required to be maintained, consisting of designated securities, bonds, and notes secured by a mortgage or deed of trust insured by the federal housing administrator, debentures issued by the federal housing administrator and obligations of national mortgage associations shall be eligible for such purposes.

(5) General Laws Not Applicable.—No law of this state prescribing the nature, amount or form of security or requiring security upon which loans or investments may be made, or prescribing or limiting the rates or time of payment of the interest any obligation may bear, or prescribing or limiting the period for which loans or investments may be made, shall be deemed to apply to loans or investments made pursuant to the foregoing paragraphs. (1935, cc. 71, 378; 1937, c. 333.)

Editor's Note.—The 1937 amendment made this section applicable to building and loan associations, and made other changes.

§ 53-46. Limitations on investments or securities.—The investment in any bonds or other interest-bearing securities of any one firm, individual or corporation, unless it be the interest-bearing obligations of the United States, obligations issued under authority of the Federal Farm Loan Act, as amended, or issued by the Federal Home Loan Banks, or the Home Owners' Loan Corporation, state of North Carolina, or other state of the United States, or of some city, town, township, county, school district, or other political subdivision of the state of North Carolina, shall at no

time be more than twenty per cent of the unimpaired capital and permanent surplus of any bank to an amount not in excess of two hundred and fifty thousand dollars; and not more than ten per cent of the unimpaired capital and permanent surplus in excess of two hundred and fifty thousand dollars: Provided, that nothing in this section shall be construed to compel any bank to surrender or dispose of any investment in the stocks or bonds of a corporation owning the lands or buildings occupied by such bank as its banking home, if such stocks or bonds were lawfully acquired prior to February 25, 1927. (1921, c. 4, s. 27; 1927, c. 47, s. 6; 1931, c. 243, s. 5; 1933, c. 359; 1935, c. 199; 1937, c. 186; C. S. 220(b).)

Cross References.—As to the suspension of this section, see § 53-49. As to limitation of amount of bank acceptances, see § 53-56.

Editor's Note. — There was no corresponding section in the prior law.

The 1927 amendment made radical changes in this section. The maximum investment which might be made in private securities was reduced from 25% to 20% of the unimpaired capital and permanent surplus where the amount was not in excess of $250,000, and reduced to 10% of the unimpaired capital and permanent surplus in excess of $250,000. Prior to the amendment the section fixed 20% of the capital and permanent surplus as the maximum where the capital was between $250,000 and $500,000; 15% where it was between $500,000 and $750,000; and 10% in excess of $750,000.

The last proviso in the section was also added by the 1927 amendment.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

By Public Laws 1933, c. 359, provisos, formerly appearing in the section, permitting restricted investments in stock or bonds of a corporation owning the building or land occupied by the bank, were omitted.

The amendment of 1935 added the words "or other state of the United States, or of some" near the beginning of this section.

The 1937 amendment inserted the words "obligations issued under authority of the Federal Farm Loan Act, as amended, or issued by the Federal Home Loan Banks, or the Home Owners' Loan Corporation."

§ 53-47. Stocks, limitations on investment in. —No bank shall make any investment in the capital stock of any other state or national bank: Provided, that nothing herein shall be construed to prevent banks doing business under this chapter from subscribing to or purchasing, upon such terms as may be agreed upon, the capital stock of banks organized under that act of congress known as the "Edge Act" or the capital stock of central reserve banks whose capital stock exceeds one million dollars. To constitute a central reserve bank as contemplated by this chapter, at least fifty per cent of the capital stock of such bank shall be owned by other banks. The investment of any bank in the capital stock of such central reserve bank or bank organized under the act of congress commonly known as the "Edge Act," shall at no time exceed ten per cent of the paid-in capital and permanent surplus of the bank making same. No bank shall invest more than fifty per cent of its permanent surplus in the stocks of other corporations, firms, partnerships, or companies, unless such stock is purchased to protect the bank from loss. Any stocks owned or hereafter acquired in excess of the limitations herein imposed shall be disposed of at public or private sale within six months after the date of acquiring the same, and if not so disposed of they shall be charged to profit and loss account, and no longer carried on the books as an asset. The limit of time in which said stocks shall be disposed of or charged off the books of the bank may be extended by the commissioner of banks if in his judgment it is for the best interest of the bank that such extension be granted; Provided that the limitations imposed in this section on the ownership of stock in or securities of corporations is suspended to the extent (and to that extent only) that any bank operating under the supervision of the commissioner of banks may subscribe for and purchase shares of stock in or debentures, bonds or other types of securities of any corporation organized under the laws of the United States of America for the purpose of insuring to depositors a part or all of their funds on deposit in banks where and to such extent as such stock or security ownership is required in order to obtain the benefits of such deposit insurance for its depositors. (1921, c. 4, s. 28; 1931, c. 243, s. 5; 1935, c. 81, s. 3; C. S. 220(c).)

Editor's Note. — There was no provision in the prior law corresponding to this section.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

The amendment of 1935 added the last proviso of this section relating to suspension of the limitations in case of banks operating under the supervision of the commissioner of banks.

§ 53-48. Loans, limitations of.—The total direct and indirect liability of any person, firm or corporation, other than a municipal corporation for money borrowed, including in the liabilities of a firm, the liabilities of the several members thereof, shall at no time exceed twenty per cent of two hundred and fifty thousand dollars, or fractional part thereof, of the unimpaired capital and permanent surplus of the bank and not more than ten per cent of the excess of two hundred and fifty thousand dollars of the unimpaired capital and permanent surplus of the bank: Provided, however, that the discount of bills of exchange drawn in good faith against actual existing values, the discount of solvent trade acceptances, or other solvent commercial or business paper actually owned by the person, firm or corporation negotiating the same and the purchase of any notes, secured by not less than a like face amount of bonds of the United States or state of North Carolina or certificates of indebtedness of the United States, shall not be considered as money borrowed within the meaning of this section: Provided, further, that the limitations of this section shall not apply to loans or obligations to the extent that they are secured or covered by guarantees or by commitments or agreements to take over or purchase the same, made by any federal reserve bank or by the United States or any department, board, bureau, commission or establishment of the United States, including any corporation wholly owned directly or indirectly by the United States. (1921, c. 4, s. 29; 1923, c. 148, s. 6; 1925, c. 119, s. 1; 1927, c. 47, s. 7; 1937, c. 419; 1943, c. 204; C. S. 220(d).)

Cross References.—As to the suspension of this section, see § 53-49. As to limitation of amount of bank acceptances, see § 53-56.

Editor's Note.—C. S. § 227 was the corresponding section of the prior law. The provisions have been so changed that this section could not be called a re-enactment of the prior law.

The words "or business" appearing in the first proviso of this section were inserted by the acts of 1923.

The 1925 amendment changed the percentage where the paid-in capital is $250,000 or less from 25% to 20%. It also inserted a proviso that upon the approval of two-thirds of the directors a loan could be increased to 25% but this was omitted when revised by the act of 1927. The word "solvent" was inserted in the first proviso before "trade acceptance" and before "commercial" by this amendment.

The acts of 1927 repealed the old section and re-enacted it with several important changes. Prior to it the section provided for a maximum loan of 20% where the paid-in capital was $250,000 or less; 20% between $250,000 and $500,000; 15% between $500,000 and $750,000; and 10% over $750,000.

A proviso at the end of the section providing that the limitations imposed should not apply to existing loans, or renewals or extension thereof, except as made to apply by the commission, was omitted.

The 1937 amendment added the proviso at the end of the section.

The 1943 act rewrote the section to include, in the last proviso; departments, boards, etc., of the United States, or corporations owned directly or indirectly by the United States.

Section Not Retroactive. — The statutory limitation upon a bank making loans to any one person or class of common interest, does not apply to loans, or extensions or renewals thereof, existing at the date of the ratification of the statute. State v. Cooper, 190 N. C. 528, 130 S. E. 180.

Violation a Misdemeanor. — The violation of this section is a misdemeanor. See sec. 53-134.

A bank must act through its officers, and where they have violated the provisions of this section as to lending the bank's money, the offense is committed by the officers under the meaning of the statute, and they are individually indictable therefor. State v. Cooper, 190 N. C. 528, 130 S. E. 180; State v. Davidson, 205 N. C. 735, 738, 172 S. E. 489.

A construction of this section which would limit criminal liability to the bank would defeat the manifest purpose of the General Assembly. The loans prohibited can be made for the bank only by officers and directors, and to hold that the bank only is liable criminally, would result, upon its conviction, in the imposition of a fine, the only punishment that can be imposed by the court upon a corporation, thus resulting in most instances in a further depletion of the already impaired resources of the bank, and entailing further loss to depositors and stockholders, for whose protection the provisions are primarily included in the statute. State v. Cooper, 190 N. C. 528, 533, 130 S. E. 180.

An indictment charging the officer of the bank of violating section 53-111, and also unlawfully making loans for the bank to certain persons in excess of the maximum percentage of the capital stock and permenent surplus, in violation of this section, alleges the commission of crimes of the same class. Where there are two indictments thereof against the same person they may be consolidated and tried together by the court. State v. Cooper, 190 N. C. 528, 130 S. E. 180.

Loss of Assets Must Result.—In an action against the managing officials of a bank for wrongful depletion of assets in mismanagement of the affairs of the bank in making loans in excess of the limit set forth in this section, the evidence is insufficient to be submitted to a jury, if it appears that no loss to the assets of the bank has been caused by the acts of the officials. Gordon v. Pendleton, 202 N. C. 241, 162 S. E. 546.

§ 53-49. Suspension of investment and loan limitation.—The board of directors of any bank, may by resolution duly passed at a meeting of the board, request the commissioner of banks to suspend temporarily the limitations on loans and investments as the same may apply to any particular loan or investment in excess of the limitations of §§ 53-46, 53-47, and 53-48 which the bank desires to make. Upon receipt of a duly certified copy of such resolution, the commissioner of banks may, in his discretion, suspend the limitations on loans and investments insofar as they would apply to the loan or investment which the bank desires to make: Provided, however, such loan shall be amply secured and shall be for a period not longer than one hundred and twenty days. (1921, c. 4, s. 30; 1931, c. 243, s. 5; 1933, c. 239, s. 1; C. S. 220(e).)

Editor's Note. — There was no corresponding section in the prior law.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-50. Reserve. — Every bank shall at all times have on hand or on deposit with approved reserve depositories, instantly available funds in an amount equal to at least fifteen per cent of the aggregate amount of its demand deposits, and five per cent of the aggregate amount of its time deposits. But no reserve shall be required on deposits secured by a deposit of United States bonds or the bonds of the state of North Carolina. Any bank that is now or may hereafter become a member of the Federal Reserve Bank shall maintain the same reserve with respect to deposits as shall be required of other members of such Federal Reserve Bank. (1921, c. 4, s. 31; C. S. 220(f).)

Cross References.—As to effect of impaired capital upon reserve, see § 53-42. As to provisions giving authority to join federal reserve bank, see § 53-61. As to failure to maintain reserve required by law, see § 53-111.

Editor's Note. — The corresponding section of the old law was C. S. sec. 226. With the exception of the insertion of the phrase permitting deposits with approved reserve depositories, this section, in so far as it goes, is a re-enactment of the prior law. The prior section contained a provision prohibiting a bank from making new loans or discounts, otherwise than by discounting or purchasing bills of exchange payable at sight, or make any dividends of its profits when the available funds are below the reserve required. This provision will be found as a part of sec. 222(i).

The prior section also contained definitions of time and demand deposit, available funds and cash. The first two terms were defined under Sec. 53-1 so that a repetition here is uncalled for and a definition of the last two terms is omitted from the banking laws.

"Deposits" Defined. — This section means all deposits the payment of which can be legally required within thirty days [see sec. 53-1], this reserve consisting in cash on hand, balance payable on demand due from other approved solvent banks designated as depositors, [see sec. 53-51], by resolution of the board of directors approved by the Corporation Commission [see sec. 53-84]. State v. Cooper, 190 N. C. 528, 130 S. E. 180.

§ 53-51. Reserve and cash defined. — Reserve shall consist of cash on hand and balances payable on demand, due from other approved solvent banks, which have been designated depositories as hereinafter provided in this chapter. Cash includes lawful money of the United States, and exchange of any clearing house association. (Rev., s. 232; 1903, c. 275, s. 29; 1919, c. 58; 1921, c. 4, s. 32; C. S. 220(g).)

Cross Reference.—See note under § 53-71.

§ 53-52. Forged check, payment of. — No bank shall be liable to a depositor for payment by it of a forged check or other order to pay money unless within sixty days after the receipt of such voucher by the depositor he shall notify the bank that such check or order so paid is forged. (1921, c. 4, s. 33; C. S. 220(h).)

Editor's Note.—"This section is a substantial reënactment of C. S., sec. 231, except that formerly the depositor had six months within which to give notice of the forgery. Greensboro Ice, etc., Co. v. Security Nat. Bank, 210 N. C. 244, 186 S. E. 362." Arnold v. State Bank, etc., Co., 218 N. C. 433, 437, 11 S. E. (2d) 307.

The liability of the bank for payment of the forged instrument is predicated upon the presumption that it knows the genuine signature of its depositors. State Bank v. Cumberland Sav., etc., Co., 168 N. C. 605, 85 S. E. 5. The

bank assumes the responsibility of holding the depositor's funds subject to his order and the burden is upon it, where a deposit is shown, to relieve itself of liability for the fund by proof of payment in accordance with the order of the depositor. Bank v. Thompson, 174 N. C. 349, 93 S. E. 849; Yarborough v. Trust Co., 142 N. C. 377, 55 S. E. 296.

The bank is just as liable for the payment of a forged check within the meaning of this section, when the endorsement is forged, as where the whole instrument is forged, it would seem, and this for the reason that the bank is authorized to pay only to the person designated by the depositor. Of course, if the payment is due to the negligence of the depositor, the bank would be relieved of liability. See Michie on Banks and Banking, p. 1209; 7 C. J. sec. 414, p. 686.

The general rule as to the liability of a bank upon a raised check is that it is liable for payment unless the depositor was so negligent in preparing his check that it was left incomplete or easily altered. But it should be observed in this connection that the depositor is not bound to prepare the checks so that it is impossible to alter them, and it would seem that if he used the care that an ordinary prudent man would use, the bank is liable. See Michie on Banks, pp. 1203 et seq. and 7 C. J. p. 684 sec. 413 for a collection of authorities.

The provision of this section requiring a return of the voucher, giving the bank notice within a specified time of the receipt thereof, is in keeping with the law of the majority of the states. This requirement is predicated upon the proposition that it is the duty of the depositor to examine his returned checks within a reasonable time and to report any forgeries or alterations. However, in the absence of a statute similar to this one, it has often been held that the depositor owes no such duty, and that even if he does and fails in it, the bank will not be relieved of payment unless it has been prejudiced by the delay. See Michie on Banks and Banking, pp. 1229-1239 for full treatment. See also 7 C. J. sec. 415, p. 687.

Receipt of Statement by Bookkeeper Who Forged Checks Is Receipt by Corporation.—The receipt of a corporation's bank statement by its bookkeeper is receipt of the statement by the corporation, and it may not recover against the bank for the payment of forged checks when notice is not given within sixty days after such receipt of the bank statement, even though the checks were forged by the bookkeeper, who destroyed them after he received the canceled checks from the bank. Greensboro Ice, etc., Co. v. Security Nat. Bank, 210 N. C. 244, 186 S. E. 362.

§ 53-53. Minor, payment of deposit in the name of.—When money is held on deposit by any state, industrial or national bank in this state in the name of a minor under fifteen years of age, it may be paid, together with the interest, if there be any interest thereon, upon receipts or checks signed by such minor and one of the minor's parents. When money is held on deposit by any state, industrial or national bank in this state in the name of a minor fifteen years of age or upwards, it may be paid, together with the interest, if there be any interest thereon, upon receipts or checks signed by the minor. A written statement from the minor, if fifteen years of age or upward, or from one of the said minor's parents, if the minor is under fifteen years of age, shall be conclusive evidence of the age of the minor. (1921, c. 4, s. 34; 1939, c. 84; C. S. 220(i).)

Cross Reference.—As to payment of deposit in trust for minor to minor upon death of trustee, see § 53-59.

Editor's Note. — The corresponding section of the prior law was C. S. sec. 228.

The 1939 amendment repealed the former section and substituted the above therefor.

For comment on the 1939 amendatory act, see 17 N. C. Law Rev. 345.

This section is an exception to the general rule that contracts of an infant are voidable at the option of the infant. Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N. C. 41, 44, 178 S. E. 863.

§ 53-54. Tranactions not performed during banking hours.—Nothing in any law of this state shall in any manner whatsoever affect the validity of, or render void or voidable, the payment, certification, or acceptance of a check or other negotiable instrument or any other transaction by a bank in this state, because done or performed during any time other than regular banking hours: Provided, that nothing herein shall be construed to compel any bank in this state, which by law or custom is entitled to close at twelve noon on any Saturday, or for the whole or part day of any legal holiday, to keep open for the transaction of business, or to perform any of the acts or transactions aforesaid on any Saturday after such hour or on any legal holiday, except at its option. (1921, c. 4, s. 35; C. S. 220(j).)

Editor's Note. — The corresponding section of the prior law was C. S. sec. 234 in so far as Saturdays, Sundays and holidays are concerned. There was no similar provision in the prior law relating to transactions not performed during banking hours on other days.

§ 53-55. Commercial and business paper defined.—The term "commercial or business paper," as used in this chapter, is hereby defined to mean a promissory note, and the term "trade acceptance" to mean a draft or bill of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used or are to be used for such purposes, but such definition shall not include notes, drafts, or bills of exchange covering merely investments, or issued or drawn for the purpose of carrying on or trading in stocks, bonds, or other investment securities, except bonds and notes of the government of the United States and state of North Carolina. (1921, c. 4, s. 36; 1923, c. 148, s. 7; 1941, c. 268; C. S. 220(k).)

Cross Reference.—As to promissory notes and checks, see § 25-191 et seq.

Editor's Note.—The 1941 amendment struck out the former second sentence of this section, which sentence related to maturity.

§ 53-56. Bank acceptances defined.—Any bank doing business under this chapter may accept for payment at a future date, drafts or bills of exchange having not more than six months sight to run, drawn upon it by its customers under acceptance agreements, and which grow out of transactions involving the importation or exportation of goods; and issue letters of credit authorizing the holders thereof to draw upon it or its correspondents, provided that there is a definite bona fide contract for the shipment of goods within a specified reasonable time, and the existence of such contract is certified in the acceptance agreement; or which grow out of transactions involving the domestic shipment of goods, provided that shipping documents, conveying or securing to the accepting bank title to readily marketable goods, are attached or in the hands of an agent of the accepting bank, independent of the drawer, for his account, at the time of acceptance, or which are secured at the time of acceptance by warehouse receipts or other documents conveying or securing to the accepting bank title to readily marketable goods fully covered by insurance, the warehouse receipts or other documents to be those of a responsible warehouse, independent of the drawer, the acceptance to remain secured during the life of the acceptance unless suitable security of same character, or cash, be substituted: Provided, no bank shall accept drafts or

bills of exchange under this section to an aggregate amount at any time more than equal to the sum of its capital and permanent surplus: Provided further, that no bank shall accept, whether in a foreign or domestic transaction, for any one person, firm, or corporation, to any amount at any time equal to more than twenty-five per cent of its capital and permanent surplus, unless the accepting bank is secured either by attached documents or those held for its account by its agent, independent of the drawer, or by some other actual security of the same character. Should the accepting bank purchase or discount its own acceptances, such acceptances will be considered as a direct loan to the drawer, and be subject to the limitation on loans hereinbefore provided in this chapter. The state banking commission may issue such further regulations as to such acceptances as it may deem necessary in conformity with this chapter. As used herein, the word "goods" shall be construed to mean and include goods, wares, merchandise, or agricultural products, including livestock. (1921, c. 4, s. 37; 1931, c. 243, s. 5; 1939, c. 91, s. 2; C. S. 220(l).)

Cross References.—As to limitations on investments in securities, see § 53-46; stocks, § 53-47; loans generally, § 53-48.

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Acceptance Prior to Statute. — Notwithstanding that, prior to the legislative enactment, an acceptance was beyond the power of a bank when not expressly permitted by the charter, an acceptance by a bank not so authorized was not invalid, though actually beyond power, and a payment might be enforced. Sherrell v. American Trust Co., 176 N. C. 591, 97 S. E. 471.

§ 53-57. Nonpayment of check in error, liability for.—No bank shall be liable to a depositor because of the nonpayment, through mistake or error, and without malice, of a check which should have been paid had the mistake or error of nonpayment not occurred, except for the actual damage by reason of such nonpayment that the depositor shall prove, and in such event the liability shall not exceed the amount of damage so proven. (1921, c. 4, s. 38; C. S. 220(m).)

Editor's Note. — The section is a substantial re-enactment of C. S. sec. 232.

A bank is held liable to the drawer for its breach of promise to pay the check, upon the ground that there is an implied promise by the bank, arising from the deposit of the funds with it, that it will pay the checks when and as they are presented. If the bank fails to perform this promise, it becomes liable to the drawer for the damage sustained by him on account of its refusal or failure to pay his check. But the holder of the check can only sue the drawer, and cannot sue the bank. The reason why the holder of the check is not permitted to sue the bank has been stated by the authorities to be that there is no privity between the holder in the bank until by certification of the check or the acceptance thereof, expressed or implied, or by any other act or conduct it has made itself directly liable to the holder. First Nat. Bank v. Whitman, 94 U. S. 343, 24 L. Ed. 229; Commercial Nat. Bank v. First Nat. Bank, 118 N. C. 783, 24 S. E. 524; Hawes v. Blackwell, 107 N. C. 196, 12 S. E. 245.

Notwithstanding that these principles have been recognized, there are courts which hold, in well considered opinions, that the bank should be held liable directly to the holder if it is notified that he has the check, or demand for its payment is made upon it, and it then has sufficient clear and unincumbered funds to the credit of the drawer with which to pay the check without any risk or embarrassment to itself. Standard Trust Co. v. Commercial Nat. Bank, 166 N. C. 112, 119, 81 S. E. 1074; Perry v. Bank, 131 N. C. 117, 42 S. E. 551; Commercial Bank v. First Nat. Bank, 118 N. C. 783, 24 S. E. 524; Hawes v. Blackwell, 107 N. C. 196, 12 S. E. 245.

For general treatment of subject, see Michie on Banks and Banking, pp. 1079, 1151 et seq. See also, 7 C. J. 425, p. 696.

Where Nonpayment Malicious.—This section does not apply where the complaint alleges that the nonpayment was wrongful and malicious. In such case the question of malice is for the jury, and the sustaining of a demurrer to the complaint is reversible error. The complaint is subject to demurrer only when it appears from the allegations that nonpayment was through error or mistake and without malice, and that no actual damages resulted to depositor from such nonpayment. Woody v. National Bank, 194 N. C. 549, 140 S. E. 150.

Damages.—Any person will be deemed substantially damaged upon the refusal of a bank to pay his checks, unless protected by the provisions of this section, and substantial damages may be awarded. And where the nonpayment is through malice, punitive damages may also be recovered. Woody v. First Nat. Bank, 194 N. C. 549, 140 S. E. 150, holding that on the facts admitted by demurrer plaintiff was entitled to nominal damages at least.

A bank wrongfully and unlawfully refusing to pay a check breaches its contract and the depositor is entitled to nominal damages at least. Thomas v. American Trust Co., 208 N. C. 653, 182 S. E. 136.

Charge on Injury to Credit and Reputation Not Supported by Evidence Is Error.—In an action to recover for the wrongful and unlawful refusal by a bank to pay a depositor's check, it is error for the court to charge the jury on the issue of damage that it should consider the evidence of damage sustained by plaintiff through injury to his credit and reputation in the community resulting from the bank's wrongful act when there is no evidence that plaintiff's credit or reputation had been injured thereby. Thomas v. American Trust Co., 208 N. C. 653, 182 S. E. 136.

§ 53-58. Checks sent direct to bank on which drawn.—Any bank receiving for collection or deposit any check, note, or other negotiable instrument drawn upon or payable at another bank, located in another town or city, whether within or without this state, may forward such instrument for collection, direct to the bank on which it is drawn, or at which it is payable, and such method of forwarding direct to the payer bank shall be deemed due diligence, and the failure of such payer bank, because of its insolvency or other default, to account for the proceeds thereof, shall not render the forwarding bank liable therefor: Provided, however, such forwarding bank shall have used due diligence in other respects in connection with the collection of such instrument. (1921, c. 4, s. 39; C. S. 220(n).)

Editor's Note. — This section is a substantial re-enactment of C. S. sec. 233 except that the last line of that section which provided, "The provision of this section shall not apply where there is more than one bank in a town," was omitted.

Dealings Presumed to Contemplate Statute. — Banks must be presumed to have dealt with each other with respect to a statute of the State in which a check was deposited for collection, defining the rights and liabilities of banks to which checks are forwarded for collection. Fed. Land Bk. v. Barrow, 189 N. C. 303, 310, 127 S. E. 3.

Sending Check to Federal Reserve Bank. — Under this section the sending of a cashier's check to the proper Federal Reserve Bank is due diligence in collecting the same, as would be sending it directly to the drawer bank. Fed. Land Bk. v. Barrow, 189 N. C. 303, 127 S. E. 3.

Abrogated Holdings. — The holding of the Supreme Court, in Bank v. Floyd, 142 N. C. 187, 55 S. E. 95; and in American Nat. Bank v. Savannah Trust Co., 172 N. C. 344, 90 S. E. 302, that "It is negligence in a bank having a draft or check for collection to send it directly to the drawee, and this is true, though the drawee is the only bank at the place of payment," is abrogated by the express provisions of this statute. See Malloy v. Fed. Reserve Bank, 281 Fed. 1003; Federal Land Bank v. Barrow, 189 N. C. 303, 309, 127 S. E. 3.

Constitutes Good Presentment.—A collecting bank makes a good presentment of a check for payment by forwarding it to the drawee bank in another city by mail. Braswell v. Citizens Nat. Bank, 197 N. C. 229, 148 S. E. 236.

When Section Not Applicable—Rights and Liabilities as to Collection.—When a collecting bank receives a check for collection payable at a bank in another town, there is no authority of agency conferred by the drawer of the check on it to receive in payment anything but money; and where the drawer of the check has money to meet the check on deposit in the drawee bank, on presentment in due course, and an intervening bank, in the course of collection, receives a check of the drawee bank in payment, which is not paid by reason of the drawee bank becoming insolvent before presentment of its check: Held, as a matter of law the drawer of the check is released from liability thereon. This section has no application to the facts in this case. Dewey Brothers v. Margolis, 195 N. C. 307, 142 S. E. 22.

Cited in Qualls v. Farmers, etc., Bank, 197 N. C. 438, 149 S. E. 546; Bank of Canton, etc., Co. v. Clark, 198 N. C. 169, 151 S. E. 102.

§ 53-59. Deposits in trust, payment of. — Whenever any deposits shall be made in any bank or banking institution in this state by any person in trust for any other person who is a minor of the age of fifteen years and upward, and no other or further notice of the existence and terms of a legal and valid trust shall have been given to the bank, in event of the death of the trustee, the same, or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom said deposit was made: Provided, that the amount of said deposit is not in excess of one hundred dollars. (1921, c. 4, s. 40; C. S. 220(o).)

Cross References.—As to whom a deposit in trust for a minor might be paid generally, see § 53-53. As to deposits made by fiduciaries generally, see § 32-8 et seq.

Editor's Note. — This section is a substantial re-enactment of C. S. sec. 229, except that formerly the terms of the section limited the deposits to which the section applied to the amount of fifty dollars or less.

See discussion in 9 N. C. L. Rev. 13.

§ 53-60. Farm loan bonds, authorized investment in.—Any bank or insurance company organized under the laws of this state, and any person acting as executor, administrator, guardian, or trustee, may invest in federal farm loan bonds issued by any federal farm loan bank or joint-stock land bank organized pursuant to an act entitled "An act of Congress to provide capital for agricultural development, to create standard forms of investment based upon farm mortgages to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government depositories, and financial agents for the United States, and for other purposes," approved the seventeenth day of July, one thousand nine hundred and sixteen. (1921, c. 4, s. 41; C. S. 220(p).)

Editor's Note. — This section is a re-enactment of the C. S. sec. 225.

§ 53-61. Federal Reserve Bank, authority to join.—The words "Federal Reserve Act," as herein used, shall be held to mean and to include the act of Congress of the United States, approved December twenty-third, nineteen hundred thirteen, as heretofore and hereafter amended. The words "Federal Reserve Board" shall be held to mean the Federal Reserve Board created and described in the Federal Reserve Act. The words "Federal Reserve Banks" shall be held to mean Federal Reserve Banks created and organized under the authority of the Federal Reserve Act. The words "member bank" shall be held to mean any National or State bank or bank and trust company which has become or which becomes a member of one of the Federal Reserve Banks created by the Federal Reserve Act.

(a) Any bank incorporated under the laws of this state shall have the power to subscribe to the capital stock and become a member of a Federal Reserve Bank.

(b) Any bank incorporated under the laws of this state which is, or which may become, a member of the Federal Reserve Bank is by this chapter vested with all powers conferred upon member banks of the Federal Reserve Banks by terms of the Federal Reserve Act as fully and completely as if such powers were specifically enumerated and described therein, and such powers shall be exercised subject to all restrictions and limitations imposed by the Federal Reserve Act, or by regulations of the Federal Reserve Board made pursuant thereto. The right, however, is expressly reserved to revoke or to amend the powers herein conferred.

(c) A compliance on the part of any such bank with the reserve requirements of the Federal Reserve Act shall be held to be a full compliance with the provisions of the laws of this state, which require banks to maintain cash balances in their vaults or with other banks, and no such bank shall be required to carry or maintain reserve other than such as is required under the terms of the Federal Reserve Act.

(d) Any such bank shall continue to be subject to the supervision and examination required by the laws of this state, except that the Federal Reserve Board shall have the right, if it deems necessary, to make examinations; and the authorities of this state having supervision over such banks may disclose to the Federal Reserve Board, or to the examiners duly appointed by it, all information in reference to the affairs of any bank which has become, or desires to become, a member of a Federal Reserve Bank. (1921, c. 4, s. 42; C. S. 220(q).)

Cross Reference.—As to the amount of reserve required, see § 53-50.

Editor's Note. — This section is a substantial re-enactment of the C. S. sec. 221.

Unemployment Compensation.—A bank organized under the laws of this state is not an instrumentality of the federal government so as to exempt it from the tax imposed by the Unemployment Compensation Act, notwithstanding that the bank may be a member of the federal reserve system. Unemployment Compensation Comm. v. Wachovia Bank, etc., Co., 215 N. C. 491, 2 S. E. (2d) 592.

§ 53-62. Establishment of branches.—Any bank doing business under this chapter may establish branches in the cities in which they are located, or elsewhere, after having first obtained the written approval of the commissioner of banks, which approval may be given or withheld by the commissioner of banks, in his discretion, and shall not be given until he shall have ascertained to his satisfaction that the public convenience and advantage will be promoted by the opening of such branch. Such branch banks shall be operated as branches of and under the name of the parent bank, and under the control and direction of the board of directors and executive officers of said parent bank. The board of directors of the parent bank shall elect a cashier and such other officers as may be required to properly conduct the business of such branch, and a board of managers or loan committee shall be responsible for the con-

duct and management of said branch, but not of the parent bank or of any branch save that of which they are officers, managers, or committee: Provided, that the commissioner of banks shall not authorize the establishment of any branch, the paid-in capital stock of whose parent bank is not sufficient in an amount to provide for the capital of at least twenty-five thousand dollars for the parent bank, and at least twenty-five thousand dollars for each branch which it is proposed to establish in cities or towns of three thousand population or less; nor less than thirty thousand dollars in cities and towns whose population exceeds three thousand, but does not exceed ten thousand; nor less than fifty thousand dollars in cities and towns whose population exceeds ten thousand, but does not exceed twenty-five thousand; nor less than one hundred thousand dollars in cities and towns whose population exceeds twenty-five thousand. All banks operating branches prior to February 18, 1921, shall, within a time limit to be prescribed by the commissioner of banks, cause said branch bank to conform to the provisions of this section: Provided, however, that any bank with a capital stock (including both common and preferred) of one million ($1,000,000.00) dollars or more may without additional capital establish and operate such number of branches or agencies in the state of North Carolina as the commissioner of banks may in his discretion permit; but a bank operating branches under this proviso shall at all times maintain an unimpaired capital of at least one million ($1,000,000.00) dollars: Provided further, that the commissioner of banks shall not permit the establishment of additional branches, and/or agencies unless said bank maintains its capital stock and surplus in ratio of one to ten to its deposits; Provided that in small communities having no other banking facilities, and upon a finding by the commissioner of banks that the public convenience and advantage will be promoted thereby, the opening of "tellers window agencies or branches" of then existing banks may be permitted, but no more than one such agency or branch may be so opened in any one community nor shall any bank be permitted to open such an agency or branch when its unimpaired capital and surplus in proportion to deposits is below that herein required. (1921, c. 4, s. 43; Ex. Sess. 1921, c. 56, s. 2; 1927, c. 47, s. 8; 1931, c. 243, s. 5; 1933, c. 451, s. 1; 1935, c. 139; C. S. 220(r).)

Editor's Note. — There is no provision in the prior law corresponding to this section. However, C. S. sec. 216 contained a provision prohibiting the establishment of branches except with the consent of the corporation commission. Authority to establish branches under the old law must have been given by the legislature in the charter, and this must have been given by express terms for the court could not construe a provision in a charter to give authority by implication. Morehead Banking Co. v. Tate, 122 N. C. 313, 316, 30 S. E. 341. In this case the court pointed out the reason for the policy, stating that past experience indicated that it was possibly a mistake to permit banks to establish branches.

It is likely that this section will go far to overcome the objections to branches which the court had in mind. The requirement that the parent bank have enough capital over and above its required capital to legally capitalize a branch as a separate bank, the vigilant supervision of the commissioner of banks and the provision that a local committee or board of managers shall be responsible for the conduct and management of the business are features calculated to bring such result.

The amendment of the section made at the extra session of 1921 changed the amount that must be provided for branch banks in cities and towns of 3,000 population or less from $20,000 to $15,000, so that it was the same amount required for parent banks in such cities and towns. The act of 1927 changed the amount in each instance to $25,000.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

The second and third provisos of this section were added by Public Laws 1933, c. 451.

For comment on changes made by Acts 1933, see 11 N. C. Law Rev. 199.

For a comment on the last proviso of this section, see 13 N. C. Law Rev. 360.

The amendment of 1935 added the proviso at the end of the section making an exception in smaller communities having no other banking facilities.

Who May Question Authority to Establish.—Whether a banking company, chartered to do business in a certain place and without express authority to establish and conduct a branch at another place, can do so, is a matter for the State, through the Attorney General, to have determined by an action to vacate its charter. Morehead Banking Co. v. Tate, 122 N. C. 313, 30 S. E. 341. [This case was decided prior to the statute.]

Contracts of Branch Illegally Established.—A bond given by a cashier of a branch bank for the faithful performance of his duties is not against public morals because the parent corporation may not have had the express authority to establish a branch bank. Morehead Banking Co. v. Tate, 122 N. C. 313, 30 S. E. 341.

Branch as Agent of Parent.—The relation between bank and the branch is that of principal and agent, and all the assets and indebtedness of the agency are those of the principal. Worth v. Bank, 122 N. C. 397, 29 S. E. 775.

The establishment of a branch by a bank, having the authority under its charter to do so, is not an estoppel upon the latter so as to require it to treat the former as an independent bank. Worth v. Bank, 122 N. C. 397, 29 S. E. 775.

Creditors of Parent and Branch Share Ratably. — The creditors and depositors of the parent and branch share ratably where the assets are being liquidated. Worth v. Bank, 122 N. C. 397, 29 S. E. 775.

§ 53-63. Certificate of deposit, unlawful issuing of.—It shall be unlawful for any bank to issue any certificate of deposit or other negotiable instrument of its indebtedness to the holder thereof except for lawful money of the United States, checks, drafts, or bills of exchange which are the actual equivalent of such money; nor shall such moneys, checks, drafts, or bills of exchange be the proceeds of any note given in payment of the purchase price of any stock. Any officer or employee of any bank violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 4, s. 44; C. S. 220(s).)

Cross Reference.—As to provision making it unlawful for bank to handle draft connected with receipt of liquor, see § 18-33.

Editor's Note.—There was no provision in the prior law corresponding to this section.

Cited in Southport v. Williams, 290 F. 488.

§ 53-64. Bank's own stock, unlawful to loan on.—It shall be unlawful for any bank to make any loan secured by the pledge of its own shares of stock, nor shall any bank be the holder as pledgee, or as purchaser, of any portion of its capital stock unless such stock is purchased or pledged to it to prevent loss upon a debt previously contracted in good faith. Provided, that whenever any bank shall have shares of its own stock sold to, or pledged to it, for the purpose of preventing a loss upon a debt previously contracted, it shall dispose of all such shares of stock within a period of six months from the date such stock was sold or pledged to it and if not so disposed of, the same shall be charged to profit and loss and no longer carried as an asset

of the bank. (1921, c. 4, s. 45; 1927, c. 47, s. 9; C. S. 220(t).)

Editor's Note.—The terms of the prior law, C. S. sec. 224, were somewhat similar to the provisions of this section. However, this section is fuller and goes into more detail than did the prior law. Prior to the former enactment (1903) there was no general law upon the subject and it was not unusual for the legislature to permit a bank to accept pledge of its own stock. But in order for stock so pledged to share in the assets of the bank when winding up business it must have been released by payment of the debt. First Nat. Bank v. Riggins, 124 N. C. 534, 32 S. E. 801. A prior statute gave a lien to a bank on stock of stockholder indebted to the bank and the statute was strictly construed. See Boyd v. Reed, 120 N. C. 335, 27 S. E. 35. See also In re Mills Co., 162 Fed. 42.

To What Indebtedness Lien Applies. — The lien given to a bank by its charter upon the stock of a stockholder indebted to it extends only to indebtedness incurred directly by such stockholders to the bank and not to his indebtedness to a third person acquired by the bank. Boyd v. Redd, 120 N. C. 335, 27 S. E. 35.

Taking Stock in Payment of Note.—A payee bank may not cancel a note in consideration of shares of its stock delivered to it by the maker of the note, it not appearing that he was insolvent, or that the transaction was necessary to prevent loss to the bank, and payment so made is not a valid defense in the hands of another bank to which the note had been endorsed before maturity by the payee bank as collateral security. White v. Whitehurst, 194 N. C. 305, 139 S. E. 598.

§ 53-65. Deposits payable on demand. — Any bank may receive deposits of funds subject to withdrawal or to be paid upon the checks of the depositor. All deposits in such banks shall be payable on demand, without notice, except when the contract of deposit shall otherwise provide. (1921, c. 4, s. 46; C. S. 220(u).)

Cross References.—As to definition of "demand deposits," see § 53-1. As to definition under prior law, see C. S. 226.

§ 53-66. Savings deposits.—Any bank conducting a savings department may receive deposits on such terms as are authorized by its board of directors and agreed to by its depositors. The board of directors shall prescribe the terms upon which such deposits shall be received and paid out, and a passbook shall be issued to each depositor containing the rules and regulations adopted by the board of directors governing such deposits, in which shall be entered each deposit made, the interest allowed thereon, and each payment made to such depositor. By accepting such book the depositor assents and agrees to the rules and regulations therein contained. (1921, c. 4, s. 47; C. S. 220(v).)

Editor's Note.—There were no provisions in the prior law which were similar to this section.

See discussion in 9 N. C. L. Rev. 13.

§ 53-67. Boards of directors, banks controlled by.—The corporate powers, business, and property of banks doing business under this chapter shall be exercised, conducted, and controlled by its board of directors, which shall meet at least quarterly. Such board shall consist of not less than five directors, to be chosen by the stockholders, and shall hold office for one year, and until their successors are elected and qualified. The annual meeting of stockholders for the election of directors shall be held during the month of January of each year. (1921, c. 4, s. 48; 1925, c. 170; C. S. 220(w).)

Editor's Note.—There was no provision in the prior law corresponding to this section. The last sentence of this section was added by the 1925 amendment.

§ 53-68. Statements showing deposits of state and state officials.—All banks in which any money is on deposit by the state of North Carolina or any of the officials thereof shall, in their published statements as by law required, show the amount of money on deposit in such bank to the credit of the state or of any official thereof; and no officials of the state shall deposit money in any bank which shall refuse to comply with the provisions of this section. (1923, c. 211, s. 1; C. S. 220(x).)

Cross Reference.—See also § 147-77 et seq.

Editor's Note.—This provision did not appear in the prior banking law.

§ 53-69. Deposits by state departments or institutions.—All moneys collected by any state department or institution shall be deposited with or to the credit of the state treasurer, as and when directed by the governor and council of state. (1923, c. 211, s. 2; C. S. 220(y).)

Editor's Note.—This provision did not appear in the prior banking law.

§ 53-70. Fees on remittances covering checks.—For the purpose of providing for the solvency, protection, and safety of the banking institutions and trust companies chartered by this state and having their principal offices in this state, it shall be lawful for all banks and trust companies in this state to charge a fee, not in excess of one-eighth of one per cent, on remittances covering checks, the minimum fee on any remittance therefor to be ten cents. (1921, c. 20, s. 1; C. S. 220(z).)

Cross Reference.—As to what checks are exempted from this section, see § 53-73.

Editor's Note.—There is no provision in the prior law similar to this section.

Transaction Not within Statute.—The exchange or collection charges authorized by this section apply only to "remittances" covering checks, and where checks, etc., are sent to a bank in the same town with the bank on which they are drawn, for which either money or bank entries are required, such transactions do not fall within the meaning of the term "remittances" which will entitle the bank on which they are drawn to the exchange charges specified in the statute. First Nat. Bank v. Peoples Bank, 194 N. C. 720, 140 S. E. 705.

Enforcement of Payment.—A bank may maintain its action against another bank to enforce by mandatory injunction its payment of the exchange charges drawn through the one on the other, allowed by the statute and the fact that the plaintiff is a national and the defendant a state bank, does not vary this principle, and § 53-74 does not apply. First Nat. Bank v. Peoples Bank, 194 N. C. 720, 140 S. E. 705.

§ 53-71. Checks payable in exchange. — In order to prevent accumulation of unnecessary amounts of currency in the vaults of the banks and trust companies chartered by this state, all checks drawn on said banks and trust companies shall, unless specified on the face thereof to the contrary by the maker or makers thereof, be payable at the option of the drawee bank, in exchange drawn on the reserve deposits of said drawee bank when any such check is presented by or through any Federal Reserve Bank, post office, or express company, or any respective agents thereof. (1921, c. 20, s. 2; C. S. 220(aa).)

Cross References.—As to what checks are exempted from this section, see § 53-73. See also note under § 53-58.

Editor's Note.—The prior banking law did not contain a provision similar to this section.

The general rule is that a check is payable only in cash and if the payee or holder accepts anything other than cash in payment, the drawer is discharged from liability. Thus the ordinary rule is that if the payee accept a draft from the payor bank on its reserve fund in another bank, the drawer is relieved from further liability.

But this section changes the rule so that payment on such

a draft does not discharge the check until the draft is paid in money.

The purpose of this section is to relieve the North Carolina banks of the pressure exerted upon them by the Federal Reserve Banks in seeking to enforce the policy of "par clearance," by presenting checks over the counters of the banks which would not agree to remit at par, and demand payment in cash. The effect of this demand for cash payment was not only to deprive the banks of their exchange charges on checks, but also to reduce their income-producing assets through the necessity of keeping in their vaults in cash a much larger portion of their resources than had heretofore been necessary. The purpose of this section is effected by the draft upon a reserve deposit as has always been the general custom. See the comprehensive article in 1 N. C. Law Rev. 133.

The effect of this section is as though the provision of the law is written into the face of the check; and consequently where the maker or drawer does not specify cash payment, he agrees, as does the payee in accepting it, that if presented by or through a Federal Reserve Bank, Express Co., etc., the check shall be payable by an exchange draft drawn by the payee bank on its reserved deposits. See Farmer, etc., Bank v. Federal Reserve Bank, 262 U. S. 649, 43 S. E. 651, 67 L. Ed. 1157; Cleve v. Graven Chem. Co., 18 Fed. (2d) 711.

For comprehensive articles by C. T. Murchison, Professor of Applied Economics, U. of N. C., giving the history of the controversy out of which this statute grew, and a review of the subsequent litigation, see 1 N. C. Law Rev. 133; 2 N. C. Law Rev. 36.

The Federal Reserve Bank cannot require payment in any other medium than the exchange. Federal Land Bank v. Barrow, 189 N. C. 303, 310, 127 S. E. 3. See also, 8 N. C. Law Rev. 55.

Constitutionality.—This section does not violate the federal constitution. Farmers, etc., Bank v. Federal Reserve Bank, 262 U. S. 649, 43 S. Ct. 651, 67 L. Ed. 1157, overruling the same case in 183 N. C. 546, 552, 112 S. E. 252; Federal Land Bank v. Barrow, 189 N. C. 303, 311, 127 S. E. 3.

Purpose of Statute.—This section was enacted to relieve banks and trust companies, chartered by this State, of embarrassments growing out of the policy theretofore pursued by the Federal Reserve Bank with respect to the collection of checks drawn on said banks and trust companies. It does not deal with or purport to deal with the rights or liabilities of depositors who in the transaction of their business draw checks on their deposits with said banks and trust companies. The purpose of the section and its only effect is to confer upon such banks and trust companies the right, in certain instances, to pay checks drawn on them in a medium other than money, and to deprive the payee or holder of such checks of the right to demand payment in money. Morris v. Cleve, 197 N. C. 253, 264, 148 S. E. 253.

This section does not change the general rule that when a depositor draws his check on a bank or trust company chartered by this State, such check is payable in money, or at the option of the holder, in a medium other than money—such payment being at the risk of the holder. Morris v. Cleve, 197 N. C. 253, 265, 148 S. E. 253.

Construed Strictly.—This section should be construed strictly. Morris v. Cleve, 197 N. C. 253, 148 S. E. 253.

This section has no application to certificates of deposit. Citizens Nat. Bank v. Fidelity, etc., Co., 86 F. (2d) 4, 7.

Right to Specify Medium of Payment.—Under this section the drawer has the right to specify on the face of the check that payment shall be made in money, and in such case the drawee bank or trust company must pay in money, in any event. Morris v. Cleve, 197 N. C. 253, 148 S. E. 253.

Payment in money may be required if the check is presented for payment, in person, or by an agent for collection other than as prescribed by this section. Morris v. Cleve, 197 N. C. 253, 148 S. E. 253.

Liability Where Exchange Unpaid.—It will not be held under this section, that a drawee bank can charge checks drawn on it by its customers to the accounts of such customers, remit in drafts or exchange to the forwarding bank, and thereby be released, notwithstanding that said drafts or exchange are, for valid and lawful reasons, not paid. Where a check drawn on a bank or trust company chartered by this State is presented to the drawee bank, "by or through any Federal Reserve Bank, post office or express company or any respective agent thereof," and such bank or trust company, in the exercise of the option conferred by said statute, sends to the forwarding bank its draft on its reserve deposits in payment of such check, it will not be discharged of liability for the collection of its depositor's check until such draft on its reserve deposit has been paid. Graham v. Proctorville Warehouse, 189 N. C. 533, 538, 127 S. E. 540.

Where the payee of a check deposits it in a bank for collection and does not thereon indicate that the collecting bank is to require payment in money, he authorizes the collecting bank to collect in due course of mail and comes within the provisions of this section and § 53-57 as being a check presented by or through a "postoffice," and the collecting bank is not liable for accepting the check of the drawee bank on another bank, resulting ultimately in nonpayment, and the payee must suffer the loss thereon. Braswell v. Citizens Nat. Bank, 197 N. C. 229, 148 S. E. 236.

Where a bank receives a check in payment of a note and elects to put it in the hands of a Federal reserve bank for collection, which bank accepts the check of the drawee bank on another bank in payment, when the check would have been paid in course of collection had cash been demanded, the drawer and endorsers on the original check are relieved of liability thereon, and may not be held if the check of the drawee bank was not paid because of its later insolvency; and this result is not affected by this section since the payee bank has the option of presenting the check for payment through the Federal reserve bank or not. Morris v. Cleve, 197 N. C. 253, 148 S. E. 253, criticizing Cleve v. Craven Chemical Co., 18 Fed. (2d) 711.

Charging Check to Drawer's Account as Payment.—When the drawee bank has to the credit of the drawer funds sufficient and available for the payment of his check, and accepts and charges the check to the drawer's account, the check is paid, and the drawer is discharged from liability, not only on the check, but also for the debt in payment of which the check was drawn. Morris v. Cleve, 197 N. C. 253, 148 S. E. 253, citing Dewey Bros. v. Margolis & Brooks, 195 N. C. 307, 142 S. E. 22; Quarles v. O. B. Taylor & Co., 195 N. C. 313, 142 S. E. 25.

§ 53-72. Notation on checks forbidden. — It shall be unlawful for any person, or persons, other than the maker thereof to make, by rubber stamp or otherwise, any notation on any check drawn on any bank or trust company chartered in this state, the effect of which notation shall change or affect any condition or provision thereof, as created by §§ 53-70 through 53-74. Any person or persons violating this section shall be guilty of a misdemeanor, and upon conviction shall pay a fine of not more than two hundred dollars, ($200) or be imprisoned not more than thirty days. (1921, c. 20, s. 3; C. S. 220(bb).)

Editor's Note.—The prior banking law did not contain a provision similar to this section.

§ 53-73. Checks exempted.—All checks drawn on the banks and trust companies in this state in payment of obligations due the state of North Carolina or the federal government shall be exempt from the provisions of §§ 53-70 and 53-71. (1921, c. 20, s. 4; C. S. 220(cc).)

§ 53-74. No protest on checks refused for nonpayment of exchange charges. No action on refusal to pay checks.—No officer in this state shall protest for nonpayment any check or checks drawn on any bank or trust company chartered by this state when payment is refused by the drawee bank solely on account of failure or refusal of the holder or owner thereof to pay exchange charges authorized in §§ 53-70 through 53-74; and there shall be no right of action, either in law or equity, against any bank or trust company chartered by this state, for refusal to pay any such check when such action is based alone on the ground of refusal to pay exchange or collection charges authorized in §§ 53-70 through 53-74. (1921, c. 20, s. 5; C. S. 220(dd).)

Cross Reference.—See note under § 53-70.

Editor's Note. — The prior law contained no provision which was similar to this section.

§ 53-75. Statement of account from bank to depositor deemed final adjustment if not objected to within five years.—When a statement of account has been rendered by a bank to a depositor accompanied by vouchers, if any, which are the basis for debit entries in such account, or the depositor's passbook has been written up by the bank showing the condition ot the depositor's account and delivered to such depositor with like accompaniment of vouchers, if any, such account shall, after the period of five years from the date of its rendition in the event no objection thereto has been theretofore made by the depositor, be deemed finally adjusted and settled and its correctness conclusively presumed and such depositor shall thereafter be barred from questioning the incorrectness of such account for any cause. (1929, c. 188, s. 1.)

§ 53-76. Depositor not relieved from exercising diligence as to errors.—Nothing in the preceding section shall be construed to relieve the depositor from the duty now imposed by law of exercising due diligence in the examination of such account and vouchers, if any, when rendered by the bank and of immediate notification to the bank upon discovery of any error therein, nor from the legal consequences of neglect of such duty; nor to prevent the application of § 53-52 to cases governed thereby. (1929, c. 188, s. 2.)

§ 53-77. Governor empowered to proclaim banking holidays.—The governor is hereby authorized and empowered, by and with the advice and consent of the council of state, to name and set apart such day or days, as he may from time to time designate, as banking holidays. During such period of holidays, all the ordinary and usual operations and business of all banking corporations, state or national, in this state shall be suspended, and during such period no banking corporation shall pay out or receive deposits, make loans or discounts, transfer credits, or transact any other banking business whatsoever: Provided, however, that during any such holiday, including the holiday validated in this section, the commissioner of banks, with the approval of the Governor, may permit any or all such banking institutions to perform any or all of the usual banking functions.

The banking holiday heretofore proclaimed by the governor of this state for Monday, Tuesday and Wednesday, March sixth, seventh and eighth, one thousand nine hundred and thirty-three, is hereby approved and validated, and the said days are hereby declared to be banking holidays in the state of North Carolina. (1933, c. 120, ss. 1, 2.)

Editor's Note.—For article discussing this section, see 11 N. C. Law Rev. 195.

Cited in Hood v. Clark, 211 N. C. 693, 191 S. E. 732.

Art. 7. Officers and Directors.

§ 53-78. Executive committee, directors shall appoint.—The board of directors shall appoint an executive committee or committees, each of which shall be composed of at least three of its members with such duties and powers as are defined by the regulations or by-laws, who shall serve until their successors are appointed. Such executive committee or committees shall meet as often as the board of directors may require, which shall not be less frequently than once each month, and approve or disapprove all loans and investments. All loans and investments shall be made under such rules and regulations as the board of directors may prescribe. (1921, c. 4, s. 49; C. S. 221(a).)

Editor's Note.—There were no sections in the banking law prior to 1921 corresponding to the sections under this article. The general corporation law, sections 55-48 et seq., was applicable by virtue of sec. 236.

§ 53-79. Minutes of directors and executive committee meetings.—Minutes shall be kept of all meetings of the board of directors and of the executive committee or committees, and same shall be recorded in a book or books which shall be kept for that purpose; which book or books shall be kept on file in the bank. Such minutes shall show a record of the action taken by the board of directors and executive committee or committees, on all loans, discounts, and investments made, authorized or approved, and such further action as the board of directors and executive committee or committees shall make concerning the conduct, management, and welfare of the bank. The minutes of the executive committee or committees shall be submitted to the board of directors for approval at each meeting of the board. (1921, c. 4, s. 50; C. S. 221(b).)

Cross Reference.—See note under § 53-78.

Effect of Not Writing Minutes.—The plaintiffs cannot be deprived of their right by reason of failure of the proper officer to actually make a written minute or record of the proceedings for the reason that proceedings of a corporate meeting of stockholders or directors are facts, and that they may be proved by parol testimony where they are not so recorded. Bailey v. Hassell, 184 N. C. 450, 459, 115 S. E. 166. And this notwithstanding this section, there being no objection appearing in the record to the testimony of the plaintiff and other witnesses as to what transpired among the directors about this transaction. Everett v. Staton, 192 N. C. 216, 220, 134 S. E. 492.

§ 53-80. Directors, qualifications of. — Every director of a bank doing business under this chapter shall be the owner and holder of shares of stock in the bank having a par value of not less than five hundred dollars, provided, such bank shall have a capital stock of more than fifteen thousand dollars; and not less than two hundred dollars if such bank shall have a capital stock of fifteen thousand dollars or less. And every such director shall hold such shares in his own name unpledged and unencumbered in any way. The office of any director at any time violating any of the provisions of this section shall immediately become vacant, and the remaining directors shall declare his office vacant and proceed to fill such vacancy forthwith. Not less than three-fourths of the directors of every bank doing business under this chapter shall be residents of the state of North Carolina: Provided, that as to banks doing business before February 18, 1921, the requirements as to amount of stock owned by a director shall not apply unless the commissioner of banks shall rule that such director is not bona fide discharging his duties. (1921, c. 4, s. 51; 1931, c. 243, s. 5; C. S. 221(c).)

Cross Reference.—As to the law prior to the enactment of this section, see § 55-48.

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-81. Directors shall take oath. — Every director shall, within thirty days after his election, take and subscribe, in duplicate, an oath

that he will diligently and honestly perform his duties in such office; and that he is the owner in good faith of the shares of stock of the bank required to qualify him for such office, standing in his own name on its books, and one of such oaths shall forthwith be filed with the commissioner of banks, and the other shall be kept on file in the bank. (1921, c. 4, s. 52; 1931, c. 243, s. 5; C. S. 221(d).)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-82. Directors, liability of. — Any director of any bank who shall knowingly violate, or who shall knowingly permit to be violated by any officers, agents, or employees of such bank, any of the provisions of this chapter shall be held personally and individually liable for all damages which the bank, its stockholders or any other person shall have sustained in consequence of such violation. Any aggrieved stockholder in any bank in liquidation may prosecute an action for the enforcement of the provisions of this section. Only one such action may be brought. The procedure shall follow as nearly as may be that prescribed by § 44-14, relative to suits on bonds of contractors with municipal corporations. (1921, c. 4, s. 53; 1935, c. 464; C. S. 221(e).)

Cross References.—As to fraud of director of a general corporation, see § 55-56. As to criminal liability of bank directors, see § 53-129. See also §§ 14-254 and 53-130.

Editor's Note.—The amendment of 1935 added the last three sentences to the section.

Similarity to National Act.—This section is, with mere verbal changes, Comp. Stat. 9831, R. S. 5239. For federal cases construing the national banking act see Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. Ed. 1002, 27 S. Ct. 638; Thomas v. Taylor, 224 U. S. 73, 56 L. Ed. 673; 32 S. Ct. 403; Chesbrough v. Woodworth, 244 U. S. 72, 61 L. Ed. 1000, 37 S. Ct. 579

Effect of Violation.—Doubtless, the General Assembly, at the regular session of 1921, thought that the inclusion of section 53-48 and this section would be sufficient, without providing that the violation of either provision should be a crime. The provision with reference to the reserve was enforceable by the Corporation Commission in the exercise of its power of supervision of banks. No provision was made for the enforcement of the prohibition of loans to individuals exceeding the statutory limitation. Violations of these and other provisions of the statute by directors might result in civil liability, only. However, at the Extra Session of 1921, the General Assembly added section 53-134 making such violation a misdemeanor. State v. Cooper, 190 N. C. 528, 532, 130 S. E. 180.

Elements of Crime in Violation.—An intent to defraud the bank or others is not required to be either alleged in the indictment or proved upon the trial of the issue raised by a plea of not guilty. Neither the bank nor any of its officers or directors have any discretion as to the making of loans which are thus forbidden. Intent is, therefore, not an element of the crime. The wilful doing of the unlawful act constitutes the crime declared by statute to be a misdemeanor, punishable as such in the discretion of the court. State v. Cooper, 190 N. C. 528, 534, 130 S. E. 180.

Who May Prosecute Action.—An action for damage against the directors for false statements as to the bank's solvency, made to private persons and in the bank's report to the commission, is solely maintainable by the receiver of the bank unless the private person can show an injury peculiar to him as distinguished from the loss among the creditors generally. Douglass v. Dawson, 190 N. C. 458, 130 S. E. 195.

Liability Where False Statement Misleads.—A false and misleading statement made by the directors by which one was led to make deposits gave a cause of action against the directors. It was also held that the directors are presumed to know the condition of the bank. Tate v. Bates, 118 N. C. 287, 24 S. E. 482. See also Houston v. Thornton, 122 N. C. 365, 29 S. E. 827; Townsend v. Williams, 117 N. C. 330, 23 S. E. 461; Solomon v. Bates, 118 N. C. 311, 24 S. E. 478.

Position as Evidence of Knowledge.—Where the official position of an officer of a bank is such as necessarily to acquaint him of the violation of the statute respecting the making of loans, and to fix him as a party thereto, it is sufficient evidence to sustain his conviction of the misdemeanor prescribed in § 53-134. State v. Cooper, 190 N. C. 528, 130 S. E. 180.

§ 53-83. Directors, examining committee of. — A committee of at least three directors or stockholders shall be appointed annually to examine, or to superintend the examination of the assets and the liabilities of the bank, and to report to the board of directors the result of such examination. The committee, with the approval of the board of directors, may provide for such examinations by a certified public accountant or clearing-house examiner in any city where such examination is provided for by the rules of such clearing-house association. A copy of such report of examination, which is herein required to be made, attested, and verified under oath by the signature of at least three members of such committee, shall forthwith be filed with the commissioner of banks. (1921, c. 4, s. 54; 1931, c. 243, s. 5; C. S. 221(f).)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-84. Depositaries, designated by directors. —By resolution of the board of directors, other banks organized under the laws of this state, or of another state, or of the national banking act of the United States, shall be designated as depositaries or reserve banks in which a part of such bank's reserve shall be deposited, subject to payment on demand. A copy of such resolution shall, upon its adoption, be forthwith certified to the commissioner of banks and the depositary so designated shall be subject to the approval of the commissioner of banks. For causes which he may deem adequate, the commissioner of banks shall have authority at any time to withdraw such approval. (1921, c. 4, s. 55; 1931, c. 243, s. 5; C. S. 221(g).)

Local Modification.—Guilford; Nash, Town of Spring Hope: 1933, c. 568; Halifax, Town of Hobgood; Haywood; Nash, Town of Bailey: 1935, c. 95.

Cross References.—As to the amount, etc., of the reserve, see § 53-50. As to draft upon depositaries as payment of check, etc., see § 53-70 et seq.

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Cited in State v. Cooper, 190 N. C. 528, 531, 130 S. E. 180.

§ 53-85. Stockholders' book. — The directors shall provide a book in which shall be kept the name and resident address of each stockholder, the number of shares held by each, the time when such person became a stockholder, together with all transfer of stock, stating the time when made, the number of shares and by whom transferred, which book shall be subject to the inspection of the directors, officers, and stockholders of the bank at all times during the usual hours for the transaction of business. (1921, c. 4, s. 56; C. S. 221(h).)

§ 53-86. Directors, officers, etc., accepting fees, etc. — No gift, fee, commission, or brokerage charge shall be received, directly or indirectly, by any officer, director, or employee of any bank doing

business under this chapter, on account of any transaction to which the bank is a party. Any officer, director, employee, or agent who shall violate the provisions of this section shall be guilty of a misdemeanor, and shall be and thereafter remain ineligible as an officer, director, or employee of any bank doing business under this chapter. Nothing in this section shall be construed to prevent the payment of necessary and proper attorney's fees to any licensed attorney for professional services rendered. (1921, c. 4, s. 57; C. S. 221(i).)

§ 53-87. Dividends, directors may declare. — The board of directors of any bank may declare a dividend of so much of its undivided profits as they may deem expedient, subject to the requirements hereinafter provided. When the surplus of any bank having a capital stock of fifteen thousand dollars or more is less than fifty per cent of its paid-in capital stock, such bank shall not declare any dividend until it has transferred from undivided profits to surplus twenty-five per cent of said undivided profits, or any lesser percentage that may be required to restore the surplus to an amount equal to fifty per cent of the paid-in capital stock. When the surplus of any bank having a capital stock of less than fifteen thousand dollars is less than one hundred per cent of its paid-in capital stock, such bank shall not declare any dividend until it has transferred from undivided profits to surplus fifty per cent of said undivided profits, or any lesser percentage that may be required to restore the surplus to an amount equal to one hundred per cent of the paid-in capital stock. In order to ascertain the undivided profits from which such dividend may be made, there shall be charged and deducted from the actual profits:

(a) All ordinary and extraordinary expenses, paid or incurred, in managing the affairs and transacting the business of the bank;

(b) Interest paid or then due on debts which it owes;

(c) All taxes due;

(d) All overdrafts which have been standing on the books of the bank for a period of sixty days or longer;

(e) All losses sustained by the bank. In computing the losses, there shall be included debts owing the bank which have become due and are not in process of collection, and on which interest for one year or more is due and unpaid, unless said debts are well secured; and debts reduced to final judgments which have been unsatisfied for more than one year and on which no interest has been paid for a period of one year, unless said judgments are well secured.

(f) All investments carried on its books, which are prohibited under the provisions of this chapter, or rules and regulations made by the commissioner of banks, pursuant to the powers conferred under this chapter. (1921, c. 4, s. 58; 1927, c. 47, s. 10; 1931, c. 243, s. 5; C. S. 221(j).)

Editor's Note.—The 1927 amendment added subsection (f). The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-88. Surplus, shall not be used for.—The surplus of any bank doing business under this chapter shall not be used for the purpose of paying expenses or losses until the credit to undivided profits has been exhausted. But any portion of such surplus may be converted into capital stock and distributed as a stock dividend, provided that such surplus shall not thereby be reduced below fifty per cent of the paid-in capital of such bank, having a paid-in capital of fifteen thousand dollars or more. When the surplus of any bank having a capital stock of less than fifteen thousand dollars shall reach an amount equal to one hundred per cent of its paid-in capital, the board of directors of such bank shall declare a dividend of fifty per cent of said surplus and distribute the same as a stock dividend: Provided, that where the distribution of such a stock dividend would increase the capital stock of any bank to an amount greater than fifteen thousand dollars, the board of directors of such bank may, in its discretion, declare a stock dividend of only so much of said surplus as will be necessary to increase the stock of the said bank to fifteen thousand dollars. (1921, c. 4, s. 59; C. S. 221(k).)

Cross Reference.—As to definition of "surplus" and "undivided profits," see § 53-1.

§ 53-89. Overdrafts, payment by officer, etc.—Any officer (other than a director), or employee of a bank, who shall permit any customer or other person to overdraw his account, or who shall pay any check or draft, the paying of which shall overdraw any account, unless the same shall be authorized by the board of directors or by a committee of such board authorized to act, shall be personally and individually liable to such bank for the amounts of such overdrafts. (1921, c. 4, s. 60; C. S. 221(l).)

§ 53-90. Officers and employees shall give bond.—The active officers and employees of any bank before entering upon their duties shall give bond to the bank in a bonding company authorized to do business in North Carolina, in the amount required by the directors and upon such form as may be approved by the commissioner of banks, the premium for same to be paid by the bank. The commissioner of banks or directors of such bank may require an increase of the amount of such bond whenever they may deem it necessary. If injured by the breach of any bond given hereunder, the bank so injured may put the same in suit and recover such damages as it may have sustained. (1921, c. 4, s. 61; Ex. Sess., 1921, c. 18; 1927, c. 47, s. 11; 1929, c. 72, s. 2; 1931, c. 243, s. 5; C. S. 221(m).)

Editor's Note.—The Act of 1929 struck out the section as amended by the Act of 1927 and inserted in lieu thereof the above.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

This statute enters into and forms a part of the bond. Hood v. Simpson, 206 N. C. 748, 175 S. E. 193.

Effect of Renewal of Bond.—When a bond which guarantees the fidelity of a bank cashier and guarantees the bank against loss by reason of embezzlement, etc., of said cashier, is executed for an indefinite term and thereafter is kept in force by the payment of annual premiums, for each year the officer was re-elected, then each and every renewal thereof is a separate and distinct bond or independent contract. Hood v. Simpson, 206 N. C. 748, 753, 175 S. E. 193.

§ 53-91. Officers and employees may borrow, when.—No officer or employee of a bank, nor a firm or partnership of which such officer or employee is a member, nor a corporation in which

such officer or employee owns a controlling interest, shall borrow any amount whatever from the bank of which he is an officer or employee, except upon good collateral or other ample security or endorsement; and no such loan shall be made until the same has been approved by a majority of the board of directors and a resolution, duly entered upon the minutes of the board of directors and signed by them, showing the amount of the loan, the directors approving the same and a brief description of the security upon which said loan is made; and a certified copy of such resolution shall be attached to the instrument evidencing the indebtedness. Provided, however, this section shall not apply to directors who are neither officers nor employees of the bank. (1921, c. 4, s. 62; 1925, c. 119, s. 2; 1927, c. 47, s. 12; C. S. 221(n).)

Editor's Note.—The scope of this section was broadened by the Act of 1925. The prohibition was extended to employees as well as officers. The provision as to partnerships and corporations in which officers or employees are interested is new. The provision immediately preceding the proviso at the end of the section is also new.

The proviso at the end of this section was added by the 1927 amendment.

Art. 8. Commissioner of Banks and Banking Department.

§ 53-92. Appointment of commissioner of banks; state banking commission.—On or before April first, one thousand nine hundred and thirty-one, after the ratification of this section, and quadrennially thereafter, the governor, with the advice and consent of the senate, shall appoint a commissioner of banks who shall hold his office for a term of four years or until his successor has been appointed and has qualified, subject, however, to the provisions herein made as to his removal. The commissioner of banks shall, before entering upon the discharge of his duties, enter into bond with some surety company authorized to do business in the State of North Carolina, in the sum of not less than fifty thousand dollars, conditioned upon the faithful and honest discharge of all duties and obligations imposed by statute upon him.

There is hereby created, to become effective on April first, one thousand nine hundred and thirty-nine, a state banking commission, which commission shall consist of the state treasurer and the attorney general, who shall serve as ex officio members thereof, and five members to be appointed by the governor, four of which said members shall be practical bankers and one shall be a business man who is not an executive official in any bank, said five members shall be appointed for a term of four years beginning on April first, one thousand nine hundred and thirty-nine; and said appointive members shall receive as compensation the same per diem and expenses paid to the members of the advisory budget commission, which compensation shall be paid from the fees collected for the examination of banks, as provided by law.

The banking commission shall meet at such time or times, and not less than once every three months, as the commission shall, by resolution, prescribe, and the commission may be convened in special session at the call of the governor, or upon the request of the commissioner of banks. The state treasurer shall be chairman of the said commission.

No member of said commission shall act in any matter affecting any bank in which he is financially interested, or with which he is in any manner connected. No member of said commission shall divulge or make use of any information coming into his possession as a result of his service on such commission, and shall not give out any information with reference to any facts coming into his possession by reason of his services on such commission in connection with the condition of any state banking institution, unless such information shall be required of him at any hearing at which he is duly subpoenaed, or when required by order of a court of competent jurisdiction.

The commissioner of banks shall act as the executive officer of the banking commission, but the commission shall provide, by rules and regulations, for hearings before the commission upon any matter or thing which may arise in connection with the banking laws of this state upon the request of any person interested therein, and review any action taken or done by the commissioner of banks.

The banking commission is hereby vested with full power and authority to supervise, direct and review the exercise by the commissioner of banks of all powers, duties, and functions now vested in or exercised by the commissioner of banks under the banking laws of this state. (1931, c. 243, s. 1; 1935, c. 266; 1939, c. 91, s. 1.)

Editor's Note.—The most notable change in the banking law is the creation of a new banking department and of a new official—the commissioner of banks, to whom is transferred the supervision of banks heretofore exercised by the corporation commission.

All of the section except the first paragraph was inserted by the 1939 amendment in lieu of provisions relating to the former advisory banking commission.

Had the new banking department been created as a purely administrative agency it might fairly be contended that the finality of its action would be in an administrative sense only, and appropriate legal proceedings could be had to test them. But the corporation commission had judicial powers in dealing with banks—its stock assessments were, for example, given the effect of Superior Court judgments. Corporation Commission v. Murphey, 197 N. C. 42, 147 S. E. 667, aff'd 280 U. S. 534, 50 S. Ct. 161, 74 L. Ed. 598, see also Corporation Commission v. Bank of Vanceboro, 200 N. C. 422, 157 S. E. 59. And the new commissioner of banks succeeds to those judicial powers so that he is obviously not a purely administrative official. There still remains the possibility that as to certain matters his rulings are administrative and that it is in respect to such rulings only that the decisions of the new commission as an appellate administrative body are final. 9 N. C. Law Rev. 348-350.

§ 53-93. Powers and duties of commissioner.—The commissioner of banks shall have the powers, duties and functions herein given, and in addition thereto such other powers and rights as may be necessary or incident to the proper discharge of his duties. (1931, c. 243, s. 2.)

Cross Reference.—For validation of foreclosures and executions of deeds of trust by the commissioner of banks, see § 53-35.

The Commissioner of Banks, when engaged in the liquidation of the assets of an insolvent bank, as authorized by statute, does not derive his power or his authority from the court. His power and authority, both to take possession of an insolvent bank, and to liquidate its assets for distribution among its creditors according to their respective rights, are derived from the statute. In re Central Bank, etc., Co., 206 N. C. 251, 253, 173 S. E. 340.

§ 53-94. Right to sue and defend in actions involving banks; liability to suit.—As commissioner of banks he is empowered to sue and prosecute

or defend in any action or proceeding in any courts of this State or any other state and in any court of the United States for the enforcement or protection of any right or pursuit of any remedy necessary or proper in connection with the subjects committed to him for administration or in connection with any bank or the rights, liabilities, property or assets thereof, under his supervision; but nothing herein shall be construed to render the commissioner of banks liable to be sued except as other departments and agencies of the State may be liable under the general law. (1931, c. 243, s. 3.)

§ 53-95. Commissioner to exercise powers under supervision of banking commission.—All the powers, duties, and functions granted to or imposed upon the commissioner of banks by law shall be exercised by him under the direction and supervision of the banking commission, and wherever provision is made in any law now in effect authorizing and permitting the commissioner of banks to make rules and regulations with respect to any actions or things required to be done under the banking laws of this state, such rules and regulations shall be made by the banking commission, and the words "the commissioner of banks," used in such statutes authorizing him to make rules and regulations, shall be construed to mean the banking commission, and the words "banking commission" substituted in such statutes for "commissioner of banks." (1931, c. 243, s. 4; 1939, c. 91, s. 2.)

Editor's Note.—The 1939 amendment added that portion of the first sentence beginning with the words "under the direction."

§ 53-96. Salary of commissioner; legal assistance and compensation.—The salary of the commissioner of banks shall be fixed by the advisory budge commission. The governor may in his discretion appoint and assign to the commissioner of banks such legal assistance as in his judgment may be necessary; and compensation therefor, when permanent, shall be fixed in like manner. (1931, c. 243, s. 6.)

§ 53-97. Vacancy appointments and removal.—Vacancies existing in the office of commissioner of banks by death, resignation or otherwise shall be filled by the governor; and he shall have the power of removal for sufficient cause. (1931, c. 243, s. 8.)

§ 53-98. Seal of office of commissioner; certification of documents.—The commissioner of banks shall have a seal of office bearing the legend "State of North Carolina—Commissioner of Banks," with such other appropriate device as he may adopt. (1931, c. 243, s. 9.)

§ 53-99. Official records.—The commissioner of banks shall keep a record in his office of his official acts, rulings and transactions: Provided, however, that where any disclosure of the records in his office, or of any report or other transaction, might injuriously affect any bank actually operating, such disclosure shall not be made or required except as may now be done under the provisions of law in similar cases. (1931, c. 243, s. 10.)

§ 53-100. General or special investigations of insolvent banks.—Whenever it may appear to be to the public interest, the governor may cause a general or special investigation to be made of the affairs of any insolvent bank or banks, singly or in related groups, with a view to discovering and establishing the causes of the failure of such bank or banks, and responsibility therefor; and of discovering the dealings with such banks of persons, officers, corporations or municipalities which may have led to such insolvency or which may have endangered or involved any public funds therein. The governor may assign counsel who shall prosecute such inquiry before the commissioner of banks, or a deputy or commissioner appointed by the commissioner of banks for the purpose; and the commissioner of banks is hereby empowered to conduct such investigation either in person or through such commissioner or deputy appointed by him. The inquiry shall be held at the office of commissioner of banks in the city of Raleigh or at any other place or places in the State designated by the commissioner of banks under such rules and regulations as the state banking commission may prescribe and may be adjourned from time to time as convenience may require. Attendance of witnesses and production of papers may be required by subpoena under the hand of the commissioner or his deputy, and on failure of any witness to appear as subpoenaed or his or her failure to produce any books or papers, as called for by such commissioner or deputy on subpoena or other order due notice shall be served, at the instance of such commissioner or deputy, of not less than three days to appear before a judge of the superior court residing in or holding courts within the district wherein such witness is subpoenaed or notified to appear or produce such records or papers, on a day certain and a place named, when such judge shall hear the matter and is authorized to punish such witness as for contempt as he may find on such hearing.

A summary of such investigation shall be made with the findings and recommendations of the commissioner thereon, and a copy thereof submitted to the governor, and when the facts shall disclose that any person or persons are criminally responsible, a summary shall be sent to the solicitor of the judicial district likely to have jurisdiction of the matter, whose duty it shall be to have the matter presented to the grand jury for its action. The governor may employ counsel to assist in the prosecution of any person or persons criminally responsible and fix his compensation and the manner of its payment. (1931, c. 243, s. 11.)

§ 53-101. Clerical help.—The commissioner of banks is empowered to employ sufficient clerical and secretarial help, and other necessary labor to conduct the affairs of his office with economy and efficiency. Persons so employed shall be paid as other employees in the departments of the State and shall be under the same rules and regulations. (1931, c. 243, s. 12.)

§ 53-102. Suitable offices; transfer of books, records, etc., by corporation commission.—Suitable offices shall be provided for the commissioner of banks in some State owned public building in Raleigh. (1931, c. 243, s. 13.)

§ 53-103. Acceptances. — Banking corporations and banking and trust companies doing a fiduciary business shall have power to accept drafts or bills of exchange drawn upon them, and to endorse

drafts or bills of exchange drawn upon another, having not more than six months sight to run, exclusive of days of grace, which grow out of transactions involving the importation or exportation of goods, or which grow out of transactions involving the domestic shipment of goods. No such banking corporation or banking and trust company doing a fiduciary business shall accept or indorse, whether in a foreign or domestic transaction, for any one person, company, firm, or corporation to an amount equal at any time in the aggregate to more than ten per centum of its paid-up and unimpaired capital stock and surplus, unless the banking corporation or banking and trust company doing a fiduciary business is secured either by attached documents or by some other actual security growing out of the same transaction as the acceptance; and no such banking corporation or banking and trust company doing a fiduciary business shall accept or indorse such bills or drafts to an amount equal at any one time in the aggregate to more than one-half of its paid-up and unimpaired capital stock and surplus. The commissioner of banks, however, under such general regulations as the state banking commission may prescribe, which shall apply to all banking corporations or banking and trust companies doing a fiduciary business alike regardless of the amount of capital stock and surplus, may authorize any banking corporation or banking and trust company doing a fiduciary business to accept or indorse such bills or drafts to an amount not exceeding at any time in the aggregate one hundred per centum of its paid-up and unimpaired capital stock and surplus: Provided, that the aggregate of acceptances growing out of domestic transactions shall in no event exceed fifty per centum of such capital stock and surplus. (1919, c. 76; 1931, c. 243, s. 5; 1939, c. 91, s. 2; C. S. 222.)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-104. Commissioner of banks shall have supervision over, etc.—Every bank, corporation, partnership, firm, company, or individual, now or hereafter transacting the business of banking, or doing a banking business in connection with any other business, under the laws of and within this state, shall be subject to the provisions of this chapter, and shall be under the supervision of the commissioner of banks. The commissioner of banks shall exercise control of and supervision over the banks doing business under this chapter, and it shall be his duty to execute and enforce through the state bank examiners and such other agents as are now or may hereafter be created or appointed, all laws which are now or may hereafter be enacted relating to banks as defined in this chapter. For the more complete and thorough enforcement of the provisions of this chapter, the state banking commission is hereby empowered to promulgate such rules, regulations, and instructions, not inconsistent with the provisions of this chapter, as may in its opinion be necessary to carry out the provisions of the laws relating to banks and banking as herein defined, and as may be further necessary to insure such safe and conservative management of the banks under its supervision as will provide adequate protection for the interests of the depositors, creditors, stockholders, and public in their relations with such banks. All banks doing business under the provisions of this chapter shall conduct their business in a manner consistent with all laws relating to banks and banking, and all rules, regulations, and instructions that may be promulgated or issued by the state banking commission. (1921, c. 4, s. 63; 1931, c. 243, s. 5; 1939, c. 91, s. 2; C. S. 222(a).)

Editor's Note.—Section 244 of the Consolidated Statutes was the corresponding section of the law prior to this section which changed the law considerably. See 3 N. C. Law Rev. 81.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" and "chief state bank examiner" formerly appearing in this section.

§ 53-105. Reports of condition. — Every bank shall make to the commissioner of banks not less than three reports during each year, according to the form which may be prescribed by said commissioner of banks; which report shall be verified by the oath or affirmation of the president, vice-president, cashier, secretary, or treasurer of said bank, and in addition thereto, two of the directors. Each such report shall exhibit in detail and under appropriate heads the resources, assets, and liabilities of such bank at the close of business on any past day by the commissioner of banks specified, and shall be transmitted to the commissioner of banks within ten days after the receipt of a request or requisition therefor from the commissioner of banks; and in a form prescribed by the commissioner of banks; a summary of such report shall be published in a newspaper published in the place where the bank is located, or if there is no newspaper in the place, then in the nearest one published thereto in the county in which such bank is established. Proof of such publication shall be furnished the commissioner of banks in such form as may be prescribed by him. (1921, c. 4, s. 64; 1923, c. 148, s. 2; 1931, c. 243, s. 5; C. S. 222(b).)

Editor's Note. — This section seems to cover all the terms of C. S. section 245, and supersedes it. However, there are a few changes. Formerly the secretary or treasurer could not verify the report on oath; and the full report must have been published "in a newspaper in the county in which the banking corporation or individual was located." The provisions prescribing the details of such report were also inserted.

The 1923 amendment changed the minimum number of reports from four to three.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-106. Special reports. — The commissioner of banks may call for special reports whenever in his judgment it is necessary to inform him of the condition of any bank, or to obtain a full and complete knowledge of its affairs. Said reports shall be in and according to the form prescribed by the commissioner of banks, and shall be verified in the manner provided in § 53-105, and shall be published as therein provided, if required by the commissioner of banks so to be. (1921, c. 4, s. 66; 1931, c. 243, s. 5; C. S. 222(d).)

Editor's Note. — There was no corresponding section in the prior law. However, under C. S. section 247 a special report might be required when necessary to acquire a full knowledge of a bank. There was no requirement as to form or publishing.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-107. Failure to make report, penalty for.— Every bank failing to make and transmit any report which the commissioner of banks is authorized to require by this chapter, and in and according to the form prescribed by said commissioner of banks, within ten days after the receipt of a request or requisition therefor, or failing to publish the reports as required, shall forthwith be notified by the commissioner of banks, and if such failure continue for five days after the receipt of such notice, such delinquent bank shall be subject to a penalty of two hundred dollars. The penalty herein provided for shall be recovered in a civil action in any court of competent jurisdiction, and it shall be the duty of the attorney-general to prosecute all such actions. (1921, c. 4, s. 67; 1931, c. 243, s. 5; C. S. 222(e).)

Editor's Note. — This section is a re-enactment of C. S. section 248.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-108. List of stockholders to be kept. — Every bank doing business under this chapter shall at all times keep a correct record of the names of all its stockholders, and once in each year, or whenever called upon, file in the office of the commissioner of banks a correct list of all its stockholders, the resident address of each, and the number of shares held by each. (1921, c. 4, s. 68; 1931, c. 243, s. 5; C. S. 222(f).)

Editor's Note. — This section is a substantial re-enactment of the first sentence of C. S. section 247.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-109. Official communications of commissioner of banks. — Each official communication directed by the commissioner of banks, or any state bank examiner, to any bank, or to any officer thereof, relating to an examination or investigation conducted or made by the commissioner of banks, or containing suggestions or recommendations as to the conduct of the bank shall, if required by the authority submitting same, be submitted by the officer or director receiving it, to the executive committee or board of directors of such bank and duly noted in the minutes of such meeting. The receipt and submission of such notice to the executive committee or board of directors shall be certified to the commissioner of banks within such time as he may require, by three members of such committee or board. (1921, c. 4, s. 69; 1931, c. 243, s. 5; C. S. 222(g).)

Editor's Note. — The provisions of this section were new with the 1921 act.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-110. Banking commission to prescribe books, records, etc.—Whenever in its judgment it may appear to be advisable, the state banking commission may issue such rules, instructions, and regulations prescribing the manner of keeping books, accounts, and records of banks as will tend to produce uniformity in the books, accounts, and records of banks of the same class. (1921, c. 4, s. 70; 1931, c. 243, s. 5; 1939, c. 91, s. 2; C. S. 222(h).)

Editor's Note. — The provisions of this section first appeared in the act of 1921.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-111. Reserve, when below legal requirement.—When the reserve of any bank falls below the amount required by law, it shall not make new loans or discounts, otherwise than by discounting or purchasing bills of exchange, payable at sight or on demand, nor make dividends of its profits until the reserve required by law is restored. The commissioner of banks shall require any bank whose reserve falls below the amount herein required immediately to make good such reserve. In case the bank fails for thirty days thereafter to make good its reserve the commissioner of banks may forthwith take possession of the property and business of such bank until its affairs be adjusted or finally liquidated as provided for in this chapter. (1921, c. 4, s. 71; 1931, c. 243, s. 5; C. S. 222(i).)

Cross References.—As to manner of making good an impaired capital, see § 53-42. As to limitations upon loans, see § 53-48. As to definition of reserve, see § 53-51. As to the amount of reserve, see § 53-50.

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Purpose of Section. — The wisdom of this provision and section 53-48 is manifest; banks, whose business is conducted in strict compliance seldom become insolvent, and thus bring loss and disaster upon depositors and stockholders and usually, also, upon others who may have no direct interest in the insolvent bank, but who nevertheless suffer by reason of the loss sustained by those who do have such interest. These sections, although arbitrary as to details are supported in principle by the lessons taught in the school of experience. State v. Cooper, 190 N. C. 528, 532, 130 S. E. 180.

Individual Liability of Officer. — A bank must act through its officers, and where they have violated the provisions of this section and section 53-48, as to lending the bank's money, the offense is committed by the officers under the meaning of the statute, and they are individually indictable therefor. State v. Cooper, 190 N. C. 528, 130 S. E. 180.

So where the official position of an officer of a bank is such as necessarily to acquaint him of the violation of the statute respecting the making of loans, and to fix him as a party thereto, it is sufficient evidence to sustain his conviction of the misdemeanor prescribed by section 53-134. State v. Cooper, 190 N. C. 528, 130 S. E. 180.

§ 53-112. Appraisal of assets of doubtful value. —If any assets of a bank are of a doubtful or disputed value, an appraisal of such assets may be had by the commissioner of banks, and for the purpose of making such appraisal the commissioner of banks shall designate one agent as an appraiser and the bank shall designate an agent as an appraiser and the two so chosen shall designate a third. The appraisers so selected shall make an appraisal of the assets so designated as doubtful or disputed and file a written report of their appraisal with the bank and with the commissioner of banks. In making such appraisal the appraisers shall determine the actual cash market value of such assets. Such appraisal, when made, shall be accepted as the value of such assets for the purpose of examination or for the purpose of determining the actual cash market value of such assets. The appraisers designated shall not be interested, in any way, either in the bank or as an employee of the commissioner of banks and all expenses of such appraisal shall be paid by the bank whose assets are appraised. If any bank required to appoint an appraiser hereunder shall fail for ten (10) days to appoint an appraiser, the commissioner of banks may apply to the Clerk of the Superior Court of the county in which the bank is located for the appointment of such an appraiser, and the clerk shall thereupon make the

appointment for the bank. (1927, c. 47, s. 13; 1931, c. 243, s. 5.)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" and "chief state bank examiner" formerly appearing in this section.

§ 53-113. Certified copies of records as evidence.—In all civil actions in the courts of this state wherein are involved as evidence or otherwise any of the records of the commissioner of banks, a certified copy over the signature and under the seal of the commissioner of banks shall be admissible in evidence to the same effect as if produced in court at trial by the proper custodian of the records. (1927, c. 47, s. 14; 1931, c. 243, s. 5.)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" and "chief state bank examiner" formerly appearing in this section.

§ 53-114. Other powers of state banking commission.—In addition to all other powers conferred upon and vested in the state banking commission, the said commission, with the approval of the governor, is hereby authorized, empowered and directed, whenever in its judgment the circumstances warrant it:

(a) To authorize, permit, and/or direct and require all banking corporations under its supervision, to extend for such period and upon such terms as it deems necessary and expedient, payment of any demand and/or time deposits.

(b) To direct, require or permit, upon such terms as it may deem advisable, the issuance of clearing house certificates or other evidences of claims against assets of such banking institutions.

(c) To authorize and direct the creation, in such banking institutions, of special trust accounts for the receipt of new deposits, which deposits shall be subject to withdrawal on demand without any restriction or limitation and shall be kept separate in cash or on deposit in such banking institutions as it shall designate or invested in such obligations of the United States and/or the state of North Carolina as it shall designate.

(d) To adopt for such banking institutions such regulations as are necessary in its discretion to enable such banking institutions to comply fully with the federal regulations prescribed for national or state banks. (1933, c. 120, s. 3; 1939, c. 91, s. 2.)

§ 53-115. State banking commission to make rules and regulations.—The state banking commission is hereby authorized, empowered and directed to make all necessary rules and regulations, and to give all necessary instructions with respect to such banking corporations which the commissioner of banks may authorize, permit and/or direct and require to be conducted under the provisions of §§ 53-77, 53-114, 53-115, and 53-116. And it shall be the duty of all such banking corporations and their officers, agents and employees, to comply fully with any and all such rules, regulations and instructions, established and promulgated by the state banking commission with respect to such banking corporations under the terms of §§ 53-77, 53-114, 53-115, and 53-116; and such orders, rules, and regulations shall have the same force and effect as rules, regulations and instructions promulgated under the existing banking laws. (1933, c. 120, s. 4; 1939, c. 91, s. 2.)

§ 53-116. Commissioner need not take over banks failing to meet deposit demands.—The commissioner of banks is authorized and directed not to take possession of any banking corporation under his supervision for failure to meet its deposit liabilities during the period in which such banking corporation is operating under the terms of § 53-114, paragraph (a); and he is hereby relieved from any and all liability for permitting such banking corporations to continue operations under the terms thereof. (1933, c. 120, s. 5.)

Art. 9. Bank Examiners.

§ 53-117. Appointment by commissioner of banks.—The commissioner of banks, for the purpose of carrying out the provisions of this chapter, shall appoint from time to time such state bank examiners, assistant state bank examiners, clerks and stenographers as may be necessary to make a thorough examination of and into the affairs of every bank doing business under this chapter, as often as the commissioner of banks may deem necessary, and at least once each year. The commissioner of banks may at any time remove any person appointed by him under this chapter. (1921, c. 4, s. 72; 1931, c. 243, s. 5; C. S. 223(a).)

Editor's Note. — This section is a re-enactment of a part of C. S. section 249.

The Act of 1931 provided that "commissioner of banks" should be substituted for "corporation commission" or "chief state bank examiner."

For a case describing the manner in which the commission takes charge through the state bank examiner see Taylor v. Everett, 188 N. C. 247, 124 S. E. 316. See also the article in 3 N. C. Law Rev. 79, discussing the case and suggesting that the bank examiner probably has power to prescribe regulations without the express approval or direction of the commission although upon an appeal the decision of the commission would undoubtedly control.

§ 53-118. Duties and powers.—It shall be the duty of the examiners to verify all reports made to the commissioner of banks by the officers and directors, members, or individuals conducting any banking institution, as required by this chapter or by the commissioner of banks. The officers of every bank shall submit and surrender its books, assets, papers, and concerns to the examiners appointed under this chapter, who shall retain the custody and possession of such books, assets, papers, and concerns for such length of time as may be required for the purpose of making an examination as required by this chapter. If any officer shall refuse to surrender the books, assets, papers, and concerns as herein provided, or shall refuse to be examined under oath touching the affairs of such bank, the commissioner of banks may forthwith take possession of the property and business of the bank and liquidate its affairs in accordance with the provisions of this chapter. (1921, c. 4, s. 73; 1931, c. 243, s. 5; C. S. 223(b).)

Editor's Note. — The first sentence of this section is a re-enactment of a portion of the first sentence of C. S. 249, which required the examiners to verify the quarterly report which was required by sec. 245; thus, it will be seen that the terms have been extended to include all the reports made to the commissioner.

By virtue of C. S. sec. 250 it was the duties of the examiners to examine the books, papers and affairs of the bank, but the section did not go into detail as to the surrender of the books etc., nor fix a penalty for a refusal to do so. However, under C. S. sec. 253 the examiners were given power to take and retain possession of any bank for the purpose of examining into its affairs, when authorized to do so, but it fixed no penalty for a failure of the officers to fail to surrender the books, etc.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-119. Officers and employees, removal of.—The commissioner of banks shall have the right, and is hereby empowered, to require the immediate removal from office of any officer, director, or employee of any bank doing business under this chapter, who shall be found to be dishonest, incompetent, or reckless in the management of the affairs of the bank, or who persistently violates the laws of this state or the lawful orders, instructions, and regulations issued by the state banking commission. (1921, c. 4, s. 74; 1931, c. 243, s. 5; 1939, c. 91, s. 2; C. S. 223(c).)

Editor's Note. — There was no section in the Consolidated Statutes corresponding to this section.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-120. Examiners may administer oath.—For the purpose of making examinations as required by this chapter, any duly appointed examiner may administer oaths to examine any officer, director, agent, employee, customer, depositor, shareholder of such bank, or any other person or persons, touching its affairs and business. Any examiner may summon in writing any officer, director, agent, employee, customer, depositor, shareholder, or any person or persons resident of this state to appear before him and testify in relation thereto. (1921, c. 4, s. 75; C. S. 223(d).)

Editor's Note. — This section is a substantial re-enactment of a portion of C. S. sec. 250.

§ 53-121. Examiners may make arrest.—When it shall appear to any examiner, by examination or otherwise, that any officer, agent, employee, director, stockholder, or owner of any bank has been guilty of a violation of the criminal laws of this state relating to banks, it shall be his duty, and he is hereby empowered to hold and detain such person or persons until a warrant can be procured for his arrest; and for such purposes such examiner shall have and possess all the powers of peace officers of such county, and may make arrest without warrant for past offenses. Upon report of his action to the commissioner of banks, said commissioner may direct the release of the person or persons so held, or, if in his judgment such person or persons should be prosecuted, the commissioner of banks shall cause the solicitor of the judicial district in which such detention is had to be promptly notified, and the action against such person or persons shall be continued a reasonable time to enable the solicitor to be present at the trial. (1921, c. 4, s. 76; 1931, c. 243, s. 5; C. S. 223(e).)

Cross Reference.—As to malfeasance of bank examiners, etc., see § 53-124 et seq., and also § 14-254.

Editor's Note.—For article discussing arrest without a warrant, see 15 N. C. Law Rev. 101.

This section is a re-enactment of C. S. sec. 254.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" and "commission" formerly appearing in this section.

§ 53-122. Fees for examinations and other services.—For the purpose of paying the salaries and necessary traveling expenses of the commissioner of banks, State bank examiners, assistant State bank examiners, clerks, stenographers and other employees of the commissioner of banks, the following fees shall be paid into the office of the commissioner of banks: (a) Each bank and each branch of any bank which under the laws of the State of North Carolina is subject to supervision and examination by the commissioner of banks and is authorized to do business or is in process of voluntary liquidation shall, within ten days after the assessment has been made, pay into the office of the commissioner of banks according to its total resources as shown by its report of condition made to the commissioner of banks at the close of business December thirty-first, nineteen hundred and twenty-six, and on the thirty-first day of December, or the date most nearly approximating same of each year thereafter on which a report of condition is made to the commissioner of banks not in excess of the following fees for its annual examination: Fifty dollars for the first one hundred thousand dollars of assets or less, seven dollars for each one hundred thousand dollars or fraction in excess thereof, and two dollars for each one hundred thousand dollars or fraction thereof of trust assets, which said trust assets shall not include real estate carried as such.

(b) All examinations made other than those provided for in subsection (a) hereof shall be deemed special examinations and for such special examination the bank shall pay into the office of the commissioner of banks the following fees for each special examination: Fifty dollars for the first one hundred thousand dollars of assets or less, seven dollars for each one hundred thousand dollars or fraction in excess thereof, and two dollars for each one hundred thousand dollars or fraction thereof of trust assets, which said trust assets shall not include real estate carried as such. The fees paid for special examination shall be based on the assets of the bank examined as of the date of such examination.

(c) For services performed for any bank other than examination, the commissioner of banks may make such charge as in his opinion is fair and just.

(d) In all criminal cases tried in any of the courts of this state wherein any of the employees of the commissioner of banks are used as witnesses, a fee of ten ($10.00) dollars per day and actual expenses incurred shall be allowed such witnesses and the same shall be paid to the commissioner of banks by the clerk of the court of the county in which the case is tried and thereafter charged in bill of costs as are other costs incurred in the trial; and in all civil actions tried in any of the courts of this State, wherein any of the employees of the commissioner of banks are required as witnesses, the party requiring such employee as witness shall deposit with the commissioner of banks when the subpoena is served a sufficient sum to cover the witness fee of ten ($10.00) dollars per day and expenses, and such sums as may thus be advanced shall thereafter be charged in the bill of costs as other costs are charged.

All sums paid under this subsection shall be paid to the commissioner of banks as are fees for examination and used in like manner.

(e) The total compensation and necessary traveling expenses of the employees of the commissioner of banks shall not in any one year exceed the total fees collected under the provisions of this section.

(f) It shall be the duty of the state banking commission annually to review the estimated cost of maintaining the office of the commissioner of banks and if the estimated fees provided for

under paragraphs (a) and (b) shall exceed the estimated cost of maintaining the office of the commissioner of banks, then the state banking commission may reduce by uniform percentage the fees provided in paragraphs (a) and (b) of this section but not in a percentage greater than twenty-five per cent (25%) nor to an amount which will exceed the surplus resulting from the operation of the office of commissioner of banks for the preceding fiscal year. Any reduction made by the state banking commission shall be applicable only for the fiscal year in which the action is taken by the state banking commission, but this shall not prevent the state banking commission from taking action each fiscal year within the limits above prescribed. (1921, c. 4, s. 77; 1927, c. 47, s. 15; 1931, c. 243, s. 5; 1943, c. 733; C. S. 223(f).)

Editor's Note. — This section is a re-enactment of C. S. sec. 252. However there were several radical changes.

Under the prior section the full amount of the fees fixed for the annual examination must be paid and in addition the expenses incurred and services rendered, other than examinations performed, had to be paid for. But in no case was a bank required to pay for more than one examination unless its condition was precarious or in some other way unsatisfactory.

The act of 1921 raised the rate in all cases and changed the amount from a fixed sum to the maximum which might be charged, the specific sum actually charged up to the amount prescribed being left to the discretion of the commission. Under this act charges were made for both annual and special examinations.

The 1927 amendment or re-enactment made a radical change in the section. The section was subdivided, new provisions were added and in many instances the old provisions changed. The fees were again raised by this act and the classification of the capital stock which determines the amount of fee charged. The distinction between annual and special examinations was first made in this act; and subsections (d) and (g) were inserted.

The Act of 1931 substituted "commissioner of banks" for "chief state bank examiner" formerly appearing in the third line of this section, as well as for "corporation commission" wherever appearing.

The 1943 amendment added the last subdivision to this section.

§ 53-123. Examiners shall make report. — Examiners shall make a full and detailed report in writing to the commissioner of banks of the condition of each bank within ten days after each and every examination made by them. (1921, c. 4, s. 78; 1931, c. 243, s. 5; C. S. 223(g).)

Editor's Note. — This section is a reenactment of the last sentence of C. S. sec. 250.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Art. 10. Penalties.

§ 53-124. Examiner making false report. — If any bank examiner shall knowingly and willfully make any false or fraudulent report of the condition of any bank, which shall have been examined by him, with the intent to aid or abet the officers, owners, or agents of such bank in continuing to operate an insolvent bank, or if any such examiner shall keep or accept any bribe or gratuity given for the purpose of inducing him not to file any report of examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be guilty of a felony, and on conviction thereof shall be imprisoned in the state prison for not less than four months nor more than ten years. (1921, c. 4, s. 79; C. S. 224(a).)

Cross Reference.—See § 14-254.

§ 53-125. Examiners disclosing confidential information.—If any bank examiner or other employee of the commissioner of banks fails to keep secret the facts and information obtained in the course of an examination of a bank, except when the public duty of such examiner or employee requires him to report upon or take official action regarding the affairs of such bank, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars or imprisoned not more than twelve months, or both, in the discretion of the court. Nothing in this section shall prevent the proper exchange of information with the representatives of the banking departments of other states, with the Federal Reserve Bank or national bank examiners, or other authorities, with the creditors of such bank or others with whom a proper exchange of information is wise or necessary, or with the clearing-house officials and examiners. (1921, c. 4, s. 80; 1931, c. 243, s. 5; C. S. 224(b).)

Editor's Note. — This section is a substantial reenactment of C. S. sec. 251.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-126. Loans or gratuities forbidden.—No State bank, or any officer, director or employee thereof shall hereafter make any loan or grant any gratuity to the commissioner of banks, any bank examiner or assistant bank examiner of the commissioner of banks of North Carolina. Any such officer, director or employee violating this provision shall be guilty of a misdemeanor and imprisoned not exceeding one year or fined not more than one thousand dollars, or both; and they may be fined a further sum equal to the money so loaned or gratuity given. If the commissioner of banks, or any bank examiner, or assistant bank examiner of the commissioner of banks of North Carolina shall accept a loan or gratuity from any State bank, or from any officer, director or employee thereof, he shall be guilty of a misdemeanor and imprisoned not exceeding one year, or fined not more than one thousand dollars, or both, and may be fined a further sum equal to the money so loaned or gratuity given. (1927, c. 29, s. 1; 1931, c. 243, s. 5.)

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "chief state bank examiner" and "corporation commission" formerly appearing in this section.

§ 53-127. Use of "bank," "banking," or "trust" in corporate name.—No corporation shall hereafter be chartered under the laws of this state with the words "bank," "banking," or "trust" as a part of its name except corporations reporting to and under the supervision of the commissioner of banks, or corporations under the supervision of the insurance commissioner; nor shall any corporate name be amended so as to include the words "bank," "banking," "banker," or "trust," unless the corporation be under such supervision. No person, association, firm or corporation domiciled within the state of North Carolina except corporations, persons, associations, or firms reporting to and unde the super-

vision of the commissioner of banks or under the supervision of the insurance commissioner, shall therein advertise or put forth any sign as bank, banking, banker or trust company, or use the word "bank," "banking," "banker," or "trust," as a part of its name and title, or in any way solicit or receive deposits or transact business as a trust company: Provided, that this chapter shall not be held to prevent any individual as such from acting in any trust capacity as heretofore: Provided, further, that it shall be lawful for any corporation incorporated prior to January first, one thousand nine hundred and five, to retain the word "trust" in the name of said corporation, though it does not transact a banking business or such other business as requires its examination by the commissioner of banks or the insurance commissioner.

Any violation of the provisions of this section shall be a misdemeanor, and upon conviction thereof the offender shall be fined in a sum not exceeding five hundred dollars for each offense. (1921, c. 4, s. 81; 1931, c. 243, s. 5; 1943, c. 543; C. S. 224(c).)

Cross Reference.—As to unauthorized use of the word "trust" in corporate name, see §§ 55-12 and 55-46.

Editor's Note.—The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

The 1943 act rewrote the section expanding it to include the provisions of duplicating sections—C. S. §§ 1124 and 1142—which sections were then repealed.

Alleging Corporation is a Bank. — Where the indictment charges the employee with making false entries upon the books of the bank in which he was employed, and that it was a corporation existing under the laws of the state of North Carolina, it is not defective for failing to particularize that it was a bank, within the contemplation of the statute under which the indictment had been drawn. State v. Hedgecock, 185 N. C. 714, 117 S. E. 47.

§ 53-128. Derogatory reports, willfully and maliciously making.—Any person who shall willfully and maliciously make, circulate, or transmit to another or others any statement, rumor, or suggestion, written, printed, or by word of mouth, which is directly or by inference derogatory to the financial condition, or affects the solvency or financial standing of any bank, or who shall counsel, aid, procure, or induce another to state, transmit, or circulate any such statement or rumor shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 4, s. 82; C. S. 224(d).)

§ 53-129. Misapplication, embezzlement of funds, etc. — Whoever being an officer, employee, agent or director of a bank, with intent to defraud or injure the bank, or any person or corporation, or to deceive an officer of the bank or an agent appointed to examine the affairs of such bank, embezzles, abstracts, or misapplies any of the money, funds, credit or property of such bank, whether owned by it or held in trust, or who, with such intent, wilfully and fraudulently issues or puts forth a certificate of deposit, draws an order or bill of exchange, makes an acceptance, assigns a note, bond, draft, bill of exchange, mortgage, judgment, decree or fictitiously borrows or solicits, obtains or receives money for a bank not in good faith, intended to become the property of such bank; or whoever being an officer, employee, agent, or director of a bank, makes or permits the making of a false statement or certificates, as to a deposit, trust fund or contract, or makes or permits to be made a false entry in a book, report, statement or record of such bank, or conceals or permits to be concealed by any means or manner, the true and correct entries of said bank, or its true and correct transactions, who knowingly loans, or permits to be loaned, the funds or credit of any bank to any insolvent company or corporation, or corporation which has ceased to exist, or which never had any existence, or upon collateral consisting of stocks or bonds of such company or corporation, or who makes or publishes or knowingly permits to be made or published a false report, statement or certificate as to the true financial condition of such bank, shall be guilty of a felony and upon conviction thereof shall be fined not more than ten thousand dollars or imprisoned in the State's prison not more than thirty years, or both. (1921, c. 4, s. 83; 1927, c. 47, s. 16; C. S. 224(e).)

Editor's Note. — This section was revised in 1927, the position of many phrases and clauses being changed. It would seem, however, that the section was not changed materially in many respects although it was made somewhat more comprehensive.

The intent and purpose of this section is to prevent the deception of the officers of a bank or the depletion of its assets or injury of its business by falsification of the bank's books by its officers or employees, and an indictment for the offense is not sufficient which merely charges such falsification without showing that the false entries were material or affected the interests of the bank or deceived its officers. State v. Cole, 202 N. C. 592, 163 S. E. 594.

A specific intent to deceive or to defraud is not necessary to a conviction of a bank officer or employee of making false entries on the books of the bank under the provisions of this section, it being sufficient if the defendant wilfully made such false entries, the performance of the act expressly forbidden by statute constituting an offense in itself without regard to the question of specific intent. State v. Lattimore, 201 N. C. 32, 158 S. E. 741.

In a prosecution under this section for wilfully making false entries on the books of a bank an instruction which was intended to stress and in effect did stress the necessity of proving that the false entries were wilfully and not inadvertently made, will not be held for error. State v. Lattimore, 201 N. C. 32, 158 S. E. 741.

"Abstracts" Construed. — The legal meaning of the word "abstract," as it appears in § 14-254, with reference to the unlawful use of the funds of the bank, is correctly charged under an instruction to the jury defining it as the taking from or withdrawing from the bank, with the intent to injure or defraud. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

"Embezzle" means to misappropriate as well as to convert to one's own use. State v. Maslin, 195 N. C. 537, 143 S. E. 3, citing State v. Lanier, 89 N. C. 517; State v. Foust, 114 N. C. 842, 19 S. E. 275.

Section 14-254 Not in Conflict.—Section 14-254, making it a criminal offense for the cashier or certain other officers, agents and employees of a bank to be guilty of malfeasance in the respects therein enumerated, making the intent necessary for a conviction, is not in conflict with this section as passed in 1921. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

Conviction of Depositor. — In order to convict a depositor of a bank who has abstracted funds from the bank in collusion with its cashier, it is not required that he himself was an officer of the bank or that he was present at the time the money was feloniously "abstracted," under the provisions of § 14-254; and he may be convicted thereunder when the bill of indictment substantially follows the language of the statute and the evidence is sufficient to sustain the charge therein. This is not applicable to the provisions of this section as passed in 1921. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

Same—Necessity of Being Present.—Though the depositor was not present at the time the offense was committed, he may be convicted as a principal under the counts of the indictment so charging the offense. State v. Switzer, 187 N. C. 88, 121 S. E. 143.

Allegation That All Defendants Were Officers.—It is not necessary for an indictment, charging a conspiracy to vio-

late the provisions of this section, to allege that all of the defendants were officers or employees of the bank, the indictment being sufficient if it alleges that some of the defendants were officers or employees of the bank and that the other defendants conspired with them to do the unlawful act. State v. Davis, 203 N. C. 13, 14, 164 S. E. 737.

Indictment.—In a prosecution under this section and § 14-254 it was not necessary to aver or to prove that the money or funds had been committed by the bank to the custody of the defendant or that there had been any breach of trust or confidence except that which arose out of the relation between the bank and the defendant. Nor was it necessary to charge in the very words that the defendant had converted the property to his own use. The words "did embezzle" sufficiently indicated the criminal act. The intent to defraud was sufficiently set out, under § 15-151, without specifically naming any particular victim of the preconceived purpose. And the indictment was sufficient though there was nothing to indicate the number of abstractions, if more than one. State v. Maslin, 195 N. C. 537, 540, 143 S. E. 3, citing State v. Switzer, 187 N. C. 88, 121 S. E. 43.

Evidence.—In a prosecution under this section and § 14-254 expert parol evidence may be properly admitted to trace book entries, without contradicting them, so as to show that the officer of the bank had embezzled the bank's funds held in trust, as charged in the bill of indictment. In such case there was no invasion of the province of the jury by the expression of an opinion upon a fact in issue. State v. Maslin, 195 N. C. 537, 143 S. E. 3.

Variance as to Some Items.—In a prosecution of an officer of a bank for publishing a false report of the bank's condition in violation of this section, a variance between the allegations and proof as to some of the items of the report will not be fatal when there is no variance with respect to all the items, it being sufficient for conviction if the report as published was false in any particular as alleged in the indictment and was published with knowledge of such falsity and with a wrongful or unlawful intent. State v. Davis, 203 N. C. 47, 48, 164 S. E. 732.

§ 53-130. Making false entries in banking accounts; misrepresenting assets and liabilities of banks.—If any person shall willfully and knowingly subscribe to, or make, or cause to be made, any false statement or false entry in the books of any bank, or shall knowingly subscribe to or exhibit false papers, with intent to deceive any person authorized to examine into the affairs of such bank, or shall willfully and knowingly make, state or publish any false statement of the amount of the assets or liabilities of any bank, he shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the state's prison not less than four months nor more than ten years. (Rev., s. 3326; 1903, c. 275, s. 27; C. S. 4402.)

§ 53-131. False certification of a check.—Whoever, being an officer, employee, agent, or director of a bank, certifies a check drawn on such bank, and willfully fails to forthwith charge the amount thereof against the account of the drawer thereof, or willfully certifies a check drawn on such bank unless the drawer of such check has on deposit with the bank an amount of money subject to the payment of such check an equivalent to the amount therein specified, shall be guilty of a felony, and upon conviction shall be fined not more than five thousand dollars or imprisoned in the state prison for not more than five years, or both. (1921, c. 4, s. 84; C. S. 224(f).)

§ 53-132. Insolvent banks, receiving deposits in.—Any person, being an officer or employee of a bank, who receives, or being an officer thereof, permits an employee to receive money, checks, drafts, or other property as a deposit therein when he has knowledge that such bank is insolvent, shall be guilty of a felony, and upon conviction thereof shall be fined not more than five thousand dollars or imprisoned in the state prison not more than five years, or both. Provided, that in any indictment hereunder insolvency shall not be deemed to include insolvency as defined under subsection (d) in the definition of insolvency under § 53-1. (1921, c. 4, s. 85; 1927, c. 47, s. 17; C. S. 224(g).)

Editor's Note.—The proviso at the end of this section was added by the 1927 amendment. This was the only change effected by the amendment.

The word "insolvent," in this section, means when the bank cannot meet its depository liabilities in due course, and does not require that the condition of the bank should at the time be such as to enable it at any given time to pay all of its depositors in full at the same time on demand. State v. Hightower, 187 N. C. 300, 121 S. E. 616.

A bank is insolvent within the meaning of this section, when the actual cash market value of its assets is not sufficient to pay its liabilities to its depositors or other creditors. State v. Brewer, 202 N. C. 187, 188, 162 S. E. 363.

Elements of Crime.—In order for a conviction under the provisions of this section, the state must prove beyond a reasonable doubt the actual receipt of the deposits by defendant officer of the bank at the time when the bank was insolvent to his own knowledge, or that such officer permitted an employee of the bank to receive the deposits with knowledge of these facts. State v. Hightower, 187 N. C. 300, 121 S. E. 616.

How Knowledge Determined. — The question as to an officer's knowledge is ordinarily to be determined with reference to a variety of facts and circumstances, and in defense it is permitted to him to go into an investigation of the assets and property of the bank at the date of the deposits, and their value at that time or thereafter, when bearing upon their worth at the time they were charged to have been unlawfully received. State v. Hightower, 187 N. C. 300, 121 S. E. 616.

Same—Admissions.—Upon the trial of an officer of an insolvent bank under this section the officer's admissions that he knew of the insolvency of the bank at the time in question with his explanation thereof is competent testimony. State v. Brewer, 202 N. C. 187, 188, 162 S. E. 363.

Who May Bring Action for Civil Liability.—A violation of this section by an employee, or by officers and directors of a bank, resulting in damages to a depositor, is a wrong to the depositor; he and not the bank or its receiver is entitled to maintain an action to recover the damages resulting from such wrong. See Russell v. Boone, 188 N. C. 830, 125 S. E. 926; Houston v. Thornton, 122 N. C. 365, 29 S. E. 827; Townsend v. Williams, 117 N. C. 330, 23 S. E. 461; Solomon v. Bates, 118 N. C. 311, 24 S. E. 478; Tate v. Bates, 118 N. C. 287, 24 S. E. 482; Bane v. Powell, 192 N. C. 387, 391, 135 S. E. 118.

In his opinion in State v. Hightower, 187 N. C. 300, 121 S. E. 616, speaking of this section, Chief Justice Stacy says: "The statute was designed to protect the depositing public against this kind of practice on the part of officers and employees of banks, and they will be held to a strict accountability under its provisions when they receive, or when any such officer permits an employee to receive deposits therein, with knowledge of the fact that, by reason of the bank's insolvency, such deposits then being received are taken at the expense or certain peril of the depositors presently making them." Bane v. Powell, 192 N. C. 387, 390, 135 S. E. 118.

The right of a depositor in a bank, who has sustained damages, peculiar to himself, by the wrongful act of the officers and directors of the bank, to recover damages in an action brought by him against the officers and directors, is not affected by the decision in Douglass v. Dawson, 190 N. C. 458, 130 S. E. 195; the right is expressly recognized in the opinion in that case. Bane v. Powell, 192 N. C. 387, 391, 135 S. E. 118.

Same—Liability as Bank Asset. — Sums for which bank officers and directors are liable for receiving or permitting receipt of deposit with knowledge of bank's insolvency, contrary to this section, are not assets of the bank. The wrong being only to the depositor, he need not allege, to maintain an action, that bank's receiver refused to sue on demand. Bane v. Powell, 192 N. C. 387, 135 S. E. 118.

Action against Officers to Recover Deposit—Necessary Allegations.—In order for a depositor to maintain an action against the individual officers of an insolvent bank for permitting the deposits to be received it is necessary, among other things, to allege and prove the insolvency of the bank at the time the deposits were made, and the allegation that it was either insolvent then or the misconduct of the officials afterwards caused its insolvency, is insufficient, the alternative of the allegation being a wrong to the bank itself which may be sued upon by its

receiver afterwards. Wall v. Howard, 194 N. C. 310, 139 S. E. 449.

Bank Examiner as Expert Witness.—In an action to convict an officer of a bank under this section, the testimony of the State Bank Examiner is to be received as that of an expert upon the question of the bank's insolvency. State v. Hightower, 187 N. C. 300, 121 S. E. 616.

Same—Weight of Evidence.—Where the State Bank Examiner and another expert have been permitted to give their testimony as to the bank's insolvency at the time of the crime, upon their investigation, without stating the basis of their opinions thereon, it may not be decided as a matter of law, upon conflicting evidence, that the defendant must have known of the insolvent condition testified to by the experts. State v. Hightower, 187 N. C. 300, 121 S. E. 616.

Certified Accountant as Witness.—Upon the trial of a bank official under the provisions of this section testimony of a certified public accountant who had had experience in such matters and who had examined the books of the bank and had obtained from the directors, collectively and individually, information as to the value of its assets including lands and collateral, that the bank was insolvent at the time in question is not objectionable. State v. Brewer, 202 N. C. 187, 162 S. E. 363.

§ 53-133. Capital stock, advertising larger amount than that paid in.—It shall be unlawful for any bank to advertise in a newspaper, letterhead, or any other way, a larger capital stock than has been actually paid in in cash. Any bank violating this section shall be subject to a penalty of five hundred dollars for each and every offense. The penalty herein provided for shall be recovered by the state in a civil action in any court of competent jurisdiction, and it shall be the duty of the attorney-general to prosecute all such actions. (1921, c. 4, s. 86; C. S. 224(h).)

§ 53-134. Offenses declared misdemeanors; prosecution; employment of counsel; punishment.—Any offense against the banking laws of the state of North Carolina which is not elsewhere specifically declared to be a crime, or for which elsewhere a penalty is not specifically provided, is hereby declared to be a misdemeanor, and shall be punishable at the discretion of the court. The commissioner of banks is authorized and directed to prosecute all offenses against the banking laws of the state, and to that end is expressly authorized to employ counsel to prosecute in the inferior courts and to aid the solicitor in the superior courts. The auditor of the state shall, upon the certificate of the commissioner of banks, accompanied by an itemized statement of the account, draw his warrant upon the state treasurer to compensate the counsel so employed, and the state treasurer shall pay the same out of the funds in the treasury and not otherwise appropriated. (Ex. Sess. 1921, c. 56, s. 4; 1927, c. 47, s. 18; 1931, c. 243, s. 5; C. S. 224(i).)

Cross Reference.—See annotation under §§ 53-48 and 53-82.

Editor's Note.—The act of 1927 re-enacted this section in full.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

Unlawful Act of Making Loans.—Under this section, the unlawful act of making loans in violation of sec. 53-48 is made a misdemeanor, and is punishable as such at the discretion of the court. State v. Cooper, 190 N. C. 528, 130 S. E. 180.

Officers Individually Liable. — Guilt is personal, and the manifest purpose of the General Assembly in declaring the acts in violation of the statute misdemeanors, punishable at the discretion of the court, was to provide further assurance that these wise and prudent statutory provisions should be obeyed by those who alone could violate them, to wit, officers and directors of the bank. Their personal and individual liability for damages sustained by the bank, its stockholders or other persons, as a result of the violation of these and other provisions of the statute by directors or officers, was evidently not deemed sufficient for the purpose in the mind of the General Assembly. State v. Cooper, 190 N. C. 528, 533, 130 S. E. 180.

§ 53-135. General corporation law to apply.—All provisions of the law relating to private corporations, and particularly those enumerated in the chapter entitled "Corporations," not inconsistent with this chapter or with the business of banking, shall be applicable to banks. (1921, c. 4, s. 87; C. S. 224(j).)

Editor's Note.—The corresponding section of the prior law was C. S. sec. 236. This section is a re-enactment.

Stated in Cole v. Farmers Bank, etc., Co., 221 N. C. 249, 20 S. E. (2d) 54.

Art. 11. Industrial Banks.

§ 53-136. Industrial bank defined. — The term "industrial bank," as used in this article shall be construed to mean any corporation organized, or which may hereafter be organized, under the general corporation laws of this state, which is engaged in lending money to be repaid in weekly, or monthly, or other periodical installments, or principal sums as a business: Provided, however, this definition shall not be construed to include building and loan associations, or commercial or savings banks. (1923, c. 225, s. 1; C. S. 225(a).)

Editor's Note.—It was stated in the caption of the act of 1923, which revised the law regulating industrial banks, that the purpose was to provide for the supervision and examination of industrial banks. While this section is a re-enactment of C. S. sec. 255, it is more specific in its terms, the provisions respecting loans which are to be paid in weekly installments, etc., and the proviso, being added by the act of 1923.

§ 53-137. Manner of organization. — Corporations may be organized under this article in the same manner as provided for corporations authorized under the chapter on corporations. (1923, c. 225, s. 2; C. S. 225(b).)

Editor's Note.—This section is a literal re-enactment of C. S. sec. 256.

§ 53-138. Corporate title. — Every corporation incorporated or reorganized pursuant to the provisions of this article shall be known as an industrial bank, and may use the word "bank" as part of its corporate title. (1923, c. 225, s. 3; C. S. 225(c).)

Editor's Note.—This section is a literal re-enactment of C. S. sec. 258.

§ 53-139. Capital stock.—The amount of capital stock with which any industrial bank shall commence business shall not be less than twenty-five thousand ($25,000.00), in cities or towns of fifteen thousand population or less; nor less than fifty thousand dollars ($50,000.00), in cities or towns whose population exceeds fifteen thousand but does not exceed twenty-five thousand; nor less than one hundred thousand dollars ($100,000.00), in cities or towns whose population exceeds twenty-five thousand; the population to be ascertained by the last preceding national census: Provided, that this section shall not apply to industrial banks organized and doing business prior to March 3, 1923. (1923, c. 225, s. 4; C. S. 225(d).)

Editor's Note.—C. S. sec. 257, which was the corresponding section of the prior law merely provided that the capital should not be under $25,000.

§ 53-140. Sales of capital stock; accounting; fees.—The capital stock sold by any industrial bank in process of organization, or for an increase of the capital stock, shall be accounted for to the

bank in the full amount paid for the same. No commission or fee shall be paid to any person, association, or corporation for selling such stock. The commissioner of banks shall refuse authority to commence business to any industrial bank where commissions or fees have been paid, or have been contracted to be paid by it, or by any one in its behalf to any person, association, or corporation for securing subscriptions for or selling stock in such bank. (1923, c. 225, s. 5; 1931, c. 243, s. 5; C. S. 225(e).)

Editor's Note.—The provisions of this section are new with the act of 1923.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-141. Powers.—Industrial banks shall have the powers conferred by paragraphs one, two, three, five and seven of § 55-26, and paragraph three of § 53-43; such additional powers as may be necessary or incidental for the carrying out of their corporate purposes, and in addition thereto the following powers:

1. To loan money on real or personal security and reserve lawful interest in advance upon such loans, and to discount or purchase notes, bills of exchange, acceptances or other choses in action.

2. To sell or offer for sale its secured or unsecured evidences or certificates of indebtedness, or investment, and to receive from investors therein or purchasers thereof payments therefor in installments or otherwise, with or without an allowance of interest upon such payments, whether such evidence or certificates of indebtedness or of investment be hypothecated for a loan or not, and to enter into contracts in the nature of a pledge or otherwise with such investors or purchasers with regard to such evidences or certificates of indebtedness, or of investment; and no such transaction shall in any way be construed to affect the rate of interest on such loans.

3. To charge for a loan made pursuant to this section one dollar for each fifty dollars or a fraction thereof loaned, up to and including loans of two hundred and fifty dollars, and for loans in excess of two hundred and fifty dollars, one dollar for each two hundred and fifty dollars excess or fraction thereof, to cover expenses, including any examination or investigation of the character and circumstances of the borrower, comaker, or surety. An additional fee of five dollars may be charged on such loans where same are secured by mortgage on real estate. No charge shall be collected unless a loan shall have been made.

4. To establish branch offices or places of business within the county in which its principal office is located, and elsewhere in the state, after having first obtained the written approval of the commissioner of banks, which approval may be given or withheld by the commissioner of banks in his discretion: Provided, that the commissioner of banks shall not authorize the establishment of any branch the paid-in capital of whose parent bank is not sufficient in amount to provide for the capital of at least twenty-five thousand dollars ($25,000.00) for the parent bank and at least twenty-five thousand dollars ($25,000.00) for each branch which it is proposed to be established in cities or towns of fifteen thousand population or less; nor less than fifty thousand dollars ($50,000.00) in cities or towns whose population exceeds fifteen thousand but does not exceed twenty-five thousand; nor less than one hundred thousand dollars ($100,000.00) in towns whose population exceeds twenty-five thousand.

5. Subject to the approval of the commissioner of banks and on the authority of its board of directors, or a majority thereof, to enter into such contracts, incur such obligations and generally to do and perform any and all such acts and things whatsoever as may be necessary or appropriate in order to take advantage of any and all memberships, loans, subscriptions, contracts, grants, rights or privileges, which may at any time be available or inure to banking institutions, or to their depositors, creditors, stockholders, conservators, receivers or liquidators, by virtue of those provisions of section eight of the Federal Banking Act of one thousand nine hundred and thirty-three (section twelve B of the Federal Reserve Act as amended) which establish the Federal Deposit Insurance Corporation and provide for the insurance of deposits, or of any other provisions of that or any other act or resolution of Congress to aid, regulate or safeguard banking institutions and their depositors, including any amendments of the same or any substitutions therefor; also, to subscribe for and acquire any stock, debentures, bonds or other types of securities of the Federal Deposit Insurance Corporation and to comply with the lawful regulations and requirements from time to time issued or made by such corporations.

6. To solicit, receive and accept money or its equivalent on deposit both in savings accounts and upon certificates of deposit.

7. Subject to the approval of the state banking commission, to solicit, receive and accept money or its equivalent on deposit subject to check. (1923, c. 225, s. 6; 1925, c. 199, s. 1; 1931, c. 243, s. 5; 1935, c. 81, s. 2; 1939, c. 244, ss. 1, 2; 1943, c. 233; C. S. 225(f).)

Editor's Note.—This section is virtually a re-enactment of C. S. sec. 259. However, subsection 4 has been changed considerably; prior to the re-enactment it was provided that branch offices could be established only in the county in which the principal office was located.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

The amendment of 1935 added subdivision (5) of this section in its entirety.

The 1939 amendment inserted the reference to § 53-43 in the opening paragraph and added subsection 6.

The 1943 amendment added paragraph 7.

§ 53-142. Restriction on powers. — No industrial bank shall deposit any of its funds in any banking corporation unless such corporation has been designated as such depositary by a vote of a majority of the directors, or of the executive committee, exclusive of any director who is an officer, director, or trustee of the depositary so designated, present at any meeting duly called at which a quorum is in attendance, and approved by the commissioner of banks. (1923, c. 225, s. 7; 1931, c. 243, s. 5; 1937, c. 220; C. S. 225(g).)

Editor's Note.—The 1937 amendment struck out the former provision prohibiting loans for longer than one year.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" formerly appearing in this section.

§ 53-143. Limit of loans.—The total liabilities to any industrial bank of any person, corporation, company, or firm, for money borrowed including in the liabilities of the company or firm the liabilities of the several members thereof, shall at

no time exceed ten per cent of the actually paid-up capital and surplus of such industrial bank, but the discount of bona fide bills of exchange or acceptances drawn against actually existing values, and the discount of commercial or business paper actually owned by the person or persons, corporation, company, or firm negotiating the same, shall not be considered money so borrowed. (1923, c. 225, s. 8; C. S. 225(h).)

Editor's Note.—This section is a literal re-enactment of C. S. sec. 261.

§ 53-144. Supervision and examination.—Every industrial bank now or hereafter transacting the business of an industrial bank as defined by this article, whether as a separate business or in connection with any other business under the laws of and within this state, shall be subject to the provisions of this article, and shall be under the supervision of the commissioner of banks. The commissioner of banks shall exercise control of and supervision over the industrial banks doing business under this article, and it shall be his duty to execute and enforce, through the state bank examiners and such other agents as are now or may hereafter be created or appointed, all laws which are now or may hereafter be enacted relating to industrial banks as defined in this article. For the more complete and thorough enforcement of the provisions of this article, the state banking commission is hereby empowered to promulgate such rules, regulations, and instructions, not inconsistent with the provisions of this article, as may, in its opinion, be necessary to carry out the provisions of the laws relating to industrial banks as in this article defined, and as may be further necessary to insure such safe and conservative management of industrial banks under the supervision of the commissioner of banks as may provide adequate protection for the interest of creditors, stockholders, and the public, in their relations with such institutions. All industrial banks doing business under the provisions of this article shall conduct their business in a manner consistent with all laws relating to industrial banks, and all rules, regulations and instructions that may be promulgated or issued by the state banking commission. (1923, c. 225, s. 11; 1931, c. 243, s. 5; 1939, c. 91, s. 2; C. S. 225(k).)

Editor's Note. — The corresponding section of the Consolidated Statutes was sec. 263. It provided for a supervision by the commission and subjected industrial banks to an examination under the provisions of the banking laws in so far as they were applicable and not inconsistent with the article on industrial banks.

The Act of 1931 substituted "commissioner of banks" for "corporation commission" and "chief state bank examiner" formerly appearing in this section.

§ 53-145. Sections of general law applicable.—Sections 53-1, 53-3, 53-4, 53-5, 53-7, 53-8, 53-9, 53-10, 53-11, 53-12, 53-13, 53-18, 53-20, 53-42, 53-47, 53-50, 53-51, 53-54, 53-63, 53-64, 53-67, 53-78, 53-79, 53-80, 53-81, 53-82, 53-83, 53-87, 53-88, 53-90, 53-91, 53-105, 53-106, 53-107, 53-109, 53-110, 53-117, 53-118, 53-119, 53-120, 53-121, 53-122, 53-123, 53-124, 53-125, 53-128, 53-129, 53-132, 53-134, relating to the supervision and examination of commercial banks, shall be construed to be applicable to industrial banks, insofar as they are not inconsistent with the provisions of this article. Sections 53-19, 53-24, 53-37, 53-39, 53-40, 53-41, 53-44, 53-45, 53-75, 53-76, 53-77, 53-86, 53-114, 53-115, 53-116, 53-146, and 53-148 through 53-158, relating to commercial banks, shall be construed to be applicable to industrial banks. (1923, c. 225, s. 13; 1927, c. 141; 1939, c. 244, s. 3; C. S. 225(m).)

Editor's Note. — The provisions of this section were new with the act of 1923.

The 1939 amendment inserted 53-50 and 53-51 in the list of sections.

Where plaintiffs applied for an industrial bank charter, under this and § 53-3, and their application was not passed upon by the secretary of state on the advice and recommendation of the commissioner of banks, acting in accordance with the statutes, and plaintiffs sued to compel the issuance of a charter, alleging no capricious acts, bad faith or disregard of law by the state officers, the complaint did not state a cause of action and was not sufficient as a petition for certiorari or as an application for mandamus. Pue v. Hood, 222 N. C. 310, 22 S. E. (2d) 896.

Art. 12. Joint Deposits; Assignments as Evidence of Insolvency; Receivers.

§ 53-146. Deposits in two names.—When a deposit has been or is hereafter made in any bank, trust company, banking and trust company, or any other institution transacting business in this state, in the names of two persons, payable to either, or payable to either or the survivor, all or any part of the deposit, or any interest or dividend thereon, may be paid to either of said persons, whether the other is living or not; and the receipt or acquittance of the person so paid is a valid and sufficient discharge to the bank for payment so made. (1917, c. 243, s. 1; C. S. 230.)

Editor's Note.—See 9 N. C. L. Rev. 14.

Purpose—Necessity of Words of Survivorship.—Like former § 220(o), this section is obviously designed to protect the bank, and does not control as between the personal representative of the deceased and the other party. While, by its terms, the statute might apply whether there are words of survivorship in the deposit record or not, the Court, in one case, held that the authority of the survivor to withdraw, where no such words were used, was revoked by the death of the other person. 9 N. C. L. Rev. 15.

When Statute Applicable.—The certificate of deposit by a bank in the name of the husband, payable to himself "or" his wife does not fall within the provisions of this section. The statute applies only where the deposit is made in the names of two persons and payable to either, nor can construing the word "or" as meaning "and" have the effect of creating a tenancy in common. Jones v. Fullbright, 197 N. C. 274, 148 S. E. 229.

Cited in Redmond v. Farthing, 217 N. C. 678, 9 S. E. (2d) 405.

§ 53-147: Repealed by Session Laws 1943, c. 543.

Art. 13. Conservation of Bank Assets and Issuance of Preferred Stock.

§ 53-148. Provision for bank conservators; duties and powers.—Whenever he shall deem it necessary, in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the commissioner of banks may (with the approval of the governor), appoint a conservator for such bank and require of such conservator such bond with such security as he may deem necessary and proper. The conservator, under the direction of the commissioner of banks, shall take possession of the books, records and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator shall have all such rights, powers and privileges, subject to the commissioner of banks, now possessed by or hereafter given to the commissioner of banks under § 53-20, as amended, as are neces-

sary to conserve the assets of said bank. During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto, shall be the same as those provided in § 53-20, as amended. All expenses of any such conservator shall be paid out of the assets of such bank and shall be a lien thereon which shall be prior to any other lien provided by this article or otherwise. The conservator shall receive as salary an amount no greater than that paid at the present time to employees of departments of the state government for similar services. (1933, c. 155, s. 1.)

Editor's Note.—This article is substantially a copy as to state banks of Titles II and III of the Federal Act of March 9, 1933, Public No. 1, 73rd Congress. 11 N. C. Law Rev. 196.

§ 53-149. Examination of bank.—The commissioner of banks shall cause to be made such examination of the affairs of such bank as shall be necessary to inform him as to the financial condition of such bank. (1933, c. 155, s. 2.)

§ 53-150. Termination of conservatorship.—If the commissioner of banks shall become satisfied that it may safely be done, he may, in his discretion, terminate the conservatorship and permit such bank to resume the transaction of its business, subject to such terms, conditions, restrictions and limitations as he may prescribe. (1933, c. 155, s. 3.)

§ 53-151. Special funds for paying depositors and creditors ratably; new deposits.—While such bank is in the hands of the conservator appointed by the commissioner of banks, the commissioner of banks may require the conservator to set aside from unpledged assets and make available for withdrawal by depositors and payment to other creditors on a ratable basis, such amounts as, in the opinion of the commissioner of banks, may safely be used for this purpose; and the commissioner of banks, may, in his discretion, permit the conservator to receive deposits, but deposits received while the bank is in the hands of the conservator (as well as special or trust deposits received by any bank, under the orders of the commissioner of banks, since March 2, 1933), shall not be subject to any limitation as to payment or withdrawal, and such deposits shall be segregated and shall not be used to liquidate any indebtedness of such bank existing at the time that a conservator was appointed for it, or any subsequent indebtedness incurred for the purpose of liquidating any indebtedness of said bank existing at the time such conservator was appointed. Such deposits received while the bank is in the hands of the conservator, as well as the special or trust deposits received since March 2, 1933, shall be kept on hand in cash or on deposit with a federal reserve bank. In being transmitted to the federal reserve bank, said deposits shall be so marked and designated as to indicate to such federal reserve bank that they are special deposits. (1933, c. 155, s. 4.)

§ 53-152. Reorganization on agreement of depositors and stockholders.—By the agreement of (a) depositors and other creditors of any bank representing at least seventy-five per cent in amount of its total deposits and other liabilities as shown by the books of the banks, or (b) stockholders owning at least two-thirds of each class of its outstanding capital stock as shown by the books of the bank, or (c) both depositors and other creditors representing at least seventy-five per cent in amount of the total deposits and other liabilities, and stockholders owning at least two-thirds of its outstanding capital stock as shown by the books of the bank, any bank may effect such reorganization with the consent and approval of the commissioner of banks as by such agreement may be determined: Provided, however, that claims of depositors or other creditors which will be satisfied in full under the provisions of the plan of reorganization shall not be included among the total deposits and other liabilities of the bank in determining the per cent thereof as above provided.

When such reorganization becomes effective, all books, records and assets of such bank shall be disposed of in accordance with the provisions of the plan, and the affairs of the bank shall be conducted by its board of directors in the manner provided by the plan and under the conditions, restrictions and limitations which may have been prescribed by the commissioner of banks. In any reorganization which shall have been approved, and shall have become effective as provided herein, all depositors and other creditors and stockholders of such bank, whether or not they shall have consented to such plan of organization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization: Provided, however, that no reorganization shall affect the lien of secured creditors. (1933, c. 155, s. 5.)

Editor's Note.—The most important feature of the law is the provision for reorganization and the issuance of preferred stock. By a reorganization agreement having the assent of certain percentages of the creditors or stockholders and also of the Commissioner of Banks, the affairs of the bank may be removed from conservatorship and restored to the Board of Directors. All non-consenting depositors and their creditors are expressly made bound by the act. The provision in the second paragraph is identical with the federal act (Sec. 207) but its validity may be questioned on a constitutional ground not applicable to the Federal Government, i. e., impairment of contract. 11 N. C. Law Rev. 196.

§ 53-153. Segregation of recent deposits not effective after bank turned back to officers; notice of turning bank back to officers. — After fifteen days after the affairs of a bank shall have been turned back to its board of directors by the conservator, either with or without a reorganization as provided in § 53-152 hereof, the provisions of § 53-151 with respect to the segregation of deposits received while it is in the hands of the conservator, and with respect to the use of such deposits to liquidate the indebtedness of such bank, shall no longer be effective: Provided, that before the conservator shall turn back the affairs of the bank to its board of directors, he shall cause to be published in a newspaper published in the city, town or county in which such bank is located, and if no newspaper is published in such city, town or county, in a newspaper to be selected by the commissioner of banks, a notice in form approved by the commissioner of banks, stating the date on which the affairs of the bank will be returned to its board of directors, and that the said provisions of § 53-151 will not be effective after fifteen days after such date; and on the date of publication of such notice, the conservator shall immediately send to every person who is a depositor in

such bank under § 53-151, a copy of such notice by registered mail, addressing it to the last known address of such persons shown by the records of the bank; and the conservator shall send similar notice in like manner to every person making deposit in such bank under § 53-151, after the date of such newspaper publication and before the time when the affairs of the bank are returned to its directors. (1933, c. 155, s. 6.)

§ 53-154. Issuance of preferred stock. — Notwithstanding any other provision of this article or any other law, and notwithstanding any of the provisions of its articles of incorporation or by-laws, any bank may, with the approval of the commissioner of banks, and by vote of stockholders owning a majority of the stock of such bank, upon not less than two days' notice given by registered mail pursuant to action taken at a meeting of its board of directors (which may be held upon not less than one day's notice) issue preferred stock in such amount and with such par value as shall be approved by said commissioner of banks. A copy of the minutes of such directors' and stockholders' meetings, certified by the proper officer and under the corporate seal of the bank, and accompanied by the written approval of the commissioner of banks shall be immediately filed in the office of the secretary of state, and when so filed, shall be deemed and treated as an amendment to the articles of incorporation of such bank.

No issue of preferred stock shall be valid until the par value of all stock so issued shall have been paid for in full in cash or in such manner as may be specifically approved by the commissioner of banks. (1933, c. 155, s. 7.)

§ 53-155. Rights and liabilities of preferred stockholders.—The holders of such preferred stock shall be entitled to cumulative dividends payable at a rate not exceeding six per centum per annum, but shall not be held individually responsible as such holders for any debts, contracts or engagements of such bank, and shall not be liable for assessments to restore impairments in the capital of such banks as now provided by law with reference to holders of common stock in banks. Notwithstanding any other provisions of law, the holders of such preferred stock shall have such voting rights and such stock shall be subject to retirement in such manner and on such terms and conditions as may be provided in the articles of incorporation or any amendment thereto, with the approval of the commissioner of banks.

No dividends shall be declared or paid on common stock until the cumulative dividends on the preferred stock shall have been paid in full; and if the bank is placed in liquidation, no payments shall be made to the holders of the common stock until the holders of the preferred stock shall have been paid in full the par value of such stock and all accumulated dividends. (1933, c. 155, s. 8.)

§ 53-156. Term "stock" not to include preferred stock; latter not to be used as collateral for loans. —Wherever in existing banking law, the words "stock," "stockholders," "capital" or "capital stock" are used, the same shall not be deemed to include preferred stock: Provided that no bank issuing preferred stock under the provisions hereof, shall be permitted at any time to make loans upon such preferred stock; Provided further that in determining whether or not the minimum capital or capital stock required in §§ 53-2, 53-11, 53-62, 53-139, and 58-116, has been supplied to such bank or banking corporation, the commissioner of banks shall include preferred stock as capital or capital stock. (1933, c. 155, s. 9; 1935, c. 80.)

Editor's Note.—The amendment of 1935 added the last proviso of this section relating to the determination of whether the capital stock has been supplied.

§ 53-157. Rights and liabilities of conservator.— The conservator appointed pursuant to the provisions of this article shall be subject to the provisions of and to the penalties prescribed by §§ 53-43, 53-129, and 53-131. (1933, c. 155, s. 10.)

§ 53-158. Naming of conservator not liquidation. —No power conferred in this article upon the commissioner of banks, when exercised, shall be deemed an act of possession for the purposes of liquidation; and whenever the commissioner of banks shall, with reference to any bank for which a conservator is appointed, deem that liquidation is necessary, he shall exercise the powers for the purposes of liquidation as provided in § 53-20 as amended. (1933, c. 155, s. 11.)

Chapter 54. Co-Operative Organizations.

SUBCHAPTER I. BUILDING AND LOAN ASSOCIATIONS.

Art. 1. Organization.

Art. 2. Shares and Shareholders.

Art. 3. Loans.

SUBCHAPTER I. BUILDING AND LOAN ASSOCIATIONS.

Art. 1. Organization.

§ 54-1. Application of term.—The term "building and loan association," as used in this subchapter, shall apply to and include all corporations, companies, societies, or associations organized for the purpose of making loans to their members only, and of enabling their members to acquire real estate, make improvements thereon and remove incumbrances therefrom by the payment of money in periodical installments or principal sums, and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes. It shall be unlawful for any corporation, company, society, or association doing business in this state not so conducted to use in its corporate name the term "building and loan association" or "building association," or in any manner or device to hold itself out to the public as a building and loan association. (Rev., s. 3881; 1905, c. 435, s. 16; C. S. 5169.)

§ 54-2. Method of incorporation; powers. — It shall be lawful for any persons in any city, town, or county of this state, under any name by them to be assumed, to associate for the purpose of organizing and establishing a homestead and building and loan association, and, being so associated, they shall, on complying with this subchapter, be a body politic and corporate, and as such be capable in law to hold and dispose of property, both real and personal; may have and use a common seal; may choose a presiding and other officers; may enact by-laws for the regulation of the affairs of such corporation, and compel the due observance of the same by fines and penalties; may sue and be sued, plead and be impleaded, answer and be answered in any court in this state, and do all acts necessary for the well ordering and good government of the affairs of such corporation, and shall exercise all and singular the powers incident to bodies politic and corporate: Provided, that before any such corporation shall be entitled to the privileges of this subchapter it shall file with the clerk of the superior court of the county where such corporation is designed to act a copy of the certificate of incorporation of such corporation, signed by at least seven members, to be recorded in the office of such clerk, and shall pay a tax of twenty-five dollars to the clerk, which tax shall be paid over by the clerk to the treasurer of the county, to the use of the school fund of the county. The clerk shall certify a copy of the charter to the insurance commissioner. The clerk shall not issue or record the same until duly authorized to do so by the Insurance Commissioner as hereinafter provided.

(a) Upon receipt of a copy of the certificate of

incorporation of the proposed association, the Insurance Commissioner shall at once examine into all the facts connected with the formation of such proposed corporation, including its location and proposed stockholders, and if it appears that such corporation, if formed, will be lawfully entitled to commence the business for which it is organized, the Insurance Commissioner shall so certify to the Clerk of Court in the county in which organized, who shall thereupon issue and record such certificate of incorporation. But the Insurance Commissioner may refuse to so certify, if upon examination and investigation he has reason to believe that the proposed corporation is formed for any purpose other than a mutual building and loan business, or that the character, general fitness, and responsibility of the persons proposed as stockholders in such corporation are not such as to command the confidence of the community in which said building and loan association is proposed to be located; or that the public convenience and advantage will not be promoted by its establishment; or that the name of the proposed corporation is likely to mislead the public as to its character or purpose; or if the proposed name is the same as one already adopted or appropriated by an existing association in the same county, or so similar thereto as to be likely to mislead the public.

(b) Upon receipt of such certificate from the Insurance Commissioner, the Clerk of Court shall, if said certificate of incorporation be in accordance with law, issue and cause same to be recorded in the records of his office as hereinabove provided. (Rev., s. 3877; 1905, c. 435, s. 1; 1931, c. 73; C. S. 5170.)

Cross References.—As to annual license tax, see § 54-25 and § 105-73. As to power to merge, see § 53-15.

Editor's Note.—The Act of 1931 amended this section by providing for an investigation of organizers, etc., substantially copied from the Banking Law. See § 53-4. The examiner of prospective building and loan associations is, however, the commissioner of insurance instead of the commissioner of banks. 9 N. C. Law Rev. 351.

§ 54-3. Amendments to certificate.—Any addition, alteration or amendment of the certificate of incorporation of any building and loan association shall be made at any annual or special meeting of such association, held in pursuance of the provisions of § 54-10, by a majority of the shareholders present in person or represented by proxy at any such meeting, and any such addition, alteration or amendment shall be signed, certified, and recorded as is provided in § 54-2. (Rev., s. 3878; 1905, c. 435, s. 2; 1939, c. 128, s. 1; C. S. 5171.)

§ 54-4. Prior amendments validated.—All additions, alterations or amendments of the certificate of any building and loan association made prior to March 17, 1939, and which failed to comply with all of the provisions of the statutes of North Carolina applicable thereto, be, and the same are hereby declared to be sufficient and valid to the same extent as if the provisions of said statutes had been fully complied with. (1939, c. 128, s. 2.)

§ 54-5. Form of certificate.—Substantially the following form shall be used by associations to be formed under this chapter:

Certificate of Incorporation

This is to certify that we, the undersigned citizens of the state of North Carolina, hereby associate ourselves into a building and loan association under and by virtue of the provisions of subchapter I, entitled Building and Loan Associations, of chapter 54 of the North Carolina Code, and by this certificate do set forth:

First. The name of said association is to be .....

Second. The location where its business is to be transacted is in the ..... of ..... in the county of ..... and state of North Carolina, and the principal office of said corporation is to be at No. ....., ... street, in the ..... of ..... aforesaid.

Third. The object for which said association is formed is to enable the subscribers hereto to assist each other, and all who may become associated with them, in making loans to its members only, and to enable them to acquire real estate, making improvements thereon and removing incumbrances therefrom by the payment of periodical installments, and to accumulate a fund, to be paid by its members who do not obtain loans for the purposes aforesaid when the funds of said association shall amount to the sum of ..... dollars per share of the first and subsequent classes or series.

Fourth. The amount fixed as the value of each share, when matured or full paid, is to be ..... dollars. The number of shares to be subscribed before said association shall begin business shall be ..... The maximum number of shares in this association at any one time to be in force shall be ..... The number of shares subscribed for by the incorporators is...., and the number of shares subscribed for by each of them is as follows:

Name	Number of Shares
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

In witness whereof, we have hereto set our hands and seals, the .... day of ...., A. D. 19..

..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)
..... (Seal.)

Signed, sealed, and delivered in the presence of ..... (Rev., s. 3879; 1905, c. 435, s. 27; C. S. 5172.)

§ 54-6. When to begin business.—Upon filing the certificate of incorporation with the clerk of the superior court of the county where the principal office of the corporation is located, and with the insurance commissioner, the company shall become a body politic and corporate, and shall be authorized to begin business, when licensed by the insurance commissioner. (Rev., s. 3880; Code, s. 2297; 1907, c. 959, s. 1; C. S. 5173.)

§ 54-7. Chapter on corporations applicable. — All of the provisions of law relating to private corporations, and particularly those enumerated in the chapter entitled Corporations, not incon-

sistent with this subchapter, or with the business of building and loan associations, shall be applicable to building and loan associations. (Rev., s. 3882; C. S. 5174.)

§ 54-8. Charters validated. — The charters of all building and loan associations heretofore organized are hereby in all respects validated and confirmed, and all such associations shall have the powers and privileges of associations formed under this subchapter. (Rev., s. 3883; 1905, c. 435, s. 27; C. S. 5175.)

§ 54-9. May become members of and hold stock in federal home loan bank.—Any building and loan association heretofore or hereafter organized under the laws of this state may subscribe to, purchase, hold, own and dispose of stock in any federal home loan bank, and may become members of any such bank authorized by or organized under an act of congress entitled "The Federal Home Loan Bank Act," approved July 22, 1932. (1933, c. 20.)

§ 54-10. Annual meetings.—The annual meeting of any such association shall be held at such time and place as shall be fixed in the notice of said meeting. There shall be published once a week for two weeks preceding such meeting, in a newspaper published in the county or town where the association has its principal office, a notice, signed by the secretary, of such meeting, and the time and place where the same is to be held; and such further notice shall be given as the charter or by-laws of the association may require. Notice of special meetings of shareholders shall be given in a like manner. Unless otherwise provided, twenty-five shareholders, present in person or represented by proxy, shall constitute a quorum at any regular or special shareholders' meeting. If no newspaper be published in the county or town in which any association has its principal office, then the notice above provided may be published by posting same at a conspicuous place in the office of the association, and a like notice at the door of the county court house. (1933, c. 19.)

§ 54-11. Conversion of building and loan associations into federal savings and loan associations.—Any corporation organized and existing under the laws of this State and operating as a building and loan association may convert itself into a federal savings and loan association pursuant to an act of Congress, approved June thirteenth, nineteen hundred and thirty-three, entitled "Home Owners' Loan Act of Nineteen Hundred and Thirty-three," and any amendments thereto, with the same force and effect as though originally incorporated under such act of Congress, and the procedure to effect such conversion shall be as follows:

1. The directors shall submit a plan of conversion to the insurance commissioner, and he may approve the same, with or without amendment, or disapprove the plan. If he approve the plan, then same shall be submitted to the shareholders as provided in the next sub-section.

2. A meeting of the shareholders shall be held upon not less than ten days' written notice to each shareholder, served personally or sent by mail to the last known address of such shareholder, postage prepaid, such notice to contain a statement of the time, place and purpose for which such meeting is called. It shall be regarded as sufficient notice of the purpose of said meeting if the call contain the following statement: "The purpose of said meeting being to consider the matter of the conversion of this corporation into a federal savings and loan association, pursuant to act of Congress approved June thirteenth, nineteen hundred and thirty-three." The secretary or other officer of the corporation shall make proof by affidavit at such meeting of due service of the notice or call for said meeting.

3. At the meeting of the shareholders of such corporation, called and held as above provided, such shareholders may, by affirmative vote of a majority of shareholders present, in person or by proxy, declare by resolution the determination to convert said corporation into a federal savings and loan association. A copy of the minutes of the proceedings of such meeting of the shareholders certified by the president or vice-president and secretary or assistant secretary of the corporation shall be filed in the office of the insurance commissioner of this State within five days after such meeting, and a like copy shall also be filed in the office of the clerk of the superior court of the county in which such corporation has its principal office. Each of said certified copies when so filed shall be presumptive evidence of the holding and the action of such meeting.

4. Within a reasonable time after the receipt of a certified copy of the minutes of said meeting the insurance commissioner shall either approve or disapprove the same. If the proceedings be approved by him he shall so endorse the certified copy of the minutes in his office, and shall issue a certificate certifying his approval of the conversion and proceedings, and send same to the corporation. Such certificate shall be recorded in the office of the clerk of superior court of the county in which the corporation has its principal office, and the original shall be held by the corporation. If the commissioner disapproves such proceedings he shall mark the certified copy of minutes in his office disapproved and notify the corporation to that effect.

5. Within sixty days after the approval of the proposed proceedings by the insurance commissioner, the officers of said corporation shall take such action, in the manner prescribed or authorized by the laws of the United States, as shall make it a federal savings and loan association, and there shall thereupon be filed in the office of the insurance commissioner a copy of the charter or authorization issued to such corporation by the federal home loan bank board, or a certificate showing the organization or conversion of such corporation into a federal savings and loan association, and upon such filing with the insurance commissioner the corporation shall cease to be a state corporation and shall be deemed to be converted into a federal savings and loan association.

6. Whenever any such corporation shall so convert itself into a federal savings and loan association it shall thereupon cease to be a corporation under the laws of this State, except that

its corporate existence shall be deemed to be extended for the purpose of prosecuting or defending suits by or against it and of enabling it to close its concerns as a state corporation, and to dispose of and convey its property. At the time when such conversion becomes effective all the property of the state corporation, including all its right, title and interest in and to all property of whatever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest and asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of the federal savings and loan association, which shall have, hold and enjoy the same in its right as fully and to the same extent as the same was possessed, held and enjoyed by the state corporation; and the federal savings and loan association as of the time of the taking effect of such conversion shall succeed to all the rights, obligations and relations of the state corporation.

7. Any such corporation may, instead of effecting the conversion above provided, at a meeting called and held as above outlined, authorize the sale of all or any portion of its assets, subject to the approval of the insurance commissioner, to a federal savings and loan association or to a building and loan association of this state, and subject to the approval of the insurance commissioner, may authorize the taking of stock in the association so buying the assets in payment thereof; and upon liquidation of the selling corporation the stock so received shall be distributed to its shareholders. In the event such sale shall be authorized, and approved by the insurance commissioner, the directors and officers shall have full power and authority to do any and everything necessary to carrying same into effect. (1935, c. 104.)

§ 54-12. Conversion of federal association into state association.—Any federal savings and loan association organized and existing under the Home Owners Loan Act of one thousand nine hundred and thirty-three, as amended, may convert into a building and loan association, pursuant to the provisions of this chapter, with the same force and effect as though originally incorporated under the provisions of this sub-chapter, by complying with the acts of congress and the requirements of federal regulatory authority, and also by following the procedure as set out below:

1. The directors of such federal savings and loan association shall submit a plan of conversion to the federal home loan bank board (hereinafter referred to as "board") or other federal regulatory authority, and also to the insurance commissioner of the state of North Carolina. When such plan has been approved, either with or without amendment by both of said authorities, then said plan shall be submitted to the members of such association as provided in the next sub-section.

2. A meeting of the members shall be held upon not less than ten days' written notice to each member, served personally or sent by mail to the last known address of such member, postage prepaid, such notice to contain a statement of the time, place and purpose for which such meeting is called. It shall be regarded as sufficient notice of the purpose of said meeting if the call contain the following statement: "The purpose of said meeting being to consider the matter of the conversion of this association into a building and loan association, pursuant to the provisions of the laws of the state of North Carolina." The secretary or other officer of the association shall make proof by affidavit at such meeting of the due service of the notice or call for said meeting.

3. At the meeting of the members of such association, called and held as above provided, such members may, by affirmative vote of fifty-one per cent or more of members present, in person or by proxy, declare by resolution the determination to convert said association into a building and loan association operating under the laws of this state. A copy of the minutes of the proceedings of such meeting of the members, certified by the president or vice-president and secretary or assistant secretary of the association, shall be filed with the federal home loan bank board within five days after such meeting. Such certified copy, when so filed, shall be presumptive evidence of the holding and the action of such meeting.

4. Within thirty days after the approval of said proceedings by the board the officers of said association shall file with the clerk of the superior court of the county where such association is designed to act a copy of the certificate of incorporation of such association, signed by at least seven members, to be recorded in the office of such clerk. Such certificate of incorporation shall conform to the provisions of the laws of this state. The clerk shall certify a copy of the certificate to the insurance commissioner, and shall not issue or record the same until duly authorized to do so by the insurance commissioner. Upon receipt of a copy of the certificate of incorporation the insurance commissioner shall at once examine into the facts connected with the conversion of such association, and, if it appears that such association if converted will be lawfully entitled to commence business as a building and loan association pursuant to the laws of this state, the insurance commissioner shall so certify to the clerk of the court in the county in which the association will be located, who shall thereupon issue and record such certificate of incorporation. Upon the issuance and recordation of such certificate of incorporation the association shall file with the board a certified copy of same. Thereupon the association shall cease to be a federal savings and loan association and shall be deemed to be converted into a building and loan association under the laws of this state, whose corporate existence shall be deemed then to begin.

5. At the time when the corporate existence of said state association begins all the property of the said federal association, including all its rights, title and interest in and to all property of whatsoever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest and asset of any conceivable value or benefit then existing, belonging or pertaining to it, or which would inure to it, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of such state associa-

tion, which shall have, hold and enjoy the same in its own right as fully and to the same extent as if the same was possessed, held or enjoyed by said federal association; and such state association shall be deemed to be a continuation of the entity and of the identity of said federal association, operating under and pursuant to the laws of this state, and all the rights, obligations and relations of said federal association to or in respect to any person, estate, or creditor, depositor, trustee or beneficiary of any trust, and in or in respect to any executorship or trusteeship or other trust or fiduciary function, shall remain unimpaired, and such state association, as of said beginning of its corporate existence, shall by operation of this section succeed to all such rights, obligations, relations and trusts, and the duties and liabilities connected therewith, and shall execute and perform each and every such trust and relation in the same manner as if such state association had itself assumed the trust or relation, including the obligations and liabilities connected therewith. (1937, c. 12.)

§ 54-12.1. Merger of building and loan associations.—Any two or more building and loan associations organized or to be organized, or existing under the laws of this state and operating under the provisions of this subchapter, may merge into a single association which may be either one of said merging associations, and the procedure to effect such merger shall be as follows:

1. The directors, or a majority of them, of such associations as desire to merge, may, at separate meetings, enter into a written agreement of merger signed by them, and under the corporate seals of the respective associations, specifying each association to be merged and the association which is to receive into itself the merging association or associations, and prescribing the terms and conditions of the merger and the mode of carrying it into effect. Such merger agreement may provide the manner and basis of converting or exchanging the shares in the association or associations so merged for shares of the same or a different class of the receiving association.

2. Such merger agreement together with the copies of the minutes of the meetings of the respective boards of directors verified by the secretaries of the respective meetings shall be submitted to the insurance commissioner, who shall cause a careful investigation and examination to be made of the affairs of the associations proposing to merge, including a determination of their respective assets and liabilities. The reasonable cost and expenses of such examination shall be defrayed by each association so investigated and examined. If, as a result of such investigation, he shall conclude that the shareholders of each of the associations proposing to merge will be benefited thereby, he shall, in writing, approve same, or shall, if he deems that the proposed merger will not be in the interest of all members of the associations so merging, disapprove, in writing, the same. If he approve the merger agreement, then same shall be submitted, within thirty days after notice to such associations of such approval, to the shareholders of each of such associations, as provided in the next subsection.

3. A special meeting of the shareholders of each of said associations shall be held separately upon written notice to each shareholder of not less than twenty days, specifying the time, place and purpose for which such meeting is called and such notice shall be served personally or sent by mail, postage prepaid, to each shareholder at the last known address of such shareholder appearing upon the books of the association; of the time, place and object of which meeting due notice shall be given by publication at least once a week for four successive weeks in one or more newspapers published in the county wherein each such association has its principal office or conducts its business (and if there be no newspaper published in such county then in a newspaper published in an adjoining county). The secretary or other officer of the association shall make proof by affidavit at such meeting of the due service of the notice or call for said meeting.

4. At separate meetings of the shareholders of each of such associations, called and held as above provided, such shareholders representing a majority of the outstanding shares of stock entitled to vote, by affirmative vote of at least two thirds of the shareholders present, in person or by proxy, may declare by resolution the determination to merge into a single association upon terms of the merger agreement as shall have been agreed upon by the directors of the respective associations and as approved by the insurance commissioner. Members of the associations who do not attend the meetings or who do not vote thereat, shall, if the merger is so approved by the members, be deemed to consent to the merger. Upon the adoption of such resolution, a copy of the minutes of the proceedings of such meetings of the shareholders of the respective associations, certified by the president or vice president and secretary or assistant secretary of the merging associations, shall be filed in the office of the insurance commissioner of this state, within ten days after such meetings, and within fifteen days after the receipt of a certified copy of the minutes of said meetings the insurance commissioner shall either approve or disapprove the same. If the proceedings be approved by him he shall so endorse the certified copy of the minutes in his office, and shall issue a certificate certifying his approval of the merger and send same to each of said associations. Such certificate shall be filed and recorded in the office of the clerk of superior court of the county or counties in this state in which the respective associations so merged shall have their original certificates of incorporation recorded; provided, that the only fees that shall be collected in connection with the merger of said associations shall be filing and recording fees. When such certificate is so filed, the merger agreement shall take effect according to its terms and shall be binding upon all the members of the associations so merging, and the same shall thence be taken and deemed to be the act of merger of such constituent building and loan associations under the laws of this state, and such record or certified copy thereof shall be evidence of the agreement and act of merger of said build-

ing and loan associations and the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such merger. If the commissioner shall disapprove the proceedings he shall mark the certified copies of the meetings in his office disapproved and notify the associations to that effect.

5. Upon the merger of any association, as above provided, into another:

a. Its corporate existence shall be merged into that of the receiving association; and all and singular its rights, powers, privileges and franchises, and all of its property, including all right, title, interest in and to all property of whatsoever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest or asset of any conceivable value or benefit then existing belonging or pertaining to it, or which would inure to it under an unmerged existence, shall immediately by act of law and without any conveyance or transfer, and without any further act or deed, be vested in and become the property of such receiving association which shall have, hold and enjoy the same in its own right as fully and to the same extent as if the same were possessed, held or enjoyed by the association or associations so merged; and such receiving association shall absorb fully and completely the association or associations so merged;

b. Its rights, liabilities, obligations and relations to any person shall remain unchanged, and the association into which it has been merged shall, by the merger, succeed to all the relations, obligations and liabilities, as though it had itself assumed or incurred the same, and no obligation or liability of a member in an association a party to the merger shall be affected by the merger, but the obligations and liabilities shall continue as they existed before the merger, unless otherwise provided in the merger agreement;

c. A pending action or other judicial proceeding to which any association that shall be so merged is a party, shall not be deemed to have abated or to have discontinued by reason of the merger, but may be prosecuted to final judgment, order or decree in the same manner as if the merger had not been made; or the receiving association may be substituted as a party to such action or proceeding, and any judgment, order or decree may be rendered for or against it that might have been rendered for or against such other association if the merger had not occurred. (1943, c. 450, s. 1.)

Art. 2. Shares and Shareholders.

§ 54-13. Number of shares and entrance fee prescribed.—Any corporation created under and by virtue of this subchapter shall have power to declare in its certificate of incorporation the maximum number of shares of which the corporation shall consist to be in force at any one time, the par value of the same, to prescribe the entrance fee per share to be paid by each shareholder at the time of subscribing, to regulate the amount of the installments to be paid on each share, and the time at which the same shall be paid and payable: Provided, that not more than one per cent of the par value of each share of stock subscribed, may be paid as commissions or other remuneration for the soliciting and sale of stock. (Rev., s. 3887; 1905, c. 435, s. 3; 1931, c. 75; C. S. 5176.)

Editor's Note.—The Act of 1931 added the proviso to this section by which a building and loan association is prohibited from paying more than 1% for services in obtaining stock subscriptions. No penalty is attached for violation but the license of the association might be revoked under the provisions of § 54-28 if any prohibited payments were discovered through the annual report (see § 54-26) or otherwise. 9 N. C. Law Rev. 351.

Applied in Dorrity v. Greater Durham Bldg., etc., Ass'n, 204 N. C. 698, 169 S. E. 640.

§ 54-14. Different classes of shares; dividends; reserve fund.—Every building and loan association doing business in this state shall be authorized to issue as many series or classes and kinds of shares and at such stated periods as may be provided for in its charter or by-laws: Provided, the dividends on paid-up stock shall be less than the association is earning, and such stock may have the right to share in the dividends between the rate paid and the earned per centum. Every association shall at all times have on hand and unpledged, investments in obligations of the United States government or the government of the state of North Carolina, or stock in the federal home loan bank, or bonds issued by the federal home loan bank, or on deposit in such bank or banks as may have been approved by a majority of the entire board of directors, an amount equal to at least five per centum of the aggregate amount of paid-up stock outstanding, as shown by the books of the association. When the aggregate of investment or funds in hand or on deposit as herein provided falls below the amount required under this section, the association shall make no new real estate loans until the required amount has been accumulated: Provided, that the refinancing, recasting or renewal of loans previously made, and/or loans made as a result of foreclosure sales under instruments held by the interested building and loan association, shall not be considered as new loans within the meaning of this section. (Rev., s. 3889; 1905, c. 435, s. 6; 1907, c. 959, s. 3; 1919, c. 179, s. 3; 1931, c. 107; 1933, c. 26; 1941, c. 67; C. S. 5177.)

Editor's Note.—The Act of 1931 amended this section in two ways: (1) by doing away with all provisions about guaranteed dividends; (2) by requiring a reserve paid-up stock.

Public Laws of 1933, c. 26, substituted the above section in lieu of the former reading. A comparison of the old with the new is necessary to determine the changes.

See 11 N. C. Law Rev., 207, for comment on changes made in this section by the 1933 amendment.

The 1941 amendment inserted the words "and unpledged" near the beginning of the second sentence.

Optional payment stock may be issued under this section. Lumpkin v. Durham Bldg., etc., Co., 204 N. C. 563, 169 S. E. 156.

§ 54-15. Certificate issued and payment enforced.—Any such corporation shall have power to issue to each member a certificate of the shares held by him, and to enforce the payment of all installments and other dues due to the corporation from the members or shareholders by such fines and forfeitures as the corporation may from time to time provide in the by-laws or its certificate of incorporation. (Rev., s. 3888; 1905, c. 435, s. 4; C. S. 5178.)

§ 54-16. New members admitted. — Any person applying for membership or shares in any cor-

poration after the end of a month from the date of its incorporation may be required to pay, on subscribing, such sums or assessments as may from time to time be fixed and assessed in the manner provided by the corporation, in order to place such new member or shareholdeer on like footing with the original members and others holding shares at the time of such application. (Rev., s. 3886; 1905, c. 435, s. 5; C. S. 5179.)

§ 54-17. Shareholders equally liable. — All shareholders shall occupy the same relative position as to debts, losses, and profits of the association: Provided, that this shall not prevent the payment of a lesser rate of dividend on paid-up stock as provided in § 54-14, but this provision shall not prevent any association from receiving dues in advance, allowing such a rate of interest for the anticipated payments of dues as may be agreed upon by the directors. No series or class of stock shall be paid off until fully matured: Provided, that this section shall not prevent the cashing in of any stock before maturity. (Rev., s. 3884; 1905, c. 435, s. 7; 1907, c. 959, s. 2; 1919, c. 179, s. 2; 1931, c. 109; C. S. 5180.)

Editor's Note.—The Act of 1931 struck out the former section and inserted the above in lieu thereof. The stockholders equality feature of the law is now expressly qualified by a provision that a lesser rate of dividend may be declared on paid-up stock than on serially maturing issues. The proviso is new. What seems to be meant is that until the full matured value of serial stock is earned, i. e., until it has actually matured, it cannot be paid off at that ultimate figure under an agreement or guarantee, but that before maturity it may be cashed in at its value then accrued. This construction has been put upon the act as now amended by a building and loan officer who was consulted on the subject. 9 N. C. Law Rev. 352.

In General.—In case of the insolvency of a building and loan association, every person having stock therein, whether as creditor or debtor, must be considered a corporator, and every member indebted to it must be treated as a debtor. Strauss v. Carolina Interstate Bldg., etc., Ass'n, 117 N. C. 308, 23 S. E. 450; 118 N. C. 556, 24 S. E. 116. Such debtors are liable for authorized assessments to cover losses. New Bern Bldg., etc., Ass'n v. Blalock, 160 N. C. 490, 76 S. E. 532.

Liability of Corporation. — Where a corporation becomes the holder of stock in another corporation, e. g., a Building and Loan Association, which becomes insolvent, it may be held liable on the same, as an incorporator, in the association issuing the stock. Meares v. Monroe Land, etc., Co., 126 N. C. 662, 36 S. E. 130.

Stockholder and Debtor. — Where the borrower from a building and loan association takes out stock, to pay at maturity the debt secured by a mortgage on his building, he occupies, upon the bankruptcy of the association in the hands of a receiver in bankruptcy, two independent relations to the association; that of stockholder, and that of debtor to the association, and he is not entitled to have his payments made on his shares of stock credited to his debt, as against the claims of the other creditors. Rendleman v. Stoessel, 195 N. C. 640, 143 S. E. 219.

§ 54-18. Minors as shareholders.—Minors of the age of twelve years and upwards are authorized and empowered to become shareholders in and buy, sell, hold, pay dues on, withdraw, transfer, and otherwise deal in the shares in any such association in the same manner and with the same powers, rights, and liabilities, force and effect as though such minors were of full age. The provisions of this section shall apply to federal savings and loan associations having their principal offices in this state. (Rev., s. 3885; 1903, c. 728; 1905, c. 435, s. 1; 1939, c. 179; C. S. 5181.)

Editor's Note.—The 1939 amendment added the last sentence.

This section is a statutory exception to the general rule that contracts of infants are voidable at the option of the infant, and when so avoided are void ab initio. Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N. C. 41, 178 S. E. 863.

Art. 3. Loans.

§ 54-19. Manner of making loans; security required.—At such times as the by-laws shall designate, not less frequently than once a month, the board of directors shall hold meetings at which the funds in the treasury applicable for loans may be loaned: Provided, that between meetings of the board of directors any three members of said board may act as an executive committee and may, by unanimous vote, make such loans. Any loans so made or approved by the executive committee shall be reported to the board of directors at its next meeting. No loans shall be made by such association to any one not a member thereof. Borrowers shall be required to give real estate security, either by way of mortgage or deed of trust, subject only to mortgages or deeds of trust to secure loans made by the association and undue taxes and special assessments: Provided, that the shares of any such association may be received as security for a loan on such shares of an amount not to exceed ninety per centum of the amount paid in as dues on such shares: Provided, further, that bonds issued as general obligations of the United States government and bonds issued as general obligations of the state of North Carolina may be received as security to an amount not exceeding ninety per centum of the face value of such bonds. (Rev., s. 3890; 1905, c. 435, s. 8; 1907, c. 959, s. 4; 1919, c. 249; 1937, c. 11; 1941, c. 65; C. S. 5182.)

Cross References.—As to investment in bonds guaranteed by United States, see § 53-44. As to loans on mortgages, etc., issued under federal housing act, see § 53-45.

Editor's Note.—The 1937 amendment so changed this section that a comparison here is not practical.

The 1941 amendment changed the wording of the proviso to the first sentence.

§ 54-20. Direct reduction of principal.—The board of directors of any building and loan association, heretofore or hereafter organized under the laws of this state, may, unless specifically prohibited by the certificate of incorporation, constitution or by-laws of the association, by resolution or by-law, permit borrowing members to repay their indebtedness by a direct monthly or periodical reduction of principal method. In every such case the borrower shall in writing make such agreement with the association relative to the repayment of his indebtedness as the directors may require. The agreement shall stipulate that the borrower or debtor shall make periodical payments, not less frequently than once a month, until such mortgage indebtedness and advances, if any, made by the association for payment of taxes, assessments, insurance premiums and other purposes, as may be owing from the borrower to the association, with interest thereon, shall have been fully paid. The balance of any loan account under such direct reduction of principal method shall be determined monthly, quarterly or semiannually, in order to ascertain the amount then necessary to satisfy in full the mortgage obligation, and when so ascertained such amount shall be the amount due upon said loan at said time to said association or any representative or successor thereof. Any association permitting such method of repayment may adopt a plan by which the in-

terest shall be computed periodically on the preceding balance, and such interest shall be added to that preceding balance, together with any and all advances and other charges above enumerated made for the benefit of the borrower during the said interest period, and then there shall be deducted from the total any and all payments made by the borrower to the association during said period, or since the preceding balance was set up.

All payments made on a loan under such plan of direct periodical reduction shall be applied first to interest, and then to the principal of advances made for the account of the borrower and charged thereto, and to the principal of the loan. The board of directors may adopt any other direct periodic reduction of principal plan that will require complete repayment of such loans: Provided, no plan of payment shall be adopted that will not mature and pay off the loan within twenty years from the date of the making thereof: Provided further, the board of directors may authorize the renewal or extension of the time of repayment of any loan theretofore made. No association shall make any loan upon this plan to any person unless he be a member of such association. (1937, c. 18.)

§ 54-21. Federal housing administration insured loans.—Notwithstanding any provision in this act any building and loan association, whether operating on the serial sinking fund plan or the direct reduction plan incorporated by and under this act, is authorized and empowered to make to its members loans under the provisions of Title I, Class two and three, and Title II of an Act of Congress of the United States entitled "National Housing Act," as amended, and all supplementary legislation thereto. (1941, c. 64.)

§ 54-22. Repayment at any time. — Any member of such association who shall borrow from it shall have the right at any time prior to the maturing of the shares pledged as collateral for such loan to pay off and discharge his loan by paying the amount received by him, including the cost and expenses of making the loan, if the same has been deducted therefrom, with interest at the rate of six per cent per annum on the whole sum received by him to the date of settlement and all fines and dues then remaining unpaid. Upon such settlement he shall be credited with only the withdrawal value of his shares as fixed by the charter or by-laws, or by the directors of such association. In case of default by a shareholder who has borrowed from the association and a foreclosure of his mortgage or deed of trust, the amount of his indebtedness to such association shall be ascertained in the manner provided by this section. (Rev., s. 3891; 1905, c. 435, s. 9; C. S. 5183.)

Cross Reference.—As to interest and usury laws in general, see § 24-1 et seq.

Stockholder Cannot Escape Payment of Losses.—Before availing himself of the privileges provided by this section the stockholder must have paid any assessments to meet losses of the corporation. New Bern Bldg., etc., Ass'n v. Blalock, 160 N. C. 490, 76 S. E. 532. See also Mears v. Davis, 121 N. C. 126, 28 S. E. 188.

Usury.—An illegal transaction cannot be settled. Dickerson v. Bldg. Asso., 89 N. C. 37. And the usury laws apply to the same extent as to natural persons. Craven v. Ry. Co., 77 N. C. 289. These laws will be found as section 24-1 et seq. of the General Statutes, and they cannot be changed by special legislation. Rowland v. Old Dominion Bldg., etc., Ass'n, 116 N. C. 877, 22 S. E. 8. No subterfuge such as calling the charges "fines," "dues," etc., or calling the borrower a partner will prevent the transaction from being usurious. Mills v. Bldg. Ass'n, 75 N. C. 292; Hollowell v. Southern Bldg., etc., Ass'n, 120 N. C. 286, 26 S. E. 781. A full exposition of usury will be found in the notes to section 24-2, and the principles there stated are applicable when usury is charged by a building and loan association.

Same—Effect.—As stated in the notes to sec. 24-2 the effect of usury is the forfeiture of the entire interest, and when already paid the recovery back of twice the amount of interest. Cases applying this principle to building and loan associations are: Smith v. Old Dominion, Bldg., etc., Ass'n, 119 N. C. 249, 26 S. E. 41; Cheek v. Iron Belt Bldg., etc., Ass'n, 126 N. C. 242, 35 S. E. 463; Hollowell v. Southern Bldg., etc., Ass'n, 120 N. C. 286, 26 S. E. 781.

This rule is qualified, however, by the equitable doctrine that where the borrower seeks an affirmative relief, such as to prevent the foreclosure of his mortgage, equity will make payment of a legal rate of interest a prerequisite to the grant of relief. This principle is fully explained in the note to section 24-2. Building and loan association cases applying the same are: Rowland v. Old Dominion Bldg., etc., Ass'n, 118 N. C. 173, 24 S. E. 366; Williams v. Maxwell, 123 N. C. 586, 31 S. E. 821.

Forfeiture of Mortgage on Default.—A contract, by which the stock, taken out by a borrower and assigned to the association, when the mortgage is executed, is forfeited to the association on default, without allowance of credit on the mortgage for the payments made on the stock, is unconscionable, and, though upheld by the laws of the association's own state, will not be enforced in North Carolina. Rowland v. Old Dominion Bldg., etc., Ass'n, 116 N. C. 877, 22 S. E. 8.

Refusal to Make Loan.—On association's refusal to make loan to subscriber, the subscriber is entitled to recover back money paid for shares of stock in association. Fagg v. Southern Bldg., etc., Ass'n, 113 N. C. 364, 18 S. E. 655.

§ 54-23. Power to borrow money.—Any such association may in its certificate of incorporation, constitution or by-laws authorize the board of directors from time to time to borrow money, and the board of directors may from time to time, by resolution adopted by a vote of at least two-thirds of all the directors and duly recorded on the minutes, borrow money for the association on such terms and conditions as they may deem proper; but the total amount of money so borrowed shall at no time exceed thirty-five per centum of the gross assets of such association. In order to secure obligations for money borrowed under the provisions of this section, any such association may assign its notes, bonds and mortgages and/or other property, including the right to repledge the shares of stock pledged as collateral security, without securing the consent of the owner thereto, as security for the repayment of its indebtedness as evidenced by its bond, obligation or note given for such borrowed money. (Rev., s. 3892; 1905, c. 435, s. 10; 1909, c. 898; 1911, c. 61; 1913, c. 21; 1933, c. 18; 1941, c. 66; C. S. 5184.)

Editor's Note.—Public Laws of 1933, c. 18, substituted the above section in lieu of the former reading. A comparison of the old with the new is necessary to determine the changes.

The chief change of the 1933 amendment is the granting of express authority to an association to pledge its assets as security for money borrowed. For further comment, see 11 N. C. Law Rev., 208.

The 1941 amendment substituted "thirty-five" for "thirty" in line eleven and omitted from the first sentence a provision relating to the use of the money borrowed.

Art. 4. Under Control of Insurance Commissioner.

§ 54-24. Power of insurance commissioner. — The insurance commissioner of the state is hereby empowered and directed to perform all the duties and exercise all the powers as to building and loan associations, unless herein otherwise

provided. (Rev. s. 3893; 1905, c. 435, s. 24; C. S. 5185.)

§ 54-25. Annual license fees. — All domestic building and loan associations shall pay an annual license fee of twenty-five dollars and may be licensed upon filing with the insurance commissioner an application in such form as he may prescribe. Such license fee shall be used to defray the expenses incurred by the insurance commissioner in supervising building and loan associations. (1919, c. 179, s. 1; C. S. 5186.)

Cross References.—As to additional license tax, see § 105-73. As to exception of building and loan associations from certain intangible taxes, see § 105-212. As to listing property for taxes, see § 105-347. As to an initial tax of twenty-five dollars ($25) before the assumption of corporate powers, see § 54-2.

§ 54-26. Statement filed by association. — Every association doing business under this subchapter shall file in the office of the insurance commissioner, on or before the first day of February in each year, in such form as he shall prescribe, a statement of the business standing and financial condition of the applicant on the preceding thirty-first day of December, signed and sworn to by the principal, or chief managing agent, attorney, or officer thereof, before the insurance commissioner, or before a commissioner of affidavits for North Carolina, or before some notary public. (Rev., s. 3894; 1905, c. 435, s. 11; 1907, c. 959, s. 5; C. S. 5187.)

§ 54-27. Statement examined, approved, and published; fees.—It shall be the duty of the insurance commissioner to receive and thoroughly examine each annual statement required by this subchapter, and if made in compliance with the requirements thereof, to publish an abstract of the same in one of the newspapers of the state, to be selected by the general agent or attorney making such statement, and at the expense of his principal. The insurance commissioner shall be entitled to a fee of five dollars, to be paid by the association filing such statement. (Rev., s. 3895; 1905, c. 435, s. 12; C. S. 5188.)

§ 54-28. License revoked.—If the insurance commissioner shall become satisfied at any time that any statements made by any association licensed under this subchapter are untrue, or in case a general agent shall fail or refuse to obey the provisions of this subchapter, or if upon examination the insurance commissioner is of opinion that such association or company is insolvent, or has exceeded its powers, or has failed to comply with any provisions of law, or its mode of business is not feasible for the purposes of carrying out successfully its plan, or that its condition is such as to render its further proceedings hazardous to the stockholders, he shall thereupon have power to revoke and cancel such license. (Rev., s. 3896; 1905, c. 435, s. 13; 1907, c. 959, s. 6; C. S. 5189.)

§ 54-29. Examinations made; expense paid.—If at any time the insurance commissioner has good reason to think that the standing and responsibility of any building and loan association or company doing business in this state, or its mode of business, is of a doubtful character, or in his discretion whenever he deems it prudent to do so, it shall be his duty to examine and investigate everything relating to the business of such company, and to that end he is hereby authorized, if he deem it advisable, to appoint a suitable and competent person to make such investigation, who shall file with the insurance commissioner a full report of his finding in such case. The expenses and cost of such examination shall be defrayed by the company or association subjected to investigation, and each company or association doing business in this state shall stipulate in writing, to be filed with the insurance commissioner, that it will pay all reasonable cost and expenses of such examination when it shall become necessary. (Rev., s. 3897; 1905, c. 435, ss. 14, 15; 1919, c. 179, s. 4; C. S. 5190.)

§ 54-30. Failing to exhibit books or making false statement a misdemeanor.—If any person having in his possession or control any books, accounts, or papers of any building and loan association licensed by law, shall refuse to exhibit the same to the insurance commissioner, or his agents on demand, or shall knowingly or wilfully make any false statement in regard to the same, he shall be guilty of a misdemeanor, and fined and imprisoned, at the discretion of the court. (Rev., s. 3329; 1893, c. 434; 1899, c. 164; C. S. 5191.)

§ 54-31. Agent must obtain certificate.—It shall be unlawful for any person to solicit business or act as agent for any building and loan association or company without having procured from the insurance commissioner a certificate that such association or company for which he offers to act is duly licensed by the state to do business for the current year in which such person solicits business or offers to act as agent. The fee for such license shall be $2.50, to be paid to the insurance commissioner at the time the certificate is issued; and no other license or fee shall be required for said business of an agent or solicitor so licensed. (Rev., s. 3898; 1895, c. 444, s. 3; 1899, c. 154, s. 2, subsec. 20; 1907, c. 959, s. 7; 1933, c. 17; C. S. 5192.)

Editor's Note.—Public Laws of 1933, c. 17, added the last sentence to this section, relating to fees.

§ 54-32. Penalties imposed and recovered.—Every general agent or attorney of any building and loan company or association who shall fail or refuse to perform any duty required of him by this subchapter shall forfeit and pay to the insurance commissioner fifty dollars for the state for every such refusal, to be recovered before any justice of the peace at the suit of the insurance commissioner. (Rev., s. 3899; 1893, c. 434, s. 2300g; 1899, c. 154, s. 2, subsec. 20; C. S. 5193.)

§ 54-33. Notice required before appointment of receivers. — No judge or court shall appoint a receiver for any building and loan association organized and incorporated under the laws of this state unless five days' advance notice of the motion, petition or application for appointment of a receiver shall have been given to such association and to the insurance commissioner of the state. (1933, c. 38.)

Editor's Note.—See 11 N. C. Law Rev. 208.

Art. 5. Foreign Associations.

§ 54-34. Allowed to do business.—A building and loan association of another state may be ad-

mitted to transact business in this state in the manner hereinafter provided, and no association not so admitted shall transact business in this state. (Rev., s. 3900; 1905, c. 435, s. 17; C. S. 5194.)

§ 54-35. Copy of charter and list of officers filed. —Application for authority to transact business in this state shall be made to the insurance commissioner, and on making such application every such association shall file with the insurance commissioner a duly authenticated copy of its charter or certificate of incorporation, its constitution and by-laws, and thereafter certified copies of all amendments thereto, the names and addresses of its officers and directors, the compensation paid each officer, and a report of its condition, in such form as may be prescribed by the insurance commissioner, which shall be verified by oath of such officers and other persons as the commissioner shall designate, and the commissioner shall furnish blank forms for the report required, and may call for additional reports at such other times as may seem to him expedient. (Rev., s. 3902; 1905, c. 435, s. 19; C. S. 5195.)

§ 54-36. License granted. — If it shall appear to the insurance commissioner by the report aforesaid and by an examination of the affairs of such association that it has good assets of sufficient value to cover all liabilities, and that its methods of doing business are safe and not contrary to the laws governing building and loan associations of this state, it may be admitted to transact business in this state upon a certificate of authority to be issued by the insurance commissioner, which shall only be issued when such association shall have complied with the further requirements of this article. (Rev., s. 3903; 1905, c. 435, s. 20; C. S. 5196.)

§ 54-37. Securities deposited. — The insurance commissioner before issuing the certificate of authority aforesaid shall require every such association to deposit with the commissioner such securities as he may approve, amounting to at least thirty thousand dollars, which securities shall be held by him in trust for the exclusive benefit and security of the creditors and shareholders of such association resident in this state, and he shall have authority to require it to deposit additional securities and to order a change in any of the securities so deposited at any time, and no change or transfer of the same shall be made or be effectual without his consent. Such deposit shall be maintained intact in the full sum required at all times, but the association making such deposit, so long as it shall continue solvent and comply with all the provisions of this subchapter applicable to it, may receive the dividends or interest on the securities deposited, and may from time to time, with the assent of the commissioner, withdraw any of such securities on depositing with the commissioner other like securities the par value of which shall be equal to such as may be withdrawn. (Rev., s. 3904; 1905, c. 435, s. 21; C. S. 5197.)

§ 54-38. Annual certificate; service of process.— Such certificate of authority shall be for the current year only, and shall not be issued until such association shall, by a duly executed instrument filed with the insurance commissioner of the state, constitute the insurance commissioner and his successors in office its true and lawful attorney, upon whom all original process in any action or legal proceedings against it may be served, and therein shall agree that any original process against it which may be served upon the commissioner shall be of the same force and validity as if served on the association, and that the authority thereof shall continue in force irrevocable so long as any liability of the association remains outstanding in this state. The service of such process shall be made by leaving a copy of the same in the office of the insurance commissioner, with a fee of two dollars, to be taxed in the plaintiff's costs. When any original process is thus served, the commissioner, by letter directed to the secretary, shall within two days after such service forward to the secretary a copy of the process served upon him, and such service shall be deemed sufficient service upon the association. The commissioner shall keep a record of all such process, showing the day and hour of service. (Rev., s. 3906; 1905, c. 435, s. 23; C. S. 5198.)

§ 54-39. Agent must have certificate of license; fees.—It shall be unlawful for any person to solicit business or act as agent for any foreign building and loan association or company doing business in this state without having first procured from the insurance commissioner a certificate that such association or company for which he offers to act is duly licensed by the state to do business for the current year in which such person solicits business or offers to act as agent. The insurance commissioner shall be entitled to a fee of one dollar for issuing each such certificate, to be paid by the company for which the same was issued. Any person violating the provisions of this section shall be guilty of a misdemeanor. (Rev., ss. 3327, 3901; 1895, c. 444, s. 3; 1905, c. 435, s. 18; C. S. 5199.)

§ 54-40. Fees and expenses.—Every such association shall pay for filing a certified copy of its charter or certificate of incorporation twenty dollars; for filing original annual reports, twenty dollars; for certificate of authority, annually, two hundred and fifty dollars; for certificate for each agency, five dollars; and shall defray all expenses incurred in making any examination of its affairs as herein provided for; and the insurance commissioner may maintain an action in the name of the state against such association for the recovery of such expenses in any court of competent jurisdiction. (Rev., s. 3905; 1905, c. 435, s. 22; C. S. 5200.)

Cross References.—As to license tax, see § 105-73. As to exception of building and loan associations from certain taxes, see § 105-212. As to listing property for taxes, see § 105-347.

§ 54-41. All contracts deemed made in this state. —Any contract made by any foreign association with any citizen of this state shall be deemed and considered a North Carolina contract, and shall be so construed by all the courts of this state according to the laws thereof. (1905, c. 435, s. 26; C. S. 5203.)

Foreign building and loan associations are subject to the application of the state usury laws where loans are made at home office. Rowland v. Old Dominion Bldg., etc., Ass'n,

115 N. C. 825, 18 S. E. 965; Meroney v. Atlanta Bldg., etc., Ass'n, 116 N. C. 882, 21 S. E. 924.

Art. 6. Withdrawals.

§ 54-42. Month's notice required for withdrawals.—Any shareholder in a building and loan association may withdraw all or any part of his or her holdings of unpledged or unhypothecated stock in such association by giving to the secretary of such association one month's written notice of his or her intention so to do, and the right of such shareholder to make such withdrawal shall accrue one month after the giving of such notice, subject to the conditions set out in § 54-43. (1933, c. 122, s. 1.)

Editor's Note.—See 11 N. C. Law Rev. 207, for review of this and § 54-43.

§ 54-43. Withdrawal or maturity fund. — Whenever any shareholder whose stock has matured or whose right to withdraw his or her stock has accrued, as set out in § 54-42, has not been paid because of insufficiency of funds in the treasury of the association, the secretary of said association shall under instruction from the directors, create a separate fund to be known as the "withdrawal or maturity fund" and into such fund shall be paid one-half of the net receipts of the association monthly. Net receipts shall mean the receipts of the association from interest, installments, rent and other revenue producing sources, diminished by the expenses of the association, and by any sums directed by the board of directors to be set apart and held separately for the purpose of meeting bills payable or notes payable at the maturity thereof. From time to time as the board of directors may direct, the secretary shall make an equitable and ratable distribution of the funds in said "withdrawal or maturity fund" to the stockholders whose right to receive payment from said fund has accrued, as hereinbefore provided, at the date of such distribution. One-half of the net receipts of the association shall be added monthly to such fund so long as there remains any shareholder of the association entitled to receive a portion thereof as aforesaid. No shareholder whose stock has matured or whose right to withdraw his stock has accrued as hereinbefore set out, shall have the right to demand or receive any funds in excess of the amount equitably and ratably distributed as hereinbefore set out except on approval of board of directors of such association and/or the insurance commissioner. (1933, c. 122, s. 2.)

Art. 7. Statements of Financial Condition of Associations.

§ 54-44. Derogatory statements.—Any person who shall willfully and maliciously make, circulate, or transmit to another or others any statement, rumor, or suggestion, written, printed, or by word of mouth, which is directly or by inference derogatory to the financial condition, or affects the solvency or financial standing of any building and loan association, or who shall counsel, aid, procure, or induce another to state, transmit, or circulate any such statement or rumor shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court. (1915, c. 273; 1921, c. 4, s. 82; 1931, c. 12; C. S. 4231.)

SUBCHAPTER II. LAND AND LOAN ASSOCIATIONS.

Art. 8. Organization and Powers.

§ 54-45. Application of term.—The term "Land and Loan Associations" shall apply to and include all corporations, companies, societies or associations organized for the purpose of making loans to their members only, and of enabling their members to acquire real estate, make improvements thereon, and remove incumbrances therefrom by the payment of money in periodical installments or principal sums, and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes, where the principles of building and loan associations and their work are adapted to the use of the farmers and the rural population.

It shall be unlawful for any corporation, company, society, or association doing business in this state not so conducted to use in its corporate name the term "land and loan association," or in any manner or device to hold itself out to the public as a land and loan association. (1915, c. 172, s. 1; C. S. 5204.)

§ 54-46. Incorporation and powers.—Land and loan associations shall be incorporated, supervised, and be subject to such regulations and have such privileges as are prescribed for building and loan associations under the laws of this state as they now are or may be hereafter enacted, except as prescribed in this article. (1915, c. 172, s. 2; C. S. 5205.)

Cross Reference.—As to powers of building and loan associations, see § 54-2.

§ 54-47. Loans. — The boards of directors of land and loan associations may contract for loans to the amount of seventy-five per cent of the securities used by them as collateral, where the loans are on long time (three or more years), and for at least one per cent less than is charged by such associations on their loans to shareholders; and they may make short loans to their shareholders on their shares and personal indorsement or personal property. (1915, c. 172, s. 3; C. S. 5206.)

Cross Reference.—As to loans on mortgages, etc., issued under federal housing act, see § 53-45.

§ 54-48. Reserve associations.—Associations to be known as "Reserve Land and Loan Associations" may be chartered and licensed as provided in this article, when they are organized and the stock therein is held by local land and loan associations, and shall have such powers, rights, and privileges as are accorded to other domestic associations, and they may conform to such laws, rules, and regulations as may be prescribed by the laws of the United States, or of this state, to enable them to receive moneys, bonds, or securities to be used in loans and to secure the same. Such reserve associations shall be under the supervision of the insurance commissioner as are building and loan associations. (1915, c. 172, s. 4; C. S. 5207.)

§ 54-49. Land conservation and development bureau; land mortgage associations. — Recognizing that agriculture is the most fundamental wealth-producing occupation of the State and that land is the basis of agriculture, the General Assembly

of North Carolina does hereby authorize and direct the State Department of Agriculture to establish as a major division of its organization a land conservation and land development bureau. The function of this bureau shall be to promote conservation, rural home ownership, and the development of the land resources of the State through land mortgage associations under the following provisions. (1925, c. 223, s. 1.)

§ 54-50. Number of incorporators; capital stock. —Any number of persons, resident freeholders of the State, not less than fifteen, may associate to establish an association on the terms and conditions and subject to the liabilities hereinafter prescribed. The aggregate amount of the capital stock of any such association shall not be less than twenty thousand dollars ($20,000). Such association shall mean a corporation organized under the laws of the State for the purpose of making loans upon agricultural lands, forest lands and dwelling houses within this State and known as a land mortgage association. (1925, c. 223, s. 2.)

§ 54-51. Incorporation.—The articles of incorporation shall be in writing signed and acknowledged by the incorporators and shall contain the following:

(1) The declaration that they are associating for the purpose of forming a land mortgage association under the provisions of this article.

(2) The name of such association, which shall be in no material respect similar to any other association in the same county.

(3) The name of the village, town or city, and the county where such association is to be located.

(4) The amount of capital stock, which shall be divided into shares of one hundred dollars each.

(5) The period for which such association is organized. (1925, c. 223, s. 3.)

§ 54-52. Organization. — The incorporators at their first annual meeting shall elect by ballot from their number a board of trustees of not less than six members who shall adopt a code of by-laws and a plan of organization approved by the Commissioner of Agriculture and the Corporation Commission. (1925, c. 223, s. 4.)

§ 54-53. Corporate powers. — Said land mortgage association shall have power: (a) To make loans, the conditions of which shall be approved by the Corporation Commission if the security taken therefor is to be used as the basis for a bond issue under subsection (c) hereof, and to accept as security for any such loan a first mortgage upon improved or partially improved agricultural lands within this State. Such loan shall not exceed, however, sixty-five per cent of the value of such real estate so conveyed, according to the appraisal made as herein provided.

(b) To purchase first mortgages, heretofore or hereafter issued against North Carolina agricultural lands, either improved or partially improved, from persons or firms resident of this State or corporations organized under the laws of this State engaged in the colonization or settlement of North Carolina lands and to whom such mortgages were issued, if, after investigation, the plan of settlement or colonization followed by such person, firm or corporation is approved by the Commissioner of Agriculture as beneficial to the settler or colonist, and if the lands against which such mortgages are issued are found by the said commissioner to be in fact agricultural lands suitable for agricultural purposes and the terms and conditions of the loans made by such person, firm or corporation are just and reasonable, or from banks or trust companies organized under the laws of this State, or of the United States, to do business in this State, to which such mortgages were issued direct by the borrowers. Each such mortgage shall be payable on the amortization plan maturing in not less than twenty years. The request for an investigation leading to such a purchase of mortgages from persons, firms or corporations engaged in the settlement or colonization of North Carolina lands shall be accompanied by a deposit, the amount of such deposit to be determined by the Commissioner of Agriculture. Upon completion of the investigation the Commissioner of Agriculture shall render a statement of expense accompanied by a remittance of any unused balance of such deposit, but no mortgage shall be purchased until the lands against which the same is issued have been appraised as hereinafter provided for the appraisal of land for a loan by the land mortgage association and such mortgage is approved by all members of the loan committee.

(c) To issue bonds secured by the pledge of the mortgage so taken or purchased.

(d) To pledge the notes and mortgages so taken or purchased under the provisions of subdivisions (a) and (b) hereof as security for the bonds of the land mortgage association referred to in subdivision (c) hereof. (1925, c. 223, s. 5.)

Cross References.—As to investment in bonds guaranteed by United States, see § 53-44. As to loan on mortgages, etc., issued under federal housing act, see § 53-45.

§ 54-54. Restrictions.—All mortgage obligations acquired by the company shall be subject to the following restrictions:

(a) Each such mortgage shall be a first and valid lien upon improved or partially improved agricultural lands within the State of North Carolina;

(b) Each such mortgage shall be a first and valid lien upon the whole and undivided fee and upon no lesser estate;

(c) Each such mortgage shall be given to secure a principal indebtedness not exceeding in amount fifteen per cent of the capital and surplus of the company;

(d) All such mortgages shall contain provisions for soil conservation;

(e) All such mortgages shall contain provisions for the time of commencing payments for annual or semiannual reduction of the indebtedness secured thereby, subject to the requirements as to repayment of loans and interest hereinafter provided;

(f) The company shall make no loan secured by mortgage of any real estate in which any officer or trustee of the company is interested either directly or indirectly, except upon the approval of two-thirds of all the trustees;

(g) A sufficient amount of the proceeds of

any loan made upon lands upon which are buildings in course of construction or upon which land clearing or other improvements are being made shall be retained by the association and paid out only upon construction or improvement vouchers, countersigned by a duly authorized agent of the association. (1925, c. 223, s. 6.)

§ 54-55. Mortgage forms; approval. — The mortgages to be given to the association, the bonds to be issued and the trust deed executed to secure the bonds shall be in such form and shall contain such conditions as will adequately protect all parties thereto. The trustees shall provide the forms subject to the joint approval of the Corporation Commission and the Attorney-General. (1925, c. 223, s. 7.)

§ 54-56. Repayment of loan and interest. — The prospective borrower may be required to pay all expenses incidental to the examination of title and appraisal of the property. The total amount shall include (a) the rate of interest agreed upon; and (b) a payment. (1925, c. 223, s. 8.)

§ 54-57. Terms of payment. — A borrower may repay his loan by installments of such frequency and amounts as may be agreed upon: Provided, that not less than one per cent of the original amount of the mortgage shall be paid upon the principal thereof annually, and commencing not later than the sixth year succeeding the year in which the loan was made the borrower may pay a larger installment upon the principal, or the whole of it, at any interest date, such payments to be in amounts equal to additions of one or more principal amortization payments. Such payment may be made in cash, or by tendering at par bonds of the associations. For failure to pay the interest or any installment required by the terms of the loan, the borrower may be fined as the by-laws may prescribe. But the borrower shall never be required to pay more than the specified installment, nor to pay the principal before it is due except as prescribed herein for partial repayment on account of depreciation and for foreclosure by the association. The borrower may on sixty days' notice repay the association his total indebtedness, or, without such notice, upon payment of sixty days' interest upon the principal unpaid. The borrower shall be entitled to a receipt for all installments as paid, and where the repayment is complete to a satisfaction of his note and mortgage. (1925, c. 223, s. 9.)

Cross Reference.—As to satisfaction of mortgages, see § 45-37 et seq.

§ 54-58. Transfer of mortgaged lands.—The acquirer of any lands mortgaged to a land mortgage association shall enter at once, on the acquisition of the land, into a written agreement with the association, attested by a notary, or a justice, and assume the personal responsibility for the indebtedness to the association attaching to such lands. This document must be presented to the trustees within fourteen days after demand. (1925, c. 223, s. 10.)

§ 54-59. Calling in loans before due. — Every land mortgage association shall have the power to call in loans upon sixty days notice:

(a) When the person acquiring the lands upon which money has been loaned does not comply with the provisions of § 54-58 and fulfill the obligations incumbent upon him;

(b) When the debtor does not meet the obligation imposed upon him by his contract and the by-laws of the land mortgage association;

(c) When the mortgaged premises become subject to forced sale;

(d) When the mortgaged premises are depreciating in value because of lack of care, of failure to maintain and conserve or from other cause.

The trustees of the association, whenever necessary, shall provide for an inspection of mortgaged premises by the State Department of Agriculture for an investigation of the care which is being given said premises, and may employ an expert to inspect the soil with a view of determining whether or not the same is being depleted. (1925, c. 223, s. 11.)

§ 54-60. Partial recall of debt.—The association may require a suitable partial repayment of the debt if the mortgaged premises may have at any time become depreciated in value from any cause whatsoever. (1925, c. 223, s. 12.)

§ 54-61. Foreclosure. — Whenever any loan is called in and the borrower shall fail to pay the principal and interest due to the association as required by law and the notices given him, the land mortgage association may then foreclose upon the mortgaged premises as for a past due loan. But in no case shall a borrower be liable for a sum greater than the amount of the unpaid portion of the loan with any accretions of interest thereon and expenses incidental to the collection thereof. (1925, c. 223, s. 13.)

§ 54-62. Appraisal of lands.—Upon application for a loan the land mortgage association shall cause the lands which it is proposed to mortgage to the association to be appraised by a competent appraiser furnished it by the State Department of Agriculture. (1925, c. 223, s. 14.)

§ 54-63. Preference prohibited; association borrowing money. — No land mortgage association, and no officer or agent thereof, shall give any preference to any creditor by pledging any of the assets of such association as collateral security, except that any such association may borrow money for temporary purposes, and may pledge assets of the association as collateral security therefor. Whenever it shall appear that any land mortgage association has borrowed habitually for the purpose of reloaning, the Corporation Commission may require such association to pay off such amount so borrowed. (1925, c. 223, s. 15.)

§ 54-64. Bond issues.

(a) The bonds to be issued by any land mortgage association may be issued for such amounts, bearing such serial number, and date or dates, and be payable at such time and times, bear such rate of interest, and be redeemable at maturity or upon notice at such times and in such manner, as the land mortgage association may, subject to the approval of the banking commission, deem advisable.

(b) Each land mortgage association shall keep a register for the registration and transfer of

bonds issued by it in which it shall register, or cause to be registered, all bonds upon presentation thereof for such purpose; and such register shall contain the post office address of all registered holders of bonds and shall, at all reasonable times, be open to the inspection of the banking commission, or any of its deputies, and to the State Treasurer. (1925, c. 223, s. 16.)

§ 54-65. Deed of trust.

(a) To secure the payment of such bonds, the land mortgage association shall issue a collateral deed of trust to the State Treasurer, pledging as security for such bonds the notes and mortgages taken or purchased, as provided herein, in an amount equal to or exceeding the aggregate amount of bonds issued or to be issued.

(b) The total amount of bonds actually outstanding shall not at anytime exceed the total amount unpaid upon the notes secured by the mortgages belonging to the association and pledged for the payment of the bonds, plus such securities and moneys as may be on deposit with the State Treasurer under the provisions hereof.

(c) The aggregate amount of the principal of all bonds issued by land mortgage associations and outstanding at any one time shall not exceed twenty times the amount of the capital and surplus of the company. (1925, c. 223, s. 17.)

§ 54-66. Collaterals deposited with State Treasurer.—All mortgages pledged to secure the payment of the bonds issued hereunder shall be deposited and left with the State Treasurer. The land mortgage association may, with the approval of the State Treasurer, remove such mortgages from the custody of the State Treasurer, substituting in place thereof other of its mortgages, or money or State of North Carolina bonds or certificates of deposit, endorsed in blank, issued by state or national banks located in North Carolina, farm mortgage bonds issued under the provisions of the Federal Farm Loan Act approved July seventeenth, one thousand nine hundred and sixteen, or obligations of the United States Government, in an amount equal to or greater than the amount unpaid upon the notes secured by the mortgages withdrawn. (1925, c. 223, s. 18.)

§ 54-67. Redemption of bonds.

(a) Notice of redemption of bonds may on no account be given on the part of the holder thereof, but may be given by the association only for the purpose of affecting redemption in accordance with the conditions of the bonds and as provided by law and the by-laws.

(b) If the land mortgage association shall elect to redeem any bond prior to maturity, six months notice of redemption shall be given and shall be effected by personal service upon the owner and holder of the bond, by notice mailed to his address as registered or by advertising the same three times in a newspaper selected by the State Treasurer.

(c) The numbers of the bonds of which notice of redemption is to be given shall be determined by lot, to be drawn by the president or the vice-president at a meeting of the trustees. (1925, c. 223, s. 19.)

§ 54-68. Validity of bonds after maturity.—In case the holder of any bond outstanding shall not have presented the same for payment within the period of two years after its maturity or within two years after the date fixed for the redemption, as the case may be, then such bonds shall cease to be a lien upon the mortgages, moneys, and securities pledged to the State Treasurer and deposited with him as security therefor, but such bond shall still constitute, until the statute of limitation running against such bonds shall have expired, a single legal money claim or demand against the land mortgage association issuing the same, and be recoverable from it in a suit at law, and in no event shall any interest be collectible upon such bond after the maturity thereof or after the date fixed for its redemption. (1925, c. 223, s. 20.)

§ 54-69. Bonds as payment.—If the association gives notice to a debtor for repayment of the mortgage loan the latter must pay to the association in cash or in its bonds at par the face of the same so far as it has not yet been covered by his assets in the amortization and payments. (1925, c. 223, s. 21.)

§ 54-70. Bonds as investments.—The bonds of a land mortgage association shall be a legal investment for savings associations, trust companies, or other financial institutions chartered under the laws of this State and shall also be a legal investment for trustees, executors, administrators, or custodians of public or private funds, or corporations, partnerships or associations. (1925, c. 223, s. 22.)

§ 54-71. Applications of earnings; reserve fund.—The gross earnings of the association shall be ascertained annually, and there shall first be deducted therefrom the expenses incurred by the association for the preceding year and the balance thereof shall be set aside as a reserve fund for the payment of contingent losses, to an amount equal to two per cent of the capital stock outstanding, and until such reserve fund equals twenty per cent of the capital stock of such association. (1925, c. 223, s. 23.)

§ 54-72. Restriction on holding real estate.—No land mortgage association shall acquire real estate (other than for the occupation of its offices) except to protect its interests in case any of the mortgages owned by it are foreclosed and the property therein described sold to pay the indebtedness secured thereby. All real estate so acquired shall be promptly sold. (1925, c. 223, s. 24.)

§ 54-73. Banking laws applicable.—The statutes relating to banks and banking in this State, that is, §§ 53-1 to 53-158, in so far as applicable and not in conflict with the provisions hereof shall apply to land mortgage associations. (1925, c. 223, s. 25.)

SUBCHAPTER III. CREDIT UNIONS.

Art. 9. Superintendent of Credit Unions.

§ 54-74. Office created.—There shall be established in the State Department of Agriculture a superintendent of credit unions and such assistants as may be necessary. (1915, c. 115, s. 1; 1925, c. 73, s. 4; 1935, c. 87; C. S. 5208.)

Editor's Note.—The Public Laws of 1925, Ch. 73 struck out all of the old section and inserted this one in its stead.

This subchapter was formerly entitled Savings and Loan Associations and the article headings conformed thereto. Public Laws 1935, chapter 87, provides: "In order to make the name of this organization conform with the names of similar organizations authorized by federal statute, the words 'savings and loan associations,' wherever appearing in Consolidated Statutes, sections five thousand two hundred and eight to five thousand two hundred and forty-one, inclusive, (Michie's Code of one thousand nine hundred thirty-one) shall be changed to read 'credit unions.' "

§ 54-75. Duties of the officer.—The duties of the superintendent of credit unions shall be as follows:

1. To organize and conduct, in the state department of agriculture, a bureau of information in regard to coöperative associations and rural and industrial credits.

2. Upon the application of three persons residing in the state of North Carolina, to furnish, without cost, such printed information and blank forms as, in his discretion, may be necessary for the formation and establishment of any local credit union in the state.

3. To maintain an educational campaign in the state looking to the promotion and organization of credit unions; and upon the written request of twelve bona fide residents of any particular locality in this state expressing a desire to form a local credit union at such locality, the superintendent or one of his assistants shall proceed as promptly as convenient to such locality and advise and assist such organizers to establish the institution in question.

4. To examine at least once a year, and oftener if such examination be deemed necessary by the superintendent or his assistant, the credit unions formed under this subchapter. A report of such examination shall be filed with the state department of agriculture, and a copy mailed to the credit union at its proper address. (1915, c. 115, s. 1; 1925, c. 73, ss. 2, 3, 5, 6; 1935, c. 87; C. S. 5209.)

Editor's Note.—The words "and industrial," in the first clause of this section were added by Public Laws of 1925, ch. 73.

Under the fourth clause of this section it was formerly required that a report of the examination, therein referred to, be also sent "to the clerk of the court of the county in which the principal office of the credit union or co-operative association"—the present saving and loan association, "is located, and such report" to be "kept on file by the clerk of the superior court for public inspection."

Art. 10. Incorporation of Credit Unions.

§ 54-76. Applications filed.—Seven or more persons employed or residing in the state may become a credit union by making, signing, and acknowledging a certificate which shall contain:

1. The name of the proposed credit union which shall include the words "credit union."

2. A statement that incorporation is desired under this article.

3. The conditions, whether of residence, of occupation, or otherwise, which shall qualify persons for membership.

4. The par value of the shares, which shall not exceed twenty-five dollars.

5. The city, village, or town in which its principal business office is to be located. If it is to be located in an incorporated city, the street address of the city shall be given. If the condition of its membership is employment by a certain individual, copartnership, or corporation, a statement that its office shall be with such individual, copartnership, or corporation may be substituted for the street address.

6. The number of its directors, not less than five, all of whom must be members of and shareholders in the corporation.

7. The names and postoffice addresses of the directors for the first year.

8. The names and postoffice addresses of the subscribers to the certificate, and a statement of the number of shares of stock which each agrees to take in the corporation. (1915, c. 115, s. 2; 1925 c. 73, s. 3; 1935, c. 87; C. S. 5210.)

§ 54-77. By-laws adopted.—At the time of filing the certificate the incorporators shall adopt by-laws which shall provide:

1. The name of corporation.

2. The purposes for which it is formed.

3. Qualifications for membership.

4. The date of the annual meeting; the manner in which members shall be notified of meetings; the manner of conducting the meetings; the number of members which constitute a quorum at the meetings, and the regulations as to voting.

5. The number of members of the board of directors, their powers and duties, and the compensation and duties of officers elected by the board of directors.

6. The number of members of the credit committee, their powers and duties.

7. The number of members of the supervisory committee, their powers and duties.

8. The par value of shares of capital stock.

9. The conditions upon which shares may be issued, paid in, transferred, and withdrawn.

10. The fines, if any, which shall be charged for failure to meet obligations to the corporation punctually.

11. The conditions upon which deposits may be received and withdrawn. Whether the proposed corporation shall, in addition, have power to borrow funds.

12. The manner in which the funds of the corporation shall be invested.

13. The conditions upon which loans may be made and repaid.

14. The maximum rate of interest that may be charged upon loans, not to exceed, however, the legal rate.

15. The method of receipting for money paid on account of shares, deposits, or loans.

16. The manner in which the reserve fund shall be accumulated.

17. The manner in which dividends shall be determined and paid to members.

18. The manner in which a voluntary dissolution of the corporation shall be effected. (1915, c. 115, s. 2; C. S. 5211.)

§ 54-78. Certificate of incorporation. — The by-laws acknowledged to have been adopted by all of the incorporators, together with the certificate of incorporation, shall be filed in the office of the superintendent of credit unions who shall approve the certificate of incorporation if he is satisfied that it is in conformity with this subchapter, and shall approve the by-laws if he is satisfied as to the character of the incorporators and that the by-laws are reasonable and will tend

to give assurance that the affairs of the prospective credit union will be administered in accordance with this subchapter. Thereupon, the superintendent of credit unions shall issue to the corporation a certificate of approval, annexed to a duplicate of the certificate of incorporation and of the by-laws, which certificate of approval, together with the attached duplicate certificate of incorporation and duplicate by-laws, shall be filed in the office of the clerk of the superior court of the county in which the office of such credit union is situated, and upon such filing the incorporators shall become and be a corporation. The county clerk shall charge the same filing fee for filing the certificate of approval, certificate of incorporation and by-laws as he is now allowed to charge for filing a certificate of incorporation of a corporation organized under the business corporations law of the state. (1915, c. 115, s. 2; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5212.)

Cross Reference.—As to clerk's fee for filing certificate of incorporation, see § 55-159.

§ 54-79. Amendment of by-laws.—The by-laws adopted by the incorporators and approved by the superintendent of credit unions shall be the by-laws of the corporation, and no amendment to the by-laws shall become operative until such amendment shall have been approved by the superintendent of credit unions, and a copy thereof certified by him, with a certificate of his approval, shall be filed in the office of the clerk of the superior court of the county where the office of the credit union is located. Such approval may be given or withheld by the superintendent of credit unions at his discretion. The county clerk shall receive the same fee for filing as provided in § 54-78. (1915, c. 115, s. 3; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5213.)

§ 54-80. Restriction of use of terms.—The use by any person, copartnership, association, or corporation except corporations formed under the provisions of this subchapter, of any name or title which contains the words "credit union" shall be a misdemeanor: Provided, that the provisions of this section shall not apply to associations or credit union leagues, the membership of which is composed entirely of corporations formed under the provisions of this subchapter. (1915, c. 115, s. 4; 1925, c. 73, s. 3; 1935, c. 87; 1941, c. 236; C. S. 5214.)

Editor's Note.—The 1941 amendment added the proviso.

§ 54-81. Change of place of business.—A credit union may change its place of business on the written approval of the superintendent of credit unions, which written approval shall be filed in the office of the superintendent of credit unions and a duplicate of the approval in the office of the clerk of the superior court of the county where its office was located, and a second duplicate in the office of the clerk of the superior court of the county in which the new office is to be located. Such approval of the superintendent may be given or withheld at his discretion. (1915, c. 115, s. 25; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5215.)

Art. 11. Powers of Credit Unions.

§ 54-82. General nature of business.—A credit union may receive the savings of its members in payment for shares or on deposit; may loan to its members at reasonable rates of interest not exceeding the legal rate, or may invest as hereinafter provided the funds so accumulated, and may undertake such other activities relating to the purpose of the corporation as its by-laws may authorize. (1915, c. 115, s. 5; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5216.)

Editor's Note.—For act relating to withdrawal of deposits from the State Employees' Credit Union, see Session Laws 1943, c. 781.

§ 54-83. Receive deposits.—A credit union may receive on deposit the savings of its members and also nonmembers in such amounts and upon such terms as the board of directors may determine and the by-laws shall provide. (1915, c. 115, s. 16; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5217.)

§ 54-84. Borrowing money.—If the by-laws so provide, a credit union shall have power to borrow money from any source in addition to receiving deposits, but the aggregate amount of such indebtedness shall not at any one time exceed more than four (4) times the sum of its capital, surplus and reserve fund. (1915, c. 115, s. 17; 1925, c. 73, s. 10; 1935, c. 87; C. S. 5218.)

§ 54-85. Authority to execute contracts of guaranty in certain cases.—A credit union may execute such contracts of guaranty as may be necessary to procure credit for its members: Provided, that the said contracts of guaranty shall not place on the said local credit union a liability arising in any one year in excess of ten (10) per cent of the total credit under the said contracts of guaranty handled through that association in a particular year; and provided further, that all such contracts shall be approved by the superintendent of credit unions and each such contract must bear his approval in writing before becoming effective. In assuming such liability the said credit union may require of the individual members being served such security as the board of directors of each such credit union may determine upon. (1925, c. 73, s. 11; 1935, c. 87.)

§ 54-86. Investment of funds.—The capital, deposits, undivided profits and reserve fund of the corporation may be invested in one of the following ways, and in such way only:

1. They may be lent to the members of the corporation in accordance with the provisions of this subchapter.

2. They may be deposited to the credit of the corporation in savings banks, credit unions, building and loan associations, state banks or trust companies, incorporated under the laws of the state, or in National banks located therein. Funds of credit unions deposited in a savings bank, state bank, or trust company which may become insolvent, shall be preferred in the same way that funds of a "credit union" so deposited are preferred under the banking law of the state.

3. A credit union shall keep on deposit at interest in any of such depositories as are enumerated in the next preceding paragraph so much of the reserve fund and capital stock as shall equal five (5) per cent of the total liabilities.

4. Not more than ten per cent of the capital stock and reserve fund of a credit union may be invested in the stock of another local credit

union and not more than twenty-five (25) per cent of the capital stock and reserve fund of a local association may be invested in the stock of a central association. (1915, c. 115, s. 18; 1917, c. 232, ss. 2, 3; 1925, c. 73, ss. 12, 13, 14; 1935, c. 87; 1939, c. 400, s. 1; C. S. 5219.)

Cross Reference.—As to investment in bonds guaranteed by the United States, see § 53-44.

Editor's Note.—The words "building and loan associations," in the second clause under this section were added by Public Laws of 1925, ch. 73.

The act changed the third clause.

The act also inserted the word "local" before the words "credit union" in the fourth clause of the section and added the provisions that follow.

The 1939 amendment changed clause 3.

§ 54-87. Loans.

1. To Members.—A credit union may lend to its members for such purposes and upon such security and terms as the by-laws shall provide and the credit committee shall approve; but security must be taken for any loan in excess of fifty dollars. An indorsed note shall be deemed to be security within the meaning of this section.

2. Installment Loans.— A member who needs funds with which to purchase necessary supplies for growing crops may receive a loan in fixed monthly installments instead of in one sum.

3. Loans to Members of Committee.—The supervisory committee shall appoint a substitute to act on the credit committee in the place of any member in case such member makes application to borrow money from the credit union or becomes surety for any other member whose application for a loan is under consideration.

4. Loans to Persons Not Members Forbidden.—All officers and members of any committees in any way knowingly permitting or participating in making a loan of funds of a credit union to one not a member thereof shall be guilty of a misdemeanor. The credit union shall have the right to recover the amount of such illegal loans from the borrower or from any officers or members of committees who knowingly permitted or participated in the making thereof, or from all of them jointly.

5. Repayment of Loans.—A borrower may repay the whole or any part of his loan on any day on which the office of the corporation is open for the transaction of business. (1915, c. 115, s. 19; 1917, c. 232, s. 4; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5220.)

Cross Reference.—As to loans on mortgages, etc., issued under federal housing act, see § 53-45.

§ 54-88. Rate of interest; penalty.—No corporation organized pursuant to this subchapter shall directly or indirectly charge or receive any interest, discount, or consideration, other than the entrance fee, greater than the legal rate.

Any corporation, any person, the several officers of any corporation, and the members of committees who shall violate the foregoing prohibition shall be guilty of a misdemeanor. The corporation shall also be subject to procedure by the superintendent of credit unions as prescribed herein in article fourteen. (1915, c. 115, s. 20; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5221.)

§ 54-89. Interest or discount rate charged by agricultural association. — An agricultural credit corporation or association, organized under the laws of the State of North Carolina, may charge and collect by way of interest or discount on all loans made for agricultural purposes to farmers, growers and truckers of staple agricultural crops, fruits and vegetables respectively, or for the purpose of raising, breeding, fattening, or marketing of live stock, a rate of interest or discount not to exceed three per centum per annum in excess of the rate of interest or rediscount rate charged by any Federal intermediate credit bank to such agricultural credit corporation or association when rediscounting or purchasing from it the notes of such farmers, growers and truckers: Provided, that the total rate, both interest and rediscount, to the borrower shall not exceed eight per centum (8%) per annum. (1927, c. 101; 1929, c. 43, s. 1; 1931, c. 329.)

Cross Reference.—As to commission in lieu of interest, see §§ 44-57 and 44-58.

§ 54-90. Reserve fund.—All entrance fees, transfer fees, and fines shall, after the payment of organization expenses, be known as reserve income, and shall be added to the reserve fund of the corporation.

At the close of each fiscal year there shall be set apart to the reserve fund twenty per centum of the net income of the corporation which has accumulated during the year. But upon the recommendation of the board of directors, the members at an annual meeting may increase, and whenever such funds equal the amount of the capital may decrease, the proportion of profits which is required by this section to be set apart to the reserve fund. Nor shall the reserve fund in any case exceed the capital of the corporation plus fifty per centum of its other liabilities.

The reserve fund shall belong to the corporation and shall be held to meet contingencies, and shall not be distributed to the members except upon the dissolution of the corporation. (1915, c. 115, s. 21; 1939, c. 400, s. 2; C. S. 5222.)

Editor's Note.—The 1939 amendment substituted "twenty" for "twenty-five" in line two of the second paragraph.

§ 54-91. Dividends.—At the close of the fiscal year a credit union may declare a dividend not to exceed six per cent per annum from the income during the year and which remains after the deduction of expenses, losses, interest on deposits, and the amount required to be set apart to the reserve fund. Dividends shall be paid on all fully paid shares outstanding at the close of the fiscal year, but shares which become fully paid during the year shall be entitled to a proportional part of such dividend calculated from the first day of the month following such payment in full. (1915, c. 115, s. 22; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5223.)

§ 54-92. Voluntary dissolution.—At any meeting specially called to consider the subject, three-fourths of the members present and represented may vote to dissolve the corporation and upon such vote shall signify their consent to such dissolution in writing. Such corporation shall then file in the office of the superintendent of credit unions such consent, attested by its secretary or treasurer and its president or vice-president, with a statement of the names and residences of the existing board of directors of the corporation and the names and residences of its officers duly veri-

fied. The superintendent of credit unions, upon receipt of satisfactory proof of the solvency of the corporation, shall issue to such corporation, in duplicate, a certificate to the effect that such consent and statement have been filed and that it appears therefrom that such corporation has complied with this section. Such duplicate certificate shall be filed by the corporation in the office of the clerk of the superior court of the county in which the corporation has its place of business, and thereupon such corporation shall be dissolved and shall cease to carry on business except for the purpose of adjusting and winding up of its affairs. The corporation, by its board of directors, shall then proceed to adjust and wind up its business and affairs, with power to carry out its contracts, collect its accounts receivable, and to liquidate its assets and apply the same in discharge of debts and obligations of such corporation, and after paying and adequately providing for the payment of such debts and obligations, each share, according to the amount paid thereon, shall be entitled to its proportion of the balance of the assets. The corporation shall continue in existence for the purpose of paying, satisfying, and discharging any existing debts or obligations, collecting and distributing its assets, and doing all other acts required in order to adjust and wind up its business and affairs, and may sue and be sued for the purpose of enforcing such debts and obligations until its business and affairs are fully adjusted and wound up. (1915, c. 115, s. 24; 1925, c. 73, ss. 3, 15; 1935, c. 87; C. S. 5224.)

Editor's Note.—The words "three-fourths of the members present and represented," in the first sentence of this section, were substituted, in lieu of the words "four-fifths of the entire membership of a corporation" which were stricken out, by the Acts of 1925, ch. 73.

§ 54-93. Savings institution; restriction of taxation.—The corporation shall be deemed an institution for savings, and together with all accumulations therein shall not be taxable under any law which shall exempt building and loan associations or institutions for savings from taxation; nor shall any law passed taxing corporations in any form, or the shares thereof, or the accumulations therein, be deemed to include corporations doing business in pursuance of the provisions of this sub-chapter, unless they are specifically named in such law. The shares of credit unions, being hereby regarded as a system for saving, shall not be subject to any stock-transfer tax either when issued by the corporation or transferred from one member to another. (1915, c. 115, s. 26; 1925, c. 73, ss. 3, 16; 1935, c. 87; C. S. 5225.)

Editor's Note.—The words "buildings and loan associations" in the first clause of this section were added by the Public Laws of 1925, ch. 73 and substituted for the words "savings banks," which were stricken out.

Art. 12. Shares in the Corporation.

§ 54-94. Ownership and transfer of shares. — The capital of a credit union shall consist of the payments that have been made to it by the several members thereof on the shares. Shares may be subscribed for and paid in such manner as the by-laws shall prescribe. The credit union shall have a lien on the shares of any member and upon any dividends payable thereon for and to the extent of any loan made to him and of any dues or fines payable by him. The credit union may, upon the resignation or expulsion of a member, cancel the shares of such member and apply the withdrawal value of such shares towards the liquidation of the member's indebtedness.

A credit union may, if the by-laws so provide, charge an entrance fee for each share subscribed, to be paid by the shareholder upon his election to membership.

Fully paid shares of a credit union may be transferred to any person eligible for membership, upon such terms as the by-laws may provide, and the payment of a transfer fee shall not exceed twenty-five cents per share. (1915, c. 115, s. 13; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5226.)

§ 54-95. Shares and deposits for minors and in trust.—Shares may be issued and deposits received in the name of a minor, and such shares and deposits may, in the discretion of the directors, be withdrawn by such minor or his parent or guardian, and in either case payments made on such withdrawals shall be valid. If shares are held or deposits made in trust, the name and residence of the beneficiary shall be disclosed and the account shall be kept in the name of such holder as trustee for such person. Such shares or deposits may, upon the death of the trustee, be withdrawn by the person for whom the shares were held or for whom such deposits were made, or by his legal representatives. (1915, c. 115, s. 14; C. S. 5227.)

§ 54-96. Fines and penalties.—For failure by any member of a credit union to meet his payments on obligations when due, such fines and other penalties may be imposed upon the delinquent member as the by-laws provide. Such fines shall not exceed two per centum per month or a fraction thereof on amounts due, except that a minimum fine of five cents may be imposed. (1915, c. 115, s. 15; 1925, c. 73, s. 3; 1935, c. 87; 1939, c. 400, s. 3; C. S. 5228.)

§ 54-97. Liability of shareholders. — A shareholder of any such corporation, unless the by-laws so provide, shall not be individually liable for the payment of its debts for an amount in excess of the par value of the shares which he owns or for which he has subscribed. (1915, c. 115, s. 26; C. S. 5229.)

Art. 13. Members and Officers.

§ 54-98. Who may become members. — The membership of the corporation shall consist of those persons who have been duly elected to membership and who have subscribed for one or more shares and have paid for the same in whole or in part, together with the entrance fee as provided in the by-laws, and have complied with such other requirements as the by-laws may contain. No credit union shall ever pay any commission or offer compensation for the securing of members or on the sale of shares. (1915, c. 115, s. 6; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5230.)

§ 54-99. Expulsion and withdrawal of members. —The board of directors may expel from the corporation any member who has not carried out his engagement with the corporation, or has been convicted of a criminal offense, or neglects or refuses to comply with the provisions of this

subchapter or of the by-laws, or who habitually neglects to pay his debts, or shall become insolvent or bankrupt. The members at a regularly called meeting may expel from the corporation any member who has become intemperate or in any way financially irresponsible; no member shall be expelled until he has been informed in writing of the charges against him and an opportunity has been given him, after reasonable notice, to be heard thereon.

A member may withdraw from a credit union by filing a written notice of his intention to withdraw.

The amounts paid in on shares or deposits by an expelled or withdrawing member, with any dividends credited to his shares and any interest accrued on his deposits to the date of expulsion or withdrawal, shall be paid to such member, but in the order of expulsion or withdrawal and only as funds therefor become available, after deducting any amounts due to the corporation by such member. The member shall have no other or further right in the credit union or to any of its benefits, but such expulsion or withdrawal shall not operate to relieve the member from any remaining liability to the corporation. (1915, c. 115, s. 23; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5231.)

§ 54-100. Meetings; right of voting.—The fiscal year of every such corporation shall end at the close of business on the thirty-first day of December. The annual meeting of the corporation shall be held at such time and place as the by-laws prescribe. Special meetings may be held by order of the directors or of the supervisory committee, and shall be held upon request in writing of ten per cent of the members. Notice of all meetings of the corporation shall be given in the manner prescribed in the by-laws. At all meetings of members or shareholders a member shall have one vote and but one vote, irrespective of the number of shares that may be held by him, and in case of sickness or other unavoidable absence of a member he shall be allowed to vote by proxy in writing, but no member present shall vote more than one such proxy. At any meeting the members may decide upon any question of interest to the corporation, and overrule the board of directors, and by a three-fourths vote of those present and represented, provided the notice of the meeting shall have specified the question to be considered, may vote to amend the by-laws. (1915, c. 115, s. 8; C. S. 5232.)

§ 54-101. Election of directors and committees.

1. Number Elected.—At the annual meeting the members shall elect a board of directors of not less than five members, a credit committee and a supervisory committee of not less than three members each. However, in credit unions whose business offices are located in places other than incorporated cities, the board of directors as such may also be the credit committee. Except as herein specified, no member of the board shall be a member of either of such committees, nor shall one person be a member of more than one of such committees. All members of committees and all directors, as well as all officers whom they may elect, shall be sworn, and shall hold their several offices for such term as may be determined by the by-laws.

2. Oath of Office.—The oath required of each director, officer, and member of committee shall be the oath of the individual taking the same that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such corporation, and will not knowingly violate or willingly permit to be violated any of the provisions of law applicable to such corporation, and that he is the owner in good faith and in his own right on the books of the corporation of at least one share therein. Such oath shall be subscribed by the individual making it and certified by the officer before whom it is taken, and shall immediately be transmitted to the superintendent of credit unions and filed and preserved in his office. (1915, c. 115, s. 9; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5233.)

§ 54-102. Duties of board of directors.

1. Elect Executive Officers.—At their first meeting and at each first meeting in the fiscal year, the board of directors shall elect from their number a president, vice-president, a secretary, and a treasurer, who shall be the executive officers of the corporation. The offices of secretary and treasurer may, if the by-laws so provide, be held by one person.

2. General Management.—The board of directors shall have the general management of the affairs, funds, and records of the corporation, shall meet as often as may be necessary, and, unless the by-laws shall specifically reserve all or any of these duties to the members, it shall be the special duty of the directors:

1. To act upon all applications for membership and the expulsion of members.

2. To fix the amount of the surety bond which shall be required of each officer having the custody of funds.

3. To determine from time to time the rate of interest which shall be allowed on deposits and charged on loans.

4. To fix the maximum number of shares which may be held by and the maximum amount which may be lent to any one member; to declare dividends; and to recommend amendments to the by-laws.

5. To fill vacancies in the board of directors or in the credit committees until the election and qualification of successors.

6. To have charge of the investment of the funds of the corporation except loans to members, and to perform such other duties as the members may from time to time authorize.

3. Compensation.—No member of the board of directors or of the credit or supervisory committees shall receive any compensation for his services as a member of the board or committees. But the officers elected by the board of directors may receive such compensation as the members may authorize. (1915, c. 115, s. 10; C. S. 5234.)

§ 54-103. Duties of credit committee.—The credit committee shall approve every loan or advance made by the corporation to members. Every application for a loan shall be made in writing and shall state the purpose for which the loan is desired and the security offered. No loan shall be made unless it has received the unanimous

approval of those members of the committee who were present when it was considered, who shall constitute at least a majority of the committee, nor if any member of the committee shall disapprove thereof; but the applicant for a loan may appeal from the decisions of the credit committee to the board of directors. The credit committee shall meet as often as may be required after due notice has been given to each member. (1915, c. 115, s. 11; C. S. 5235.)

§ 54-104. Duties of supervisory committee.—The supervisory committee shall inspect the securities, cash, and accounts of the corporation and supervise the acts of its board of directors, credit committee, and officers. At any time the supervisory committee, by a unanimous vote, may suspend the credit committee or any member of the board of directors, or any officer elected by the board, and by a majority vote may call a meeting of the shareholders to consider any violation of this subchapter or of the by-laws, or any practice of the corporation which, in the opinion of said committee, is unsafe and unauthorized. Within seven days after the suspension of the credit committee the supervisory committee shall cause notice to be given of a special meeting of the members to take such action relative to such suspension as may seem necessary. The supervisory committee shall fill vacancies in their own number until the next regular meeting of the members

At the close of each fiscal year the supervisory committee shall make a thorough audit of the receipts, disbursements, income, assets, and liabilities of the corporation for the fiscal year, and shall make a full report thereon to the directors. This report shall be read at the annual meeting of the members and shall be filed and preserved with the records of the corporation. (1915, c. 115, s. 12; C. S. 5236.)

Art. 14. Supervision and Control.

§ 54-105. Subject to superintendent of credit unions.—Corporations organized under the provisions of this subchapter shall be subject to the supervision of the superintendent of credit unions. (1915, c. 115, s. 7; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5237.)

§ 54-106. Reports; penalties; fees.—1. Every corporation organized under this subchapter shall, in January and in July of each year, make a report of condition to the superintendent of credit unions giving such information as he shall require, which reports shall be verified by oath of the treasurer and by oath of a majority of the supervisory committee, and shall make such other and further reports under like oath as the superintendent shall demand at any time.

2. Each credit union applying on or after July first, one thousand nine hundred forty-one, for a certificate to do business under the provisions of this subchapter shall, before receiving such certificate, pay into the office of the superintendent of credit unions a charter fee of five dollars ($5.00).

3. Each credit union subject to supervision and examination by the superintendent of credit unions, including credit unions in process of voluntary liquidation, shall pay into the office of the superintendent of credit unions supervisory fees as follows: (a) two dollars and fifty cents ($2.50) for the first one thousand dollars ($1,000.00) of assets and fifty cents ($.50) for each additional thousand dollars ($1,000.00) of assets, or fraction thereof, payable during the month of July each year on the basis of total assets as shown by its report of condition made to the superintendent of credit unions as of the previous June thirtieth, or the date most nearly approximately same of each year; and (b) two dollars and fifty ($2.50) for the first one thousand dollars ($1,000.00) of assets and fifty cents ($.50) for each additional thousand dollars ($1,000.00) of assets, or fraction thereof, payable during the month of January each year on the basis of total assets as shown by its report of condition made to the superintendent of credit unions as of the previous December thirty-first, or the date most nearly approximating same of each year: Provided, that no credit union shall be required to pay any supervisory fee until the expiration of twelve months from the date of the issuance of a certificate of incorporation to such credit union.

4. Any such corporation which neglects to make semi-annual reports as provided in paragraph 1 of this section, or any of the other reports required by the superintendent of credit unions at the time fixed by the superintendent, shall forfeit to the superintendent of credit unions five dollars ($5.00) for each day such neglect continues; and, furthermore, the superintendent of credit unions shall have authority, in his discretion, to revoke the certificate of incorporation and take possession of the assets and business of any corporation failing to pay the fees required in this section after serving notice of at least fifteen (15) days upon such corporation of his intention so to do.

5. Moneys collected under this section shall be deposited with the state treasurer of North Carolina and expended, under the terms of the Executive Budget Act, to defray expenses incurred by the office of the superintendent of credit unions in carrying out its supervisory and auditing functions. (1915, c. 115, s. 7; 1925, c. 73, ss. 3, 7; 1935, c. 87; 1941, c. 235; C. S. 5238.)

Editor's Note.—Under the first paragraph of this section it was formerly provided that the report, therein referred to, "shall be verified by the oath of the president, treasurer and secretary, as well as by the oath of a majority of the members of the supervisory committee". By Public Laws 1925, ch. 73, the word "president" was stricken out and the word "and" substituted in lieu of "as well as."

Prior to the 1941 amendment annual reports were required. The amendment changed the provision relating to penalties and added subsections 2, 3 and 5.

§ 54-107. Annual examinations required. — The superintendent of credit unions shall cause every such corporation to be examined once a year and whenever he deems it necessary. The examiners appointed by him shall be given free access to all books, papers, securities, and other sources of information in respect to the corporation; and for the purpose of such examination the superintendent shall have power and authority to subpœna and examine personally, or by one of his deputies or examiners, witnesses on oath and documents, whether such witnesses are members of the corporation or not, and whether such documents are documents of the corporation or not.

(1915, c. 115, s. 7; 1925, c. 73, s. 3; 1935, c. 87; C. S. 5239.)

§ 54-108. Revocation of certificate; liquidation.—If any such corporation shall neglect to make its annual report, as provided in this article, or any other report required by the superintendent of credit unions, for more than fifteen days, or shall fail to pay the charges required, including the fines for delay in filing reports, the superintendent of credit unions shall give notice to such corporation of his intention to revoke the certificate of approval of the corporation for such neglect or failure, and if such neglect or failure continues for fifteen days after such notice, the said superintendent shall, at his discretion, revoke the certificate, and he, personally or by one of his deputies, shall take possession of the property and business of the corporation and retain possession until such time as he may permit it to resume business, or until its affairs be finally liquidated as provided in the banking laws of the state. (1915, c. 115, s. 7; 1925, c. 73, ss. 3, 8; 1935, c. 87; C. S. 5240.)

Editor's Note.—The words "or any other report required by the superindendent of savings and loan associations," (now credit unions), following the words "as provided in this article," in the first part of the section were added by Public Laws 1925, ch. 73.

§ 54-109. Deficits supplied; business discontinued.—If it shall appear to the superintendent of credit unions by any examination or report that any such corporation is insolvent, or that it has violated any of the provisions of this subchapter or any other law of the state, he may, by an order made over his hand and official seal, after a hearing or an opportunity for a hearing given the accused corporation, direct any such corporation to discontinue the illegal methods or practices mentioned in the order to make good any deficit. A deficit, in the discretion of the superintendent of credit unions, may be made good by an assessment on the members in proportion to the shares held by each member. If any such corporation shall not comply with such order within the time stipulated after the same shall have been delivered in person or shall have been mailed to the last address filed by such corporation in the office of the superintendent of credit unions (provided, that not more than thirty (30) days shall be allowed) the superintendent shall thereupon take possession of the property and business of such corporation and retain such possession until such time as he may permit it to resume business or its affairs be finally liquidated, as provided in the banking law of the state. (1915, c. 115, s. 7; 1925, c. 73, ss. 3, 9; 1935, c. 87; C. S. 5241.)

Editor's Note.—The provision, in the third sentence of this section, that "the time stipulated after the same shall have been delivered in person or shall have been mailed to the last address filed by such corporation in the office of the superintendent of credit unions (Provided, that not more than thirty (30) days shall be allowed)," was substituted by the acts of 1925, ch. 73, in place of the former provision "sixty days after the same shall have been mailed to the last address filed by such corporation in the division of markets and rural co-operation," which was stricken out by same act.

Art. 15. Central Associations.

§ 54-110. Central association.—(1) Upon application of seven or more credit unions for a central corporation for the purpose of securing credit and discounting notes with any outside agency, and to act as a clearing house in the settlement of these accounts, the superintendent of credit unions shall, upon receipt and investigation of charters and by-laws signed by the secretary-treasurers of the several credit unions, approve same if he is satisfied they are in conformity with and give reasonable assurance that the affairs of the corporation will be administered in accordance with this article.

(2) The procedure and plan of organization, method of operation, officers and their duties, supervision, liquidation and dissolution shall be the same as with any local credit union; except that the membership of a central credit union shall be institutional and only local credit unions can become members, unless the by-laws otherwise prescribe.

(3) Any local credit union can become a member of a central association by subscribing to any number of shares and paying for same, in whole or in part, not to be in excess of twenty-five per cent (25%) of their share capital and reserve fund.

(4) Deposits in the central association may be accepted from any source in such amounts and upon such terms as the board of directors may determine and the by-laws shall prescribe.

(5) The secretary-treasurer shall cast the one vote of local member credit unions in its annual election of officers and at all meetings of the member associations unless the by-laws otherwise prescribe.

(6) A central credit union shall not charge more than three-fourths (¾) of one per cent for discounting paper, provided that no discount rate shall make the interest higher than the legal rate.

(7) Section 54-84 shall not apply to a central association, and such an association shall have power to borrow money from any source in amounts not in excess of ten times the amount of its capital and reserve fund.

(8) A central credit union shall not be taxable under any law which shall exempt any local credit union. (1925, c. 73, s. 17; 1935, c. 87.)

SUBCHAPTER IV. CO-OPERATIVE ASSOCIATIONS.

Art. 16. Organization of Associations.

§ 54-111. Nature of the association.—Any number of persons, not less than five, may associate themselves as a mutual association, society, company, or exchange, for the purpose of conducting any agricultural, horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business on the mutual plan. For the purposes of this subchapter, the words association, company, corporation, exchange, society, or union shall be construed to mean the same; Provided, that the membership of agricultural organizations incorporated under this subchapter shall consist of producers of agricultural products, handled by such organizations or by organizations owned and controlled by such producers. (1915, c. 144, s. 1; 1925, c. 179, ss. 1, 2; 1931, c. 447; C. S. 5242.)

Cross Reference.—As to power of a mutual corporation to create stock, see § 55-72.

Editor's Note. — This and the following sections were amended by Public Laws 1925, ch. 179 by striking out the word "co-operative" wherever it occurred in this subchapter and inserting in the lieu thereof the word "mutual."

The scope of this subchapter was enlarged by the 1925 act which added to the number of societies that may be organized thereunder the following: "horticulture, forestry, and telephone, electric light, power, storage, refrigeration, flume, irrigation, water and sewerage."

The Act of 1931 added the proviso to this section.

§ 54-112. Use of term restricted.—No corporation or association hereinafter organized for doing business for profit in this state shall be entitled to use the term "mutual" as part of its corporate or other business name or title, unless it has complied with the provisions of this subchapter; and any corporation or association violating the provisions of this section may be enjoined from doing business under such name at the instance of any shareholder of any association legally organized under this subchapter. (1915, c. 144, s. 18; 1925, c. 179, s. 1; C. S. 5243.)

§ 54-113. Articles of agreement.—The persons desiring to organize such association shall sign and acknowledge written articles which shall contain the name of the association and the names and residences of the persons forming the same. Such articles shall also contain a statement of the purposes of the association and shall designate the city, town, or village where its principal place of business shall be located. The articles shall also state the amount of authorized capital stock, the number of shares subscribed, and the par value of each. No shareholder in any corporation organized under this subchapter shall be personally liable for any debt of the corporation. (1915, c. 144, s. 2; C. S. 5244.)

§ 54-114. Certificate of incorporation. — The original articles of incorporation of corporations organized under this subchapter, or a true copy thereof, verified as such by the affidavits of two of the signers thereof, shall be filed with the secretary of state. A like verified copy of such articles and certificate of the secretary of state, showing the date when such articles were filed with and accepted by the secretary of state, within thirty days of such filing and acceptance, shall be filed with and recorded by the clerk of the superior court of the county in which the principal place of business of the corporation is to be located, and no corporation shall, until such articles be left for record, have legal existence. The clerk of court shall forthwith transmit to the secretary of state a certificate stating the time when such copy was recorded. Upon a receipt of such certificate, the secretary of state shall issue a certificate of incorporation. (1915, c. 144, s. 3; C. S. 5245.)

§ 54-115. Fees for incorporation. — For filing the articles of incorporation of corporations organized under this subchapter, there shall be paid the secretary of state ten dollars and his fees allowed by law, and for the filing of an amendment to such articles, five dollars and his fees allowed by law: Provided, that when the authorized capital stock of such corporations shall be less than one thousand dollars, such fee for filing either the articles of incorporation or amendments thereto shall be two dollars. For recording copy of such articles, the clerk of court shall receive a fee of fifty cents, to be paid by the person presenting such papers for record. (1915, c. 144, s. 4; C. S. 5246.)

§ 54-116. By-laws adopted. — At the time of making the articles of incorporation the incorporators shall make by-laws which shall provide:

1. The name of the corporation.
2. The purposes for which it is formed.
3. Qualifications for membership.
4. The date of the annual meeting; the manner in which members shall be notified of meetings; the manner of conducting the meetings; the number of members which shall constitute a quorum at the meetings, and regulations as to voting.
5. The number of members of the board of directors; powers and duties; the compensation and duties of officers elected by the board of directors.
6. In the case of selling agencies or productive societies, regulations for grading.
7. In the case of selling agencies or productive societies, regulations governing the sale of products by the members through the organization.
8. The par value of the shares of capital stock.
9. The conditions upon which shares may be issued, paid in, transferred, and withdrawn.
10. The manner in which the reserve fund shall be accumulated.
11. The manner in which the dividends shall be determined and paid to members.
12. Associations, societies, companies or exchanges, organized hereunder to engage in the telephone or electric light business upon a mutual basis, shall adopt a by-law limiting the patrons and subscribers to members of the association. (1915, c. 144, s. 5; 1925, c. 179, s. 4; C. S. 5247.)

Editor's Note.—This section was amended by Public Laws 1925, ch. 179, by adding thereto subsection twelve.

§ 54-117. General corporation law applied; dealing in products of non-members. — All mutual associations shall be maintained in accordance with the general corporation law, except as otherwise provided for in this subchapter. And no corporation or association hereafter organized under this subchapter for doing business in this State shall be permitted to deal in the products of non-members to an amount greater in value than such as are handled by it for members. (1915, c. 144, s. 17; 1925, c. 179, s. 1; 1931, c. 447, s. 2; C. S. 5248.)

Editor's Note.—The Act of 1931 added the second sentence to this section.

§ 54-118. Other corporations admitted.—All mutual corporations, companies, or associations heretofore organized and doing business under prior statutes, or which have attempted to so organize and do business, shall have the benefit of all of the provisions of this subchapter, and be bound thereby on filing with the secretary of state a written declaration, signed and sworn to by the president and secretary, to the effect that the mutual company or association has by a majority vote of its shareholders decided to accept the benefits of and to be bound by the provisions of this subchapter. No association organized under this subchapter shall be required to do or perform anything not specifically required herein, in order to become a corporation. (1915, c. 144, s. 16; 1925, c. 179, s. 1; C. S. 5249.)

Art. 17. Stockholders and Officers.

§ 54-119. Certificate for stock fully paid. — Certificates of stock shall not be issued to any subscriber until fully paid, but the by-laws of the association may allow subscribers to vote as shareholders: Provided, part of the stock subscribed for has been paid in cash. (1915, c. 144, s. 11; C. S. 5250.)

§ 54-120. Ownership of shares limited. — No shareholder in any such association shall own shares of a greater aggregate par value than twenty per cent of the paid-in capital stock, except as hereinafter provided, or be entitled to more than one vote. A mutual association shall reserve the right of purchasing the stock of any member whose stock is for sale, and may restrict the transfer of stock to such persons as are made eligible to membership in the by-laws. (1915, c. 144, s. 9; 1925, c. 179, s. 1; C. S. 5251.)

§ 54-121. Shares issued on purchase of business. —Whenever an association, created under this subchapter, shall purchase the business of another association or person, it may pay for the same in whole or in part by issuing to the selling association or persons shares of its capital stock to an amount which at par value would equal the fair market value of the business so purchased, and in such case the transfer to the association of such business at such valuation shall be equivalent to payment in cash for the shares of stock so issued. (1915, c. 144, s. 10; C. S. 5252.)

§ 54-122. Absent members voting.—At any regularly called general or special meeting of the shareholders a written vote received by mail from any absent shareholder, and signed by him, may be read in such meeting, and shall be equivalent to a vote of such of the shareholders so signing: Provided, he has been previously notified in writing of the exact motion or resolution upon which such vote is taken, and a copy of same is forwarded with and attached to the vote so mailed by him. In case of sickness or other unavoidable absence of a member, he shall be allowed to vote by proxy in writing; but no member shall vote more than one such proxy. (1915, c. 144, s. 12; C. S. 5253.)

§ 54-123. Directors and other officers. — Every such association shall be managed by a board of not less than five directors. The directors shall be elected by and from the stockholders of the association at such time and for such term of office as the by-laws may prescribe, and shall hold office for time for which elected and until their successors are elected and shall enter upon the discharge of such duties as are prescribed in the by-laws; but a majority of the stockholders shall have the power at any regular or special stockholders' meeting, legally called, to remove any director or officer for cause, and fill the vacancy, and thereupon the director or officer so removed shall cease to be a director or officer of the association. The officers of every such association shall be a president, one or more vice-presidents, a secretary and treasurer, who shall be elected annually by the directors, and each of the officers must be a director of the association. The office of secretary and treasurer may be combined, and when so combined the person filling the office shall be secretary-treasurer. (1915, c. 144, s. 6; C. S. 5254.)

Art. 18. Powers and Duties.

§ 54-124. Nature of business authorized. — An association created under this subchapter shall have power to conduct any agricultural, horticultural, forestry, dairy, mercantile, mining, manufacturing, telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage, or mechanical business, on the mutual plan. (1915, c. 144, s. 8; 1925, c. 179, ss. 1, 3; C. S. 5255.)

§ 54-125. Amendment of articles.—The association may amend its articles of incorporation by a majority vote of its shareholders at any regular shareholders' meeting, or any special shareholders' meeting called for that purpose, on ten days notice to the shareholders. The power to amend shall include the power to increase or diminish the amount of capital stock and the number of shares: Provided, the amount of the capital stock shall not be diminished below the amount of the paid up capital at the time the amendment is adopted. Within thirty days after the adoption of an amendment to its articles of incorporation, an association shall cause a copy of such amendment adopted to be recorded in the office of the secretary of state and of the clerk of court of the county where the principal place of business is located. (1915, c. 144, s. 7; C. S. 5256.)

§ 54-126. Apportionment of earnings. — The directors, subject to revision by the association at any general or special meeting, shall apportion the earnings by first paying dividends on the paid-up capital stock, not exceeding six per cent per annum, then setting aside not less than ten per cent of the net profits for a reserve fund, until an amount has been accumulated in the reserve fund equal to thirty per cent of the paid-up capital stock, and not less than two per cent thereof for an educational fund to be used in teaching coöperation, and the remainder of the net profits by uniform dividend upon the amount of purchases of shareholders and upon the wages and salaries of employees, and one-half of such uniform dividend to nonshareholders on the amount of their purchase, which may be credited to the account of such nonshareholders on account of capital stock of the association; but in selling agencies such as fruit, truck, peanuts, and cotton growers' associations, and in productive associations such as creameries, canneries, warehouses, factories, and the like, dividends shall be prorated on raw materials delivered instead of on goods purchased. In case the association is both a selling and productive concern, or a service and distributing association the dividends may be on both raw material delivered and on goods or service purchased by patrons. (1915, c. 144, s. 13; 1925, c. 179, s. 5; C. S. 5257.)

Editor's Note.—The words, "or a service and distributing association" and "or service," in the last sentence of this section, were added, to the sentence as it formerly stood, by Public Laws 1925, ch. 179.

§ 54-127. Time of distribution. — The profits or net earnings of such associations shall be distributed to those entitled thereto, at such times as the by-laws shall prescribe, which shall be as

often as once in twelve months. (1915, c. 144, s. 14; C. S. 5258.)

§ 54-128. Annual reports.—Every association organized under the provisions of this subchapter shall annually, on or before the first day of March of each year, make a report to the secretary of state; such report shall contain the name of the company, its principal place of business in this state, and generally a statement as to its business, showing total amount of business transacted, amount of capital stock subscribed for and paid in, number of shareholders, total expenses of operation, amount of indebtedness or liabilities, and its profits and losses. A copy of such report shall also be filed with the division of markets in the Department of Agriculture. (1915, c. 144, s. 15; C. S. 5259.)

SUBCHAPTER V. MARKETING ASSOCIATIONS.

Art. 19. Purpose and Organization.

§ 54-129. Declaration of policy.—In order to promote, foster, and encourage the intelligent and orderly producing and marketing of agricultural products through coöperation, and to eliminate speculation and waste; and to make the distribution of agricultural products as direct as can be efficiently done between producer and consumer; and to stabilize the marketing problems of agricultural products this subchapter is enacted. (1921, c. 87, s. 1; 1935, c. 230, s. 1; C. S. 5259(a).)

Editor's Note. — An excellent discussion of co-operation marketing will be found in 1 N. C. Law Rev. 216, and a review of the cases in 2 N. C. Law Rev. 222. Volume 27 of the Columbia Law Review pp. 827 et seq. contains an article on the constitutionality of this and the corresponding statutes of other states as being in restraint of trade. The soundness of the North Carolina decisions upholding the statute is questioned.

Public Laws of 1935 inserted the words "producing and."

Validity.—"The Tobacco Growers Co-operative Association Act, this and the following sections of the chapter, was construed and its validity sustained in Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174." Tobacco Growers Co-Op. Ass'n v. Bissett, 187 N. C. 180, 182, 121 S. E. 446.

Same—Assailed on Ground of Insufficient Signers. — In Pittman v. Tobacco Growers Co-op. Ass'n, 187 N. C. 340, 341, 121 S. E. 634, the Court said that the validity cannot be assailed by alleging an insufficient number of signers. This is a collateral attack and is not a direct attack by the State upon a quo warranto to vitiate the incorporation. Besides, there was no evidence of an insufficient sign-up, and if the plaintiff could bring a collateral attack to vitiate the organization, the burden is upon him to produce evidence to that effect.

Withdrawal of Charter. — It was held in the Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174, that since an association formed under this act had no capital, stock, surplus or credit except as given by the act, the legislature may withdraw its charter at any time and for this reason a monopoly is safely guarded against. For a constructive criticism of this holding, see 27 Columbia Law Rev. 827 et seq.

§ 54-130. Definitions.—As used in this subchapter—

(a) The term "agricultural products" shall include horticultural, viticultural, forestry, dairy, livestock, poultry, bee, and any farm products;

(b) The term "member" shall include actual members of associations without capital stock and holders of stock in associations organized with capital stock;

(c) The term "association" means any corporation organized under this subchapter; and

(d) The term "person" shall include individuals, firms, partnerships, corporations, and associations.

Associations organized hereunder shall be deemed nonprofit, inasmuch as they are not organized to make profits for themselves, as such, or for their members, as such, but only for their members as producers.

This subchapter shall be referred to as the "Coöperative Marketing Act." (1921, c. 87, s. 2; 1935, c. 436, s. 1; C. S. 5259(b).)

Editor's Note.—The 1935 amendment omitted "common" which preceded the word "stock."

§ 54-131. Who may organize. — Five (5) or more persons engaged in the production of agricultural products may form a nonprofit, coöperative association, with or without capital stock, under the provisions of this subchapter. (1921, c. 87, s. 3; C. S. 5259(c).)

§ 54-132. Purposes. — An association may be organized to engage in any activity in connection with the producing, marketing or selling of the agricultural products of its members and other farmers, or with the harvesting, preserving, drying, processing, canning, packing, storing, handling, shipping, or utilization thereof, of the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling, or supplying to its members of machinery, equipment, or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein. (1921, c. 87, s. 4; 1933, c. 350, s. 2; 1935, c. 230, s. 2; C. S. 5259(d).)

Editor's Note.—Public Laws of 1933, c. 350, inserted, near the beginning of this section, the words "and other farmers" after the word "members."

The amendment of 1935 inserted the word "producing" preceding the word "marketing."

§ 54-133. Preliminary investigation. — Every group of persons contemplating the organization of an association under this subchapter is urged to communicate with the chief of the division of markets, who will inform it whatever a survey of the marketing conditions affecting the commodities to be handled by the proposed association indicates regarding probable success. (1921, c. 87, s. 5; C. S. 5259(e).)

§ 54-134. Articles of incorporation. — Each association formed under this subchapter must prepare and file articles of incorporation, setting forth:

(a) The name of the association.

(b) The purposes for which it is formed.

(c) The place where its principal business will be transacted.

(d) The term for which it is to exist, not exceeding fifty (50) years.

(e) The names and addresses (not less than five) of those who are to serve as directors for the first term or until the election of their successors.

(f) If organized without capital stock, whether the property rights and interest of each member shall be equal or unequal; and if unequal, the article shall set forth the general rule or rules applicable to all members by which the property rights and interests, respectively, of each member

may and shall be determined and fixed; and this association shall have the power to admit new members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules. This provision of the articles of incorporation shall not be altered, amended, or repealed except by the written consent or the vote of three-fourths of the members.

(g) If organized with capital stock, the amount of such stock and the number of such shares into which it is divided and the par value thereof. The capital stock may be divided into preferred and common stock. If so divided, the articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the number of shares of stock to which no preference is granted and the nature and extent of the preference and the privileges granted to each.

In addition to the foregoing, the petition for articles of incorporation may contain any provision consistent with law with respect to management, regulation, government, financing, indebtedness, membership, the establishment of voting districts and the election of delegates for representative purposes, the issuance, retirement and transfer of its stock, if formed with capital stock, or any provisions relative to the way or manner in which it shall operate with respect to its members, officers, or directors, and any other provisions relating to its affairs; provided that nothing set forth in this paragraph shall be construed as limiting any of the rights or powers otherwise given to such associations.

The articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this state to take and certify acknowledgments of deeds and conveyances; and shall be filed in accordance with the provisions of the general corporation law of this state; and when so filed the said articles of incorporation, or certified copies thereof, shall be received in all the courts of this state, and other places, as prima facie evidence of the facts contained therein, and of the due incorporation of such association. A certified copy of the articles of incorporation shall also be filed with the chief of the division of markets. (1921, c. 87, s. 8; 1935, c. 230, ss. 3, 4; C. S. 5259(f).)

Editor's Note.—The amendment of 1935 changed subsection "(e)" of this section and added the next to the last paragraph in its entirety.

When Agreement Becomes Binding. — The agreement to form an association under this subchapter, becomes binding at once upon its being accepted by the association after incorporation. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

§ 54-135. Amendments to articles of incorporation.—The articles of incorporation may be altered or amended at any regular meeting, or any special meeting called for that purpose. An amendment must first be approved by two-thirds of the directors and then adopted by a vote representing a majority of a quorum of the members attending a meeting of which notice of the proposed amendment shall have been given. Amendments to the articles of incorporation, when so adopted, shall be filed in accordance with the provisions of the general corporation law of this state. (1921, c. 87, s. 9; 1935, c. 230, s. 5; C. S. 5259(g).)

Cross Reference.—As to filing amendments to articles of incorporation generally, see § 55-31.

Editor's Note.—The amendment of 1935 changes the second sentence to this section. Prior to the amendment the adoption was by a majority of all members rather than by a majority of the quorum of the members attending a meeting.

§ 54-136. By-laws. — Each association incorporated under this subchapter must, within thirty (30) days after its incorporation, adopt for its government and management a code of by-laws, not inconsistent with the powers granted by this subchapter. A majority vote of a quorum of the members or stockholders attending a meeting, of which notice of the proposed by-law or by-laws shall have been given, is sufficient to adopt or amend the by-laws. Each association under its by-laws may also provide for any or all of the following matters:

(a) The time, place, and manner of calling and conducting its meetings.

(b) The number of stockholders or members constituting a quorum.

(c) The right of members or stockholders to vote by proxy or by mail, or by both, and the conditions, manner, form, and effects of such votes.

(d) The number of directors constituting a quorum.

(e) The qualifications, compensations, and duties and terms of office of directors and officers; time of their election, and the mode and manner of giving notice thereof.

(f) Penalties for violations of the by-laws.

(g) The amount of entrance, organization, and membership fees, if any; the manner and method of collection of the same, and the purposes for which they may be used.

(h) The amount which each member or stockholder shall be required to pay annually or from time to time, if at all, to carry on the business of the association, the charge, if any, to be paid by each member or stockholder for services rendered by the association to him, and the time of payment and the manner of collection; and the marketing contract between the association and its members or stockholders which every member or stockholder may be required to sign.

(i) The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time, and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members, and of the shares of common stock; the conditions upon which, and the time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association, and mode, manner, and effect of the expulsion of a member; manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder, or upon the expulsion of a member or forfeiture of his membership, or at the option of the association, by conclusive appraisal by the board of directors. In case of the withdrawal or expulsion

of a member the board of directors shall equitably and conclusively appraise his property interests in the association, and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion or withdrawal. (1921, c. 87, s. 10; 1935, c. 230, s. 6; C. S. 5259(h).)

Editor's Note.—The amendment of 1935 changed the second sentence to this section. Prior to the amendment the majority vote of all members was required instead of a majority vote of a quorum of stockholders attending a meeting.

§ 54-137. General and special meetings; how called.—In its by-laws each association shall provide for one or more regular meetings annually. The board of directors shall have the right to call a special meeting at any time, and ten per cent of the members or stockholders may file a petition stating the specific business to be brought before the association, and demand a special meeting at any time. Such meeting must thereupon be called by the directors. Notice of all meetings, together with a statement of the purposes thereof, shall be mailed to each member at least ten days prior to the meeting: Provided, however, that the by-laws may require instead that such notice may be given by publication in a newspaper of general circulation, published at the principal place of business of the association. (1921, c. 87, s. 11; C. S. 5259(i).)

§ 54-138. Conflicting laws not to apply.—Any provisions of law which are in conflict with this subchapter shall not be construed as applying to the associations herein provided for. (1921, c. 87, s. 20; C. S. 5259(j).)

§ 54-139. Limitation of use of term "coöperative".—No person, firm, or corporation, or association hereafter organized or doing business in this state shall be entitled to use the word "coöperative" as part of its corporate or other business name or title unless it has complied with the provisions of this subchapter. (1921, c. 87, s. 21; C. S. 5259(k).)

§ 54-140. Association heretofore organized may adopt the provisions of this subchapter.—Any corporation or association organized under previously existing statutes may, by a majority vote of its stockholders or members, be brought under the provisions of this subchapter by limiting its membership and adopting the other restrictions as provided herein. It shall make out in duplicate a statement signed and sworn to by its directors, upon forms supplied by the secretary of state, to the effect that the corporation or association has by a majority vote of its stockholders or members decided to accept the benefits and be bound by the provisions of this subchapter. Articles of incorporation shall be filed as required in § 54-134, except that they shall be signed by the members of the board of directors. The filing fee shall be the same as for filing an amendment to articles of incorporation. (1921, c. 87, s. 24; C. S. 5259(l).)

Cross Reference.—As to fees for filing an amendment to articles of incorporation, see § 54-144.

§ 54-141. Associations not in restraint of trade.—No association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily, nor shall the marketing contracts or agreements between the association and its members, or any agreements authorized in this subchapter be considered illegal or in restraint of trade. (1921, c. 87, s. 26; C. S. 5259(m).)

Purpose and Effect of Act.—This chapter, is an enabling act whereby an organization among tobacco growers may be formed by the voluntary act of those joining therein for handling the product of its members, to enable them to obtain a fair price therefor without profit to the organization itself, in opposition to any agreement among the manufacturers or others that may have a contrary effect, and under conditions that will keep the public informed of its methods, and control them under governmental supervision when they go beyond a protective policy or become monopolistic in effect; and the statute, and the organization formed in pursuance thereof, are not objectionable as being in restraint of interstate commerce, or contrary to the law against monopolies or the public policy or Constitution of this State. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

Presumption in Favor of Validity.—The legal presumption is in favor of the validity of the marketing contract made by a member with the coöperative association, in an action by the latter against the former for its breach, which presumption will only yield when its illegal character plainly appears; and in this case there is nothing appearing that would indicate the association proposed to sell the member's tobacco for a greater sum than its true or actual value, or that it was acting in violation of the Anti-trust Law, or in restraint of trade. Tobacco Growers Co-op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

Governmental Control as Affecting.—The governmental control to be exercised as herein prescribed renders the coöperative plan for the protection of its own members incapable of exercise to the extent of a monopoly or restraint of trade prohibited by law. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

§ 54-142. Application of general corporation laws.—The provisions of the general corporation laws of this state, and all powers and rights thereunder, shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this subchapter. (1921, c. 87, s. 28; C. S. 5259(o).)

Effect of Period Limiting Existence.—The provisions in the charter that an association under the provision of the coöperative marketing acts exists for five years, is the same as applies to a period limited for the existence of other corporations formed under other legislative acts, and does not contemplate that the association hold over the crops raised in one year for one or more successive years, such being destructive of the purposes of the association as contemplated by the statute. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

§ 54-143. Annual license fees.—Each association organized hereunder shall pay an annual license fee of ten dollars ($10), but shall be exempted from all franchise or license taxes. (1921, c. 87, s. 29; C. S. 5259(p).)

Cross Reference.—As to listing property for taxes, see § 105-316.

§ 54-144. Filing fees.—For filing articles of incorporation, an association organized hereunder shall pay ten dollars ($10); and for filing an amendment to the articles, two dollars and one-half ($2.50). (1921, c. 87, s. 30; C. S. 5259(q).)

Art. 20. Members and Officers.

§ 54-145. Members.—(a) Under the terms and conditions prescribed in its by-laws, an association may admit as members, or issue common stock, only to persons engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the produc-

tion of such products and any lessors and landlords who receive as rent part of the crop raised on the leased premises.

(b) If a member of a nonstock association be other than a natural person, such member may be represented by any individual, associate, officer, or member thereof, duly authorized in writing.

(c) One association organized hereunder may become a member or stockholder of any other association or associations, organized hereunder. (1921, c. 87, s. 7; C. S. 5259(r).)

§ 54-146. Directors; election.—(a) The affairs of the association shall be managed by a board of not less than five directors, elected by the members or stockholders from their own number. The by-laws may provide that the territory in which the association has members shall be divided into districts, and that the directors shall be elected according to such districts. In such case the by-laws shall specify the number of directors to be elected by each district, the manner and method of reapportioning the directors and of redistricting the territory covered by the association. The by-laws may provide that primary elections should be held in each district to elect the directors apportioned to such districts, and the result of all such primary elections must be ratified by the next regular meeting of the association.

(b) The by-laws shall provide that one or more directors shall be appointed by the director of agricultural extension or any other public official or commission. The directors so appointed need not be members or stockholders of the association, but shall have the same powers and rights as other directors.

(c) An association may provide a fair remuneration for the time actually spent by its officers and directors in its service. No director, during the term of his office, shall be a party to a contract for profit with the association differing in any way from the business relations accorded regular members or holders of common stock of the association, or to any other kind of contract differing from terms generally current in that district.

(d) When a vacancy on the board of directors occurs, other than by expiration of term, the remaining members of the board, by a majority vote, shall fill the vacancy, unless the by-laws provide for an election of directors by districts. In such case the board of directors shall immediately call a special meeting of the members or stockholders in that district to fill the vacancy: Provided, that this subsection shall not apply to the director or directors appointed under the provisions of subsection (b) of this section: Provided further, that any vacancy occurring in the office of a director appointed under subsection (b) of this section shall be filled in the same manner as the original appointment was made. (1921, c. 87, s. 12; C. S. 5259(s).)

§ 54-147. Election of officers.—The directors shall elect from their number a president and one or more vice presidents. They shall also elect a secretary and treasurer, who need not be directors, and they may combine the two latter offices and designate the combined office as secretary-treasurer. The treasurer may be a bank or any depository, and as such shall not be considered an officer, but as a function of the board of directors. In such case the secretary shall perform the usual accounting duties of the treasurer, excepting that the funds shall be deposited only as authorized by the board of directors. (1921, c. 87, s. 13; C. S. 5259(t).)

§ 54-148. Stock; membership certificates; when issued; voting; liability; limitation on transfer of ownership.—

(a) When a member of an association established without capital stock has paid his membership fee in full, he shall receive a certificate of membership.

(b) No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note, but such retention as security shall not affect the members' right to vote.

(c) Except for debts lawfully contracted between him and the association, no member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

(d) A coöperative association, incorporated under this subchapter, may fix or limit in its by-laws the amount of stock which one member might own in said association.

(e) No member or stockholder shall be entitled to more than one vote.

(f) Any association organized with stock under this subchapter may issue preferred stock, with or without the right to vote. Such stock may be redeemable or retirable by the association on such terms and conditions as may be provided for by the articles of incorporation and printed on the face of the certificate.

(g) The by-laws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of the agricultural products handled by the association, and such restrictions must be printed upon every certificate of stock subject thereto.

(h) The association may at any time, except when the debts of the association exceed fifty per cent (50%) of the assets thereof, buy in or purchase its common stock at book value thereof as conclusively determined by the board of directors, and pay for it in cash within one (1) year thereafter. (1921, c. 87, s. 14; 1935, c. 436, s. 2; C. S. 5259(u).)

Editor's Note.—The amendment of 1935 changed subsection (d) of this section. Prior to the amendment no stockholder could own more than one-twentieth of the common stock and the association could in its by-laws limit the amount to less than one-twentieth.

§ 54-149. Removal of officer or director.—Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by ten per cent of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the association, and by a vote of a majority of the members, the

association may remove the officer or director and fill the vacancy. The director or officer against whom such charges have been brought shall be informed in writing of the charges previous to the meeting, and shall have an opportunity at the meeting to be heard in person or by counsel, and to present witnesses; and the person or persons bringing the charges against him shall have the same opportunity.

In case the by-laws provide for election of directors by districts, with primary elections in each district, then the petition for removal of a director must be signed by twenty per cent of the members residing in the district from which he was elected. The board of directors must call a special meeting of the members residing in that district to consider the removal of the director. By a vote of the majority of that district, the director in question shall be removed from office: Provided, that this section shall not apply to directors appointed under subsection (b) of § 54-146. (1921, c. 87, s. 15; C. S. 5259(v).)

§ 54-150. Referendum.—Upon demand of one-third of the entire board of directors, any matter that has been approved or passed by the board must be referred to the entire membership of the stockholders for decision at the next special or regular meeting: Provided, however, that a special meeting may be called for the purpose. (1921, c. 87, s. 16; C. S. 5259(w).)

Art. 21. Powers, Duties, and Liabilities.

§ 54-151. Powers. — Each association incorporated under this subchapter shall have the following powers:

(a) To engage in any activity in connection with the producing, marketing, selling, harvesting, preserving, drying, processing, canning, packing, storing, handling, or utilization of any agricultural products produced or delivered to it by its members and other farmers; or the manufacturing or marketing of the by-products thereof; or in connection with the purchase, hiring, or use by its members of supplies, machinery, or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No such association, during any fiscal year thereof, shall deal in or handle products, machinery, equipment, supplies, and/or perform services for and on behalf of non-members to an amount greater in value than such as are dealt in, handled, and/or performed by it for and on behalf of members during the same period.

(b) To borrow money and to make advances to members and other farmers who deliver agricultural products to the association.

(c) To act as the agent or representative of any member or members in any of the above mentioned activities.

(d) To purchase or otherwise acquire, and to hold, own, and exercise all rights or ownership in, and to sell, transfer, or pledge shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the handling or marketing of any of the products handled by the association, or engaged in the financing of the association.

(e) To establish reserves and to invest the funds thereof in bonds or such other property as may be provided in the by-laws.

(f) To buy, hold, and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conducting and operation of any of the business of the association, or incidental thereto.

(g) To do each and everything necessary, suitable, or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition, to exercise and possess all powers, rights, and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and in addition, any other rights and powers, and privileges granted by the laws of this state to ordinary corporations, except such as are inconsistent with the express provisions of this subchapter; and to do any such thing anywhere. (1921, c. 87, s. 6; 1933, c. 350, ss. 3, 4; 1935, c. 230, ss. 7-9; C. S. 5259(x).)

Editor's Note.—Public Laws of 1933, c. 350, made this section applicable to a certain extent to other farmers not members. Prior to the amendment the association could not handle the agricultural products of a non-member. See 11 N. C. Law Rev. 212, for review of this section as amended 1933.

Near the beginning of subsection (a) the amendment of 1935 inserted the word "producing." The amendment also changed the last sentence of that subsection and added the last clause of subsection (d).

Formation of Subsidiary Companies.—Objection to the validity of the Coöperative Marketing Act that an organization of tobacco growers thereunder has formed subsidiary or minor companies to cure tobacco, redry it, and store it, prize it, and get it ready for market, is without merit, the money for such purpose being very small, specifically limited and under a complete system for its return to its members who have contributed it, it being necessary for the association to own or control enough of the facilities to make effective the authorized purpose of its organization. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

§ 54-152. Marketing contract.—(a) The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over ten years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association or any facilities to be created by the association. The contract may provide that the association may sell or resell the products of its members, with or without taking title thereto, and pay over to its members the resale price, after deducting all necessary selling, overhead, and other costs and expenses, including interest on preferred stock, not exceeding eight per cent per annum, and reserve for retiring the stock, if any; and other proper reserves; and interest not exceeding eight per cent per annum upon common stock.

(b) The by-laws and the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees in case any action is brought upon the contract by the association; and any such provisions shall

be valid and enforceable in the courts of this state.

(c) In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract, and to a decree of specific performance thereof. Pending the adjudication of such an action, and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member. (1921, c. 87, s. 17; C. S. 5259(y).)

Validity of Standard Contract. — The provisions of the standard contract made by the Tobacco Co-operative Marketing Association with its members are valid under a constitutional statute, and upon the alleged breach thereof on the part of the member in its material parts, the equitable remedy by injunction is available to the association. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631.

A co-operative association formed under the provisions of this act. whereby its members agree to sell and deliver to it all of the tobacco owned and produced by or for him or acquired by him as landlord or tenant, being, among other things, for the purpose of steadying the market and enabling the member to obtain a proper price for his tobacco and compensate him for his labor, skill, etc., exists by virtue of a constitutional statute, and the provisions of its standard contract with its members are valid and enforceable. Tobacco Growers Co-Op. Ass'n v. Battle, 187 N. C. 260, 121 S. E. 629.

Remedies for Breach by Member.—Upon the breach by a member of a contract for the sole handling of his crop the recovery of liquidated damages and all cost of the action, including premiums for bonds, expenses, and fees, and equitable relief by injunction to prevent the further breach of the contract by a member, and a decree of specific performance, can be had, and also pending the adjudication of such actions, a temporary restraining order against the member upon the filing of a verified complaint showing the breach of the contract, with the filing of sufficient bond. Tobacco Growers Co-Op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174.

Same—Liquidated Damages.—The fact that the co-operative marketing contract provides for liquidated damages does not give the association an adequate remedy at law for its members otherwise selling their tobacco as provided in the marketing contract, as such would seriously menace the existence of the association for the purpose for which it was incorporated under the provisions of the statute. Tobacco Growers Co-Op. Ass'n v. Pollock, 187 N. C. 409, 121 S. E. 763.

Same—Specific Performance.—Injuries from the breach of contract by a member with the Co-operative Tobacco Marketing Association, formed under the provisions of chapter 87, Public Laws of 1921, to market his tobacco, etc., cannot be adequately compensated for in damages, and the equitable remedy of specific performance as allowed by the statute will be upheld by the courts. Tobacco Growers Co-Op. Ass'n v. Battle, 187 N. C. 260, 121 S. E. 629.

Same—Extent of Injunctive Relief.—Upon an alleged breach on the part of the member the equitable remedy by injunction is available to the association. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631.

Where the defendant resists injuctive relief upon the ground that he had not become a member, and the plaintiff's evidence tends strongly to show to the contrary, it was held that the injunction should be continued to the hearing upon the principle that the plaintiff has established an apparent right to the relief sought, and that the writ is reasonably necessary to protect the property pending the inquiry. Tobacco Growers Co-Op. Ass'n v. Battle, 187 N. C. 260, 121 S. E. 629; Tobacco Growers Co-Op. Ass'n v. Spikes, 187 N. C. 367, 121 S. E. 636.

The temporary restraining order obtained under the provisions of the statute will not be continued if the breach of the contract complained of was caused by the plaintiff's own default, or if the continuance of the temporary restaining order will work greater injury than its dissolution by the court. Tobacco Growers Co-Op. Ass'n v. Bland, 187 N. C. 356, 121 S. E. 636.

The fact that the member gave a lien on his crop for advancements does not invade the rights of the association under the contract such that an injunction against selling the crops should be continued until the final hearing. Tobacco Growers Co-Op. Ass'n v. Harvey & Son Co., 189 N. C. 494, 127 S. E. 545.

The general denial by the association of owing the defendant anything under the contract, without detailed statement as to the account between them from information available to it, was insufficient against the defense that the defendant was forced to sell a small portion of crop to maintain his livelihood because of a failure of the association to pay for bulk of crop under contract; and an order of the Superior Court judge dissolving the restraining order upon defendant's giving a proper bond for plaintiff's protection was proper under the evidence in this case. Tobacco Growers Co-Op. Ass'n v. Bland, 187 N. C. 356, 121 S. E. 636.

Same—Justification for Breach. — A penalty in a small sum erroneously attempted to be imposed on a member by the tobacco marketing association, under its contract for the failure to market the tobacco of his non-member tenant, is not of sufficient proportionate importance to justify an entire severance of the contract relation by the member thereof. Tobacco Growers Co-Op. Ass'n v. Bland, 187 N. C. 356, 121 S. E. 636.

Same—Same—Shown by Parol.—Where a member of a co-operative marketing association, formed under the statute, resists the performance of marketing his tobacco with the association under the usual and written contract, he may show by parol that he had never been a member thereof or obligated by the contract sued on, for the failure of the association to obtain a certain membership within the territory. Tobacco Growers Co-Op. Ass'n v. Moss, 187 N. C. 421, 121 S. E. 738.

Right of Court to Continue Injunction to Final Hearing.—The right given to injunctive relief against a member breaching his contract, upon filing the bond and verified complaint showing such breach, or threatened breach, relates only to the initial process and does not, and is not, intended to withdraw from the courts their constitutional right to pass upon the question of continuing the injunction to the final hearing upon the issues, under approved principles of law and equity. Tobacco Growers Co-Op. Ass'n v. Bland, 187 N. C. 356, 121 S. E. 639.

Where the defendant has admitted breaking his contract and he expects to continue doing so, a temporary injunction should be continued until the final hearing. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 256, 121 S. E. 631.

Right of Member to Mortgage Crop.—In Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 256, 121 S. E. 631, it was said: "It is true that a member may place a mortgage or crop lien on his crop for the current year for the purpose of enabling him to successfully cultivate and produce the same, the contract between plaintiffs and defendant clearly contemplates such a mortgage, and good policy requires that such a privilege should never be withdrawn."

The mortgagee or lien holder for supplies furnished to produce the crop has a right to demand and receive of defendant, or to enforce delivery by any appropriate procedure, of a sufficient amount of the tobacco or other property included in his mortgage, to satisfy his claims to the extent that the same constitute a valid lien superior to the rights and interests of plaintiff under its contract. If such a lien and the amount and extent of it cannot be agreed upon and adjusted it would seem that the lien claimant should become or be made a party of record, that authoritative and final disposition should be made of the matter. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 256, 121 S. E. 631.

Effect of Mortgage upon Injunction.—A preliminary order restraining a member of the co-operative association from disposing of the tobacco embraced in the contract in breach thereof will not be dissolved by reason of a defense set up by its member that the tobacco was the subject of a lien for supplies necessary for its cultivation. The restraining order should be continued to the hearing, safeguarding the rights of the mortgagee to be asserted by his appropriate action. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631.

Evasive Answer Respecting Breach.—In proceedings for injunctive relief by a co-operative marketing association wherein the plaintiff definitely alleges that the defendant had breached his contract and declares his purpose to dispose of his tobacco in breach thereof, the defendant's answer not admitting the allegations, but demanding strict proof, is too evasive or illusive to be a denial of plaintiff's allegation, or received as sufficient evidence upon the question of the injunctive relief. Tobacco Growers Co-Op. Ass'n v. Patterson, 187 N. C. 252, 121 S. E. 631.

Liability of Landlord for Non-Member Tenant.—The landlord is not liable for a penalty on account of failure of tenant to market tobacco through the association until and unless he

receives the tenant's crop as payment for rent, etc. He is then liable for as much as is received. Tobacco Growers Co-Op. Ass'n v. Bissett, 187 N. C. 180, 121 S. E. 446.

Evasion of Contract for Fraud.—In order to avoid a written contract, which was made under this section, for fraud for misrepresentations of a party or his authorized agent, it must not only be shown that the statements complained of were false, but among other things that the party was at the time ignorant of their falsity, and was induced thereby to his damage, and he must show facts sufficient to make out a case of fraud with all the material elements required in such instances. Simpson v. Tobacco Growers Co-Op. Ass'n, 190 N C. 603, 130 S. E. 507.

In order to render void for fraud in its procurement a tobacco marketing contract made in conformity with the provisions of our statute, it is required that the member seeking to do so must introduce evidence of the fraud he relies on, as well as allege it. Tobacco Growers Co-Op. Ass'n v. Chilton, 190 N. C. 602, 130 S. E. 312; Simpson v. Tobacco Growers Co-Op. Ass'n, 190 N. C. 603, 130 S. E. 507.

Where one as agent for the Association falsely represents to a prospective member certain material advantages that induce him to sign the membership contract, without affording him, an illiterate man, an opportunity to become informed as to its contents, and he, within a reasonable time afterwards, is informed of this misrepresentation, and requests the agent to take his name off the books as a member and cancel the contract, the agent and the one to whom the false representations were made were not upon an equality as to the facts, and the law will avoid the contract for the fraud. The cases in which the representations were only promissory in character, not amounting to a factual representation, do not apply. Dunbar v. Tobacco Growers Co-Op. Ass'n, 190 N. C. 680, 130 S. E. 505.

§ 54-153. Purchasing business of other associations, persons, firms, or corporations; payment; stock issued.—Whenever an association organized hereunder with preferred capital stock, shall purchase the stock or any property, or any interest in any property of any person, firm, or corporation or association, it may by agreement with the other party or parties to the transaction discharge the obligations so incurred, wholly or in part, by exchanging for the acquired interest shares of its preferred capital stock to an amount which at par value would equal a fair market value of the stock or interest so purchased, as determined by the board of directors. In that case the transfer to the association of the stock or interest purchased shall be equivalent to payment in cash for shares of stock issued. (1921, c. 87, s. 18; C. S. 5259(z).)

§ 54-154. Annual reports.—Each association formed under this subchapter shall prepare and make out an annual report on forms furnished by the division of markets, containing the name of the association, its principal place of business, and a general statement of its business operations during the fiscal year, showing the amount of capital stock paid up, and the number of stockholders of a stock association or the number of members and the amount of membership fees received, if a nonstock association; the total expenses of the operations; the amount of its indebtedness, or liability, and its balance sheets. (1921, c. 87, s. 19; C. S. 5259(aa).)

§ 54-155. Interest in other corporations or associations. — An association may organize, form, operate, own, control, have interest in, own stock of, or be a member of any other corporation or corporations, with or without capital stock, and engaged in preserving, drying, processing, canning, packing, storing, handling, shipping, utilizing, manufacturing, marketing, or selling of the agricultural products handled by the association, or the by-products thereof. If such corporations are warehousing corporations, they may issue legal warehouse receipts to the association, or to any other person, and such legal warehouse receipts shall be considered as adequate collateral to the extent of the current value of the commodity represented thereby. In case such warehouse is licensed or licensed and bonded under the laws of this state or the United States, its warehouse receipt shall not be challenged or discriminated against because of ownership or control, wholly or in part, by the association. (1921, c. 87, s. 22; C. S. 5259(bb).)

§ 54-156. Contracts and agreements with other associations.—Any association may, upon resolution adopted by its board of directors, enter into all necessary and proper contracts and agreements, and make all necessary and proper stipulations, agreements and contracts and arrangements with any other coöperative corporation, association, or associations, formed in this or in any other state, for the coöperative and more economical carrying on of its business, or any part or parts thereof. Any two or more associations may by agreement between them, unite in employing and using or may separately employ and use the same methods, means, and agencies for carrying on and conducting their respective businesses. (1921, c. 87, s. 23; C. S. 5259(cc).)

§ 54-157. Breach of marketing contract of coöperative association; spreading false reports about the finances or management thereof; misdemeanor.—Any person or persons, or any corporation whose officers or employees knowingly induces or attempts to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management thereof shall be guilty of a misdemeanor and subject to a fine of not less than one hundred dollars ($100), and not more than one thousand dollars ($1,000), for such offense and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars ($500) for each such offense: Provided, that this section shall not apply to a bona fide creditor of any member or stockholder of such association, or the agents or attorney of any such bona fide creditor, endeavoring to make collection of the indebtedness. (1921, c. 87, s. 25; C. S. 5259(dd).)

§ 54-158. Coöperative associations may form subsidiaries.—Nothing in this subchapter shall prevent an association organizing, forming, operating, owning, controlling, having an interest in, owning stock of, or being a member of any other corporation (hereinafter referred to as a subsidiary corporation) from including or having included in the charter or by-laws of such subsidiary corporation provisions for the control or management of said subsidiary corporation by such association to such extent as shall by votes of the board of directors of such association, and the majority of the stockholders of such subsidiary corporation, be declared to be for the best interests of said association and said subsidiary corporation respectively. Such provisions may be so included in any such charter or by-laws and may by way of

illustration, but not of limitation, include the following:

1. Representation of said association on the board of directors or other governing body of said subsidiary corporation, upon such terms as may be deemed advisable.

2. Ownership by an association of an interest or interests in a subsidiary corporation represented by stock of any class thereof, or otherwise, to such extent and upon such terms, and with such voting power, as may be deemed advisable.

3. Participation by said association in the profits of such subsidiary corporation to such extent and upon such terms as shall be deemed advisable. (1933, c. 350, s. 1.)

Chapter 55. Corporations.

Art. 1. Definitions.

§ 55-1. Definitions.—The following words and phrases where used in this chapter, unless differently defined or described, have the meanings and references stated below:

1. "Corporation" refers to a corporation which may be created and organized under this chapter, or under any other general or any special act.

2. "Certificate of incorporation" is the instrument filed by the incorporators and by which the corporation is formed.

3. The words "special act" refer to the act of the legislature enacted for the purpose of creating the corporation.

4. The word "charter" means either "certificate of incorporation" or "special act," together with all appropriate parts of this chapter and its amendments.

5. "Court," "superior court," or "judge of the superior court" means the judge of the superior court resident in the district or holding the courts of the district in which the corporation affected has its principal place of business.

6. "Receiver" as used in this chapter includes receivers and trustees appointed by the court, as herein provided. (Rev., ss. 1136, 1222, 1247; Code, s. 668; 1901, c. 2, ss. 7, 74, 111; C. S. 1113.)

Cross References.—As to constitutional provisions regarding corporations, see N. C. Constitution, Article VIII. As to the requirements of the certificate of incorporation, see § 55-3. As to jurisdiction of superior courts upon dissolution of a corporation, see § 55-134. As to receivers of corporations, see § 55-147 et seq.

In General.—A corporation, though very hard to define, has been said to be "an artifical being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. See the famous case of Dartmouth College v. Woodward, 4 Wheat, 518, 636, 4 L. Ed. 629.

It has been described as an "association of persons," contracting a joint capital for a common purpose, with assignability of shares in perpetual succession, and is a mere creature of the legislature. Horn Silver Min. Co. v. New York, 143 U. S. 305, 312, 12 S. Ct. 403, 36 L. Ed. 164.

Private, Public and Quasi Public Corporations.—Corporations are private, where the property of the corporation is private, although the corporation is engaged in a quasi public business, such as a railroad corporation, and the fact that the state owns a portion of its stock does not change its character; public and quasi public corporations, are corporations exercising a public employment, and having duties to the public to perform. Railroad Co. v. Commissioners, 103 U. S. 1, 26 L. Ed. 359; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 50, 11 S. Ct. 478, 35 L. Ed. 55.

A Charter Defined.—A charter, is an instrument or authority from the sovereign power, bestowing rights or privileges; as it is briefly expressed, it is an act of incorporation, and an amendment thereto may be treated as part thereof. Humphrey v. Pegues, 16 Wall. 244, 21 L. Ed. 326.

Art. 2. Formation.

§ 55-2. How created.—Three or more persons who desire to engage in any business, or to form any company, society, or association, not unlawful, except railroads other than street railways, or banking or insurance, or building and loan associations, may be incorporated in the following manner only (except corporations created for charitable, educational or reformatory purposes that are to be and remain under the patronage and control of the state): Such persons shall, by a certificate of incorporation, under their hands and seals, set forth—

Strict Construction. — The requirements of this section should be strictly construed. Hill v. Lumber Co., 113 N. C. 173, 180, 18 S. E. 107.

Position of Corporators and Promoters. — The promoters of a corporation are held to the duties of trustees and the obligation of directors. They may not take a secret or undis-

closed profit in the organization by way of shares therein or otherwise. Goodman v. White, 174 N. C. 399, 93 S. E. 906.

When Powers Granted by Special Act.—When corporate powers are granted by a special, instead of a general act of the Legislature, there must be evidence of acceptance by the corporators and compliance with all the conditions precedent prescribed by law, in order to show affirmatively that the corporation is lawfully organized. Powell Brothers v. McMullan Lumber Co., 153 N. C. 52, 55, 68 S. E. 926.

1. The name of the corporation. No name can be assumed which is already in use by (a) a domestic corporation, or (b) a foreign corporation authorized to do business under the laws of this State, or (c) a corporation which has heretofore or may hereafter sell its good will to any other person, firm or corporation, and notice thereof has been or may hereafter be filed in the office of the Secretary of State of North Carolina, and the filing fee of twenty-five dollars paid to the said Secretary of State: Provided, however, that the purchaser of the good will of such corporation, or his or its assigns, may be permitted to use the same name, or one similar thereto, of the corporation whose good will it has purchased. The prohibition of this paragraph shall extend to names so nearly resembling or deceptively similar to such existing corporate names as may be likely to mislead or deceive the public or tend to confusion of identity. The name adopted must end with the word "company," "corporation," "incorporated" or the abbreviation "inc.," and will not be accepted for filing unless approved by the secretary of state.

Cross References.—As to necessity of displaying the name of the corporation, see § 55-37. As to the use of the word "trust" in a name, see §§ 53-127 and 55-12. As to use of the term "building and loan association" in a name, see § 54-1. As to the use of "land and loan association," see § 54-45. As to use of the term "credit union," see § 54-80. As to restriction of use of term "mutual" as part of a corporate name, see § 54-112. As to limitation of use of term "co-operative," see § 54-139.

Editor's Note.—Prior to the 1935 amendment this subdivision read as follows: "No name can be assumed already in use by another domestic corporation, or so similar as to cause uncertainty or confusion, and the name adopted must end with the word 'company,' 'corporation' or 'incorporated.'"

The 1939 amendment added the requirement as to approval by secretary of state, and substituted the part of the third sentence after the word "so" for the words "similar in sound or appearance to such existing corporate names as may tend to confusion of identity."

Right to Name.—One corporation cannot prevent another from using in its corporate title a name to which others have a common right. Howe Scale Co. v. Wyckoff, 198 U. S. 118, 25 S. Ct. 609, 47 L. Ed. 972.

And in the absence of contract, fraud or estoppel, any man may use his own name, in all legitimate ways, and as the whole or a part of a corporate name. Id.

2. The location of its principal office in the state.

Cross Reference.—As to change in principal office, see § 55-34.

3. The object or objects for which the corporation is to be formed.

Corporation Limited to Objects Stated.—A charter of incorporation creating a company for the purpose of effecting a communication by a plank-road between designated points, with the privilege of taking tolls, does not authorize the company to establish a stage line upon their road, nor to contract for carrying the United States mail. Wiswall v. Greenville Plank-Road Co., 56 N. C. 183.

Need Not Use All Powers.—The fact that a corporation avails itself of only one of several privileges granted by its charter—that is, manufacture all the products it is permitted to manufacture—does not invalidate the act of incorporation. Wadesboro Cotton Mills Co. v. Burns, 114 N. C. 353, 19 S. E. 238.

4. The amount of the total authorized capital stock, the number of shares into which it is divided, the par value of each share, the amount of capital stock with which it will commence business, and, if there is more than one class of stock, a description of the different classes. The provisions of this subsection shall not apply to religious, charitable, nonprofit social or literary corporations, unless they desire to have a capital stock. If they desire to have no capital stock, that fact and the conditions of membership shall be stated.

Cross Reference.—As to making provision for future exchange of par value stock for non-par value stock, see § 55-80.

Editor's Note.—The Legislature has recently made two changes in this paragraph of the section. The first sentence formerly contained the additional clause "with the terms on which the respective classes of stock are created." This concluding clause was stricken out by ch. 55, Ex. Sess. 1920.

By ch. 98, Laws of 1924 the second sentence in the paragraph was amended by inserting the words "non-profit social" immediately after the word "charitable," thus adding to the list of corporations to which the paragraph does not apply.

5. The names and postoffice addresses of the subscribers for stock and the number of shares subscribed for by each; the aggregate of the subscriptions shall be the amount of capital with which the corporation will commence business. If there is to be no capital stock, the certificate must contain the names and postoffice addresses of the incorporators.

Editor's Note.—Formerly it was not required that the number of shares taken by each subscriber be set out in the certificate of incorporation. In Cotton Mills v. Cotton Mills. 115 N. C. 475, 478, 20 S. E. 770, the court says that although this was not at that time required it is the usual practice to set them out and should have been required by statute.

6. The period, if any, limited for the duration of the corporation.

Cross Reference.—As to period of existence if no limit given, see § 55-26, subsection 1.

Limit of Corporate Existence.—It is unquestionably true that a corporation, whose term of existence is fixed and limited in the act which creates it, cannot endure beyond the prescribed time, unless prolonged by the same authority or continued for the purpose of adjusting and closing its business, and no judicial proceedings are required to terminate it. The expiration of the time ends the life given to the artificial body, as death terminates the life of the natural person. Asheville Division v. Aston, 92 N. C. 578, 579, 585.

Exhaustion.—When a charter power is once exhausted it is, in respect to further contracts and rights, as though it had never been granted. East Tennessee, etc., R. Co. v. Frazier, 139 U. S. 288, 292, 11 S. Ct. 517, 35 L. Ed. 196.

7. The certificate of incorporation may also contain any provision, consistent with the laws of this state, for the regulation of the affairs of the corporation, or creating, defining, limiting and regulating its powers, directors and stockholders, or any class or classes of the latter. (Rev., s. 1137; Code, s. 677; 1885, cc. 19, 190; 1889, c. 170; 1891, c. 257; 1893, cc. 244, 318; 1897, c. 204; 1899, c. 618; 1901, c. 2, s. 8, cc. 6, 41, 47; 1903, c. 453; 1911, c. 213, s. 1; 1913, c. 5, s. 1; Const., Art. 8, s. 1; Ex. Sess. 1920, c. 55; 1924, c 98; 1935, cc. 166, 320; 1939, c. 222; C. S. 1114.)

Cross References.—As to the constitutional power of the legislature to form corporations, see N. C. Constitution, Article VIII, § 1. As to legislature's power to amend this chapter and charters of corporations, see § 55-36. As to the requirements for incorporating banks, see § 53-2 et seq. As to the establishment of railroads, see § 60-9 et seq. As to creating insurance companies, see § 58-73. As to incorporating building and loan associations, see § 54-2; land and loan associations, see § 54-46; credit unions, see § 54-76 et seq.; co-operative associations, see § 54-111 et seq.; marketing associations, see § 54-131 et seq.; hospital service corporations, see § 57-2.

Under Dual Incorporation.—Where a corporation is incorporated under the laws of two states, all its powers in relation to land lying in one of them must be derived from the law of that state alone. Beaty v. Knowler, 4 Pet. 152, 167, 7 L. Ed. 813.

Liabilities. — A corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature, and courts will not allow corporations to escape from their proper responsibilities by means of any disguise. New York, etc., R. Co. v. Winans, 17 How. 30, 40, 15 L. Ed. 27.

§ 55-3. Requirements as to certificate of incorporation.—The certificate of incorporation shall be signed by the original stock subscribers, or a majority of them, and must be acknowledged before an officer duly authorized under the laws of this state to take the proof or acknowledgment of deeds. The certificate shall then be filed in the office of the secretary of state, and there remain of record, and he shall, if it is in accordance with law, cause it to be recorded in his office in a book to be kept for that purpose and known as the Corporation Book. Upon the payment of the organization tax and fees, the secretary of state shall certify under his official seal a copy of the certificate of incorporation and probates, which certified copy shall be forthwith recorded in the office of the clerk of the superior court of the county where the principal office of the corporation in this state is, or is to be, established, in a book to be known as the Record of Incorporations. The certificate, or a copy thereof, duly certified by the secretary of state, or by the clerk of the superior court of the county in which it is recorded, is evidence in all courts and places, and in all judicial proceedings is prima facie evidence of the complete incorporation and organization of the corporation purporting thereby to have been established. (Rev., s. 1139; Code, ss. 678, 679, 682; 1901, c. 2, s. 9; 1903, c. 343; C. S. 1115.)

Cross References.—As to taxes for filing the certificate, see § 55-158. As to amending the certificate, see §§ 55-30 and 55-31. As to the effect of errors or omissions in the certificate, see § 55-8. As to fees for recording, see § 55-159.

Record of Incorporations Admissible in Evidence.—Under the former wording of this section which provided that the letters of incorporation or copies duly certified by the clerk should be admissible in evidence, it was held that the Record of Incorporation's book was also admissible as prima facie evidence of the complete organization and incorporation of the company. Iron Co. v. Abernathy, 94 N. C. 545, 547.

Proof of Existence—By Reputation.—The existence of a corporation may be proved by reputation. Gulf States Steel Co. v. Ford, 173 N. C. 195, 91 S. E. 84. Existence or nonexistence is a fact and may be proved as other facts. Id.

Same—By Written Contract.—Where a written contract entered into between the parties furnishes evidence that the defendant was dealing with the plaintiff as a corporation, and the plaintiff's existence as a corporation is denied, the contract may properly be introduced upon this disputed fact. Otis Elevator Co. v. Cape Fear Hotel Co., 172 N. C. 319, 90 S. E. 253.

Same—Copies Prima Facie Evidence. — Copies of letters of incorporation are admissible to show prima facie the existence of a corporation, and it cannot avoid its liability for debts because in fact it had but an inchoate existence. Marshall v. Macon County Bank, 108 N. C. 639, 13 S. E. 182.

§ 55-4. When incorporators become corporation.—From the date the certificate of incorporation is filed in the office of the secretary of state, the stock subscribers, their successors and assigns, are a body corporate by the name specified in the certificate, subject to amendment and dissolution as provided in this chapter. (Rev., s. 1140; 1901, c. 2, s. 10; C. S. 1116.)

Cross Reference.—As to when a building and loan association becomes a body corporate, see § 54-6; a co-operative association, see § 54-114; a credit union, see § 54-78; a bank, see § 53-5.

Signing and Recording Articles Sufficient. — When corporate powers are granted by a special act of the Legislature, there must be evidence of the acceptance by the corporators of the privileges conferred and compliance with all conditions precedent prescribed by law in order to show affirmatively that the corporation is lawfully organized. It is otherwise when the corporation is formed under the general law, for by the signing of the articles of agreement, and the due recording thereof, the corporators become a body politic for the purposes set forth in the agreement. Benbow v. Cook, 115 N. C. 324, 325, 20 S. E. 453.

No Requirement for Stock Issue. — There is no requirement of the statute that the stock should be issued or paid up before a valid organization can be effected or corporate action taken. Fayetteville Street Ry. v. Aberdeen R. R., 142 N. C. 423, 434, 55 S. E. 345.

Adoption of By-Laws Not Necessary.—By signing and recording the articles of incorporation three or more persons become a body corporate and it is not necessary for the exercise of such powers as are conferred by statute or corporations that the one so formed shall issue certificates of stock or adopt by-laws. Powell Brothers v. McMullan Lumber Co., 153 N. C. 52, 68 S. E. 926.

Date Corporation Begins to Do Business.—While incorporators became a body incorporate from the date the certificate of incorporation is filed in the office of the secretary of state, there is no presumption that the corporation is organized and doing business as such from that time, the time from which it begins to do business as a corporation being a question of fact to be proved as any other fact. Hammond v. Williams, 215 N. C. 657, 3 S. E. (2d) 437.

De Jure and De Facto Existence. — A corporation de jure is said to exist when persons holding a charter have made substantial compliance with the provisions of the same, looking to its proper organization, while a corporation de facto is one where the parties having a charter or law authorizing it have in good faith made a colorable compliance with such requirements, and have proceeded in the exercise of the corporate powers or a part of them. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

If the corporation has acted as such and exercised its franchises, then it is a corporation de facto, and in such case any irregularity in its organization is immaterial. Whitney v. Wyman, 101 U. S. 392, 395, 25 L. Ed. 1050.

Same—Distinctions. — So far as the State is concerned, the ultimate distinction between a corporation de jure and a corporation de facto is that the former, having made substantial compliance with the charter requirements looking to the proper organization, can successfully resist the suit instituted by the State or its officers for the direct purpose of annulling the charter, while the latter cannot; but as to private persons holding claims against them, the individual corporators, in either case, are not personally liable for debts, except and to the extent the charter and law applicable may so provide. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

Applied in Britt v. Howell, 210 N. C. 475, 187 S. E. 566.

§ 55-5. Incorporators act until directors elected.—Until directors are elected the signers of the certificate of incorporation shall have the direction of the affairs of the corporation, and may take proper steps to obtain the necessary subscription to stock and to perfect the organization of the corporation. (Rev., s. 1141; 1901, c. 2, s. 11; C. S. 1117.)

Subscribers May Release Member. — Under this section the management of a corporation, before the first directors are elected, vests entirely in the subscribers, and, before the rights of creditors have supervened, the subscribers or stockholders may, by the consent of each and all of them and within the limits of the charter, release one from his subscription to the stock. Boushall v. Myatt, 167 N. C. 328, 83 S. E. 352.

§ 55-6. First meeting; notice.—The first meeting of every corporation shall be called by a notice, signed by a majority of the incorporators, designating the time, place, and purpose of the meeting, which notice shall be published at least two weeks before the meeting, in a newspaper of the county where the corporation is established; or the meeting may be called without publication,

if two days notice is personally served on all the incorporators; or if all the incorporators in writing waive notice and fix a time and place of meeting, no notice or publication is required. (Rev., s. 1142; Code, s. 665; 1901, c. 2, s. 18; C. S. 1118.)

Cross References.—As to stockholders' meetings generally, see § 55-105. As to meeting called by three stockholders, see § 55-106.

Waiver of Notice. — The strict requirements as to notice, being intended to protect stockholders, may be waived by them, and when they do waive it, the meeting and all proceedings are as valid as they would be had the full statutory notice been given. Benbow v. Cook, 115 N. C. 324, 325, 330, 20 S. E. 453.

Meeting outside of State. — Though the first meeting of stockholders may have been held outside of the State, that fact cannot be shown by the body assuming the powers of a corporation in order to avoid its liability, nor by its debtors for the purpose of evading their accountability under contracts made with it, but the State only can set up that fact. Tuckasegee Mining Co. v. Goodhue, 118 N. C. 981, 985, 24 S. E. 797.

§ 55-7. Death of incorporators; vacancy filled.—When one or more of the incorporators of any corporation die before the corporation has been organized pursuant to law, the survivor or survivors may, in writing, designate others who may take the place and act instead of the deceased, in the organization; and the organization so effected by their aid is as effectual in law as if it had been effected by all the original incorporators. (Rev., s. 1143; 1901, c. 2, s. 36; C. S. 1119.)

§ 55-8. Errors or omissions in certificate of incorporation.—Whenever in the certificate of incorporation under any general law there is an error or omission in the recital of the act under which the corporation is created or an error or omission of any matter required to be stated therein, it is lawful for the corporation to correct the error or supply the omission in the following manner: The board of directors shall pass a resolution declaring that the error or omission exists and that the corporation desires to correct it, and shall call a meeting of the stockholders to take action upon the resolution. The stockholders' meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days notice, given personally or by mail. If two-thirds in interest of all the stockholders vote in favor of the correction of the error or omission, a certificate of their action shall be made and signed by the president and secretary under the corporate seal; which certificate shall be acknowledged as in the case of deeds of real estate, and, together with the written consent in person or by proxy of two-thirds in interest of all the stockholders of the corporation, shall be filed in the office of the secretary of state. Upon the filing thereof, in conformity with this section, the certificate of incorporation has the same force and effect as if it had been originally drafted in conformity with the amendment so made. (Rev., s. 1144; 1901, c. 2, s. 109; C. S. 1120.)

Cross References.—As to amendments generally, see § 55-31 et seq. As to amendments before payment of stock, see § 55-30.

§ 55-9. Street railways.—Corporations may be organized under the provisions of this chapter for the purpose of building, maintaining or operating street railways. The term street railways, wherever used in this chapter, includes railways operated either by steam or electricity, or other motive power, used and operated as means of communication between different points in the same municipality, or between points in municipalities lying adjacent or near to each other, or between the municipality in which is the home office of the company and the territory contiguous thereto, and such railways may carry and deliver freights. No such railway may operate a line extending in any direction more than one hundred miles from the municipality in which is located its home office, or in any city or town without the consent of the municipal authorities thereof. (Rev., s. 1138; 1901, cc. 6, 41; 1903, c. 350; Ex. Sess. 1913, c. 70, s. 1; C. S. 1121.)

§ 55-10: Repealed by Session Laws 1943, c. 543.

§ 55-11. Public parks and drives.—Three or more persons may be incorporated under this chapter for the purpose of creating and maintaining public parks and drives. It is not necessary, however, to set forth in the certificate of incorporation of any corporation created for such purpose the amount of authorized capital stock, the number of shares into which the same is divided, the par value of such stock, or the amount of capital stock with which it will commence business. Any corporation created hereunder shall have full power and authority to lay out, manage, and control parks and drives within the state, under such rules and regulations as the corporation may prescribe, and shall have power to purchase and hold property and take gifts or donations for such purpose. It may hold property and exercise such powers and trust for any town, city, township, or county, in connection with which said parks and drives shall be maintained. Any city, town, township, or county, holding such property, may vest and transfer the same to any such corporation for the purpose of controlling and maintaining the same as public parks and drives under such regulations and subject to such conditions as may be determined upon by such city, town, township, or county. All such lands as the corporation may acquire shall be held in trust as public parks and drives, and shall be held open to the public under such rules, laws, and regulations as the corporation may adopt through its board of directors; and it shall have power and authority to make and adopt all such laws and regulations as it may determine upon for the reasonable management of such parks and drives. All property owned by it and appropriated exclusively for public parks and drives shall not be subject to taxation, and no such corporation shall be liable in damages on account of the construction or maintenance of any such parks or drives. (1911, c. 155, ss. 1, 2, 3, 4; C. S. 1123.)

Local Modification.—Scotland: 1939, c. 359, s. 1.

§ 55-12: Repealed by Session Laws 1943, c. 543.

§ 55-13. Certain religious, etc., associations deemed incorporated.—In all cases where a religious, educational or charitable association has been formed prior to January first, one thousand eight hundred and ninety-four, and has since said

date been acting as a corporation, exercising the powers and performing the duties of religious, educational or charitable corporations as prescribed by the laws of this state, then such association shall be conclusively presumed to have been duly and regularly organized and existing as a corporation under the laws of this state on January first, one thousand eight hundred and ninety-four, and all of its acts as a corporation from and after said date, if otherwise valid, are hereby declared to be valid corporate acts. (1919, c. 137; C. S. 1125.)

Art. 3. North Carolina State Thrift Society.

§§ 55-14 to 55-25: Transferred to §§ 115-383 to 115-394.

Editor's Note.—Acts 1943, c. 543, transferred these sections to chapter 115 to follow immediately after § 115-382 and directed that they be appropriately renumbered.

Art. 4. Powers and Restrictions.

§ 55-26. Express powers.—Every corporation has power—

1. To have succession, by its corporate name, for the period limited in its charter, and when the charter contains no time limit, for a period of sixty years.

2. To sue and be sued in any court.

3. To make, use, and alter a common seal.

4. To purchase, acquire by devise or bequest, hold and convey real and personal property in or out of the state, and to mortgage the same and its franchises.

5. To elect and appoint, in such manner as it determines to be proper, all necessary officers and agents, fix their compensation, and define their duties and obligations. And when there devolves upon an officer or agent of a corporation such duties and responsibilities that a financial loss would result to the corporation from the death and consequent loss of the services of such officer or agent, the corporation has an insurable interest in, and the power to insure the life of, the officer or agent for its benefit and in all cases where a religious, educational or charitable corporation or institution shall be, or has been, named as beneficiary in any policy of life insurance by a friend, student, former student or any person who for any reason is loyal to such corporation or institution and has himself or herself paid the premiums on said policy, then such corporation or institution shall be deemed to have an insurable interest in the life of such person.

6. To conduct business in this state, other states, the District of Columbia, the territories, dependencies and colonies of the United States, and in foreign countries, and have offices in or out of the state.

7. To make by-laws and regulations, consistent with its charter and the laws of the state, for its own government, and for the due and orderly conduct of its affairs and management of its property.

8. To wind up and dissolve itself, or be wound up and dissolved, in the manner hereafter mentioned.

9. To sell, transfer and convey any part of its corporate property in the course of its regular business.

10. To sell, transfer and convey any part of its corporate real or personal property when authorized so to do by its board of directors.

11. To sell, transfer and convey all of its corporate property when authorized so to do by its board of directors and approved by a two-thirds vote of the stock entitled to vote at any stockholders meeting, notice of which contains notice of the proposed sale: Provided, paragraph nine, ten and eleven of this section shall not be construed as authorizing any public utility corporation to sell or convey all of its property otherwise than under the terms prescribed in its charter, or as authorizing the sale of stock in bulk, in violation of the Bulk Sales Law. (Rev., s. 1128; Code, ss. 663, 666, 691, 692, 693; 1893, c. 159; 1901, c. 2, s. 1; 1909, c. 507, s. 1; 1925, c. 235; 1925, c. 298; 1929, c. 269; 1939, c. 279; C. S. 1126.)

I. Editor's Note.
II. Suits by and against Corporations.
III. The Common Seal.
IV. Rights as to Property.
V. The Officers; Conducting Business; By-Laws and Dissolution.

Cross References.

As to powers of building and loan associations, see § 54-2; of land and loan associations, see § 54-46; of credit unions, see § 54-82 et seq.; of co-operative associations, see § 54-124 et seq.; of marketing associations, see §§ 54-151 and 54-152. As to powers of banks, see § 53-43 et seq. As to power of insurance company to purchase, hold, and convey real estate, see § 58-76. As to powers of railroads and other carriers, see § 60-37 et seq. As to corporate power of eminent domain, see § 40-1 et seq. As to powers of a municipal corporation, see § 160-2. As to powers of consolidated corporations, see § 55-170. As to corporate conveyance and when same is void as to torts, see § 55-40. As to mortgaged property of public service corporations subject to execution, see § 55-44. As to directors and officers, see § 55-48 et seq. As to election of directors, see §§ 55-112 and 55-113. As to dissolution, see § 55-121 et seq.

I. EDITOR'S NOTE.

Previous to 1925 this section enumerated 8 general powers. By chapter 235, Laws 1925 paragraph 9 containing an additional power with several provisos was added, and the 1929 amendment added another proviso thereto. The 1939 amendment struck out such paragraph as amended and inserted the present paragraphs 9, 10 and 11 in lieu thereof. See discussion of former paragraph 9 in 3 N. C. Law Rev. 137.

By ch. 298, Laws 1925 an addition was made to par. 5 of this section. Formerly the paragraph ended with the word "benefit". In 3 N. C. Law Rev. 147 this amendment is discussed and it is concluded that although the Legislature intended to extend the doctrine of insurable interest, it has merely stated a well-established rule of insurance law.

II. SUITS BY AND AGAINST CORPORATIONS.

Must Be in Corporate Name. — A suit against a corporation must be brought in its corporate name, and not against its officers or agents. Young v. Barden, 90 N. C. 424; Britain v. Newland, 19 N. C. 363. However, in case of insolvency, where a receiver has been appointed, he may sue either in his own name or in that of the corporation. Smathers v. Bank, 135 N. C. 410, 413, 47 S. E. 893; Davis v. Mfg. Co., 114 N. C. 321, 19 S. E. 371.

Misnomer Immaterial.—A misnomer does not vitiate, provided the identity of the corporation with that intended by the parties is apparent, whether it is in a deed, Asheville Division v. Aston, 92 N. C. 579, 584, or in a judgment, or in a criminal proceeding, McCrea v. Starr, 5 N. C. 252. See Gordon v. Pintsch Gas Co., 178 N. C. 435, 100 S. E. 878.

Same Liability as Natural Person. — A corporation is now held liable to civil and criminal actions under the same conditions and circumstances as natural persons are. Redditt v. Singer Mfg. Co., 124 N. C. 100, 32 S. E. 392.

No Application to Governmental Agencies. — The general authority to sue and be sued conferred on corporations by this section, has reference only to private and quasi public corporations, and not to corporations like the state prison, which are merely governmental agencies. As to these the authority to be sued must be expressly given. Moody v. State's Prison, 128 N. C. 12, 13, 38 S. E. 131.

Same—State Highway Commission. — This section giving corporations the right to sue and be sued, does not apply to the State Highway Commission, a governmental

agency of the State, but only to private and quasi-private corporations. Carpenter v. Atlantic, etc., Ry. Co., 184 N. C. 400, 114 S. E. 693.

Suits against Cities and Towns. — As to cities and towns, though by their charters they are broadly authorized "to sue and be sued," it is equally well settled that this suability does not create any liability for damages caused by the torts of their officers and agents when acting in a governmental capacity. McIlhenney v. Wilmington, 127 N. C. 146, 37 S. E. 187, and numerous cases there cited. Moody v. State's Prison, 128 N. C. 12, 13, 16, 38 S. E. 131.

Suits against Counties.—As to counties, we have an unbroken line of authorities that they can be sued only in such cases and for such causes of action as are authorized by statute, and such cases do not embrace liabilities for negligence or other torts of their officers and agents. White v. Commissioners, 90 N. C. 437; Manuel v. Commissioners, 98 N. C. 9, 3 S. E. 829; Threadgill v. Commissioners, 99 N. C. 352, 6 S. E. 189; Pritchard v. Commissioners, 126 N. C. 908, 36 S. E. 353; Bell v. Commissioners, 127 N. C. 85, 37 S. E. 136; Moody v. State's Prison, 128 N. C. 12, 13, 16, 38 S. E. 131.

Liability for Slander. — A corporation may be held liable for slander when the defamatory words are uttered by express authority of the company or by one of its officers or agents in the course of his employment, and authority for their utterances may be fairly and reasonably inferred under relevant and sufficient circumstances. Cotton v. Fisheries Products Co., 177 N. C. 56, 97 S. E. 712.

Cited in Independence Trust Co. v. Keesler, 206 N. C. 12, 16, 173 S. E. 53.

III. THE COMMON SEAL.

An Inherent Power.—The power to have a common seal and to alter or renew the same at will is frequently conferred on corporations by statute, but such a power is one of the incidental and implied powers of every corporation when not expressly conferred 14 C. J. § 404, p. 334. Bailey v. Hassell, 184 N. C. 450, 454, 115 S. E. 166, 168.

Any Device May Be Used. — While it is required for the sufficiency of the deed of a corporation to convey its lands that the corporate seal should be affixed to the instrument, any device used for the corporate seal will be sufficient, provided it was intended for and used as the seal of the corporation, and had been adopted by proper action of the corporation for that purpose. Bailey v. Hassell, 184 N. C. 450, 115 S. E. 166.

The simple word "seal" with a scroll adopted as the seal of a corporation and used by it on a deed to its lands according to resolutions of the stockholders and directors thereof at separate meetngs held for the purpose, when all were present, is sufficient. Bailey v. Hassell, 184 N. C. 450, 115 S. E. 166.

IV. RIGHTS AS TO PROPERTY.

Corporation Not Stockholders Own Property.—The property of a corporation belongs to it, and not to the stockholders. They only have an interest in such property through their relation to the company, and in this respect the state is like any other stockholder. Marshall v. Western N. C. Railroad Co., 92 N. C. 322.

Same—Where State a Stockholder. — Where the state is a stockholder in a railroad company, it is bound by the provisions of the charter in the same manner as an individual. It has no advantage as a stockholder on account of its sovereignty, for, by becoming such, it lays aside its character as a sovereign and places itself on a footing of equality with the individual stockholders. Marshall v. Western N. C. Railroad Co., 92 N. C. 322.

May Hold Estates in Fee. — Although the existence of a corporation be limited to a certain number of years, yet it is capable of holding estates in fee. Asheville Division v. Aston, 92 N. C. 578, 579.

Same—Not Forfeited upon Suspension of Business. — A corporation, chartered for the purpose of promoting temperance, does not forfeit real estate which it has purchased because it ceases to pursue the objects for which it was incorporated. Asheville Division v. Aston, 92 N. C. 578, 579.

Adverse Possession. — A corporation may acquire land by showing sufficient adverse possession for the statutory period. Cross v. Seaboard Air Line R. Co., 172 N. C. 119, 90 S. E. 14.

Ejectment and Trespass Will Lie. — Corporations, in contemplation of the law, are capable of having actual possession of the land, and whatever may have been supposed to the contrary in the distant past, it is now settled that the actions of ejectment and trespass lie against them. Young v. Barden, 90 N. C. 424, 426.

Right to Dispose of Property.—A private corporation may dispose of its property without express authority of the Legislature. Benbow v. Cook, 115 N. C. 324, 325, 20 S. E. 453.

Same—Quasi Public Corporation.—A strictly private corporation can lawfully sell any of its property, real or personal, just as an individual can; but such is not the case with corporations which are quasi public and have duties to perform in which the public is interested. Barcello v. Hapgood, 118 N. C. 712, 713, 24 S. E. 124.

Same—Example.—A corporation chartered for the purpose of mining and milling ores has the right, by implication of law, to buy and sell real estate essential to the successful prosecution of its business. Barcello v. Hapgood, 118 N. C. 712, 713, 24 S. E. 124.

Right to Dispose of Franchise.—The franchise or the right of being a corporation, unlike the property and other powers and privileges, can never be alienated by the corporation without express authority and provision therefor, pointing out how it may be effected. New Orleans, etc., R. Co. v. Delamore, 114 U. S. 501, 508, 5 S. Ct. 1009, 29 L. Ed. 244.

A quasi public corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of its duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 49, 11 S. Ct. 478, 35 L. Ed. 55.

Right to Mortgage Property. — Corporations other than railroad companies have a general power to mortgage their property, unless prohibited by some provision in the charter, the right to mortgage being a natural result of the right to incur an indebtedness. Antietam Paper Co. v. Chronicle Pub. Co., 115 N. C. 143, 20 S. E. 366.

Right to Mortgage Franchise—Power of Sale.—The power given to mortgage the franchises of the corporation must necessarily include the power to bring it to sale with the property to make the sale effectual as a means of transferring the right to use the thing conveyed. Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 464, 26 S. Ct. 660, 50 L. Ed. 1102.

Where Powers Exceeded.—Where a corporation takes a conveyance of lands for use beyond its charter powers, the deed is not void, but only voidable upon the objection of the State. Cross v. Seaboard Air Line R. Co., 172 N. C. 119, 120, 90 S. E. 14.

V. THE OFFICERS; CONDUCTING BUSINESS; BY-LAWS AND DISSOLUTION.

Power to Insure Life of Officer.—A manufacturing corporation engaged in the operation of a cotton mill had no implied power to insure the life of its president, at least beyond the period of his connection with the company. Victor v. Louise Cotton Mills, 148 N. C. 107, 61 S. E. 648; Victor v. Chadwick Mfg. Co., 148 N. C. 119, 61 S. E. 653. [These cases were decided in 1908 when the section did not contain the present provision as to insurable interest. The question of implied power would of course no longer arise.]

A corporation may transact business anywhere unless prohibited by its charter or excluded by local laws. Garrett v. Bear, 144 N. C. 23, 25, 56 S. E. 479; Ex Parte Schollenberger, 96 U. S. 369, 377, 24 L. Ed. 853, Waite, C. J.

§ 55-27. By-laws.—A corporation may, by its by-laws, when consistent with its charter, determine the manner of calling and conducting all meetings; the number of members that constitute a quorum, but in no case shall more than a majority of shares or amount of interest be required to be represented at any meeting in order to constitute a quorum, and if the quorum is not so determined by the corporation, a majority in interest of the stockholders, represented either in person or by proxy, constitutes a quorum; the number of shares that will entitle the members to one or more votes; the mode of voting by proxy; the mode of selling shares for the nonpayment of assessments; the tenure of office of the several officers, and the manner in which vacancies in any of the offices shall be filled till a regular election; and they may annex suitable penalties to such by-laws, not exceeding in any case the sum of twenty dollars for any one offense. The power to make and alter by-laws is in the stockholders, but a corporation may, in the certificate of incorporation, confer that power upon the directors.

By-laws made by the directors under power so conferred may be altered or repealed by the stockholders. (Rev., ss. 1145, 1146; Code, s. 664; 1901, c. 2, ss. 12, 13; C. S. 1127.)

Cross References.—As to power to make by-laws, see § 55-26, paragraph 7. As to by-laws of insurance companies, see § 58-75. As to by-laws of building and loan association, see § 54-2; of a land and loan association, see § 54-52; of a credit union, see § 54-77; of a co-operative association, see § 54-116; of a marketing association, see § 54-136. As to power to determine, by by-law, the number of shares a stockholder must hold to qualify as director, see § 55-48.

Extent to Which Stockholder Is Bound by By-Laws.—The principle by which a shareholder in a corporation is bound by a corporate resolution, regularly passed pursuant to its charter and by-laws, prevails only in reference to his status and rights as a shareholder and not where he deals independently with it as one of its customers in the line of its business. Cardwell v. Garrison, 179 N. C. 476, 103 S. E. 3.

By-Law to Sell Defaulting Subscriber's Stock. — Under this section a corporation is empowered to provide by its by-laws for the sale of shares of a subscriber who makes default in paying the assessments. Elizabeth City Cotton Mills v. Dunstan, 121 N. C. 12, 27 S. E. 1001.

Strangers Must Have Notice. — The by-laws of the corporation are not evidence for it against strangers who deal with it, unless brought home to their knowledge and assented to by them. Smith v. N. C. R. R. Co., 68 N. C. 107.

§ 55-28. Implied powers.—In addition to the powers enumerated in §§ 55-26 and 55-27 and the powers specified in its charter, every corporation, its officers, directors and stockholders, possess all the powers and privileges contained in this chapter so far as they are necessary or convenient to the attainment of the objects set forth in such charter, and shall be governed by the provisions and be subject to the restrictions and liabilities in this chapter contained, so far as they are applicable to and not inconsistent with such charter; and no corporation may possess or exercise any other corporate powers, except such incidental powers as are necessary to the exercise of the powers so given. Nothing in this chapter shall authorize or empower corporations organized under this chapter to lease, operate, maintain, manage or control any railroad except street railways. (Rev., s. 1129; Code, s. 701; 1897, c. 204; 1901, c. 2, s. 4; 1901, c. 6; C. S. 1128.)

Cross References.—As to express powers, see § 55-26. As to powers of street railways, see § 55-9. As to power of the legislature to amend or repeal corporate charter, see § 55-36.

In General. — Corporations possess by legal implication such powers as are essential to the exercise of the powers expressly conferred and necessary to attain the main objects for which they were formed. Barcello v. Hapgood, 118 N. C. 712, 713, 24 S. E. 124.

Charter Subsequent to General Law Prevails. — Where a charter was granted to a corporation after the passage of a general law and the charter confers powers conflicting with the general law, then by this section the provisions of the charter prevail. Carolina Power Co. v. Power Co., 171 N. C. 248, 256, 88 S. E. 349.

Ultra Vires Acts. — It is true, as held by numerous courts, including our own, that the doctrine of ultra vires has been very much modified in recent years, and many contracts made in the course of business, especially when executed and benefits are received or liabilities are incurred, will be upheld and enforced which were formerly declared absolutely void. Hutchins v. Bank, 128 N. C. 72, 38 S. E. 252; Womack Pr. Corp. 142.

Same—State May Bring Action. — This modification of the doctrine does not involve the right in an appropriate case, of the State to enjoin a threatened ultra vires act. Victor v. Louise Cotton Mills, 148 N. C. 107, 61 S. E. 648, 650.

Same—Stockholder May Bring Action. — If the act of the corporation be ultra vires, any one or more stockholders may by some appropriate method call it in question and, unless by having consented to or acquiesced in it he is barred, have relief. Victor v. Louise Cotton Mills, 148 N. C. 107, 110, 61 S. E. 648; Lutterloh v. Fayetteville, 149 N. C. 65, 62 S. E. 758.

Same—Law Governing. — When the question of ultra vires arises, the validity of a corporate contract is to be determined by the lex loci contractus, not the lex fori. Eastern Building, etc., Ass'n v. Ebaugh, 185 U. S. 114, 121, 22 S. Ct. 566, 46 L. Ed. 830.

Conclusion of Law. — The question of whether acts are ultra vires is a conclusion of law to be drawn from the facts stated. Spencer v. Railroad, 137 N. C. 107, 117, 49 S. E. 96.

§ 55-29. Banking powers not conferred by this chapter.—No corporation created under the provisions of this chapter shall have the power to carry on the business of discounting bills, notes or other evidences of debt, of receiving deposits of money, of buying gold or silver bullion or foreign coins, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt, upon loan, or for circulation as money; but in the transaction of its business it may make and take and indorse, when necessary, all such bonds, notes and bills of exchange as the business may require. (Rev., s. 1134; Code, s. 684; 1901, c. 2, s. 5; C. S. 1129.)

Cross Reference.—As to banks and banking in general, see Chapter 53.

Cited in Independence Trust Co. v. Keesler, 206 N. C. 12, 17, 173 S. E. 53.

§ 55-30. Amendments before payment of stock.—The incorporators of a corporation, before the payment of any part of its capital, may file with the secretary of state an amended certificate of incorporation, duly signed and acknowledged by the incorporators named in the original certificate, changing the original certificate of incorporation, in whole or in part, which amended certificate takes the place of the original one, and when recorded in the proper county is deemed to have been filed and recorded on the date of filing and recording the original certificate. The officers are entitled to the same fees for filing and recording the amended certificate of incorporation as if it were original; but there shall be charged no additional organization tax, except when the certificate is amended by increasing the capital stock, in which event such tax shall be paid upon the increase. (Rev., s. 1174; 1901, c. 2, s. 28; C. S. 1130.)

Cross References.—As to the original certificate of incorporation, see § 55-3. As to taxes for filing, see § 55-158.

Subscriber Released. — Any fundamental change in the charter of a corporation relieves a non-assenting subscriber from liability upon his stock. Bank v. City, 85 N. C. 433.

§ 55-31. Amendments, generally.—A corporation, whether organized under a special act or general laws, and which might now be created under the provisions of this chapter, may, in the manner set out below—

1. Change the nature or relinquish one or more branches of its business, or extend its business to such other branches as might have been inserted in its original certificate of incorporation.
2. Change its name.
3. Extend its corporate existence.
4. Increase or decrease its capital stock.
5. Change the par value of the shares of its capital stock.
6. Create one or more classes of preferred stock.
7. Make any other desired amendment. In all cases the certificate of amendment can contain

only such provisions as could be lawfully and properly inserted in an original certificate of incorporation filed at the time of making the amendment.

The board of directors shall pass a resolution declaring that the amendment is advisable, and call a meeting of the stockholders to take action thereon; the meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days notice, given personally or by mail; if the holders of a majority of the shares of stock with voting powers vote in favor of the amendment, a certificate thereof shall be signed by the president and secretary, under the corporate seal, acknowledged as in the case of deeds to real estate, and this certificate, together with the written assent, in person or by proxy, of said stockholders, shall be filed and recorded in the office of the secretary of state. Upon such filing the secretary of state shall issue a certified copy thereof, which shall be recorded in the office of the clerk of the superior court of the county in which the original certificate of incorporation is recorded, and thereupon the certificate of incorporation is amended accordingly. The certificate of the secretary of state, under his official seal, that such certificate of amendment and assent have been filed in his office, is evidence of the amendment in all courts and places. A corporation which cannot now be created under the provisions of this chapter may, except as otherwise provided by law, in like manner increase or decrease its capital stock, or change its name, or extend its corporate existence: Provided, that before the Secretary of State shall issue a certificate of such amendment to any corporation possessing powers, franchises, privileges or immunities, which could not be obtained under this chapter, he shall forthwith transmit to the Commissioner of Banks or the Utilities Commission, as the case may be, a copy of said certificate and shall not issue or record the same until duly authorized so to do by the Commissioner of Banks or the Utilities Commission, as the case may be, as provided for the issuing of certificates of incorporation of banks in the chapter entitled, "Banks", provided that nothing herein shall be construed to require the increase of the capital stock of a bank renewing its charter over the capital of such bank at the time such renewal is applied for.

Any corporation organized on or after March 4, 1925, may insert a provision in its charter that amendments to said charter may be made or amendments to said charter in certain specified respects may be made only when such amendments shall be approved by the holders of such amount of the stock of the corporation (not less than a majority of the shares of stock with voting powers) or such amount of each class of stock as may be specified in said charter and any corporation heretofore organized may by vote of the holders of a majority of the stock entitled to vote amend its charter at any stockholders' meeting, notice of which contains notice of the proposed amendment so as to provide the vote of stockholders (not less than a majority of the stock entitled to vote) required to enable the corporation to amend its charter or to amend it in certain specified respects: Provided, however, that no new class of stock shall hereafter be created by amendment of the charter or otherwise entitled to dividends or shares in distribution of assets in priority to any class of preferred stock already outstanding except with the consent of the holders of record of two-thirds (or such greater amount as may be specified in the charter) of the number of shares of such outstanding preferred stock having voting powers: Provided, that the provisions of this paragraph shall not apply to banks and building and loan associations. (Rev., ss. 1175, 1178; 1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 29, 30, 37; 1903, c. 516; 1925, c. 118, ss. 1, 2a; 1927, c. 142; 1931, c. 243, ss. 4, 5; 1933, c. 134, ss. 7, 8; 1941, c. 97, s. 5; C. S. 1131.)

Cross References.—As to amendments by charitable, educational, penal, or reformatory corporations, see § 55-33. As to amendment of certificate of incorporation of building and loan association, see § 54-3. As to amendment of articles of incorporation of a co-operative association, see § 54-125; of a marketing association, see § 54-135. As to amendment of charter by railroad, see § 60-11. As to amendments changing shares with nominal or par value into shares without nominal or par value, see § 55-76.

Editor's Note.—This section has been amended several times.

The seventh subdivision formerly provided that any proposed amendment should require a favorable vote by "two-thirds in interest of each class of stockholders." By P. L. 1925, c. 118, these words were stricken out and the words "the holders of a majority of the shares of stock" substituted therefor. However, it was provided that this amendment should not apply to banks and building and loan associations. It was evidently the legislative intent that the "two-thirds" requirement should apply to amendments to these two kinds of corporations. See, for example, §§ 53-10, 53-11, and 54-7.

As to building and loan associations, however, P. L. 1939, c. 128 amended § 54-3 to require a vote of the majority of the shareholders, so that now the "two-thirds" provision apparently extends only to banks.

The paragraph providing that a corporation may insert in its charter at the time of its organization a rule regulating amendments was also added by P. L. 1925, c. 118, and banks and building and loan associations were excepted from its operation. For a discussion of the effect of these amendments, see 3 N. C. L. Rev. 134.

Chapter 142, Laws of 1927 makes further changes. Par. three formerly contained a provision following the word "existence" which made the corporation, in extending its existence, waive and abandon any privileges, franchises or immunities which could not be obtained under this chapter. This provision was stricken out.

Par. 7 formerly contained the following provision: "A corporation which cannot now be created under the provisions of this chapter may in like manner increase or decrease its capital stock or change its name." Chapter 142, supra, struck out the period at the end of that sentence and added the words "or extend its corporate existence" and the proviso which immediately follows.

Amendment Operates Prospectively.—Whether the law itself makes an amendment, or as now, confers the power of amendment to the corporation, it will not be construed to operate retrospectively to the detriment of rights already vested under the old charter. Patterson v. Durham Hosiery Mills, 214 N. C. 806, 200 S. E. 906.

A charter provision requiring consent of three-fourths in interest of the preferred stockholders to the issuing of bonds or securities of prior or equal rank, is prospective in effect, and does not constitute a waiver of the right to the declaration of accrued, accumulated dividends, when earned, by permitting the interposing of new preferred stock by agreement of three-fourths of the preferred stockholders, nor does legislative authority to amend the charter extend to authority to defeat the vested right to the declaration of such dividends by amendment of the charter. Id.

§ 55-32. Inadvertent omission to file amendment extending corporate existence.—Any private corporation chartered under the general laws of the State of North Carolina whose period of existence fixed in its charter has expired and which corporation has continued to act and do business as a corporation, but has through inadvertence, omitted to file an amendment extend-

ing the period of its corporate existence, may at any time after the expiration of the period of corporate existence set forth in its original charter, file an amended certificate in the office of the Secretary of State as provided by § 55-31 to extend or renew its corporate existence, as provided for in the amended certificate; provided, this section shall not serve to impair the validity of any contract or vested right in existence at the time of the filing of said amended charter. All acts of such a corporation, purporting to be the acts of the corporation, done or performed after the expiration of its period of existence and before the amendment to its charter, shall be legal and valid as the acts and deeds of said corporation. (1929, c. 271; 1935, c. 6.)

Editor's Note.—Prior to the amendment of 1935 this section contained a seven-year limitation after the expiration of the original period in which the amended certificate should be filed. This provision was omitted.

§ 55-33. Amendments by charitable, educational, penal, reformatory, etc., corporations.—A charitable, educational, social, ancestral, historical, penal, or reformatory corporation not under the patronage or control of the state, and any corporation, without capital stock, organized for the purpose of aiding in the work of any church, religious society or organization, or fraternal order whether organized under a special act or general laws, may change its name, extend its corporate existence, change the manner in which its directors, trustees or managers are elected or appointed, abolish its present method of electing such officers and create a different method of election, and generally reorganize the manner of conducting such corporation, and make any other amendment of its charter desired, in the following manner: The board of directors, trustees, or managers shall pass a resolution declaring that the amendment is advisable, and call a meeting of trustees, managers, and directors to take action thereon. The meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days notice given personally or by mail. If two-thirds of the directors, trustees, or managers of the corporation vote in favor of the amendment, a certificate thereof shall be signed by the president and secretary under the corporate seal, acknowledged as provided in the case of deeds to real estate, and such certificate, together with the written assent in person or proxy of two-thirds of the directors, trustees, or managers, shall be filed and recorded in the office of the secretary of state, and upon filing it he shall issue a certified copy thereof, which shall be recorded in the office of the clerk of the superior court of the county in which the original certificate of incorporation is recorded, or in which the corporation is doing business, and thereupon the certificate of incorporation shall be deemed amended accordingly. Such certificate of amendment may contain only such provision as it would be lawful and proper to insert in an original certificate of incorporation made at the time of making the amendment, and the certificate of the secretary of state, under his official seal, that such certificate and assent has been filed in his office shall be taken and accepted as evidence of such amendment in all courts. (1917, c. 62, s. 1; 1925, c. 42; 1925, c. 257; C. S. 1132.)

Editor's Note. — Two additions were made to this section in 1925. By ch. 257, Laws of 1925 the words "social, ancestral, historical" were inserted in the first sentence of the section.

Chapter 42, Laws of 1925 added the following clause after the word "state" in the first sentence: "and any corporation, without capital stock, organized for the purpose of aiding in the work of any church, religious society or organization, or fraternal order."

§ 55-34. Change of location of principal office.—The board of directors of a corporation organized under the laws of this state may, by resolution adopted at a regular or special meeting by a two-thirds vote of its members, change the location of the principal office of the corporation in the state. A copy of the resolution, signed by the president and secretary of the corporation and sealed with the corporate seal, shall be filed in the office of the secretary of state. No certificate need be filed of the removal of an office from one point to another in the same town, city, or township. (Rev., s. 1176; 1901, c. 2, s. 31; C. S. 1133.)

"Principal Place of Business." — The words "principal place of business," as used in section 1-79 must be regarded as synonymous with the words "principal office," as used in this section and sections 55-2, par. 2 and 55-105. Roberson v. Johnson Lumber Co., 153 N. C. 120, 122, 68 S. E. 1064.

§ 55-35. Curative act; amendments prior to 1901.—All amendments to the plan of incorporation of any corporation organized under the provisions of the general laws of North Carolina prior to the passage of the act entitled "An act to revise the corporation law of North Carolina," being chapter two, public laws of nineteen hundred and one, are declared to be valid in all respects, whether such amendments were made in accordance with the provisions of chapter three hundred and eighty of the public laws of eighteen hundred and ninety-three or in accordance with the provisions of chapter two of the public laws of nineteen hundred and one; but no amendment shall be validated by this section unless it is an amendment of such nature as is authorized to be made under the provisions of chapter two of the public laws of nineteen hundred and one. (Rev., s. 1248; 1905, c. 316; C. S. 1134.)

§ 55-36. Amendment or repeal of this chapter; a part of all charters.—This chapter may be amended or repealed by the legislature, and every corporation is bound thereby; but such amendment or repeal shall not take away or impair any remedy against the corporation, or its officers, for any liability which has been previously incurred. This chapter and all amendments are a part of the charter of every corporation formed hereunder, so far as the same are applicable and appropriate to the objects of the corporation. (Rev., s. 1136; 1901, c. 2, s. 7; C. S. 1135.)

§ 55-37. Name must be displayed.—The name of every corporation must be at all times conspicuously displayed at the entrance of its principal office in this state, and in default thereof for sixty days the corporation is liable to a penalty of one hundred dollars, to be recovered with costs, by the state, in an action to be prosecuted by or under the direction of the attorney-general. (Rev., s. 1242; 1901, c. 2, s. 50; C. S. 1136.)

§ 55-38. Resident process agent.—Every corporation having property or doing business in this

state, whether incorporated under its laws or not, shall have an officer or agent in the state upon whom process in all actions or proceedings against it can be served. A corporation failing to comply with the provisions of this section is liable to a forfeiture of its charter, or to the revocation of its license to do business in this state. In the latter event, process in an action or proceeding against the corporation may be served upon the secretary of state by leaving a true copy thereof with him, and he shall mail the copy to the president, secretary or other officer of the corporation upon whom, if residing in this state, service could be made. For this service to be performed by the secretary, he shall receive a fee of fifty cents, to be paid by the party at whose instance the service was made. (Rev., s. 1243; 1901, c. 5; C. S. 1137.)

Cross References.—As to service of process upon a corporation, see § 1-97, paragraph 1. As to service of process upon foreign insurance companies, see § 58-153. As to foreign corporations generally, see § 55-117 et seq. As to service of process against a foreign corporation in an action within the jurisdiction of the justice of peace, see § 7-143. As to service of summons in action for dissolution, or for appointment of a receiver, see § 55-131.

Section Constitutional. — This section is constitutional and valid. Currie v. Mining Co., 157 N. C. 209, 72 S. E. 980; Fisher v. Ins. Co., 136 N. C. 217, 222, 48 S. E. 667.

Strict Compliance Not Required. — Formal compliance with the statutory requirements for domesticating these corporations and the appointment of process agents is not required, but it is sufficient if such corporations doing business or holding property within the state have been continuously for the statutory period subject to valid service of process, so as to confer jurisdiction on our courts to render binding judgments in personam against them. Anderson v. United States Fidelity Co., 174 N. C. 417, 418, 93 S. E. 948.

A Federal Land Bank created by act of Congress and deriving its right to own property and to do business in this State solely through a Federal statute is not a foreign corporation exercising such functions under express or implied authority of this State, and this section is not applicable to such corporation, and our courts acquire no jurisdiction over it by such service. Leggett v. Federal Land Bank, 204 N. C. 151, 167 S. E. 557.

Jurisdiction over Foreign Corporation. — A foreign corporation, having neither property nor process agent in this state and not having domesticated in North Carolina, must be engaged in business within the state in order to give our courts jurisdiction over it. Goldey v. Morning News, 156 U. S. 518, 15 S. Ct. 559, 39 L. Ed. 517; Lunceford v. Commercial Travelers Mutual Asso., 190 N. C. 314, 318, 129 S. E. 805.

The fact that nonresident defendant corporation had samples, order blanks and stationery in the state was held insufficient to show that defendant had property in the state for the purpose of service of process on it by service on the Secretary of State under the provisions of this section. Plott v. Michael, 214 N. C. 665, 200 S. E. 429.

Transitory Cause of Action Arising in Another State.—In an action by a nonresident plaintiff against a nonresident bus corporation, doing business in this state, to recover for personal injuries alleged to have been sustained through negligence of defendant occurring in Virginia, service of process upon the process agent appointed by the defendant under this section was ineffective. Hamilton v. Atlantic Greyhound Corp., 220 N. C. 815, 18 S. E. (2d) 367.

Foreign Corporation May Plead Statute of Limitations.— A foreign corporation which had complied with the requirements of this section in maintaining an agent in this state upon whom process may be served, together with public-service corporations doing business in this state, may plead the statute of limitations. Volivar v. Richmond Cedar Works, 152 N. C. 656, 68 S. E. 200. Overruling Green v. Insurance Co., 139 N. C. 309, 51 S. E. 887, and cases cited. See also, Anderson v. U. S. Fidelity Co., 174 N. C. 417, 418. 93 S. E. 948.

The nonresidence of a foreign corporation will not prevent the running of the statute of limitations in its favor where constantly from the accrual of the cause of action it might have been served with summons under the provisions of this section. Smith v. Finance Co., 207 N. C. 367, 177 S. E. 183.

Service on Insurance Company. — In Fisher v. Ins. Co., 136 N. C. 217, 224, 48 S. E. 667, it was held that service of process on an insurance company is not restricted to that method as prescribed by section 58-153 but that it may be made also in the manner prescribed by this section. Pardue v. Absher, 174 N. C. 676, 678, 94 S. E. 414.

Merger of Express Companies. — An express company conveyed its property, used in transportation, for its appraised value, to the American Express Company formed at the suggestion of the Director General of Railways, etc., under government control, retaining property of very large value, so that it remained perfectly solvent, and continued to do business under its franchise, and having its own officials and shareholders distinct from those of the new corporation. In such a case the American Express Company is not affected by the provisions of this section, requiring foreign corporations to keep a process agent in this state. McAlister v. American Ry. Exp. Co., 179 N. C. 556, 103 S. E. 129.

Doing Business Here is Acceptance of Section. — Where foreign corporations come into the state to do business after the enactment of a statute providing a method of personal service on them, reasonably calculated to give them full notice of the pendency of suits against them, the statutory provisions are regarded as conditions on which they are allowed to do business within the state, and their doing so here thereafter is an acceptance by them of the statutory method and in recognition of its validity to confer jurisdiction on our courts by service thereunder. Anderson v. United States Fidelity Co., 174 N. C. 417, 93 S. E. 948.

What Constitutes Doing Business. — A foreign company acquiring membership of persons in North Carolina for life insurance, without soliciting agents to whom policies are issued, upon a mutual benefit plan and kept in force by the payments of dues, is doing a life insurance business here in contemplation of this section, and valid service of summons may be had on such corporation upon compliance with its provisions in respect thereto. Lunceford v. Commercial Travelers Mutual Accident Asso., 190 N. C. 314, 129 S. E. 805.

The meaning of the phrase "doing business in this state" as used in this section is not susceptible to an all embracing definition, and each case must be decided upon the particular facts therein appearing, the general criteria being that a foreign corporation is doing business in this state if it transacts in this state the business it was created and authorized to do, through representatives in this state, and thus is present in this state through the person of its representatives. Parris v. Fischer & Co., 219 N. C. 292, 13 S. E. (2d) 540.

It cannot be held that the issuance of one or more policies of fire insurance, by a corporation, created and existing under the laws of another state, and not authorized to do business in this state, insuring citizens of this state against loss or damage by fire to property situate in this state, the contracts for such policies having been made, and the premiums having been paid in the state in which the foreign corporation has its principal office and place of business, not by or through any agent of such corporation or person authorized to act for it in this state, constitutes "doing business" in the State of North Carolina within the meaning of these words in this section. Ivy River Land, etc., Co. v. National Fire etc. Co., 192 N. C. 115, 119, 133 S. E. 424.

In determining the question whether a foreign corporation is doing business within a state, so as to be subject to its jurisdiction, and, to the end that such jurisdiction may be exercised, subject to service of process from its courts, in accordance with statutory provisions for such service, it has been generally held that the foreign corporation must have entered the state and must have been within the state during the time such business was transacted. Ivy River Land, etc., Co. v. National Fire, etc., Ins. Co., 192 N. C. 115, 119, 133 S. E. 424.

A foreign banking corporation which sends its agents here for the purpose of investigating and looking after the properties in its capacity as trustee, does business in the State, "doing business in this State" as used in this section meaning engaging in, carrying on, or exercising in this State some of the functions for which it was created. Ruark v. Virginia Trust Co., 206 N. C. 564, 174 S. E. 441.

Where nonresident defendant corporation employed a soliciting agent who took orders and forwarded them to home office in another state, it was held that the contract was entered into in the state where the home office was situated and that evidence failed to show that defendant was doing business in the state for the purpose of service of process on it by service on the secretary of state under this section. Plott v. Michael, 214 N. C. 665, 200 S. E. 429.

Same—Continuity of Conduct.—While the phrase "doing business in this state" connotes some degree of continuity

and an isolated instance is insufficient to support service of process under this section, evidence that defendant nonresident corporation maintained dealer-representatives in this state, and that in the particular instance in suit the corporation was doing business in this state through its dealer-representative, is held sufficient to support service of process under this section, since the fact that it employed dealer-representatives for the purpose of selling its products and carrying on its business, presumably in a similar manner, implies a sufficient continuity of conduct within the purview of the statute. Parris v. Fischer & Co., 219 N. C. 292, 13 S. E. (2d) 540.

Same—Question of Fact. — The question as to doing business is one of fact, and must be determined largely according to the facts of each individual case, rather than by the application of fixed, definite and precise rules. In the last analysis, the question is one of due process of law under the Constitution of the United States, 14a C. J., 1372, sec. 4079. Ivy River Land, etc., Co. v. National Fire, etc., Ins. Co., 192 N. C. 115, 119, 133 S. E. 424.

Finding by Trial Court Conclusive.—Where there is evidence to show that a foreign corporation, is doing business in this State at the time the summons in the action is served on the Secretary of State, a finding by the trial court to the contrary is conclusive and not subject to review of this Court. Brown v. Tennessee Coal, etc., R. Co., 208 N. C. 50, 52, 178 S. E. 858.

Cited in White v. Vaca Land & Lumber Co., 199 N. C. 410, 154 S. E. 620; Mauney v. Luzier, 212 N. C. 634, 194 S. E. 323; C. T. H. Corporation v. Maxwell, 212 N. C. 803, 195 S. E. 36.

§ 55-39. Process agent in county where principal office located; service on inactive corporations.—Every corporation chartered under the laws of North Carolina shall have an officer or agent in the county where its principal office is located upon whom process can be had, and shall at all times keep on file with the secretary of state the name and address of such process officer or agent, and upon the return of any sheriff or other officer of such county that such corporation or process officer or agent cannot be found, service may be had upon such corporation by leaving a copy with the secretary of state, who shall mail the copy so served upon him to the process agent or officer at the address last given and on file with him, or if none, to the corporation at the address given in its charter; and any such corporation so served shall be in court for all purposes from and after the date of such service on the secretary of state.

For service as above provided to be performed by the secretary of state he shall receive a fee of one dollar ($1.00), to be paid by the party at whose instance the service is made.

This section shall not be in derogation of any other act or law pertaining to the service of summons or process, but shall be in addition thereto. (1937, c. 133, ss. 1-3.)

Cross References.—As to service of process upon a corporation, see § 1-97, paragraph 1, and notes thereto. As to service of summons in action for dissolution, or for appointment of a receiver, see § 55-131.

Editor's Note.—For article discussing the effect of this chapter, see 15 N. C. Law Rev. 340.

Service on Secretary of State.—The provision of this section providing for service upon the secretary of state is not in the nature of a penalty upon the corporation for not having an agent upon whom process could be had and not keeping the name of such agent on file with the secretary of state, which might be condoned because of the alleged inability of the corporation to comply with the statute. It is a device for public convenience and is sustained upon the theory that it is reasonably adequate notice, either to be employed alternatively or where other forms of notice are unavailable. Sisk v. Old Hickory Motor Freight, 222 N. C. 631, 633, 24 S. E. (2d) 488.

Service after Bankruptcy.—The continuance of corporate existence, by § 55-132, makes service of process on a corporation after it has been adjudged a bankrupt and its charter forfeited under § 55-129 reasonable notice and a valid service. Sisk v. Old Hickory Motor Freight, 222 N. C. 631, 24 S. E. (2d) 488.

§ 55-40. Corporate conveyances; when void as to torts.—Any corporation may convey lands, and other property which is transferable by deed, by deed sealed with the common seal and signed in its name by the president, a vice-president, presiding member or trustee, and two other members of the corporation, and attested by a witness, or by deed sealed with the common seal and signed in its name by the president, a vice-president, presiding member or trustee, and attested by the secretary or assistant secretary of the company. If the corporation is a bank, the deed may be attested by the secretary or an assistant secretary or by the cashier or an assistant cashier of the bank. But any conveyance of its property, whether absolutely or upon condition, executed by a public service corporation, is void as to torts committed by such corporation prior to the execution of said deed, if persons injured, or their representatives, commence proceedings or actions to enforce their claims against said corporation within sixty days after the registration of said deed as required by law. (Rev., s. 1130; Code, s. 685; 1891, c. 118; 1893, c. 95, s. 2; 1899, c. 235, s. 17; 1901, c. 2, s. 2; 1903, c. 660, s. 1; 1905, c. 114; 1929, cc. 28, 189, 256; 1931, c. 238; 1943, c. 219, s. 1; C. S. 1138.)

I. In General.
II. The Seal.
III. Pleading and Practice.
IV. Former Provision as to Creditors.

Cross References.

As to probate of corporate conveyances, see § 47-41. As to validation of corporate probates, see §§ 47-70 to 47-75 and § 55-41. As to probate of corporate deeds when the corporation has ceased to exist, see § 47-16. As to probates before stockholders in building and loan association, see § 47-9.

I. IN GENERAL.

Editor's Note.—The Act of 1929, c. 28, inserted the words "public service" in the last sentence of this section. Public Laws of 1929, c. 189 provided that such amendatory act should not affect pending litigation, and Chapter 256 provided that it should be construed to apply only to instruments executed after its ratification. The Act of 1931 which became effective April 2, 1931, except as to pending litigation, repealed the last mentioned chapter. Consequently the section, limited to public service companies, must be regarded as affecting the standing of corporate mortgages whenever executed. 9 N. C. Law Rev. 363. Some of the cases treated here were decided prior to these amendments.

The 1943 amendment inserted the second sentence.

Purpose of Section. — The primary purpose of this section is to impose restraints upon insolvent corporations, and disable them from borrowing money and conveying their property to secure it, whereby present liabilities might go unpaid. Traders National Bank v. Lawrence Mfg. Co., 96 N. C. 298, 307, 3 S. E. 363.

Applies Generally. — By this section the Legislature expressed a general intention with regard to a general subject-matter, that is, it applies to all conveyances and to all creditors and to all torts. Boston Safe-Deposit & Trust Co. v. Hudson, 68 Fed. 758, 760.

Not Applicable to Leases.—It is not required that a lessee corporation should sign a lease, this section applying only to conveyances, and the failure of a lessee corporation to affix its seal to a lease to it of lands necessary to the purpose of its business does not of itself render the lease invalid. Raleigh Banking & Trust Co. v. Safety Transit Lines, 198 N. C. 675, 153 S. E. 158.

An Enabling Act. — This section is an enabling act, additional to and not exclusive of the common law mode of executing deeds. Clark v. Hodge, 116 N. C. 761, 765, 21 S. E. 562; Bason v. Mining Co., 90 N. C. 417.

Power to Convey Belongs Primarily to Stockholders. — The extraordinary powers of a corporation, such as that of selling or leasing the corporate property, where it exists, belongs primarily to the stockholders but may be delegated by them, as it can be by an individual, to the directors or

to an agent designated in the resolution of the body, either by his official title or his name. Barcello v. Hapgood, 118 N. C. 712, 714, 730, 24 S. E. 124.

Hence a mortgage deed executed according to the provisions of this section is the act of the corporation alone, and not that of the corporation officers, by whose agency the deed is executed. Traders National Bank v. Mfg. Co., 10[illegible] N. C. 345, 5 S. E. 81.

Other Methods of Execution Permissible. — The statutory method of alienation by corporations, like that provided by this section is not exclusive of the common law mode of conveyance, and does not prohibit other methods of execution by authorized agents. Barcello v. Hapgood, 118 N. C. 712, 713, 730, 24 S. E. 124.

Same—Example. — A deed of a corporation, the concluding clause being, in witness whereof the said corporation "has caused this indenture to be signed by its president and attested by its secretary, and its common seal to be affixed," with the signatures and seal, is properly executed as a common law deed. Bason v. Mining Co., 90 N. C. 417.

Sixty Day Provision Mandatory. — Under this section the action should be commenced within sixty days after the registration of the mortgage. Joyner v. Reflector Co., 176 N. C. 274, 275, 97 S. E. 44.

Judgment for Tort Committed before Transfer.—Under this section as construed with §§ 47-18 and 47-20, an absolute sale by a corporation of its personal property, accompanied by delivery to the purchaser, is not void as to a judgment creditor of the corporation on a judgment obtained against the corporation for a tort committed before the transfer. Carolina Coach Co. v. Begnell, 203 N. C. 656, 166 S. E. 903.

II. THE SEAL.

Corporation Seal Necessary. — When a mortgage by a corporation is signed by the president, secretary and two stockholders and duly witnessed, but there is no common seal attached, and the probate recites that it is "acknowledged by the secretary, who also proves the execution by the president and two stockholders," such probate is insufficient and does not authorize registration, and is ineffectual to pass title as against creditors. Duke v. Markham, 105 N. C. 138, 10 S. E. 1003.

An instrument purporting to be the deed of a corporation, signed by the president and two members of the corporation, but not having the common seal of the corporation attached, is not effective as a deed, under this section for lack of the common seal. Caldwell v. Morganton Mfg. Co., 121 N. C. 339, 28 S. E. 475.

Where a corporate act must be executed by an instrument under seal and the corporation has adopted a common seal, the corporation speaks through and by its seal. Withrell v. Murphy, 154 N. C. 82, 69 S. E. 748.

Presumption of Validity.—When a corporation deed recites that it is sealed with the corporate seal it will be presumed that what purports to be such seal placed after the name of the officer executing the deed is the seal of the corporation. Benbow v. Cook, 115 N. C. 324, 325, 20 S. E. 453.

When Private Seal of Officer Used.—An instrument purporting to be the deed of a corporation and executed in its name by its president with the word "seal" at the end of the signature, is not effective as the deed of the corporation, either at common law or under this section, but is only the personal act of the president, and is not admissible in evidence to prove a conveyance by the corporation. Caldwell v. Morganton Mfg. Co., 121 N. C. 339, 28 S. E. 475. See Clark v. Hodge, 116 N. C. 761, 21 S. E. 562.

Same—May Be Adopted by Corporation.—A corporation may adopt and make effectual as its seal the individual seals of its officers affixed to a deed of the corporation, when it has no seal of its own. Taylor v. Heggie, 83 N. C. 244.

III. PLEADING AND PRACTICE.

No Action to Vacate Required.—This section does not require that an action be brought for the purpose of setting aside or vacating the assignment, but that it becomes void and of no effect immediately upon the bringing of an action by the creditor to "enforce his claim." Hence it is unnecessary for the plaintiffs in their action to make any reference or to ask any judgment in respect to the deed of assignment. Fisher v. Western Carolina Bank, 132 N. C. 769, 778, 44 S. E. 601.

Recital in Deed Proof of Authority.—A recital in a deed of a corporation, properly executed, that it was executed in pursuance of an order of the board of directors, dispenses with the necessity of proving such action of the board otherwise than by the deed itself. Caldwell v. Morganton Mfg. Co., 121 N. C. 339, 28 S. E. 475.

When Demurrer Insufficient. — In an action against a corporation for specific performance of a contract the defense, that it is not in writing with the corporate seal attached or signed by an officer, must be taken advantage of by plea and not by demurrer. Friedenwald Co. v. Asheville Tobacco Works, 117 N. C. 544, 23 S. E. 490.

Presumption of Authority Rebutted. — The presumption that a mortgage, with its seal affixed, was authorized by a corporation is rebutted when it was executed to the company's officers to secure a pre-existing debt. Edwards v. Hill Supply Co., 150 N. C. 171, 63 S. E. 742.

When Authority Granted at Special Meeting.—A mortgage executed by a corporation pursuant to a resolution adopted by a majority of the stockholders at a meeting which was specially called, but was not a "regular general meeting," is valid against creditors of the corporation other than the mortgage creditors. Antietam Paper Co. v. Chronicle Pub. Co., 115 N. C. 143, 20 S. E. 366.

IV. FORMER PROVISIONS AS TO CREDITORS.

Editor's Note.—Prior to 1901 this section provided that conveyances should be void as to creditors existing prior to or at the time of the execution of the said deed provided they commenced proceedings within sixty days after registration. See Fisher v. Bank, 132 N. C. 769, 771, 777, 44 S. E. 601 where this former provision is discussed by the court.

The following constructions were given while the provision above referred to was a part of the section.

In General.—The provisions of this section manifestly are designed to prevent a fraudulent conveyance by a corporation contemplating insolvency to the detriment of its existing creditors. It recognizes the principle that the property of an insolvent corporation is a trust fund for the benefit of its creditors. Giving to this creature of the law the rights of property of a natural person, the statute in express terms protects its existing creditors from fraud in disposition of this property. Finance Co. v. Charleston, C & C. R. Co., 61 Fed. 369, 371.

An insolvent corporation may, under the laws of this State, exercise preference in favor of creditors, not corporators or officers, provided it is not done with a purpose to defeat, delay or hinder other creditors or parties in interest (Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107, Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 S. E. 680, distinguished), and subject (in the case of preference by a conveyance by deed) to the right of other creditors to avoid the preference by commencing suit to enforce their claims within sixty days from the date of the registration of the deed, as provided in this section. Merchants National Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

Creditors Must Act within Sixty Days.—An assignment by an insolvent corporation for the benefit of creditors will be set aside at the suit of creditors within sixty days from the assignment, as provided in this section. Wilson Cotton Mills v. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770. But the right must be asserted within sixty days. William v. R. R., 125 N. C. 918, 36 S. E. 189.

A conveyance by a corporation of its property in trust for creditors is not void as to pre-existing creditors, unless the latter shall bring suit to enforce their claims, within sixty days after the registration of such conveyance. Blalock v. Kernersville Mfg. Co., 110 N. C. 99, 100, 14 S. E. 501.

Cited in Carolina Coach Co. v. Hartness, 198 N. C. 524, 527, 152 S. E. 489; Begnell v. Safety Coach Lines, 198 N. C. 688, 153 S. E. 264.

§ 55-41. Certain corporate conveyances validated.—All deeds and conveyances of land in this state, made by any corporation of this state prior to January first, one thousand nine hundred thirty-eight, executed in its corporate name and signed and attested by its proper officers, from which the corporate seal was omitted, shall be good and valid, notwithstanding the failure to attach said corporate seal. (1939, c. 23.)

Editor's Note.—Public Laws 1937, c. 360, validated such conveyances executed prior to January 1, 1935.

§ 55-41.1. Certain deeds executed by banks validated.—All deeds heretofore executed by banks and attested by the cashier, assistant cashier, secretary or assistant secretary thereof, which deeds are otherwise regular and valid, are hereby validated. (1943, c. 219, s. 1½.)

§ 55-42. Conveyances by corporations owned by the United States government.—The home owners' loan corporation and any corporation, the

majority of whose stock is owned by the United States government, may convey lands, and/or other property which is transferable by deed which is duly executed by either an officer, manager, or agent of said corporation, sealed with the common seal and has attached thereto a signed and attested resolution under seal of the board of directors of said corporation authorizing the said officer, manager, or agent to execute, sign, seal and attest deeds, conveyances and/or other instruments.

All deeds, conveyances and/or other instruments which have been executed prior to March 15, 1941 in the manner prescribed above, if otherwise sufficient, shall be valid, and shall have the effect to pass the title to the real and/or personal property described therein.

To the extent as modified in this section the provisions of § 55-40 shall not apply to conveyances executed by the corporations herein referred to. (1941, c. 294.)

Editor's Note.—This section became effective March 15, 1941.

§ 55-43. Conditional sale contracts.—Contracts, in writing, for the purchase of personal property by corporations, providing for a lien on the property or the retention of the title thereto by the vendor as a security for the purchase price, or any part thereof, are sufficiently executed if signed in the name of the corporation by the president, secretary or treasurer in his official capacity, and may be acknowledged and ordered to registration as is provided by law for the execution, acknowledgment and registration of deeds by natural persons. (1909, c. 335, s. 1; C. S. 1139.)

Cited in Pick & Co. v. Morehead Bluffs Hotel Co., 197 N. C. 110, 147 S. E. 819.

§ 55-44. Mortgaged property subject to execution for labor, clerical services, and torts.—Mortgages of public service corporations upon their property or earnings cannot exempt said property or earnings from execution for the satisfaction of any judgment obtained in courts of the state against such corporations for labor and clerical services performed, or torts committed whereby any person is killed or any person or property injured. (Rev., s. 1131; Code, s. 1255; 1879, c. 101; 1897, c. 334; 1901, c. 2, s. 3; 1915, c. 201, s. 1; 1929, cc. 29, 256; 1931, c. 238; C. S. 1140.)

I. In General.
II. Relation to Other Sections.
III. Effect on Mortgages.
IV. Certain Judgments Preferred.
A. Labor Performed.
B. Torts Committed.

Cross References.

As to power of corporation to mortgage its property, see § 55-26, paragraph 4. As to when corporate conveyances are void as to torts, see § 55-40. As to wages being a prior lien upon the insolvency of a corporatoin, see § 55-136. As to execution against a corporation, see § 55-140 et seq.

I. IN GENERAL.

Editor's Note.—It must be noted in studying the cases under this section that there were formerly included the words "for material furnished." These words were stricken out in 1897.

Under the section as formerly constituted it was held that coal is "material furnished." Pocahontas Coal Co. v. Henderson Elec., etc., Co., 118 N. C. 232, 24 S. E. 22. Steam Engine and boiler were not "material furnished" where it did not appear that they were necessary to the conduct of the business. James v. Lumber Co., 122 N. C. 157, 29 S. E. 358. A mortgage is now not postponed to a judgment for material furnished. Cheesborough v. Sanatorium, 134 N. C. 245, 46 S. E. 494; Cox v. New Bern Lighting & Fuel Co., 152 N. C. 164, 166, 67 S. E. 477.

The words "clerical services" were added to the section by ch. 201, Laws of 1915.

The Act of 1929 inserted the words "public service" before "corporations" in line two of this section. Public Laws of 1929, c. 256 provided that such amendatory act should be construed to apply only to instruments executed after its ratification. The Act of 1931, which became effective April 2, 1931, except as to pending litigation, repealed the last amendment and consequently the section, limited to public service companies, must be regarded as affecting the standing of corporate mortgages whenever executed. 9 N. C. Law Rev. 363.

The Act of February 13, 1929, was not intended to affect instruments executed before its passage, since it does not expressly state that they shall be also affected and acts of the Legislature are to be construed prospectively, not retroactively. Dial v. Chatham, 70 F. (2d) 21, 23.

Strict Construction.—This section being in derogation of the common law, must be strictly construed. Fidelity Insurance, Trust, etc., Deposit Co. v. Norfolk & W. R. Co., 90 Fed. 175.

Purpose.—This section is exceedingly comprehensive in its terms, and was intended manifestly to prevent corporations within the State of North Carolina, and those doing business with them, from avoiding the payment of obligations due to laborers. Union Trust Co. v. Southern Sawmills, etc., Co., 166 Fed. 193, 204.

This section was passed to secure labor and materials, and to give ample protection against the necessary consequences of the use of plant and machinery. Finance Co. v. Charleston, C. & C. R. Co., 61 Fed. 369, 372.

Protects Employees and Not Officers.—This section is for the protection of employees of a corporation and not for its officers. Helsabeck v. Vass, 196 N. C. 603, 146 S. E. 576.

Applies Only to Property within State.—This section can only operate on property within the State. Fidelity Insurance Trust, etc., Deposit Co. v. Norfolk & W. Ry. Co., 114 Fed. 389, 393.

Does Not Create a Lien.—This section neither creates nor provides for the creation of a lien. It does not seem to provide against prior judgment liens, whether taken upon a prior or subsequent debt; nor does it provide against an absolute bona fide sale, but only provides that the property mortgaged shall stand, so far as their debts and liabilities are concerned, just as if there had been no such mortgage made. Clement v. King, 152 N. C. 456, 463, 67 S. E. 1023.

The section confers no lien or priority. It simply wipes out a mortgage as against a judgment for tort, so that the judgment creditor may proceed to collect his judgment as if there was no mortgage, by execution if the property is not in the hands of a receiver, or by prorating with the mortgage creditors if a receiver has taken charge. Clement v. King, 152 N. C. 456, 460, 67 S. E. 1023, and cases cited. Joyner v. Reflector Co., 176 N. C. 274, 275, 97 S. E. 44.

Same—Example.—This section confers no lien on the products of a cotton factory corporation in favor of one furnishing coal used in their manufacture, but only the right to enforce their claims by judgment and execution, as against the holders of mortgages upon the corporate property. Norfleet v. Tarboro Cotton Factory, 172 N. C. 833, 89 S. E. 785.

Priorities.—This section creates a priority in favor of those performing labor or rendering clerical services only from the time a judgment has been entered by a court of competent jurisdiction ascertaining the amount and declaring the priority, and when so established it relates back and becomes prior to that of general creditors of the corporation under a prior registered judgment. Helsabeck v. Vass, 196 N. C. 603, 146 S. E. 576.

Same—Purchaser at Foreclosure Sale.—A notice at a foreclosure sale of the property of a corporation under a mortgage that the employees of the corporation claim a priority under the provisions of this section, does not affect the title conveyed to the purchaser at the sale, but the claimants after obtaining judgment against the corporation may maintain the superiority of their claims to those of the purchaser, but the purchaser is entitled to be heard, and may bring suit to restrain the execution. Helsabeck v. Vass, 196 N. C. 603, 146 S. E. 576.

Judgments Not Superior Except as Provided in This Section.—Judgments against a corporation for its obligations arising on a contract are not superior to the lien of a prior registered deed of trust given to secure bondholders when the judgments were not in actions to recover for labor and clerical services performed or to recover damages for a tort or for injuries to property within the meaning of this

section. Amoskeag Mfg. Co. v. Yadkin Cotton Mills, 200 N. C. 10, 156 S. E. 101.

II. RELATION TO OTHER SECTIONS.

Editor's Note.—In Boston Safe-Deposit and Trust Co. v. Hudson, 68 Fed. 758, the court makes an exhaustive comparison between this section and section 55-40. The decision reached was that a judgment against a railroad company for a tort causing injury to the person is superior to the mortgage executed after the tort was committed, and that the bringing of the action within 60 days, as provided by section 55-40, did not apply.

See also Finance Co. v. Charleston, etc., R. R., 61 Fed. 369, where the court discusses the history and purpose of this section and section 55-40.

Gives a Different Remedy.—This section was enacted after sections 55-40 and 44-1 and could not have been intended to give the same relief they gave; and it is equally certain it was passed for the benefit of the class of persons mentioned in the enactment, and it is the duty of the court to take into consideration the object for which it was passed and to construe it in that light. Pocahontas Coal Co. v. Henderson Electric, etc., Co., 118 N. C. 232, 236, 24 S. E. 22.

Applies to Labor and Torts after Mortgage.— This section must mean such labor performed, and such torts committed after making the mortgage, as the Act was passed in 1879. If it were for liabilities existing prior to making the mortgage, they would have been provided by section 55-40 which was enacted in 1798, and there would have been no need for the enactment of this section. Pocahontas Coal Co. v. Henderson Electric, etc., Co., 118 N. C. 232, 234, 24 S. E. 22.

Mechanics' Lien under Sec. 44-1.—The mechanics' lien, under section 44-1 has no preference over a prior registered mortgage. Cox v. New Bern Lighting & Fuel Co., 152 N. C. 164, 165, 67 S. E. 477.

III. EFFECT ON MORTGAGES.

Refers to Mortgage of Corporation Itself.—This section expressly refers to a mortgage given by the corporation itself, and not to mortgages on the corporate property acquired by a stranger and registered before the formation of the corporation. Roberts v. Bowen Mfg. Co., 169 N. C. 27, 85 S. E. 45.

This section does not directly invalidate the mortgages, but notwithstanding the attempted alienation, exposes the corporate property to execution issued upon a judgment recovered upon the causes of action mentioned. Traders National Bank v. Lawrence Mfg. Co., 96 N. C. 298, 308, 3 S. E. 363.

Property Acquired Subject to Prior Mortgage.—This section, which gives to judgments against corporations for labor performed and torts committed priority over prior mortgages executed by the corporation, has no application where the corporation acquired the property subject to such prior mortgage. Humphery Brothers v. Buell-Crocker Lumber Co., 174 N. C. 514, 519, 93 S. E. 971; Walker v. Linden Lumber Co., 170 N. C. 460, 87 S. E. 331.

Conveys Nothing.—A mortgage of a corporation conveys nothing as against a subsequent judgment for a tort by the corporation. Howe v. Harper, 127 N. C. 356, 358, 37 S. E. 505; R. R. Co. v. Burnett, 123 N. C. 210, 213, 31 S. E. 602; Clement v. King, 152 N. C. 456, 67 S. E. 1023.

Prior Claim.—A mortgagee of the legal title of property of a corporation, to secure a debt, takes subject to laborers' liens, judgments for torts, and expenses of receivership, and other court proceedings to wind it up, in case of insolvency. Humphery Brothers v. Buell-Crocker Lumber Co., 174 N. C. 514, 515, 93 S. E. 971.

Judgment against Lessee.—This section does not make a judgment, against the lessee of a railroad, a lien on the property superior to a mortgage given by the lessor before the lease. And where the road is in the hands of receivers, appointed in a suit to foreclose the mortgages, the judgment creditor has no right to payment from earnings of the road as all rights and interests of the lessee were ended by the appointment of the receiver. Hampton v. Norfolk & W. Ry. Co., 127 Fed. 662.

IV. CERTAIN JUDGMENTS PREFERRED.

A. Labor Performed.

Meaning of Labor.—The word "labor" in legal parlance and as used in this section has a well defined, understood, and accepted meaning. It implies continued exertion of the more onerous and inferior kind, usually and chiefly (prior to the addition of the word "clerical" in the section) consisting in the protracted exertion of muscular force. Moore v. Industrial Co., 138 N. C. 304, 305, 50 S. E. 687.

Foreman Included.—A foreman is a laborer, and the money paid him is entitled to any preference for "labor performed" which is given his co-laborers whom he supervised and with whom he worked. Moore v. Industrial Co., 138 N. C. 304, 50 S. E. 687; Cox v. New Bern Lighting & Fuel Co., 152 N. C. 164, 167, 67 S. E. 477.

Services Need Not Add to Value of Plant.—Debts of a corporation for labor performed to keep it "a going concern," have a priority over a mortgage previously recorded, although the labor done or materials furnished do not add to the plant or enhance its value. Pocahontas Coal Co. v. Henderson Electric, etc., Co., 118 N. C. 232, 24 S. E. 22.

What Services Excluded.—The words "labor performed," as used in this section, do not embrace such services as superintending the conduct of its milling operations, or conducting a commissary store and keeping the books of the corporation. Moore v. Industrial Co., 138 N. C. 304, 305, 50 S. E. 687, and cases cited. (But note the effect of the addition of the word "clerical" in the section.)

Independent Contractor's Laborers Excluded.—Under this section the preference given for "labor performed" over prior mortgages of corporations is intended to, and does, give such preference only to laborers employed by the corporation in carrying on the ordinary business of the company, including its repairs and up-keep, and does not confer such preference upon contractors who employ labor under a contract to place "betterments" upon the company's property. Cox v. New Bern Lighting & Fuel Co., 152 N. C. 164, 167, 67 S. E. 477.

Prior Judgment Unnecessary.—Under this section it is not necessary that claims for labor should be reduced to a formal judgment before they can be proved and given priority over a mortgage. The decree, adjudging the amount of the claim, is to all intents and purposes such a judgment as will meet the requirements of the statute. Union Trust Co. v. Southern Sawmills, etc., Co., 166 Fed. 193, 194, 204.

B. Torts Committed.

Must Injure Person or Property.—This section expresses a particular intention with regard to a restricted subject-matter, and applies only to torts which injure persons or property. Boston Safe-Deposit & Trust Co. v. Hudson, 68 Fed. 760.

Action against Purchaser. — An insolvent railroad company is not a necessary party to a suit against a purchaser at the foreclosure of a mortgage on its road for an injury while it was operating the road. Howe v. Harper, 127 N. C. 356, 37 S. E. 505.

Remedy for Injured Person. — While this section does not create a lien, it gives to the tort-claimant, who has reduced his claim to judgment, a right (remedy) to follow and subject to the payment of his claim such property as the corporation has disposed of by mortgage, even where the sale under the mortgage had taken place before the judgment has been rendered. Clement v. King, 152 N. C. 456, 464, 67 S. E. 1023.

Judgment Pending Foreclosure Proceedings. — A passenger recovered judgment in the courts of this state against a railroad company for personal injury. At the time, a suit to foreclose a mortgage against the railroad was pending in the federal courts. Held, the judgment in the state court constituted a prior lien on the property of the railroad. Trust Co. v. Norfolk, etc., R. Co., 183 Fed. 803.

Deed of Trust Subordinate.—While this section does not give a tort claimant a lien for his judgment for the tort committed, it does create a priority and has the effect of rendering a deed of trust subordinate to the judgment. Dial v. Chatham, 70 F. (2d) 21, 23.

§ 55-45. Gas and electric power companies.— Gas and electric light and power companies have power to lay, extend, construct, erect, maintain, repair and remove all necessary or convenient towers, poles, cable wires, conductors, lamps, fixtures, appliances, and appurtenances upon, through and over any roads, streets, avenues, lanes, alleys and bridges within and near any city, town or village where said company is located; and all such roads, streets, lanes, alleys and bridges shall be left in as good condition as they were in at the time of using them as aforesaid: Provided, that the rights and privileges conferred in this section shall not be exercised unless the authorities of such city, town or village first give their consent, and afterwards the said authorities shall have full power to control the location of all towers, poles, wires, conductors

and all other fixtures, appliances and appurtenances belonging to or operated by any of said companies. (Rev., s. 1133; 1889 (Pr.), c. 35, s. 2; C. S. 1141.)

Cross References.—As to acquisition and condemnation of property by an electric power company, see § 56-1 et seq. As to power of eminent domain in the North Carolina Rural Electrification Authority, see § 117-2, paragraph g. As to right of eminent domain generally, see § 40-1 et seq.

§ 55-46: Repealed by Session Laws 1943, c. 543.

§ 55-47. Actions by attorney-general to prevent ultra vires acts, etc.—In the following cases the attorney-general may, in the name of the state, upon his own information, or upon the complaint of a private party, bring an action against the offending parties for the purpose of—

1. Restraining by injunction a corporation from assuming or exercising any franchise or transacting any business not allowed by its charter.

2. Restraining any person from exercising corporate franchises not granted.

3. Bringing directors, managers, and officers of a corporation, or the trustees of funds given for a public or charitable purpose, to an account for the management and disposition of the property confided to their care.

4. Removing such officers or trustees upon proof of gross misconduct.

5. Securing, for the benefit of all interested, the said property or funds.

6. Setting aside and restraining improper alienations of the said property or funds.

7. Generally compelling the faithful performance of duty and preventing all fraudulent practices, embezzlement, and waste. (Rev., s. 1197; Code, ss. 607, 686; 1901, c. 2, s. 107; C. S. 1143.)

Cross Reference.—As to action by the attorney general to dissolve a corporation, see § 55-126.

Editor's Note.—For article on Powers and Duties of Attorney General, see 16 N. C. Law Rev. 127.

Application. — This section applies when the purpose of the action is not to dissolve a corporation but to preserve it in order that its useful functions may be performed and at the same time that it may not be able to abuse its powers or transcend them. Attorney General v. R. R., 28 N. C. 456, 464.

The above case was decided under the old R. S., ch. 26, sec. 10, the provisions of which are contained in this section.

Cited in McGuinn v. High Point, 219 N. C. 56, 13 S. E. (2d) 48.

Art. 5. Directors and Officers.

§ 55-48. Directors.—The business of every corporation shall be managed by its directors, who must be at least three in number, and at all times bona fide stockholders or the guardian of a bona fide stockholder, or the executor or administrator of the estate of a deceased bona fide stockholder, or a director in a corporation which is a bona fide stockholder, in case the corporation is one issuing stock. A corporation may, by its certificate of incorporation or by-laws, determine the number of shares a stockholder must own to qualify him as a director. The directors shall be chosen annually by the stockholders at the time and place provided in the by-laws, and shall hold office for one year and until others are chosen and qualified in their stead; but by so providing in its certificate of incorporation, a corporation may classify its directors in respect to the time for which they will severally hold office, the several classes to be elected for different terms, but no class may be elected for a shorter period than one year, or for a longer period than five years, and the term of office of at least one class must expire in each year. A corporation which has more than one kind of stock may, by so providing in its certificate of incorporation, confer the right to choose the directors of any class upon the stockholders of such class, to the exclusion of the others. One director of every corporation of this state shall be, and only one need be, an actual resident of the state, notwithstanding the provisions of the charter or any other act. (Rev., ss. 1147, 1148; 1901, c. 2, ss. 14, 44; 1937, c. 179; C. S. 1144.)

Cross References.—As to election of directors, see §§ 55-112 to 55-114. As to cumulative voting for directors, see § 55-110. As to production of books at elections, see § 55-108. As to directors' meetings, see §§ 55-105 and 55-106. As to power to declare dividends, see § 55-115 and § 55-116. As to power to make assessments, see § 55-70. As to liability for impairing capital, see § 55-116. As to liability for fraud, see § 55-56. As to directors acting as trustees upon dissolution of the corporation, see § 55-133. As to directors' power to have offices, keep books of the corporation, and hold meetings outside the state, see § 55-105.

Editor's Note. — The 1937 amendment inserted the words "or the guardian of a bona fide stockholder, or the executor or administrator of the estate of a deceased bona fide stockholder, or a director in a corporation which is a bona fide stockholder" in the first sentence.

Director Occupies Fiduciary Relation. — A director of a company occupies a fiduciary relation to the company which, by virtue of his office, he represents in the management of its principal functions. Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107. Directors are to be considered and dealt with as trustees or quasi trustees. Besseliew v. Brown, 177 N. C. 65, 67, 97 S. E. 743.

Care Required of Directors. — Good faith alone will not relieve the directors of a corporation from liability to its creditors for damages caused them by their gross mismanagement and neglect of its affairs. Anthony v. Jeffress, 172 N. C. 378, 90 S. E. 414.

They are not, as a rule, responsible for mere errors of judgment (Fisher v. Fisher, 170 N. C. 378, 87 S. E. 113, and authorities cited), nor for slight omissions from which the loss complained of could not have been reasonably expected; but where they accept these positions of trust they are expected and required to give them the care and attention that a prudent man should exercise in like circumstances and are charged with a like duty, usually the care that he shows in the conduct of his own affairs of a similar kind. Besseliew v. Brown, 177 N. C. 65, 97 S. E. 743.

Director Cannot Prefer Himself as Creditor. — A director, who is also a creditor of a corporation, cannot prefer himself to the other creditors in the application of its assets to the security or payment of its debts. Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107; Bank v. Cotton Mills, 115 N. C. 507, 20 S. E. 765; McIver v. Young Hardware Co., 144 N. C. 478, 483, 57 S. E. 169.

Powers of Directors. — It is well settled that the directors of a corporation, unless they are specially restrained by the charter or by-laws, have the power to borrow money with which to conduct its business and to secure payment by mortgage on the corporate property. Wall v. Rothrock, 171 N. C. 388, 88 S. E. 633.

Same—May Loan Money to Corporation. — While a director of a company may lend it money when needed for its benefit, and take a lien upon the corporate property as security for its repayment, provided the transaction be open and entirely fair and capable of strict proof as to its bona fides, yet where a corporation is insolvent a director who is a creditor can not, upon a debt theretofore existing, take advantage of his superior means of information to secure his debt as against other creditors. Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107.

Liens of Directors. — Where the directors of a corporation made a bona fide sale of property to it, for value and free from fraud, judgments against the corporation for the purchase price, duly docketed, constitute liens in favor of the directors against the corporate property. Caldwell v. Robinson, 179 N. C. 518, 523, 103 S. E. 75.

Right of Directors to Security. — By taking mortgage on corporate property, when the corporation is in failing circumstances, directors, occupying a fiduciary relation, are not permitted to secure themselves against pre-existing

liabilities of the corporation upon which they are already bound. Wall v. Rothrock, 171 N. C. 388, 88 S. E. 633; Caldwell v. Robinson, 179 N. C. 518, 523, 103 N. C. 75.

Right of Corporation to Sue Negligent Directors.—Where the directors or managing officers of a corporation are liable in damages for their willful or negligent failure to exercise the care and attention to the corporate affairs entrusted to them and which they have assumed, an action will lie against them in favor of the corporation, and in case of its insolvency and receivership, in favor of its receiver. Besseliew v. Brown, 177 N. C. 65, 97 S. E. 743.

Cited in Lloyd & Co. v. Poythress, 185 N. C. 180, 116 S. E. 584.

§ 55-49. Officers, agents, and vacancies.—Every corporation organized under this chapter shall have a president, secretary, and treasurer, to be chosen either by the directors or stockholders, as the by-laws direct, and they shall hold office until others are chosen and qualified in their stead; the president shall be chosen from among the directors; the secretary shall record all the votes of the corporation and directors in a book to be kept for that purpose, and perform such other duties as are assigned to him; the treasurer may be required to give bond for the faithful discharge of his duty in such sum, and with such surety or sureties, as are required by the by-laws. Any two of these offices may be held by the same person, if the body electing so determine. The corporation may have such other officers and agents, who shall be chosen in the manner and hold office for the terms, and upon the conditions, prescribed by the by-laws or determined by the board of directors. Any vacancy occurring among the directors, or in the office of president, secretary or treasurer, shall be filled in the manner provided for in the by-laws; in the absence of such provision the vacancy shall be filled by the board of directors. (Rev., ss. 1149, 1150, 1151; 1901, c. 2, ss. 15, 16, 17; C. S. 1145.)

Cross References.—As to release of mortgage to a corporation by corporate officer, see § 45-42. As to arrest in civil cases, see § 1-410. As to oath of corporation being made by an officer, see § 11-5.

Officers Must Act in Good Faith. — The officers of the company had no right to take advantage of their knowledge of its financial condition to secure a preference for themselves on all its property as to a pre-existing debt. Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107; Electric Light Co. v. Electric Light Co., 116 N. C. 112, 21 S. E. 951; Graham v. Carr, 130 N. C. 271, 274, 41 S. E. 379; Holshouser v. Copper Co., 138 N. C. 248, 251, 50 S. E. 650; Edwards v. Hill Supply Co., 150 N. C. 171, 172, 63 S. E. 742.

Powers of President. — The president of a corporation is not bound by any secret limitation upon the authority usually vested in the chief officer of a corporation; hence a defense to a note, issued by the president of a corporation, that it was unauthorized because of an unwritten by-law is untenable. Phillips v. Interstate Land Co., 176 N. C. 514, 97 S. E. 417.

The president of a corporation under this section has implied power to sign a note and secret limitations on his authority will not be binding on the payee, and a plea of **ultra vires** by the corporation, having placed its president in a position to mislead plaintiff and cause the loss, will be excluded. White v. Johnson & Sons, 205 N. C. 773, 172 S. E. 370.

Power of General Manager. — The general manager of one of a chain of stores has implied authority to employ clerks by the year, and the corporation is bound by such contract though there exists an undisclosed limitation of the agent's authority to make contracts of employment for more than a month. Strickland v. Kress & Co., 183 N. C. 534, 112 S. E. 30.

Implied Authority of Secretary. — The secretary of an incorporated garage and auto repair company has the implied authority under this section to settle claims made for damages upon the corporation, and one so dealing with him therein will not be bound by a secret limitation of his authority; and upon his own testimony that he was the proper one to be dealt with in this respect, the question of the corporation's liability for his promise to pay the claim is properly presented. Beck v. Wilkins-Ricks Co., 186 N. C. 210, 119 S. E. 235.

Individual Liability of Officers. — Where officers of a corporation knowingly participate in a wrong which is actionable they are jointly and severally liable therefor. Cone v. United Fruit Growers' Ass'n, 171 N. C. 530, 83 S. E. 860.

Necessity for Contract for Compensation. — The cases very generally hold that an officer of a corporation, for services in the course and scope of his official duties, can only recover when compensation therefor has been authoritatively agreed upon in advance. It is not always required that a definite sum be fixed upon, but there must be a previous agreement for compensation existent or in some way expressed so as to bind the company. There can be no recovery on a quantum meruit. Chiles v. United States, etc., Mfg. Co., 167 N. C. 574, 83 S. E. 812, citing Caho v. Norfolk, etc., R. Co., 147 N. C. 20, 60 S. E. 640.

Removal. — The officers of a corporation created for private purpose have no franchise in their offices, and are removable during the term for which they are appointed, when found to be incompetent or faithless. Eliason v. Coleman, 86 N. C. 236, 240.

Cited in Lloyd & Co. v. Poythress, 185 N. C. 180, 116 S. E. 584.

§ 55-50. Books to be audited on request of stockholders.—Upon request of twenty-five per cent of the stockholders, or of any stockholder or stockholders owning twenty-five per cent of the capital stock, of a private corporation organized under the laws of North Carolina and doing business in this state, it is the duty of the officers of the corporation to have all of its books audited by a competent accountant, so that its financial status may be ascertained. Upon refusal or failure of the corporation to commence the auditing of its books within thirty days after such request, the requesting stockholder or stockholders, after ten days notice to the corporation, may apply to the judge of the district, or to the judge holding the courts of the district, in which the corporation has its residence, either at chambers or term time, at any place in the district, and the judge shall appoint an auditor and require the books to be audited at the expense of the corporation. The officers of the corporation shall render to the auditor any assistance or information they can, and give him access to all of the assets, books, papers, etc., relating to the affairs of the corporation, in order that a proper audit may be made. Upon completion of the audit the auditor shall render a statement to the corporation, and to the petitioning stockholder or stockholders. (1911, c. 174, s. 1; 1913, c. 76, s. 1; C. S. 1146.)

This section is primarily concerned with the protection of the rights of minority stockholders, and has reference to private corporations as distinguished from municipal, public, or quasi public corporations. Cole v. Farmers Bank, etc., Co., 221 N. C. 249, 20 S. E. (2d) 54.

It applies to banking corporations since the statute embraces all domestic corporations organized for profit in which the beneficial interest and pro rata ownership are represented by shares of stock. Cole v. Farmers Bank, etc., Co., 221 N. C. 249, 20 S. E. (2d) 54.

Sufficient Number of Signatures.—The fact that an interlocutory motion of plaintiff stockholders for an audit of defendant corporation under this section was denied because request therefor was not signed by 25 per cent of its stockholders, does not estop them from thereafter moving for the same relief after the corporation had failed to act within the statutory time on another request for audit signed by more than 25 per cent of its stockholders. Cole v. Farmers Bank, etc., Co., 221 N. C. 249, 20 S. E. (2d) 54.

§ 55-51. Loans to stockholders.—No loan of money may be made to a stockholder or officer of a corporation, and if any is made, the officers who made it or assented thereto are jointly and severally liable, to the extent of such loan and interest, for all the debts of the corporation until

the repayment of the sum loaned. (Rev., s. 1160; 1901, c. 2, s. 53; C. S. 1147.)

§ 55-52. Forfeiture of corporate charter and organization of new corporation.—Wherever a corporation created under the laws of the state of North Carolina has, on account of failure to make reports to the different state authorities, for such a length of time as to lose its charter and where thereafter, under the laws of the state of North Carolina, a new charter is issued, in the same name as the original corporation, and on behalf of the same corporation, such new corporation shall succeed to the same properties, to the same rights as the original corporation before losing its charter on account of neglect hereinbefore mentioned.

Whenever such new corporation shall have been created, under the laws of this state, all the title, rights and emoluments to the property held by the original corporation shall inure to the benefit of the newer corporation and the new corporation shall issue its stock to the stockholders in the defunct corporation, in the same number and with the same par value as held by the stockholders of the defunct corporation.

Such new corporation shall have the rights and privileges of maintaining any action or cause of action which the defunct corporation might maintain, bring or defend and to all intents and purposes the new corporation shall take the place of the defunct corporation to the same intent and purposes as if the defunct corporation had never expired by reason of its failure to make the reports hereinbefore referred to. (1933, c. 124.)

Editor's Note.—See 11 N. C. Law Rev. 211, for criticism and interpretation of this section.

§ 55-53. Secretary of state may call for special reports.—The secretary of state has power to call for special reports from corporations, of the same character as their regular reports, at such times as he may deem the public interest requires, but no fees shall be charged for filing these special reports. (Rev., s. 1153; C. S. 1149.)

§ 55-54. Secretary of state to publish list of corporations created. — The secretary of state shall annually compile and publish from the records of his office a complete alphabetical list of the original and amended certificates of incorporation filed during the preceding year, together with the location of the principal office of each in this state, the name of the agent in charge thereof, the amount of authorized capital stock, the amount with which business is to be commenced, the amount issued, the date of filing the certificate, and the period for which the corporation is to continue; but the secretary of state and the Commissioner of Banks or the Utilities Commission, as the case may be, shall confer and arrange the statistics so as to prevent the same facts being embodied in the reports of both departments. (Rev., s. 1244; 1901, c. 2, s. 104; 1911, c. 211, s. 10; 1913, c. 198, s. 5; 1931, c. 243, ss. 4, 5; 1933, c. 134, ss. 7, 8; 1941, c. 97, s. 5; C. S. 1150.)

§ 55-55. Liability of officers failing to make reports or making false reports.—If any of the officers neglect or refuse to make any report required of them by law for thirty days after written request so to do by a creditor or stockholder of the corporation, they are jointly and severally liable to the person demanding such report, for the amount of his debt if he is a creditor, or for the amount of his loss if he is a stockholder. If any report or certificate made, or any public notice given, by the officers in pursuance of the provisions of this chapter, is false in any material representation, all the officers who signed the same, knowing it to be false, are jointly and severally liable for all the debts of the corporation contracted while they were stockholders or officers thereof, as a penalty enforceable in the courts of this state only. (Rev., ss. 1154, 1163; 1901, c. 2, ss. 27, 56; C. S. 1151.)

§ 55-56. Liability for fraud.—In case of fraud by the president, directors, managers, or stockholders, in a corporation, the court shall adjudge personally liable to creditors and others injured thereby the directors and stockholders who were concerned in the fraud. (Rev., s. 1155; Code, s. 686; 1901, c. 2, s. 107; C. S. 1152.)

While directors of a corporation are not insurers or guarantors and therefore liable for its debts, yet they are trustees and liable as such for losses attributable to their bad faith, misconduct, or want of care. Townsend v. Williams, 117 N. C. 330, 23 S. E. 461.

Officer Cannot Appropriate Corporate Business.—A corporate officer cannot for himself take business from the corporation. Brite v. Penny, 157 N. C. 110, 72 S. E. 964.

Action by Creditor or Stockholder.—It is settled that an action can be brought by a creditor or stockholder against the officers, including directors, of a corporation, for losses resulting from their fraud or negligence, without having first applied to the corporation to bring such action. Solomon v. Bates, 118 N. C. 311, 24 S. E. 478; White v. Kincaid, 149 N. C. 415, 63 S. E. 109; Braswell v. Pamlico Ins., etc., Co., 159 N. C. 628, 75 S. E. 813.

Action in Alleged Fraudulent Merger. — In an action against a corporation charged to be fraudulently in possession of the assets of another corporation which had been merged into it, the officers of the corporation are not necessary parties. Friedenwald Co. v. Asheville Tobacco Works, 117 N. C. 544, 23 S. E. 490.

§ 55-57. Joint and several liability of officers, etc., contribution.—When the officers, directors or stockholders of a corporation are liable to pay its debts, or any part thereof, any person to whom they are liable has a right of action against any one or more of them. And any such officer, director or stockholder has the right of equitable contribution in any action for that purpose against any other officer, director or stockholder who is liable with him for any amount which he has been compelled to pay as provided in this section. (Rev., s. 1156; 1901, c. 2, s. 90; C. S. 1153.)

Corporation Need Not Be Joined.—The directors of a corporation are jointly and severally liable for their torts, and the corporation itself can be joined or not, at the election of the plaintiff, in an action to enforce that liability. Solomon v. Bates, 118 N. C. 311, 24 S. E. 478.

Neither a corporation nor its trustee in bankruptcy was a necessary party defendant to a suit for the defendants' wrong as officers of the corporation in misappropriating the plaintiff's money and notes. Virginia-Carolina Chemical Co. v. Floyd, 158 N. C. 455, 74 S. E. 465.

§ 55-58. Officers paying may enforce exoneration against corporation.—An officer, director or stockholder who pays a debt of a corporation for which he is made liable by the provisions of this chapter may recover the amount paid, in an action against the corporation for money paid for its use, in which action only the property of the corporation is liable to be taken, and not the property of any stockholder, except as provided in the pre-

ceding section. (Rev., s. 1157; 1901, c. 2, s. 91; C. S. 1154.)

§ 55-59. Assets of corporation first exhausted.—No sale or other satisfaction shall be had of the property of a director or stockholder for a debt of the corporation of which he is director or stockholder until judgment be obtained therefor against the corporation and execution thereon returned unsatisfied, or until it is shown to the court that the corporation has no property available for the satisfaction of the indebtedness. (Rev., s. 1158; 1901, c. 2, s. 92; C. S. 1155.)

§ 55-60. No personal liability on corporate manager of partnership.—Any corporation created under this chapter which is a member of a partnership may have its interests in such partnership managed, and may be engaged in or have charge of the management and affairs of such partnership, by and through any of its officers, directors, stockholders, agents and servants, and no such person acting as manager of the interests of any corporation in such partnership, or engaged in or having charge of the management and affairs of such partnership, whether as executive, member of an executive committee or board, employee or otherwise, shall be personally subject to any liability for the debts of such partnership or such corporation. (1933, c. 354, s. 2.)

Art. 6. Capital Stock.

§ 55-61. Classes of stock.—Every corporation has power to create two or more kinds of stock of such classes, with such designations, preferences, and voting powers or restrictions or qualifications thereof as are prescribed by those holding a majority of its outstanding capital stock entitled to vote; and the power to increase or decrease the stock as herein elsewhere provided applies to all or any of the classes of stock; and the preferred stock may, if desired, be made subject to redemption in whole or in part on a pro rata basis at not less than par, at a fixed time or times and price, to be expressed in the certificate thereof; and the holders thereof are entitled to receive, and the corporation is bound to pay thereon, a fixed yearly dividend, to be expressed in the certificate, payable quarterly, half-yearly or yearly, before any dividend is set apart or paid on the common stock, and such dividends may be made cumulative. In case of insolvency, its debts or other liabilities shall be paid in preference to the preferred stock. No corporation shall create preferred stock except by authority given to the board of directors by a vote of at least a majority of the stock entitled to vote at a meeting of the stockholders, duly called for that purpose. Provided, that no new class of stock shall hereafter be created entitled to dividends or shares in distribution of assets in priority to any class of preferred stock already outstanding except with the consent of the holders of record of two-thirds (or such greater amount as may be specified in the charter) of the number of shares of such outstanding preferred stock having voting powers. The terms "general stock" and "common stock" are synonymous. (Rev., s. 1159; 1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3; 1923, c. 155; 1925, c. 118, ss. 2, 2a; 1939, c. 199; C. S. 1156.)

Cross Reference.—As to capital stock without nominal or par value, see § 55-73 et seq.

Editor's Note.—This section was amended by ch. 118, Laws of 1925 by substituting the words "a majority" for the words "two-thirds" in the two places dealing with the vote of stockholders except in the case of banks and building and loan associations. The proviso was also added by the same chapter. This change is in accordance with the change made in section 55-31 by the same act. See editor's note under sec. 55-31. See also, 3 N. C. Law Review 134, 137, for a discussion of this amendment.

The 1939 amendment inserted in the first sentence the words "in whole or in part on a pro rata basis," also the words "or times."

Capital Stock—As Distinguished from Capital. — The capital stock of a corporation, strictly speaking, is the amount in money or property subscribed and paid in or secured to be paid in by the shareholders, and always remains the same unless changed by proper legal authority, while its capital is a broader term and includes all funds, securities, credits, and property of every kind whatever belonging to the corporation, though the words are often used interchangeably in revenue statutes. Person v. Board, 184 N. C. 499, 115 S. E. 336.

A Trust Fund for Creditors.—The capital stock and property of a corporation, in case of its insolvency, constitute a fund, first, for the satisfaction of its creditors, and next, for its stockholders. Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107; Gilmore v. Smathers, 167 N. C. 440, 83 S. E. 823.

Generally speaking, the property and assets of a corporation become, upon its insolvency, a "trust fund" for the benefit of its stockholders and creditors. Mellen v. Moline, etc., Iron Works, 131 U. S. 352, 366, 9 S. Ct. 781, 33 L. Ed. 178.

Meaning of "Trust Fund."—The term "trust fund," as used in various decisions of the courts in reference to the assets of a corporation, does not imply that upon the insolvency of a corporation, its assets will be administered strictly as a trust for the benefits of all creditors pro rata, but that whenever proceedings under the statute are had, and the court takes charge of the assets through its receiver, it will make equitable distribution, among all the creditors, of all the assets not subject to prior liens or rights. Merchants National Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

The preferred stock forms a part of the capital stock of the corporation, under this section, entitling the holders to all rights of the stockholder subject to the terms and conditions on which their stock was issued. Kistler v. Caldwell Cotton Mills Co., 205 N. C. 809, 813, 172 S. E. 373.

A preferred stockholder of a corporation is not a creditor of the corporation, and must be confined to his rights as a stockholder. Weaver Power Co. v. Elk Mountain Mill Co., 154 N. C. 76, 69 S. E. 747.

Lien of Preferred Stockholders—Rights of Creditors.—This section fixes the authority of the corporation to issue its preferred stock and the priorities thereof are always subject to the rights of creditors. So an attempt of the corporation to give the preferred stockholders a lien upon its realty in the nature of a mortgage or deed of trust under the provisions of its charter is ineffectual as to the prior rights of creditors. Ellington v. Supply Co., 196 N. C. 784, 147 S. E. 307.

Cited in Windsor Redrying Co. v. Gurley, 197 N. C. 56, 61, 147 S. E. 676.

§ 55-62. Stock to be paid in money or money's worth; issue for labor or property.—Nothing but money shall be considered as payment for any part of the capital stock of any corporation organized under this chapter, except as herein provided in case of the purchase of property or labor performed. Any corporation may issue stock for labor done or personal property or real estate, or leases thereof, and, in the absence of fraud in the transaction, the judgment of the directors as to the value of such labor, property, real estate or leases shall be conclusive. (Rev., ss. 1159, 1160; 1901, c. 2, ss. 19, 53; 1903, c. 660, ss. 2, 3; C. S. 1157.)

Cross Reference.—As to non par value stock issued for services, see § 55-74.

Purposes to Prevent Fraud.—This section was passed in order that such subscriptions may be protected in their integrity and not become a means of deceiving those who

deal with the corporation. Goodman v. White, 174 N. C. 399, 401, 93 S. E. 906.

Effect of Charter Provision.—A provision in the charter of an incorporated company that the capital stock "shall be issued as full-paid stock," does not permit shares of stock to be issued to stockholders without payment for it by them in money, or its equivalent in property at an honest valuation. Clayton v. Ore Knob Co., 109 N. C. 385, 14 S. E. 36.

Judgment of Directors Arbitrary.—This section makes the judgment of the board of directors, in fixing the value of property of its subscribers to its shares of stock to be accepted in lieu of money, arbitrary and of artificial weight, in the absence of fraud; and where there is no evidence of fraud therein, a judgment as of nonsuit is properly granted. Gover v. Malever, 187 N. C. 774, 122 S. E. 841.

Cash Payment Unnecessary.—It is not essential to a bona fide subscription to stock in a corporation that there be a present payment in cash by the subscriber or that he be solvent; a subscription is considered bona fide whenever made by one who subscribes in good faith, with reasonable expectation and apparent prospect of being able to pay assessments on his stock as they may thereafter be called for. Boushall v. Myatt, 167 N. C. 328, 83 S. E. 352.

Conditional Subscription.—A subscription to stock of a corporation may be made on condition that there shall be no liability until the corporation has received actual subscriptions to its capital stock to a specified amount. Alexander v. North Carolina, etc., Trust Co., 155 N. C. 124, 71 S. E. 69; citing Queen City Printing, etc. Co. v. McAden, 131 N. C. 178, 183, 42 S. E. 575; Perriman v. Alexander, 111 N. C. 427, 428, 16 S. E. 408; Kelly v. Oliver, 113 N. C. 442, 443, 18 S. E. 698.

Illegal Payment.—Under this section a transaction whereby the defendant borrowed a certain sum and bought a half interest in a company, and let the company that he was promoting take it over as soon as it was incorporated, and pay his note, and also issue to him stock as the consideration, was illegal. Goodman v. White, 174 N. C. 399, 93 S. E. 906.

Cited in Windsor Redrying Co. v. Gurley, 197 N. C. 56, 61, 147 S. E. 676.

§ 55-63. Stock issued for property; how value ascertained; how stock reported.—Any corporation formed under this chapter may purchase any property necessary for its business, and issue stock to the amount of the value thereof in payment therefor. The stock so issued shall be full-paid stock, and not liable to any further call, nor shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of actual fraud the judgment of the directors as to the value of the property shall be conclusive. In all statements and reports of the corporation to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the facts. (Rev., s. 1161; 1901, c. 2, s. 54; C. S. 1158.)

Cross Reference.—As to non par value stock issued for property, see § 55-74.

Evidence of Fraud.—In an action by the receivers of an insolvent corporation to compel the payment of a subscription to stock issued for property acquired by the corporation for the conduct of the business, evidence tending to show a grossly excessive valuation of the property by the directors, knowingly made, is strong evidence of fraud, and may be conclusive thereof. Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538.

Proceedings Where Property Overvalued. — Although a margin may be allowed for an honest difference of opinion as to value, a valuation grossly excessive, knowingly made, while its acceptance may bind the corporation, is a fraud on creditors, and they may proceed against the stockholders individually who sell the property, as for an unpaid subscription. Goodman v. White, 174 N. C. 399, 401, 93 S. E. 906; Hobgood v. Ehlen, 141 N. C. 344, 345, 53 S. E. 857.

Burden of Proof.—The burden of proving that the property was taken in payment at its true value, and, further, that such value was approved by a board of directors acting independently in the interest of the corporation is upon the person who alleges payment. Goodman v. White, 174 N. C. 399, 401, 93 S. E. 906.

Cited in Windsor Redrying Co. v. Gurley, 197 N. C. 56, 61, 147 S. E. 676.

§ 55-64. Construction companies building railroads, etc., may take stock therein; how issued, valued, and reported.—Corporations having for their object the building or repairing of railroads, water, gas or electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers, or any like works of internal improvement or public use, may subscribe for, take, pay for, hold, use and dispose of stock or bonds in any corporation formed for the purpose of constructing, maintaining and operating any such public works; and the directors of any such corporation formed for the purpose of constructing, maintaining and operating any public work of the description aforesaid may accept in payment of any such subscription, or purchase, real or personal property, necessary for the purposes of such corporation, or work, labor and services performed, or materials furnished to, or for, such corporation to the amount of the value thereof, and from time to time issue upon any such subscription or purchase, in such installments or proportions as such directors may agree upon, full-paid stock, in full or partial performance of the whole, or any part of such subscription or purchase, and the stock so issued shall be full-paid stock, and not liable to any further call, nor shall the holder thereof be liable for any further payments. And in all statements and reports of the corporation to be published or filed, this stock shall not be stated, or reported, as being issued for cash paid to the corporation, but shall be reported and published in this respect according to the fact. (Rev., s. 1172; 1901, c. 2, s. 55; C. S. 1159.)

§ 55-65. Liability for unpaid stock.—Where the capital stock of a corporation has not been paid in and the assets are insufficient to satisfy its debts and obligations, each stockholder is bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter, or such proportion of that sum as is required to satisfy such debts and obligations; but no person holding stock in any corporation in this state as executor, administrator, guardian, or trustee, or as collateral security, is personally subject to any liability as a stockholder of the corporation; but the person pledging the stock is considered as holding the same, and is liable as a stockholder accordingly, and the estate and funds in the hands of such executor, administrator, guardian, or trustee, is liable in like manner, and to the same extent, as the testator or intestate, or the ward, or the person interested in such fund, would have been had he been living and competent to act and hold the stock in his own name. (Rev., s. 1162; 1893, c. 471; 1901, c. 2, s. 22; C. S. 1160.)

In General.—Both under general principles of corporate law, appertaining to the subject, and by this section, stockholders of an insolvent corporation are liable pro rata for their unpaid subscriptions to an amount necessary to liquidate the corporate debts. Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538; McIver v. Hardware Co., 144 N. C. 478, 57 S. E. 169; Claypoole v. McIntosh, 182 N. C. 109, 111, 108 S. E. 433.

Unpaid Balances to Be Collected.—The capital stock, paid or unpaid, of a corporation being a trust fund for the benefit of creditors, it is the duty of the courts, at the suit of creditors, to require unpaid subscriptions to be collected at least to the extent necessary to pay the unpaid debts of the corporation. Wilson Cotton Mills v. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770.

In case of insolvency any unpaid balance may, by proper proceedings, be made available to the extent required for the

settlement of outstanding claims. Whitlock v. Alexander, 160 N. C. 465, 468, 76 S. E. 538.

Suspension of Enterprise.—The mere fact, alone, that a proposed corporate enterprise has been suspended affords a subscriber to the capital stock no excuse for not paying his subscription according to his agreement. Raleigh Impr. Co. v. Andrews, 176 N. C. 280, 96 S. E. 1032. Decree affirmed, 178 N. C. 328, 100 S. E. 514.

Agreement Contrary to Section.—No agreement or arrangement between a corporation and its stockholders, whereby the latter are to be released from indebtedness on their subscriptions, will be valid or of any force as against creditors. Marshall Foundry Company v. Killian, 99 N. C. 501, 6 S. E. 680; Heggie v. Building and Loan Asso., 107 N. C. 581, 591, 12 S. E. 275. See also, Gilmore v. Smathers, 167 N. C. 440, 83 S. E. 823.

Stockholder Estopped. — Where a person has agreed to become a stockholder in a corporation and has enjoyed the benefits and privileges of membership he cannot, in a suit by the corporation to recover his unpaid subscription, set up as a defense that the corporation was not legally organized. Wadesboro Cotton Mills Co. v. Burns, 114 N. C. 353, 19 S. E. 238; Academy v. Lindsey, 28 N. C. 476; Navigation Co. v. Neal, 10 N. C. 520, 537; R. R. v. Thompson, 52 N. C. 387; Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 S. E. 680.

Same—Preliminary Agreement Broken.—Except in cases of fraud, and then only in restricted instances (Chamberlain v. Trogden, 148 N. C. 139, 61 S. E. 628), a subscriber to stock in a corporation, absolute in terms, may not be relieved of his obligation by reason of nonperformance of conditions attached to a preliminary agreement among some of the members prior to incorporation, a position especially insistent where the rights of creditors have supervened. Marshall Foundry Co. v. Killian, 99 N. C. 501, 6 S. E. 680; North Carolina R. Co. v. Leach, 49 N. C. 340.

Set-Offs.—In a receiver's action to collect unpaid stock subscriptions, a subscriber can not set off a debt due him by the corporation. Vaughan-Robertson Drug Co. v. Grimes-Mills Drug Co., 173 N. C. 502, 92 S. E. 376. Nor can he credit himself with amounts he paid on another subscription. Id.

Cited in Windsor Redrying Co. v. Gurley, 197 N. C. 56, 59, 147 S. E. 676.

§ 55-66. Decrease of capital stock.—The decrease of capital stock may be effected by—

1. Retiring or reducing any class of the stock.
2. Drawing the necessary number of shares by lot for retirement.
3. The surrender by every stockholder of his shares and the issue to him in place thereof of a decreased number of shares.
4. The purchase at not above par of certain shares for retirement.
5. Retiring shares owned by the corporation.
6. Reducing the par value of shares.

When a corporation decreases the amount of its capital stock as above provided, the certificate decreasing the same shall be published at least once a week for three successive weeks in a newspaper published in the county in which the principal office of the corporation is located, the first publication to be made within fifteen days after the decrease has been regularly authorized by the stockholders. In default of such publication the directors of the corporation are jointly and severally liable for all debts of the corporation contracted before the filing of the certificate, and the stockholders are also liable for such sums as they respectively receive of the amount so reduced. No such decrease of capital stock decreases the liability of any stockholder whose shares have not been fully paid, for debts of the corporation theretofore contracted. (Rev., s. 1164; 1901, c. 2, s. 32; 1939, c. 221; C. S. 1161.)

Cross References.—As to decreasing or increasing the amount of capital stock by amendment to the charter, see § 55-31. As to directors' liability for impairing capital stock, see § 55-116. As to capital stock being a trust fund for creditors, see note to § 55-61. As to lack of power of corporation to vote its own stock, see § 55-111.

Editor's Note.—The 1939 amendment struck out the words "filing of the certificate" formerly appearing in the seventh sentence and inserted in lieu thereof the words "decrease has been regularly authorized by the stockholders."

Bona Fide Creditors Protected. — The right to buy in and cancel its own stock may sometimes be exercised by a corporation, but not in derogation of the rights of bona fide creditors. Heggie v. Peoples Building and Loan Asso., 107 N. C. 581, 12 S. E. 275.

Purpose of Provision for Notice. — This provision as to notice is only necessary to afford the stockholders of a corporation protection against creditors. As between the stockholders the reduction, if otherwise lawful and valid and pursuant to resolutions properly passed, will bind the members, and may be enforced by corporate action. Meisenheimer v. Alexander, 162 N. C. 226, 235, 78 S. E. 161.

While Debts Unpaid.—No part of capital stock can be withdrawn for the purpose of reimbursing the principal of the capital stock until the debts of the corporation are paid. Weaver Power Co. v. Elk Mountain Mill Co., 154 N. C. 76, 69 S. E. 747.

Repurchase of Stock.—This section was held inapplicable to suit by receiver against directors for repurchase of stock by corporation in Thompson v. Shepherd, 203 N. C. 310, 165 S. E. 796.

§ 55-67. Certificates and duplicates. — Every stockholder shall be entitled to have a certificate signed by the president or a vice-president and by the treasurer or an assistant treasurer or the secretary or an assistant secretary of the corporation certifying the number of shares owned by him in such corporation. A corporation may issue a new certificate of stock in the place of any certificate theretofore issued by it, alleged to have been lost or destroyed, and the directors authorizing such issue of a new certificate may require the owner of the lost or destroyed certificate, or his legal representatives, to give the corporation a bond, in such sum as they may direct, as an indemnity against any claim that may be made against the corporation. A new certificate may be issued without requiring any bond when, in the judgment of the directors, it is proper to do so. (Rev., ss. 1165, 1166; 1885, c. 265; 1901, c. 2, s. 94; 1927, c. 173; C. S. 1162.)

Cross References.—As to action to compel issuance of duplicate certificate, see § 55-97. As to procedure when corporation in which lost stock is held merges with another, see § 55-166.

Editor's Note.—The first sentence in this section formerly read, "Every stockholder shall have a certificate signed by the president and treasurer, or secretary, certifying the number of shares owned by him." The present first sentence was added by ch. 173, Public Laws 1927.

Nature of Stock Certificate.—A certificate of stock is simply a written acknowledgment by a corporation of the interest of the holder in its property and franchises. It has no value except that derived from the company issuing it; and its legal status is in the nature of a chose in action. Person v. Board, 184 N. C. 499, 115 S. E. 336.

Evidence of Ownership of Stock.—A certificate for shares is not the stock itself, but constitutes only prima facie evidence of the ownership of that number of shares. Misenheimer v. Alexander, 162 N. C. 226, 78 S. E. 161, citing Cook on Corporations (6th Ed.) § 13; Clark on Corporations, p. 260.

Certificate Unnecessary.—Issuance of stock certificates is unnecessary either to the existence of the corporation or to confer title to the stockholder. Powell Bros. v. McMullan Lumber Co., 153 N. C. 52, 68 S. E. 926.

Reissue—Application of Last Sentence.—The last sentence of this section, relative to the reissue of stock to supply lost certificates, is valid and applies to all incorporated companies, and interferes with the chartered rights of none. Hendon v. North Carolina R. Co., 125 N. C. 124, 34 S. E. 227.

§§ 55-68 and 55-69: Repealed by Public Laws 1941, c. 353, s. 24. Deleted by authority of Session Laws 1943, c. 15, s. 3.

§ 55-70. Assessments, sale, and notice.—The directors of a corporation may, from time to time, make assessments upon the shares of stock subscribed for, not exceeding, in the whole, the par value thereof, remaining unpaid; and the sums assessed shall be paid to the treasurer at such times and by such installments as the directors direct, the directors having given thirty days notice of the assessment and of the time and place of payment, either personally, by mail, or by publication in a newspaper published in the county where the corporation is established. If the owner of any share or shares neglects to pay a sum assessed thereon for thirty days after the time appointed for payment, the treasurer, when ordered by the board of directors, shall sell, at public auction, such share or shares of the delinquent owner as will pay any assessment due from him, with interest, and all necessary incidental charges, and shall transfer the share or shares sold to the purchaser, who is entitled to a certificate therefor. The treasurer shall give notice of the time and place appointed for the sale, and of the sum due on each share, by advertising the same once a week for three successive weeks before the sale in a newspaper published in the county where the principal office of the corporation is located, at the courthouse door, and by mailing a notice thereof to the last known postoffice address of the delinquent stockholder. (Rev., ss. 1169, 1170, 1171; 1901, c. 2, ss. 23, 24, 25; C. S. 1165.)

Assessment as Incumbrance.—Acceptance of an offer of sale of corporation stock cannot be enforced when the proposed purchaser was unaware at the time that there had been an assessment made upon the shares; the usual implied warranty of title applies to such sales. Martin v. McDonald, 168 N. C. 232, 84 S. E. 258.

Setting Aside Sale.—Where the plaintiff's stock has been wrongfully sold, after a legal tender, he is entitled to a mandamus for the issue to him of his certificate of stock upon payment of the amount due on the stock with interest to the date of tender and cost of advertisement. Wilson v. Tel. Co., 139 N. C. 395, 52 S. E. 62.

Cited in Windsor Redrying Co. v. Gurley, 197 N. C. 56, 58, 147 S. E. 676.

§ 55-71. One corporation may purchase stock, etc., of another.—A corporation may purchase stock, securities or other evidences of indebtedness created by any other corporation or corporations of this or any other state, and while owner of such may exercise all the rights, powers and privileges of ownership. (Rev., s. 1173; 1903, c. 660, s. 3; C. S. 1166.)

Cross References.—As to power of corporation to purchase its own stock, see § 55-66. As to lack of power to vote its own stock, see § 55-111.

Corporation May Purchase Its Own Stock.—A corporation, unless restrained by some provision of its organic law, may purchase its own stock from holders thereof, and the latter are entitled to all rights of other creditors of the corporation for the protection and enforcement of their demand for payment. Blalock v. Kernersville Mfg. Co., 110 N. C. 99, 100, 14 S. E. 501.

Cited in Citizens Lumber Co. v. Elias, 199 N. C. 103, 108, 154 S. E. 54; Carolina Coach Co. v. Hartness, 198 N. C. 524, 527, 152 S. E. 489.

§ 55-72. Mutual corporations may create stock.—A mutual corporation, upon the consent in writing of all its members, may provide for and create a capital stock and may provide for the payment of the stock, and fix and prescribe the rights and privileges of the stockholders therein not inconsistent with law. (Rev., s. 1245; 1901, c. 2, s. 105; C. S. 1167.)

Cross Reference.—As to mutual associations in general, see § 54-111 et seq.

Art. 7. Capital Stock without Nominal or Par Value.

§ 55-73. Corporations which may create shares without nominal or par value. Classes of stock or debentures.—Any corporation heretofore or hereafter organized under the laws of this State, whether under a special act of Legislature or otherwise, except banks, trust companies and insurance companies, may, in its original certificate of incorporation, articles of association, charter or any amendment thereof, create shares of stock with or without nominal or par value, and may create two or more classes of stock or debentures, any class or classes of which may be with or without nominal or par value, with such designations, preferences, voting powers, restrictions and qualifications as shall be fixed in such certificate of incorporation, articles of association, charter or amendment thereof, or by resolution adopted by those holding two-thirds of the outstanding capital stock entitled to vote. Subject to any provisions so fixed, every share without nominal or par value shall equal every other such share. (1921, c. 116, s. 1; 1925, c. 262, s. 1; C. S. 1167(a).)

Editor's Note.—This law as passed in 1921 was the first legislation in this state permitting the issuance of non-par stock in corporations. It grew out of a pressing demand to overcome the difficulties in financing corporations, whose stock is either above or below par value, resulting from misrepresentations and misunderstandings arising through the difference between the actual value and face value of stock, and from the blue sky laws which prohibit the sale of new stock unless the actual value and par value correspond, and require that new stock be sold at its actual value. (For a detailed description of these hardships, see 1 N. C. L. Rev. 26.)

New York was the first state to pass such laws (1912), but since that time over half of the states have enacted them. Along with the many advantages of the law are many objections to it and it might be said that the wisdom of such legislation is yet speculative. The article in the Law Review, cited supra, gives an excellent discussion of such problems.

The N. C. Law Review, vol. 3, p. 136, gives an interesting discussion of the changes effected by the 1925 amendment. The first section was stricken and reenacted in the form in which it now appears, several changes having been made.

The provision permitting two thirds of those holding the outstanding capital stock entitled to vote, to create stock with or without par value and fix its status with respect to voting, preference, etc., was inserted. It is pertinent to point out here an apparent inconsistency between this provision and section 55-61 as amended by the acts of 1925 seven days before this statute was passed.

Prior to the 1925 amendment, section 55-61 provided that a two-thirds vote of the outstanding capital stock was necessary to create new stock, including preferred stock. The 1925 amendment changed the two-thirds requirement to a majority vote, (except as to banks and building and loan associations) and further provided that no stock should be created in priority to any existing preferred stock without a two-thirds vote. Therefore, there is an apparent conflict between the provisions of section 55-61, requiring a majority vote, and the provisions of this section, requiring a two-thirds vote for the creation of stock "with or without per value."

The 1925 amendment also inserted the provision that "any class or classes may be with or without par value," the reference to "special acts of the legislature" and the words "charter" and "designations."

§ 55-74. Stock issues; payment for stock; terms and manner of disposition.—The provisions of law relating to the issuance of stock

with par value shall apply to the issuance of stock without nominal or par value, and such corporation may issue and dispose of its authorized shares without nominal or par value for such consideration and on such terms and in such manner as may be determined or approved from time to time by the board of directors, subject to such conditions or limitations as may be contained in the certificate of incorporation, articles of association, charter, or any amendment thereof or as may be contained in any vote of the holders of a majority of the stock of the corporation, such consideration to be in the form of cash, property, tangible or intangible, services or expenses. Any and all shares without nominal or par value issued for the consideration determined or approved in accordance with the provisions of this section shall be fully paid and not liable to any further call or assessment thereon, nor shall the subscriber or holder be liable for any further payments. (1921, c. 116, s. 2; 1925, c. 262, s. 2; C. S. 1167(b).)

Editor's Note.—The 1925 amendment struck out this section as enacted in 1921 and revised it. While the section is made more comprehensive generally, it would seem the most important change is that the stockholders are now given power to prescribe the consideration, terms and manner of issue and disposal of the stock whereas formerly they exercised such power only with respect to an increase in capital stock.

In some respects, at least, this section is very similar to the corresponding section of the New Jersey Statute. Respecting the similar provision of the New Jersey Statute which provides for fixing the selling price of the stock. Wickersham on "Stock without Par Value" on page 16, says, "This provision is important. The corporation may now issue its stock for what it can get for it, provided proper corporate action is taken. It is no longer bound by the par consideration rule, nor to seek evasions of that rule for its legitimate purposes."

Although the consideration for the stock is fixed as prescribed in this section, it must be remembered that the right to fix such values is statutory and therefore subject to the statutory limitation. The price must be fixed with at least some relation to value and courts of equity would probably interfere to protect stockholders from the issuance of stock for such inadequate consideration as to jeopardize their rights by unduly reducing the value of their stock. For a general treatment of this subject see Wickersham on "Stock without Par Value," section 30-38.

§ 55-75. Statements as to value of shares; reports of amount of stock.—In any case in which the law requires that the par value of the shares of stock of a corporation be stated, it shall be stated, in respect to shares without nominal or par value, that such shares are without nominal or par value, and wherever the amount of stock authorized or issued is required to be stated, if any shares without nominal or par value are authorized, the number of shares authorized or issued of the several classes shall be stated, and it shall also be stated whether such shares are with or without nominal or par value, and what the par value is of such shares as have par value. (1921, c. 116, s. 3; C. S. 1167(c).)

§ 55-76. Amendments to existing charters.—Any corporation, whether organized under a special act of Legislature or otherwise, having outstanding shares either with or without nominal or par value, may amend its certificate of incorporation, articles of association or charter, as follows:

(a) So as to change its shares with nominal or par value or any class thereof into an equal number of shares without nominal or par value; or

(b) So as to provide for the exchange of its shares with nominal or par value, or any class thereof, for an equal or different number of shares without nominal or par value; but all outstanding shares in any class shall be exchanged on the same basis; or

(c) So as to provide for the exchange of its shares without nominal or par value, or any class thereof, for a different number of shares without nominal or par value; but all outstanding shares in any class shall be exchanged on the same basis:

Provided, however, the preferences on liquidation, redemption price, dividend rate and like preferences or limitations lawfully granted or imposed with respect to any class of outstanding stock so changed or exchanged under the provisions hereof, shall not be impaired, diminished or changed as to any nonassenting holders thereof. Such preferences, rights and limitations, however, may be expressed in dollars, or in cents, per share rather than by reference to par value. Whenever such a corporation has heretofore issued shares without nominal or par value, in exchange for an equal or different number of shares with par value, such exchange and the issue of an equal or different number of shares without nominal or par value in consummation of such exchange are hereby validated, ratified and confirmed. (1921, c. 116, s. 4; 1925, c. 262, s. 3; 1931, c. 59; C. S. 1167(d).)

Editor's Note.—Prior to the 1925 revision this section merely provided that any such corporation "may amend its certificate of incorporation so as to change its certificate of stock from certificates with par value to certificates with non-par or nominal value, or vice versa." All the other provisions making the section more comprehensive are new. The revisal also subdivided the section into paragraphs.

The Act of 1931 struck out the words "such" and "heretofore organized" formerly appearing before and after the word corporation in line one of this section, and inserted after the word "whether" the word "organized."

As to the rights of minority stockholders who object to the exchange of stock with, for stock without, par value, see Wickersham on "Stock without Par Value," sections 24-29, pages 58-73.

§ 55-77. Tax on certificate of incorporation or amendments.—The tax upon the certificate of incorporation, or extension or renewal or corporate existence, or increase of capital stock without nominal or par value shall be the same as if each share of stock had a par or face value of one hundred dollars. (1921, c. 116, s. 5; C. S. 1167(e).)

Cross References.—As to the taxes required, see § 55-158. As to provision for taxing the non par value shares of a foreign corporation, see § 55-118.

Editor's Note.—For a discussion of problems arising in connection with the constitutionality of this section, see Wickersham, "Stock without Par Value," and 17 N. C. L. Rev. 346.

§ 55-78. Intent or purpose of law.—The intent and purpose of this article is to require a share of stock to be treated and represented, subject to lawful preferences, rights, limitations, privileges, and restrictions as a mere evidence of an aliquot part or divisional interest in the assets and earnings of the corporation issuing the same, whatever the extent or value of such assets or earnings may be, to the end that misrepresentation or misunderstanding arising through the difference between actual value of a share of stock and the value appearing on the face of the certificate

therefor may be eliminated. (1921, c. 116, s. 6; C. S. 1167(f).)

§ 55-79. Laws applicable to corporations.—Except as otherwise provided by this article, corporations issuing shares without any par or face value under the provisions hereof shall be and remain subject to the laws of the state now or hereafter in force relating to the formation, regulation, or reorganization rights, powers, and privileges of such corporations, and all other laws applicable thereto. (1921, c. 116, s. 7; C. S. 1167(g).)

§ 55-80. Provision for future exchange of par value stock for non-par value stock.—Any corporation heretofore or hereafter organized under the laws of this State, whether under a special act of Legislature or otherwise, except banks, trust companies, and insurance companies, may, in its original certificate of incorporation, articles of association, charter, or any amendment thereof, provide for the exchange of its shares to be issued with nominal or par value for an equal or different number of outstanding shares without nominal or par value. (1929, c. 338, s. 1.)

Cross Reference.—As to railroads, see also § 60-11.

Art. 8. Uniform Stock Transfer Act.

§ 55-81. How title to certificates and shares may be transferred.—Title to a certificate and to the shares represented thereby can be transferred only:

(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent. (1941, c. 353, s. 1.)

Cross References.—As to the sale of shares of stock of a foreign corporation held by a life tenant, see § 55-119. See also § 55-69.

Editor's Note.—For comment on this enactment, see 19 N. C. L. Rev. 469. The cases annotated here were decided under former § 1164.

In General.—Although shares of stock are personal property and are transferable on the books of the corporation as provided by the by-laws, such provision, it is held, can be of no practical benefit to those not connected with the corporation, because they have "no means of knowing whether the transfer has been made or not." Castelloe v. Jenkins, 186 N. C. 166, 172, 119 S. E. 202.

Transfer on Books Not Necessary.—It is well settled that the requirement of this section as to entering transfers of stock upon the books of the corporation is for the protection of the corporation, and that the failure to enter such transfer upon the corporate books has no effect upon the legality of the transfer as between the parties themselves. Grissom v. Sternberger, 10 Fed. (2d) 765, 766 citing numerous cases.

Duty of the Corporation.—It is the duty of the corporation to protect persons interested, such as contingent remaindermen or legatees when the corporation has knowledge of the contents of the will, from an unauthorized transfer of stock. Wooten v. Railroad, 128 N. C. 119, 38 S. E. 298; Baker v. Railroad, 173 N. C. 365, 92 S. E. 170.

Requests by Representatives.—If an agent makes a demand for a transfer the corporation must look to the power of attorney; if an executor, to the will; if an administrator to his letters, because these are the sources of power. Baker v. Railroad, 173 N. C. 365, 369, 92 S. E. 170.

Holder Has Preference.—The holder of the stock either as a purchaser or a pledgee has the preference over an attaching creditor although the transfer of the stock has not been entered on the books of the corporation. Bleakly v. Candler, 169 N. C. 16, 20, 84 S. E. 1039.

Corporation May Trade in Own Stock.—Shares of stock are declared by this section to be personal property, and may be sold or purchased by the corporation which has created them. Byrd v. Tidewater Power Co., 205 N. C. 589, 591, 172 S. E. 183.

Transfer of Title.—Where the holder and owner of stock surrenders the certificates to the corporation and directs the corporation to transfer same on its books, the transferee acquires title which is perfected by the surrender or delivery of the new certificate to him. Jones v. Waldroup, 217 N. C. 178, 7 S. E. (2d) 366.

§ 55-82. Powers of those lacking full legal capacity and of fiduciaries not enlarged.—Nothing in this article shall be construed as enlarging the powers of an infant or other person lacking full legal capacity, or of a trustee, executor or administrator, or other fiduciary, to make a valid indorsement, assignment or power of attorney. (1941, c. 353, s. 2.)

§ 55-83. Corporation not forbidden to treat registered holder as owner.—Nothing in this article shall be construed as forbidding a corporation;

(a) To recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner, or

(b) To hold liable for calls and assessments a person registered on its books as the owner of shares. (1941, c. 353, s. 3.)

§ 55-84. Title derived from certificate extinguishes title derived from a separate document.—The title of a transferee of a certificate under a power of attorney or assignment not written upon the certificate, and the title of any person claiming under such transferee, shall cease and determine if, at any time prior to the surrender of the certificate to the corporation issuing it, another person, for value in good faith, and without notice of the prior transfer, shall purchase and obtain delivery of such certificate with the indorsement of the person appearing by the certificate to be the owner thereof, or shall purchase and obtain delivery of such certificate and the written assignment or power of attorney of such person, though contained in a separate document. (1941, c. 353, s. 4.)

§ 55-85. Delivery of certificate by one without authority or right of possession.—The delivery of a certificate to transfer title in accordance with the provisions of § 55-81, is effectual, except as provided in § 55-87, though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title. (1941, c. 353, s. 5.)

§ 55-86. Indorsement effectual in spite of fraud, duress, mistake, revocation, death, incapacity or lack of consideration or authority.—The indorsement of a certificate by the person appearing by the certificate to be the owner of the shares

represented thereby is effectual, except as provided in § 55-87, though the indorser or transferor;

(a) was induced by fraud, duress or mistake, to make the indorsement or delivery, or

(b) has revoked the delivery of the certificate, or the authority given by the indorsement or delivery of the certificate, or

(c) has died or become legally incapacitated after the indorsement, whether before or after the delivery of the certificate, or

(d) has received no consideration. (1941, c. 353, s. 6.)

§ 55-87. Rescission of transfer.—If the indorsement or delivery of a certificate.

(a) was procured by fraud or duress, or

(b) was made under such mistake as to make the indorsement or delivery inequitable; or

If the delivery of a certificate was made

(c) without authority from the owner, or

(d) after the owner's death or legal incapacity, the possession of the certificate may be reclaimed and the transfer thereof rescinded, unless,

(1) The certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful, or

(2) The injured person has elected to waive the injury, or has been guilty of laches in endeavoring to enforce his rights.

Any court of appropriate jurisdiction may enforce specifically such right to reclaim the possession of the certificate or to rescind the transfer thereof and, pending litigation, may enjoin the further transfer of the certificate or impound it. (1941, c. 353, s. 7.)

§ 55-88. Rescission does not invalidate subsequent transfer by transferee in possession.—Although the transfer of a certificate or of shares represented thereby has been rescinded or set aside, nevertheless, if the transferee has possession of the certificate or of a new certificate representing part or the whole of the same shares of stock, a subsequent transfer of such certificate by the transferee, mediately or immediately, to a purchaser for value in good faith, without notice of any facts making the transfer wrongful, shall give such purchaser an indefeasible right to the certificate and the shares represented thereby. (1941, c. 353, s. 8.)

§ 55-89. Delivery of unindorsed certificate imposes obligation to indorse.—The delivery of a certificate by the person appearing by the certificate to be the owner thereof without the indorsement requisite for the transfer of the certificate and the shares represented thereby, but with intent to transfer such certificate or shares, shall impose an obligation, in the absence of an agreement to the contrary, upon the person so delivering, to complete the transfer by making the necessary indorsement. The transfer shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced. (1941, c. 353, s. 9.)

§ 55-90. Ineffectual attempt to transfer amounts to a promise to transfer.—An attempted transfer of title to a certificate or to shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer and the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts. (1941, c. 353, s. 10.)

§ 55-91. Warranties on sale of certificate.—A person who for value transfers a certificate, including one who assigns for value a claim secured by a certificate, unless a contrary intention appear, warrants;

(a) that the certificate is genuine,

(b) that he has a legal right to transfer it, and

(c) that he has no knowledge of any fact which would impair the validity of the certificate.

In the case of an assignment of a claim secured by a certificate, the liability of the assignor upon such warranty shall not exceed the amount of the claim. (1941, c. 353, s. 11.)

§ 55-92. No warranty implied from accepting payment of a debt.—A mortgagee, pledgee, or other holder for security of a certificate who in good faith demands or receives payment of the debt for which such certificate is security, whether from a party to a draft drawn for such debt, or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such certificate, or the value of the shares represented thereby. (1941, c. 353, s. 12.)

§ 55-93. No attachment or levy upon shares unless certificate surrendered or transfer enjoined.—No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. Except where a certificate is lost or destroyed, such corporation shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it. (1941, c. 353, s. 13.)

Cross Reference.—As to attachment of shares of stock, see §§ 1-458 to 1-460.

§ 55-94. Creditor's remedies to reach certificate.—A creditor whose debtor is the owner of a certificate shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such certificate or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process. (1941, c. 353, s. 14.)

§ 55-95. No lien or restriction unless indicated on certificate.—There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any by-laws of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate. (1941, c. 353, s. 15.)

§ 55-96. Alteration of certificate does not divest title to shares.—The alteration of a certificate, whether fraudulent or not and by whomsoever made, shall not deprive the owner of his title to the certificate and the shares originally represented thereby, and the transfer of such a certificate shall convey to the transferee a good title to such certificate and to the shares originally represented thereby. (1941, c. 353, s. 16.)

§ 55-97. Lost or destroyed certificate.—Where a certificate has been lost or destroyed, a court of competent jurisdiction may order the issue of a new certificate therefor on service of process upon the corporation and on reasonable notice by publication, and in any other way which the court may direct, to all persons interested, and upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the corporation or any person injured by the issue of the new certificate from any liability or expense, which it or they may incur by reason of the original certificate remaining outstanding. The court may also in its discretion order the payment of the corporation's reasonable costs and counsel fees.

The issues of a new certificate under an order of the court as provided in this section, shall not relieve the corporation from liability in damages to a person to whom the original certificate has been or shall be transferred for value without notice of the proceedings or of the issuance of the new certificate: Provided, nothing in this section shall prevent the issuance of a new stock certificate in the place of a lost or destroyed certificate in accordance with the provisions of § 55-67. (1941, c. 353, s. 17.)

Cross References.—As to the issuance of duplicate certificates, see also §§ 55-67 and 55-68. As to procedure when corporation in which stock is held merges with another, see § 55-166.

Editor's Note.—The case annotated here was decided under former § 1163.

Loss Question of Fact.—Where a stockholder in an unincorporated company loses his certificate of stock and sues his company for a reissue and the allegation of loss is denied, an issue of fact is raised for trial by jury and it must be submitted to them. Hendon v. North Carolina R. Co., 125 N. C. 124, 34 S. E. 227.

§ 55-98. Rules for cases not provided for by this article.—In any case not provided for by this article, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators and trustees, and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern. (1941, c. 353, s. 18.)

§ 55-99. Interpretation of article.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1941, c. 353, s. 19.)

§ 55-100. Definition of indorsement.—A certificate is indorsed when an assignment or a power of attorney to sell, assign, or transfer the certificate or the shares represented thereby is written on the certificate and signed by the person appearing by the certificate to be the owner of the shares represented thereby, or when the signature of such person is written without more upon the back of the certificate. In any of such cases a certificate is indorsed though it has not been delivered. (1941, c. 353, s. 20.)

§ 55-101. Definition of person appearing to be the owner of certificate.—The person to whom a certificate was originally issued is the person appearing by the certificate to be the owner thereof, and of the shares represented thereby, until and unless he indorses the certificate to another specified person, and thereupon such other specified person is the person appearing by the certificate to be the owner thereof until and unless he also indorses the certificate to another specified person. Subsequent special indorsements may be made with like effect. (1941, c. 353, s. 21.)

§ 55-102. Other definitions.—(1) In this article, unless the context or subject matter otherwise requires—

"Certificate" means a certificate of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this article.

"Delivery" means voluntary transfer of possession from one person to another.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee or as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Shares" means a share or shares of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this article.

"State" includes state, territory, district and insular possession of the United States.

"Transfer" means transfer of legal title.

"Title" means legal title and does not include a merely equitable or beneficial ownership or interest.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a certificate is taken either in satisfaction thereof or as security therefor.

(2) A thing is done "in good faith" within the meaning of this article, when it is in fact done honestly, whether it be done negligently or not. (1941, c. 353, s. 22.)

§ 55-103. Article does not apply to existing certificates.—The provisions of this article apply only to certificates issued after March 15, 1941. (1941, c. 353, s. 23.)

Editor's Note.—This act became effective March 15, 1941.

§ 55-104. Name of article.—This article may be cited as the Uniform Stock Transfer Act. (1941, c. 353, s. 26.)

Art. 9. Meetings, Elections and Dividends.

§ 55-105. Place of stockholders' and directors' meetings.—The meetings of the stockholders of every corporation of this state shall be held at the principal office in this state. The directors may hold their meetings, and have an office and keep the books of the corporation (except the stock and transfer books) outside the state. Every corporation shall maintain a principal office in this state, and have an agent in charge thereof. (Rev., s. 1179; 1901, c. 2, s. 49; C. S. 1168.)

Cross References.—As to first meeting of a corporation, see § 55-6. As to the stock and transfer books, see § 55-107. As to power of court to compel corporation to bring its books into the state, see § 55-109. As to changing the location of the principal office, see § 55-34.

Where Charter Provision Contrary.—Although the act incorporating a company provided that Norfolk, Virginia, should be the place of its principal office, it was held in Simmons v. Norfolk & Baltimore, etc., Co., 113 N. C. 147, 18 S. E. 117, that it is the duty of a corporation to keep its principal place of business, its books and records and its principal officers within the state which incorporates it, to an extent necessary to the fullest jurisdiction and visitorial

power of the state and its courts, and the efficient exercise thereof in all proper cases which concern said corporations. Roberson v. Johnson Lumber Co., 153 N. C. 120, 122, 68 S. E. 1064.

Scope of Meetings.—The scope of a special meeting of stockholders is limited to the purpose stated in the notice thereof; business action beyond this scope is void unless all stockholders are present, consent, or subsequently ratify it. Asbury v. Mooney, 173 N. C. 454, 92 S. E. 267.

Must Act in Meeting.—It is essential to the validity of the acts of stockholders of a corporation that they should be assembled in their representative capacity as they are not permitted to discharge any of their duties as stockholders unless so organized. Hill v. Railroad, 143 N. C. 539, 55 S. E. 854, citing Duke v. Markham, 105 N. C. 131, 10 S. E. 1017.

Same—Individual Assent Invalid. — The assent of a majority of stockholders, expressed elsewhere than at a meeting of the stockholders, as where the assent of each is given separately and at different times to a person who goes around to them privately, does not bind the company. Duke v. Markham, 105 N. C. 131, 10 S. E. 1017.

Necessity for Notice.—In order to protect the rights of minorities the law requires that notice of the meetings of the stockholders of a corporation shall be given to every shareholder, either by the method prescribed in the charter or by-laws or by express notice; but where it appears that every person interested had express notice and participated in a meeting, there is no necessity for proving a compliance with section 55-6 as to such notice. Benbow v. Cook, 115 N. C. 325, 20 S. E. 453.

Meetings of Directors.—To make the proceedings of a meeting of the directors of a corporation regular, it must be at a stated time provided for in the charter or by-laws or held after notice to all of the directors. First Nat. Bank v. Asheville, etc., Lumber Co., 116 N. C. 827, 21 S. E. 948.

Same—Necessity for Notice.—The acts of the majority of the directors at a meeting held at an unusual time and place, without notice to the other directors, are not valid. First Nat. Bank v. Asheville, etc., Lumber Co., 116 N. C. 827, 21 S. E. 948.

§ 55-106. Meeting called by three stockholders.—When, for any reason, a legal meeting of the stockholders of any corporation cannot be otherwise called, three stockholders with voting power may call such meeting by publishing in a newspaper published in the county in which the principal office in this state is located ten days notice of the time, place and purposes of the meeting, and mailing this notice to all stockholders whose postoffice addresses are known or can be ascertained. A meeting so called is a legal meeting of the corporation, and if there are no officers present, the stockholders may elect officers for the meeting; and the secretary of the meeting shall record the proceedings thereof in the minute book of the corporation. (Rev., s. 1190; 1901, c. 2, s. 51; C. S. 1169.)

§ 55-107. Transfer and stock books.—Every corporation shall keep at its principal and registered office in this state the transfer books, in which the transfer of stock shall be registered, and the stock books, which shall contain the names and addresses of the stockholders, and the number of shares held by them respectively, and shall at all times during the usual hours for business be open to the examination of every stockholder. These books shall be the only evidence as to who are the stockholders entitled to examine them, and to vote at elections. In case the right to vote upon any share of stock is questioned, the stock books of the corporation shall be referred to, to ascertain who are the stockholders, and in case of a discrepancy between the books, the transfer book shall control and determine who are entitled to vote. (Rev., ss. 1180, 1181; 1901, c. 2, ss. 38, 45; C. S. 1170.)

§ 55-108. Directors to produce books at election.—The board of directors shall produce at the time and place of elections the transfer books and the stock books, there to remain during the election, and the neglect or refusal of the directors to produce the same after a demand therefor shall render them ineligible to any office at such election. All elections of directors held under this chapter prior to February 28, 1913, where these books were not produced, and no demand was made therefor, are ratified and confirmed and given full legal force and effect. (Rev., s. 1180; 1901, c. 2, s. 38; 1913, c. 14; C. S. 1171.)

§ 55-109. Superior court may require production.—The superior court may, upon proper cause shown, order any or all of the books of the corporation to be forthwith brought within this state, and kept therein at such place and for such time as is designated in such order. The charter of any corporation failing to comply with such order may be declared forfeited by the court making the order, and all its directors and officers shall be liable to be punished for contempt of court for disobedience of the order. (Rev., s. 1179; 1901, c. 2, s. 49; C. S. 1172.)

Cross References.—As to jurisdiction of superior court upon dissolution of corporation, see § 55-134. As to jurisdiction of superior court over elections, see § 55-114.

§ 55-110. Votes stockholders entitled to; cumulative voting.—Unless otherwise provided in the charter or by-laws of a corporation, at every election each stockholder is entitled to one vote in person, or by proxy duly authorized in writing, for each share of the capital stock held by him, but no proxy may be voted after three years from its date; nor may there be voted at any election a share of stock which has been transferred on the books of the corporation within twenty days prior to the election. The certificate of incorporation of any corporation authorized to issue shares of capital stock may provide that at all elections of directors, managers, or trustees, each stockholder is entitled to as many votes as equal the number of his shares of stock multiplied by the number of directors, managers, or trustees to be elected, and that he may cast all of his votes for a single director, manager, or trustee, or may distribute them among the number to be voted for, or any two or more of them, as he sees fit. This right of cumulative voting may be exercised in the absence of charter provision when at the time of the election the stock transfer book of such corporation discloses, or it otherwise appears, that more than one-fourth of the capital stock of the corporation is owned or controlled by one person. A stockholder owning or controlling more than twenty-five per cent of the stock has the same right to vote cumulatively as any other stockholder; and no amendment of the charter or by-laws of a corporation can abrogate or abridge any right herein conferred. The right to vote cumulatively cannot be exercised unless some stockholder announces in open meeting, before the voting for directors, trustees, or managers begins, his purpose to exercise such right, and then every other stockholder may likewise vote cumulatively. (Rev., ss. 1183, 1184; 1907, c. 457, s. 1; 1909, c. 827, s. 1; C. S. 1173.)

When Cumulative Voting Applies.—It is impossible for a person to vote cumulative upon a single proposition. It is only when several persons are voted for at the same

time that the voter can "cumulate" his votes. Bridgers v. Staton, 150 N. C. 216, 217, 218, 63 S. E. 892.

The right to cumulative voting is not given generally, but only in the election of officers. It could not apply to other matters, as the motion to adjourn, for instance, where there is only one proposition and nothing to "cumulate" upon. Bridgers v. Staton, 150 N. C. 216, 217, 220, 63 S. E. 892.

Voting Trust Illegal.—An agreement which deprives the stockholders of the right to vote is contrary to public policy and void. Harvey v. Improvement Co., 118 N. C. 693, 24 S. E. 489; Sheppard v. Rockingham Power Co., 150 N. C. 776, 778, 64 S. E. 894.

Same—Not a Proxy.—An agreement pooling stock in a corporation which creates a voting trust, with absolute powers to decide upon matters arising for a period exceeding three years cannot be considered as a proxy authorized by this section for a proxy is only good for the period of three years. Sheppard v. Rockingham Power Co., 150 N. C. 776, 777, 64 S. E. 894.

A proxy cannot be made irrevocable. Sheppard v. Rockingham Power Co., 150 N. C. 776, 777, 64 S. E. 894.

§ 55-111. Stock held by fiduciary, pledgor, life tenant, or corporation. — Every person holding stock as executor, administrator, guardian or trustee, or in any other representative or fiduciary capacity, may represent it at all meetings of the corporation, and may vote it as a stockholder, with the same effect as if the absolute owner thereof, unless the instrument creating the trust provides to the contrary. Every person who has pledged his stock as collateral security may represent it at all such meetings, and may vote it as a stockholder, unless in the transfer to the pledgee on the books of the corporation he has expressly empowered the pledgee to vote it, in which case only the pledgee or his proxy may represent and vote said stock. Where stock is owned by, or has been transferred on its record books to, one for life and remainder over, the life tenant at all meetings of the corporation may represent and vote the stock in person or by proxy, in the same manner and with the same effect as if he were the absolute owner thereof. Shares of stock of a corporation belonging to the corporation cannot be voted directly or indirectly. (Rev., ss. 1185, 1186, 1187; 1901, c. 2, ss. 42, 43; 1901, c. 474, ss. 1, 2; C. S. 1174.)

Cross Reference.—As to power of a corporation to purchase its own stock, see §§ 55-66 and 55-71.

When Trustee May Vote.—When the terms and provisions of a will, bequeathing a life interest in certain shares of stock in a corporation, are construed to be that the shares are to be held and controlled by trustees therein named as executors and trustees, the trustees may vote the same in stockholders' meetings under this section and the provisions for voting of the shares by the life tenant has no application. Haywood v. Wright, 152 N. C. 421, 422, 67 S. E. 982.

Assignee Empowered to Vote.—A written agreement assigning stock in a corporation with authority to vote, reserving to the assignors who retain possession the right to all dividends, amounts only to a proxy. Bridgers v. Staton, 150 N. C. 216, 63 S. E. 892.

Applied in Wolf v. Citizens Bank, etc., Co., 92 F. (2d) 233.

§ 55-112. Election of directors.—All elections for directors shall be by ballot, unless otherwise provided in the charter or by-laws, and a majority of the issued and outstanding stock must be present in person or by proxy; the persons receiving the greatest number of votes shall be the directors. (Rev., s. 1182; 1901, c. 2, s. 39; 1927, c. 138; C. S. 1175.)

Cross Reference.—As to directors in general, see § 55-48, and cross references and annotations thereunder.

Editor's Note.—This section formerly contained this additional provision: "The polls must remain open one hour, unless all the stockholders are present in person or by proxy and have sooner voted, or unless all the stockholders waive this provision in writing." This sentence was stricken out by ch. 138, Public Laws 1927.

Effect of Motion of Adjournment.—When a motion to adjourn a stockholders' meeting has been carried, and a sufficient number have withdrawn to reduce the number of those present below a majority of all the stock issued and outstanding, an election of officers cannot be lawfully held thereafter at that meeting, though the adjournment was carried by an illegal vote. Bridgers v. Staton, 150 N. C. 216, 63 S. E. 892.

§ 55-113. Failure to hold election.—If the election for directors of a corporation is not held on the day designated by the charter or by-laws, the directors shall cause the election to be held as soon thereafter as is convenient. No failure to elect directors at the designated time shall work any forfeiture or dissolution of the corporation; and if the directors fail or refuse for thirty days after receiving a written request for such election from those owning one-tenth of the outstanding stock, to call a meeting for the election, the judge of the district, or the judge presiding in the courts of the district, in which the principal office of the corporation is located, may, upon the application of any stockholder, and on notice to the directors, order an election or make such other order as justice requires. The proceedings governing the issuance and hearing of injunctions shall, as far as applicable, govern such hearing. (Rev., s. 1188; 1901, c. 2, s. 46; C. S. 1176.)

Mandamus Cannot Issue.—A mandamus sought under the provisions of this and the following section cannot issue to compel the reconvening of the stockholders for the election of directors because of an illegal adjournment to a certain date by unlawful voting of stock, when that date has passed but the provisions of this section should be followed. Bridgers v. Staton, 150 N. C. 216, 217, 63 S. E. 892.

When Meeting Ordered by Judge.— A meeting of the stockholders of a corporation, ordered, upon application, by the judge in accordance with the provisions of this section, must be composed of a majority of shares held twenty days before such meeting, as it appears from the stock book, or, in case of a discrepancy, the transfer book of the corporation. Bridgers v. Staton, 150 N. C. 216, 217, 63 S. E. 892.

Notice.—The notice of a meeting called under this section by custom and by analogy to section 55-106 should be mailed to all stockholders whose addresses are known. Bridgers v. Staton, 150 N. C. 216, 217, 63 S. E. 892.

Stated in In re Hotel Raleigh, 207 N. C. 521, 527, 177 S. E. 648.

§ 55-114. Jurisdiction of superior court over corporate elections.—Whenever there shall be any dispute with reference to the election of directors by the stockholders of any corporation in the hands of a receivership, or whenever there shall be any dispute with reference to the election of officers of any corporation by directors or stockholders, if the stockholders elect the officers, the resident or presiding judge of the district may, after ten days' notice to the stockholders, or to the directors as the case may be, hear at chambers, in the county in which the principal office of the corporation is situated, evidence in the form of affidavits as to dispute, and may continue from time to time such hearing for the purpose of establishing facts with reference thereto to his satisfaction; and upon the completion of his hearing may order a new election or may declare the result of the election so held, or may continue the directors or officers, as the case may be, until a new election shall be held: Provided, however, that no order shall be entered temporarily affecting the status of the corporation. With reference to notice, evidence, and the findings by the judge hearing the same, the proceedings shall

be, as far as possible, the same as in injunctions. (Rev., s. 1189; 1901, c. 2, s. 47; 1935, c. 413; 1937, c. 347; C. S. 1177.)

Cross References.—As to power of superior court to compel production of books, see § 55-109. As to superior court's jurisdiction upon dissolution of corporation, see § 55-134.

Editor's Note.—Prior to the 1937 amendment this section contained a provision for the appointment of receivers, which was inserted by the 1935 amendment.

Failure to Elect Directors.—A proceeding based upon the failure of stockholders of a corporation to elect directors at the annual meeting held for that purpose is a proceeding under this section, and notice in writing signed by complainant served on the adverse parties by the sheriff ten days before the date designated for the hearing of the complaint confers jurisdiction upon the judge of the Superior Court over the parties and subject-matter of the proceeding, and the conditions precedent to proceedings under section 55-113, are not applicable. In re Hotel Raleigh, 207 N. C. 521, 177 S. E. 648.

In this proceeding the corporation is neither a necessary nor a proper party, nor may its rights be affected, and the judge of the Superior Court has no jurisdiction to appoint a receiver for the corporation in such proceeding. Id.

§ 55-115. When dividend declared.—The directors of every corporation created under this chapter shall, in January of each year, unless some specific time for that purpose is fixed in its charter, or by-laws, and in that case at the time so fixed, after reserving, over and above its capital stock paid in, as a working capital for the corporation, whatever sum has been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount reserved, and pay it to the stockholders on demand. The corporation may, in its certificate of incorporation or by-laws, give the directors power to fix the amount to be reserved as a working capital. (Rev., s. 1191; 1901, c. 2, s. 52; C. S. 1178.)

Profits Must Be Earned.—Stock dividends may be declared by a solvent corporation from its profits, where the total amount of the stock is kept within the charter limits and the profits have really been earned. Whitlock v. Alexander, 160 N. C. 465, 466, 76 S. E. 538.

Dividend Must Not Impair Capital Stock or Working Capital.—Neither the capital stock of the corporation, paid in and outstanding, nor its working capital as fixed pursuant to the provisions of this section, may be impaired by the payment of a dividend, under any circumstances. Cannon v. Wiscassett Mills Co., 195 N. C. 119, 141 S. E. 344.

Determining Accumulated Profits Available for Dividend.—For the purpose of determining the amount of accumulated profits to be declared and paid as a dividend, it is necessary that the true value of the assets, in cash, and not the mere book value should be ascertained in view of the restrictions of § 55-116. There should be deducted from such amount the capital stock, the working capital, and all other liabilities of the corporation. For this purpose the amount reserved for depreciation is a liability. Cannon v. Wiscassett Mills Co., 195 N. C. 119, 141 S. E. 344.

Where, in a suit to require that dividends be paid stockholders, it was not error for the court to refuse to order all profits, as shown by the company's statements for the years 1940-41, paid out in cash dividends, such profits being subject to deductions for income taxes, allowance for bad debts, and inventory adjustments; but the court erred in allowing a ten per cent deduction from such profits to cover probable expense, and the order should have directed the payment in dividends of the full net profits, the company showing at the end of 1941 a surplus of $38,000 on a capital of $7,800. Amick v. Coble, 222 N. C. 484, 23 S. E. (2d) 854.

Mandamus to Compel Dividends.—Where, under the provisions of this section, the accumulated profit of a private corporation in excess of the working capital has been ascertained, the directors are without authority to carry it to the surplus fund, and upon the demand of the stockholders it must be distributed into dividends in accordance with the requirements of the statute, and mandamus will lie to compel such distribution. Cannon v. Wiscassett Mills Co., 195 N. C. 119, 141 S. E. 344.

Stock Dividend May Be Declared.—The issuance of paid-up stock as a dividend cannot be attacked by an existent creditor, nor by one who has notice of the facts, since it withdraws nothing from the corporation or in any way depletes its assets. Whitlock v. Alexander, 160 N. C. 465, 466, 76 S. E. 538.

Effect of Sale.—A sale of corporate stock carries dividends not yet payable. Burroughs v. North Carolina R. Co., 67 N. C. 376.

Declared Dividend Is Debt.—A dividend declared by and due from a private corporation is a debt due to the shareholder, and is recoverable as such. Trustees v. North Carolina R. Co., 76 N. C. 103.

Debt Can Not Be Deducted from Dividend.—A bank has no right to retain out of the dividends upon the stock a debt due from the stockholder. Attorney General v. State Bank, 21 N. C. 545.

An action to compel declaration of a dividend can not be maintained where the stockholder has not applied to the directors, and he must allege that the directors refused to entertain such application. Winstead v. Hearne Bros. & Co., 173 N. C. 606, 611, 92 S. E. 613, citing 2 Cook on Corps., § 684, p. 209.

§ 55-116. Dividends from profits only; directors' liability for impairing capital. — No corporation may declare and pay dividends except from the surplus or net profits arising from its business, or when its debts, whether due or not, exceed two-thirds of its assets, nor may it reduce, divide, withdraw, or in any way pay to any stockholder any part of its capital stock except according to this chapter; provided, a public service corporation may declare and pay such dividends from the surplus or net profits arising from its business except when its debts, whether due or not, exceed three-fourths of its assets; provided, further, that any corporation, other than a public service corporation, which is a member of a partnership may declare and pay dividends from the surplus or net profits arising from its business when the sum of the corporation's separate debts, whether due or not, and that part of the partnership debts which is the same proportion of all the partnership debts, whether due or not, as the corporation's interest in the partnership assets is of all such assets, does not exceed two-thirds of the corporation's assets, and in such calculation the amount of its interest in the partnership assets shall be considered assets of the corporation. In case of a violation of any provision of this section, the directors under whose administration the same occurs are jointly and severally liable, at any time within six years after paying such dividend, to the corporation and its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend paid, or capital stock reduced, divided, withdrawn, or paid out, with interest on the same from the time such liability accrued. Any director who was absent when the violation occurred, or who dissented from the act or resolution by which it was effected, may exonerate himself from such liability by causing his dissent to be entered at large on the minutes of the directors at the time the action was taken or immediately after he has had notice of it. (Rev., s. 1192; Code, s. 681; 1901, c. 2, ss. 33, 52; 1927, c. 121; 1933, c. 354, s. 1; C. S. 1179.)

Cross References.—As to officer's liability for fraud, see § 55-56. As to joint and several liability of directors, see § 55-57.

Editor's Note.—The first proviso in the first sentence was added by ch. 121, Public Laws of 1927.

The second proviso, relating to dividends by corporation holding membership in partnership, was inserted by Public Laws 1933, c. 354.

See 11 N. C. Law Rev. 212, for criticism of this section.

Surplus or net profits, as used in this section, are what remains after deducting from the present value of all the assets of a corporation the amount of all the liabilities, including the capital stock. Cannon v. Wiscassett Mills Co., 195 N. C. 119, 125, 141 S. E. 344.

Where Charter Exempts Stockholder from Liability. — The charter provisions, that "no stockholder of the corporation shall be individually liable for debt, liability, contract, tort, omission, or engagement of the corporation or any other stockholder therein," does not interfere with the just and equitable principle embodied in this section holding the stockholders who are directors liable for a joint tort or misfeasance committed by them to the prejudice of creditors. McIver v. Young Hardware Co., 144 N. C. 478, 479, 57 S. E. 169.

Fraudulent Representation that Dividend is Earned.—Evidence that the agent for the sale of shares of stock in a corporation had induced the defendant to purchase, by falsely representing that a dividend would be credited upon his notes given for the shares, is in effect a representation that the corporation had earned the dividend as represented in this section; and it may be received as a circumstance of fraud, together with other evidence tending to establish it. Seminole Phosphate Co. v. Johnson, 188 N. C. 419, 124 S. E. 859.

The declaration of a dividend and issuance of stock for it, by an excessive overvaluaton of property or by an excessive and entirely unwarranted estimate of profits or the unearned increment would be evidence from which fraud could be inferred, and in extreme cases it might be regarded as conclusive. Whitlock v. Alexander, 160 N. C. 465, 473, 76 S. E. 538.

Liability of Director.—A director of a corporation who has not brought himself within the provisions of this section, exonerating him from liability for the payment of dividends to the stockholders when the profits of the business did not justify it, or its debts exceeded two-thirds of its assets, etc., is liable, in the action of the trustee in bankruptcy of such corporation, for the amount of such debts, and the proper court costs and charges, not exceeding the amount of the dividends unlawfully declared. Claypoole v. McIntosh, 182 N. C. 109, 108 S. E. 433.

Question of Fraud for Jury.—The question as to actual fraud in issuing a stock dividend must be referred to a jury. Whitlock v. Alexander, 160 N. C. 465, 473, 76 S. E. 538.

Repurchase of Stock.—This section was held inapplicable to suit by receiver against directors for repurchase of stock by corporation in Thompson v. Shepherd, 203 N. C. 310, 165 S. E. 796.

Art. 10. Foreign Corporations.

§ 55-117. Powers existing independently of permission to do business.—A corporation created by another state of the United States, or by any foreign state, kingdom, or government may acquire by devise or otherwise, and may hold, mortgage, lease, and convey real estate in this state for the purpose of prosecuting its business or objects, or such real estate as it may acquire by way of mortgage or otherwise in the payment of debts due to it, but is not eligible or entitled to qualify in this state as executor, administrator, guardian, or trustee under the will of any person domiciled in this state at the time of his death. The right to acquire, hold and convey real estate exists only where at the time of the acquisition, the foreign state, government, or kingdom under whose laws the corporation was created is not at war with the United States. (Rev., s. 1193; 1901, c. 2, s. 93; 1915, c. 196, s. 1; C. S. 1180.)

Cross Reference.—As to power of nonresident corporation licensed by the insurance commissioner to act as fiduciary, see § 58-113.

In General.—The Legislature of this State has not undertaken to regulate by statute the powers and methods of business of foreign corporations, nor to prescribe how their contracts shall be executed; and the general principles of law applicable to corporations apply. Rumbough v. Southern Improvement Co., 106 N. C. 461, 466, 11 S. E. 528.

A Matter of Comity Only.—A corporation of one state may do business in another only by comity of the latter state, when not so permitted by a valid Federal statute, as in matters of interstate commerce, and may be prohibited from doing business therein entirely, or may be restricted with conditions made a prerequisite by statute. Lunceford v. Commercial Travelers Mutual Asso., 190 N. C. 314, 129 S. E. 805; Blackwells Tobacco Co. v. American Tobacco Co., 145 N. C. 367, 59 S. E. 123, citing Range Co. v. Carver, 118 N. C. 328, 329, 24 S. E. 352.

Internal Management. — The courts of North Carolina have not the power and will not interfere with the internal management of the business matters of foreign corporations. Howard v. Mutual Reserve Fund Life Association, 125 N. C. 49, 34 S. E. 199; Reid v. Norfolk, etc., R. Co., 162 N. C. 355, 78 S. E. 306.

Power to Acquire and Sell Land.—Foreign corporations, having a right under their charters to acquire and sell land, can exercise such rights in this State to the same extent that corporations of this State can do so. Barcello v. Hapgood, 118 N. C. 712, 713, 24 S. E. 124.

Capacity to Sue and Be Sued.—A foreign corporation can sue in the courts of another state by comity only, and the Legislature may deny to a foreign corporation that right, or may impose conditions on its exercise. Exchange Bank v. Tiddy, 67 N. C. 169.

Not Restricted to Authority Conferred in Home State.—A corporation incorporated in another State with authority to conduct business in North Carolina, which has complied with the statutes of this State, can maintain an action in the courts of this State although its charter may not authorize it to do business in the State of its incorporation. Troy, etc., Co. v. Snow Lumber Co., 173 N. C. 593, 92 S. E. 494.

§ 55-118. Requisites for permission to do business.—Every foreign corporation before being permitted to do business in this state, insurance companies excepted, shall file in the office of the secretary of state a copy of its charter or articles of agreement, attested by its president and secretary, under its corporate seal, and a statement attested in like manner of the amount of its capital stock authorized, the amount actually issued, the principal office in this state, the name of the agent in charge of such office, the character of the business which it transacts, and the names and post-office addresses of its officers and directors. And such corporation shall pay to the secretary of state, for the use of the state, forty cents for every one thousand dollars of the total amount of the capital stock authorized to be issued by such corporation, but in no case less than forty dollars nor more than five hundred dollars: and also a filing fee of five dollars. Provided that the tax upon shares of stock without nominal or par value shall be the same as if each share of stock had a par or face value of one hundred dollars. Such corporation may withdraw from the state upon filing in the office of the secretary of state a statement signed by its president and secretary and attested by its corporate seal, setting forth the fact that such corporation desires to withdraw, and upon payment to the secretary of state of a fee of five dollars. Every corporation failing to comply with the provisions of this section shall forfeit to the state five hundred dollars, to be recovered, with costs, in an action to be prosecuted by the attorney-general, who shall prosecute such actions whenever it appears that this section has been violated. This section does not apply to railroad, banking, express or telegraph companies which, prior to March 9, 1915, had been licensed to do business in this state, or were engaged in business in this state, having a regularly appointed agent upon whom service of process could be made, located in this state.

All acts of the Secretary of State domesticating foreign corporations without nominal or par value shares of stock and taxing the same as provided in the proviso are hereby validated. (Rev., s. 1194; 1901, c. 2, s. 57; 1903, c. 76; 1915, c. 263; 1935, c. 44; 1939, c. 57; C. S. 1181.)

Cross References—As to service of process and appointment of agent, see §§ 1-97, paragraph 1, 1-98, 55-38, and 7-143 As to venue, see § 1-80. As to foreign insurance companies, see § 58-149 et seq. As to foreign building and loan associations, see § 54-34 et seq. As to foreign security and loan corporations in this state, see § 55-10. As to taxation, see §§ 105-122 and 105-250.

Editor's Note.—One extremely important question which has arisen under this section is in regard to the effect of compliance by foreign corporations, particularly whether after compliance they have a right to sue in the federal courts on the ground of diverse citizenship. This question arose in 1900 in the case of Debnam v. Tel. Co., 126 N. C. 831, 36 S. E. 269 and it was decided that the purpose of this section was to require all corporations doing business in the state to become domesticated and that the result of this domestication was that the corporation could not remove a cause, when sued in the state courts, to a federal court, on the ground of diverse citizenship. This ruling was upheld the following year in Allison v. Southern Ry. Co., 129 N. C. 336, 40 S. E. 91, and again in 1903 in Beach v. Southern Ry. Co., 131 N. C. 399, 42 S. E. 856. The Allison case, supra, was appealed to the U. S. Supreme Court and was pending at the time the Beach case, supra, was decided. In 1903 the U. S. Supreme Court handed down its opinion, reversing the N. C. Supreme Court and holding that a foreign corporation, by compliance with this section did not lose its right to remove to the federal courts. Southern Ry. v. Allison, 190 U. S. 326, 23 S. Ct. 713, 47 L. Ed. 1078. This decision reverses Allison v. R. R., supra, and overrules Debnam v. Tel. Co., supra, and Beach v. R. R., supra.

The amendment of 1935 increases the amount payable on every one thousand dollars of capital stock from twenty to forty cents and placed the minimum at forty instead of twenty-five dollars and the maximum as five hundred instead of two hundred and fifty dollars. The changes occur in the second sentence of the section.

The 1939 amendment, which added the proviso after the second sentence, provided: "All acts of the secretary of state domesticating foreign corporations without nominal or par value shares of stock and taxing the same as provided in this act are hereby validated."

For comment on 1939 amendatory act, see 17 N. C. Law Rev. 346.

In General.—Although this section excludes insurance companies from its operation, the statutes will be construed in relation to their subject-matter. The exception in this section is because insurance companies are exclusively dealt with elsewhere. Occidental Life Ins. Co. v. Lawrence, 204 N. C. 707, 169 S. E. 636.

Exercise of Police Power.—There is nothing in the U. S. or State Constitution which prohibits the state, in the exercise of its police power, from making the transaction of business by a foreign corporation prior to procuring a license an indictable offense. State v. Agency, 171 N. C. 831, 834, 88 S. E. 726.

The only restriction of the constitution is that the license tax must not interfere with interstate commerce or be otherwise invalid. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568.

Property Not Removed to State.—This section requiring "domestication" enables plaintiffs to get personal service upon a foreign corporation, but does not remove its property to the State nor the situs of its debts created elsewhere. Stause Bros. v. Aetna Fire Ins. Co., 126 N. C. 223, 35 S. E. 471.

Effect of Non-Compliance.—From the character of this section and its evident purpose the contracts of a foreign corporation doing business in the State without compliance are not avoided, but the penalty alone is enforceable, and by action as the statute prescribes. Miller v. Howell, 184 N. C. 119, 122, 113 S. E. 621; Ober & Sons Company v. Katzenstein, 160 N. C. 439, 76 S. E. 476. And in such a case the State sues for the penalty. Blackwell's Tobacco Co. v. American Tobacco Co., 144 N. C. 352, 363, 57 S. E. 5; Ober & Sons Company v. Katzenstein, supra.

If the State, in addition to the penalty, has desired to render invalid the contract and to deny a recovery thereon, it would have so enacted, as it has done in regard to gambling and other illegal contracts. Ober & Sons Company v. Katzenstein, 160 N. C. 439, 441, 76 S. E. 476.

How Charter Proven.—The charter of a foreign corporation may be proven in this State by exhibiting a copy duly certified by the Secretary of State of the State in which the corporation was created. Barcello v. Hapgood, 118 N. C. 712, 714, 24 S. E. 124.

Right to Sue and Be Sued.—Where a foreign corporation has submitted to domestication in this State by filing its certificate of incorporation with the Secretary of State and by otherwise complying with the provisions of this section, it thereby acquires the right to sue and be sued in the courts of this State as a domestic corporation, and where it brings action on a note in the county of its designated residence the defendants are not entitled to removal to the county of their residence as a matter of right. Smith-Douglass Co. v. Honeycutt, 204 N. C. 219, 167 S. E. 810.

Cited in Ward v. Southern Sand & Gravel Co., 33 F. (2d) 773.

§ 55-119. Sale of shares of stock held by life tenant.—The shares of the capital stock of a foreign corporation, in which any person owns a life estate, may be sold by an order in a special proceeding, unless prohibited by the instrument under which such title was acquired. All persons in esse who are interested in the property aforesaid shall be made parties to the proceedings. Whenever it appears from the petition, or otherwise, that among those interested are persons not in being, or who, because of some contingency, cannot be presently ascertained, such persons shall be made parties defendant by publication of notice of the proceeding, according to the usual practice, and a guardian ad litem shall be appointed for them, and he shall file answer, as provided by §§ 1-66 and 1-67. The clerk of the Superior Court shall have power to make, from time to time, appropriate orders for the sale of said shares of stock, and for handling, securing and investing the net proceeds of sale. In lieu of the payment to the life tenant of the income and profits on the net proceeds of sale, the clerk may order the present cash value of the life tenant's share, ascertained as by law provided, to be paid to the life tenant absolutely, out of said proceeds, and order the balance thereof to be invested and kept invested for the remaindermen, or paid over to a trustee appointed for the purpose, after the trustee shall have qualified by filing with the clerk an undertaking, to be approved by him, payable to the State of North Carolina, for the benefit of the remaindermen, in a sum double the amount of the balance of the net proceeds aforesaid, and conditioned for the prompt forthcoming and payment of the principal and interest or income thereof, and the faithful performance of duty and compliance with the orders of court relating thereto. The orders aforesaid shall be approved by the judge of the Superior Court residing in or holding the courts of the district, where such approval is now required by law. (1925, c. 59.)

§ 55-120. Secretary of state directed to require domestication of all foreign corporations doing business in state.—The secretary of state is hereby directed to require that every foreign corporation doing business in North Carolina, as permitted under the provisions of § 55-117, shall file in the office of the secretary of state a copy of its charter or articles of agreement, in the manner required by § 55-118, and all amendments thereto, and otherwise fully comply with the provisions of said law, including the payment to the secretary of state of fees fixed by said law for the privilege of doing business in this state and domestication therein. The secretary of state is authorized and empowered to employ such assistants as shall be deemed necessary in his office for the purpose of carrying out and enforcing the provisions of this section, and for making such investigations as shall be necessary to ascertain foreign corporations now doing business in North Carolina which

may have failed or hereafter fail to domesticate as required by law. (1937, c. 343.)

Art. 11. Dissolution.

§ 55-121. Voluntary, generally.—When in the judgment of the board of directors it is deemed advisable and for the benefit of a corporation that it be dissolved, the board, within ten days after the adoption of a resolution to that effect by a majority of the whole board, at a meeting called for that purpose, of which meeting every director shall have received three days notice, shall cause notice of adoption of such resolution to be mailed to each stockholder residing in the United States, to his last known postoffice address, and also, beginning within said ten days, cause a like notice to be published in a newspaper published in the county wherein the corporation has its principal office, at least once a week for four successive weeks, next preceding the time appointed for the same, of a meeting of the stockholders to be held at the office of the corporation, to take action upon the resolution. The stockholders' meeting thus called may, on the day appointed, by consent of a majority in interest of the stockholders present, be adjourned from time to time for not less than eight days at one time, of which adjourned meeting notice by advertisement in said newspaper shall be given. If at such meeting two-thirds in interest of all the stockholders consent in writing that a dissolution take place, their consent, together with the list of the names and residences of the directors and officers, certified by the president and the secretary or treasurer, shall be filed in the office of the secretary of state, who, upon being satisfied by due proof that the requirements aforesaid have been complied with, shall issue a certificate that the consent has been filed, and the board of directors shall cause this certificate to be recorded in the office of the clerk of the superior court of the county in which the principal office of the corporation is located, and published once a week for four successive weeks in a newspaper published in said county. Upon the filing in the office of the secretary of state of an affidavit of the manager or publisher of such newspaper that the certificate has been so published, the corporation is dissolved, and the board shall proceed to settle up and adjust its business and affairs.

Whenever all the stockholders consent in writing to a dissolution, no meeting or notice thereof is necessary, but on filing the consent in the office of the Secretary of State, he shall issue a certificate showing that such consent in writing has been filed in his office, and said certificate shall be published as above provided in cases without unanimous consent, and recorded in the office of the clerk of the superior court of the county in which the principal office of the corporation is located. Upon the filing in the office of the Secretary of State of an affidavit of the manager or publisher of the newspaper in which publication is made, showing that said certificate has been so published, the Secretary of State shall forthwith issue a certificate of dissolution of the said corporation.

The Secretary of State shall withhold issuance of final certificate of dissolution of or withdrawal of any corporation, domestic or foreign, until the receipt by him of a notice from the Commissioner of Revenue to the effect that such corporation has met the requirements with respect to reports and taxes required by the Revenue Laws of the State of North Carolina. (Rev., s. 1195; 1901, c. 2, s. 34; 1941, c. 195; C. S. 1182.)

Cross References.—As to status of debts due and actions pending at time of dissolution, see § 55-138. As to fees, see § 55-158. As to voluntary dissolution of a bank, see § 53-18. As to voluntary dissolution of a credit union, see § 54-92.

Editor's Note.—The 1941 amendment substituted the second and third paragraphs in lieu of the former last sentence of the section which reads as follows: "Whenever all the stockholders consent in writing to a dissolution, no meeting or notice thereof is necessary, but on filing the consent in the office of the secretary of state he shall forthwith issue a certificate of dissolution, which shall be published as above provided, and recorded in the office of the clerk of the superior court of the county in which the principal office of the corporation is located."

Section Settles Mooted Questions.—As far as North Carolina is concerned, this statute settles the question formerly much mooted in the courts as to whether, and under what circumstances, a corporation could be dissolved by the stockholders, when no time was fixed for its duration, upholding and extending this power of voluntary dissolution as established by the better considered decisions on the subject. White v. Kincaid, 149 N. C. 415, 419, 63 S. E. 109.

A Part of Every Charter.—The provision of this section enters into every charter, and unless otherwise enacted by the Legislature, every stockholder takes and holds his stock subject to this power of voluntary dissolution, by resolution of the directors concurred in by two-thirds in interest of the stockholders. White v. Kincaid, 149 N. C. 415, 419, 63 S. E. 109.

Motive Generally Immaterial. — When a corporation lawfully proceeds to wind up its affairs in accordance with this section the motive prompting the act, however reprehensible or malicious, is not, as a rule, relevant to the inquiry; and the courts will not undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem in a given instance. White v. Kincaid, 149 N. C. 415, 416, 63 S. E. 109.

Same—Directors Are Trustees.—The directors of a corporation in proceedings for dissolution, under this section, are trustees in the sense that they must act faithfully in their judgment for the benefit of the corporation and in furtherance of its interest, and not for the purpose of unjustly oppressing the holders of the minority stock, or to attain their own personal ends. White v. Kincaid, 149 N. C. 415, 63 S. E. 109.

Liquidation to Escape Judgment.—An attempted liquidation by a corporation, to escape judgment for the refund of money wrongfully distributed, is in fraud of creditors. Chatham v. Realty Co., 180 N. C. 500, 105 S. E. 329.

Suits Pending Dissolution.—Where it appears in an action that the indebtedness sought to be recovered was claimed to be due a corporation, and that the suit was instituted by the individual stockholders, a judgment as of nonsuit is properly entered, though proceedings in dissolution of the corporation were being had under this section, the proper party plaintiff being the corporation or a receiver appointed therefor. Worthington v. Gilmers, 190 N. C. 128, 129 S. E. 153.

§ 55-122. Liability of stockholders.—The stockholders of a corporation chartered under the laws of this state are individually liable for all taxes, costs and fees for the dissolution of the corporation, and the attorney-general is authorized to enforce the provisions of this section by suit before a justice of the peace or in the superior court in the county where such corporation had its principal place of business, whenever it appears upon report from the secretary of state that the corporation has ceased to transact business and fails to pay the taxes due the state or to file annual statements or to dissolve itself as provided by law. If a nonresident stockholder of the corporation refuses to sign the certificate of dissolution the resident stockholders shall make affidavit to that effect, and the written assent of such resi-

dent stockholders, accompanied by such affidavit, is sufficient to dissolve the corporation. If no stockholder of such corporation is found within the state the secretary of state has authority to declare the charter of the corporation forfeited, and shall publish annually in his corporation report a list of the corporations whose charters have been so forfeited. (1909, c. 730, s. 1; C. S. 1183.)

Cross Reference.—As to liability for unpaid stock, see § 55-65.

Cited in Life Ins. Co. v. Edgerton, 206 N. C. 402, 411, 174 S. E. 96.

§ 55-123. Voluntary, before payment of stock.—The incorporators named in a certificate of incorporation, before the payment of any part of the capital stock, and before beginning the business for which the corporation was created, may surrender all their corporate rights and franchises, by filing in the office of the secretary of state a certificate, verified by oath, that no part of the capital stock has been paid and such business has not been begun, and surrendering all rights and franchises. Thereupon the corporation is dissolved. (Rev., s. 1177; 1901, c. 2, s. 35; C. S. 1184.)

§ 55-124. Involuntary, at instance of private persons.—Corporations may be dissolved by civil action, instituted by the corporation, a stockholder, or creditor, or by authority of the attorney-general in the name of the state, in the following cases:

1. For any abuse of its powers to the injury of the public or of its stockholders, creditors, or debtors.

2. For nonuser of its powers for two or more consecutive years.

3. When it is insolvent, or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate rights.

4. Upon any conviction of the company of a persistent criminal offense. (Rev., s. 1196; Code, s. 694; 1901, c. 2, s. 73; C. S. 1185.)

Cross Reference.—As to involuntary dissolution of a bank, see § 53-19.

Editor's Note.—The provision in the next section, that the stockholder instituting the dissolution proceeding must own one-fifth or more of the stock, does not apply to proceedings under this section. Lasley v. Mercantile Co., 179 N. C. 575, 103 S. E. 213.

Nor is it necessary that the stockholder allege or prove that he first made application to the directors or management to take action in the matter for this relates to suits concerning corporate management. Id.

Failure to Maintain Principal Place of Business in State.—The persistent failure of a corporation chartered in this State to maintain its principal place of business within the State as required by its charter, and the withdrawing of all its agencies from the State, will authorize the courts to decree a dissolution of such corporation upon the suit of a stockholder, under this section. Simmons v. Norfolk etc., Steamboat Co., 113 N. C. 147, 18 S. E. 117.

Direct Proceeding Necessary.—A cause of forfeiture cannot be taken advantage of collaterally or otherwise than by a direct proceeding for that purpose so that the corporation may be heard in answer. Asheville Division v. Aston, 92 N. C. 579, 585.

Amount of Stock Held by Plaintiff Immaterial.—In a suit to dissolve a corporation for nonuser of the powers the right to proceed is conferred on the individual stockholder by express provision of the statute, and without regard to the amount of his holdings. Lasley v. Mercantile Co., 179 N. C. 575, 577, 103 S. E. 213.

Proceedings May Be in Equity.—While it is more orderly to proceed under this section to appoint a receiver for a corporation, this could have been done in the courts of equity, wherein, under the decree, all parties were before the court or thereunder could be brought in, and the same relief awarded as if the provision of the statute had been complied with. Greenleaf v. Land & Lumber Co., 146 N. C. 505, 60 S. E. 424.

Bankruptcy Proceedings Not Authorized.—The fact that minority stockholders have instituted a suit in the State court under this section, and that a receiver has been appointed under sec. 55-147, does not entitle creditors to avail themselves of the relief provided for them in the federal bankruptcy statute until the corporation has become insolvent and committed an act of bankruptcy. Bank v. Gudger, 212 Fed. 49, 54.

Where Creditors Estopped.—Where a provision in a deed of trust is to the effect that upon default in the payment of the interest, etc., the trustee shall have the power to foreclose upon request of the holders of a certain part of the par value of the bonds, those who hold such a proportionate part are bound by the valid provision of their contract, and without complying therewith a permanent receiver may not be appointed by the court under the provisions of this section in their suit for the purpose, though the corporation itself may be insolvent. Jones v. A. & W. Ry. Co., 193 N. C. 590, 137 S. E. 707.

§ 55-125. Involuntary, by stockholders.—When stockholders owning one-fifth or more in amount of the paid-up stock of any corporation organized under the laws of and doing business in this state, except corporations organized for religious, charitable, fraternal, and educational purposes, and except banking and public-service corporations, apply in term or vacation to the judge of the superior court holding the courts for the county in which the principal place of business of the corporation is situated, by petition containing a statement that for three years next preceding the filing of the petition, which time shall begin to run from three years after it has begun business, the net earnings of the corporation have not been sufficient to pay in good faith an annual dividend of four per cent upon the paid stock of the corporation, over and above the salaries and expenses authorized by its by-laws and regulations, or that the corporation has paid no dividend for six years preceding said application; or whenever stockholders owning one-tenth or more in amount of the paid-up common stock of any such corporation apply to the judge of the superior court as aforesaid by petition containing a statement that the corporation has paid no dividend on the common stock for ten years preceding said application, and that they desire a dissolution of the corporation, the judge shall make an order requiring the officers of the corporation to file in court, within a reasonable time, inventories showing all the real and personal estate of the corporation, a true account of its capital stock, the names of the stockholders, their residences, the number of shares belonging to each, the amount paid in upon said shares and the amount still due thereon, and a statement of all the encumbrances on the property of the corporation and all its contracts which have not been fully satisfied and canceled, specifying the place and residence of each creditor, the sum owing to each, the nature of the debt or demand, and the consideration therefor, and the books and papers of the corporation. Upon the filing of the inventories, accounts and statements, the court shall enter an order requiring all persons interested in the corporation to appear before a referee to be appointed by the court, at a time and place named in the order, service of which may be made by publication for such time as may be deemed proper by the court, and show cause why the corporation should not

be dissolved. If it appears to the court that the statements contained in the petition are true, the court may adjudge a dissolution of the corporation and shall appoint one or more receivers, who shall have all powers of receivers conferred by this chapter for the winding up the affairs and distribution of the assets of the corporation. If it appears to the court that the corporation is insolvent or in imminent danger of insolvency, the court may appoint a temporary receiver of the corporation pending dissolution. No suit shall be brought for the dissolution of a corporation under the provisions of this section until each and all of the petitioners have owned their stock for the term of two years prior to the institution of the action; nor shall any such suit be brought for the period of three years after a final judgment upon a prior petition as herein provided. (1913, c. 147; 1915, c. 137, s. 1; C. S. 1186.)

Editor's Note.—The provision for dissolution, upon the application of stockholders owning one-tenth or more of the paid up common stock, when the corporation has paid no dividends for ten years preceding, was added by Laws of 1915, ch. 137. In regard to this amendment the court said in Winstead v. Hearne Bros., 173 N. C. 606, 610, 92 S. E. 613: "This amendment would appear to be inconsistent with the six-year clause of the original act, and to require ten years complete suspension of dividends on the common stock of a corporation before application can be made for a receiver on that ground."

The constitutionality of this section providing for the dissolution of corporations in certain instances, cannot be successfully assailed in an action thereunder to dissolve a corporation organized subsequent to its enactment. Kistler v. Caldwell Cotton Mills Co., 205 N. C. 809, 172 S. E. 373.

A Remedial Statute.—This section is a remedial statute, and intended to remedy an abuse of power by the majority shareholders by a suspension of dividends, a method at times resorted to for the purpose of freezing out minority holders or depressing the market value of the shares. Winstead v. Hearne Bros., 173 N. C. 606, 92 S. E. 613.

Applies to "A Going Concern."—This section is intended to control and regulate suits for the dissolution of a corporation doing business as "a going concern," and by reason of the fact that they have not earned for three years next preceding the filing of the petition a net dividend of 4 per cent, or who have not paid a dividend for six years, and clearly has no application to an action under the preceding section to dissolve a corporation for nonuse of its powers. Lasley v. Mercantile Co., 179 N. C. 575, 577, 103 S. E. 213.

When Stockholders Estopped. — Where a stockholder in a corporation has actively participated in its management and consented to the increase in its capital stock from the earnings of a profitable concern, which has proven decidedly advantageous, he is thereafter estopped to assert the right given a holder of a certain amount of the stock to throw the corporation into a receiver's hands for nonpayment of dividends within a certain period. Winstead v. Hearne Bros., 173 N. C. 606, 92 S. E. 613.

Construed with Art. 15 on Reorganization. — Standing alone, this section might be considered as confining the court, in such a proceeding, to a decree strictly of dissolution, involving a destruction of the corporate franchise, but when construed as it should be (Keith v. Lockhart, 171 N. C. 451, 457, 88 S. E. 640), in connection with other provisions of our statute law on the subject, namely Art. 15 of this chapter, the court has ample power to enter a decree for a sale of franchise with the corporate property, transferring the same to the purchasers and conferring upon them the right to recognize and carry on the business as a new corporation. Coal and Ice Co. v. R. R., 144 N. C. 732, 57 S. E. 444; Wood v. Staton, 174 N. C. 245, 250, 93 S. E. 794.

Paid-Up Stock Refers to Common and Preferred.—It is not required that stockholders suing for its dissolution under this section should own one-fifth of its common stock in order to maintain the action, it being sufficient if they own common and preferred stock constituting one-fifth or more of the total paid-in capital stock of the corporation, and their right to maintain the action is not affected by the fact that holders of preferred stock are given no vote in the management of the corporation. Kistler v. Caldwell Cotton Mills Co., 205 N. C. 809, 172 S. E. 373.

Dividend Must Equal 4%.—The fact that a corporation has earned net income sufficient to pay in good faith dividends on its preferred stock within three years prior to the institution of an action for its dissolution under this section, is not sufficient to resist the action for dissolution if the earned dividends do not amount to four per cent on its total capital stock, preferred and common. Kistler v. Caldwell Cotton Mills Co., 205 N. C. 809, 172 S. E. 373.

When Order for Inventories Proper.—Where a petition in an action for dissolution of a corporation meets all requirements of this section, it is not error for the court to require the defendant corporation to file inventories as provided. Kistler v. Caldwell Cotton Mills Co., 205 N. C. 809, 810, 172 S. E. 373.

Dissolution in Discretion of Court.—Whether the court will order dissolution upon the final hearing is to be determined in its discretion according to whether, from all facts shown, the failure of the corporation to earn the required dividends was due to temporary conditions or to its management. Kistler v. Caldwell Cotton Mills Co., 205 N. C. 809, 810, 172 S. E. 373.

§ 55-126. Involuntary, by attorney-general.—An action may be brought by the attorney-general in the name of the state against a corporation for the purpose of annulling its charter upon the ground that it was procured upon a fraudulent suggestion, or concealment of a material fact, by the persons incorporated or by some of them, or with their knowledge or consent; or for the purpose of annulling the existence of a corporation, other than municipal, when such corporation—

1. Offends against the act creating, altering, or renewing it.

2. Violates any law by which it has forfeited its charter by abuse of its power.

3. Has forfeited its privileges or franchises by failure to exercise its power.

4. Has done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises.

5. Has exercised a franchise or privilege not conferred upon it by law.

6. Has failed to use its powers for two or more consecutive years.

7. Has become insolvent as manifested by the return of an execution unsatisfied upon a judgment against the corporation docketed in the superior court of the county where it has its principal place of business.

It is the duty of the attorney-general, whenever he has reason to believe that any of these acts or omissions can be established by proof, to bring an action in every case of public interest, and also in every other case in which satisfactory security is given to indemnify the state against the costs and expenses to be incurred thereby. (Rev., s. 1198; Code, ss. 604, 605; 1889, c. 533; C. S. 1187.)

Cross Reference.—As to action in the nature of quo warranto by the attorney general against corporations, see § 1-515.

Editor's Note.—Formerly this section provided that an action might be brought against a corporation by the Attorney-General, "whenever the Legislature shall so direct." Under this wording it was held that the Attorney-General could not bring an action to vacate the charter of a corporation of his own motion, but that the authority of the Legislature was necessary. Attorney General v. R. Co., 134 N. C. 481, 46 S. E. 959.

Forfeiture without Proceedings.—A corporation cannot endure longer than the time prescribed by its charter, and no judicial proceedings are necessary to declare a forfeiture for such a cause but for any other cause of forfeiture a direct proceedings must be instituted by the sovereign to enforce the forfeiture. Asheville Division v. Aston, 92 N. C. 579.

An information in the nature of a writ of quo warranto against a corporation, to have its privileges declared forfeited because of neglect and abuse in the exercise of them, must be filed in the name of the Attorney-General of the state,

and can not be instituted in the name of a solicitor of a judicial circuit. Houston v. Neuse River Nav. Co., 53 N. C. 476.

An information, filed by the Attorney-General, for the purpose of having the charter of an incorporation declared to be forfeited, though it need not be expressed in technical language, yet it must set out the substance of a good cause of forfeiture in its essential circumstances of time, place and overt acts. Attorney General v. Petersburg, etc., R. Co., 28 N. C. 456.

Area of Rural Community Misrepresented.—The right of action is given the Attorney-General, on the relation of the State, to annul a certificate of incorporation of a rural community when the petition upon which the Secretary of State has issued the certificate misrepresents that the area of the community to be incorporated extended only to that of "one school district," under the provisions of this section authorizing the Attorney-General to bring action when a certificate of incorporation has been procured upon "a fraudulent suggestion or concealment of a material fact by the persons incorporated, or by some of them, or with their knowledge or consent," etc. State v. Rural Community, 182 N. C. 861, 109 S. E. 576.

§ 55-127. Forfeiture or dissolution for failure to organize or act. — When a charter has been granted creating a corporation, and the incorporators for two years neglect to organize and carry into effect the intent of the charter, or when organized, if they for two consecutive years cease to act, then this disuse of their corporate privileges and powers is a forfeiture of the charter. If, after thirty days notice by the secretary of state, the corporation fails to surrender its corporate rights or to dissolve, in the manner provided in this chapter, the secretary of state shall report it to the attorney-general, who shall institute an appropriate action for its dissolution. (Rev., s. 1246; Code, s. 688; 1901, c. 2, s. 106; C. S. 1188.)

State Must Bring Action.—The fact that a bank failed to organize within two years after it was chartered cannot affect the validity of whatever lien the bank may, by its charter, have on the shares of stock of a stockholder indebted to it. Such defect in the organization of the bank can be taken advantage of only by a direct proceeding by the state for that purpose. Boyd v. Redd, 120 N. C. 335, 27 S. E. 35.

§ 55-128. Forfeiture for nonuser by hydro-electric companies. — All waterpower, hydro-electric power, and water companies or corporations organized in this state shall be required to begin active work in making their proposed development within two years after their organization and diligently to prosecute their work on the same until it has been completed; and a failure to begin the work or development within the time, and to diligently prosecute work on the same until its completion, as herein provided, shall be legal grounds for declaring their charter rights, privileges and franchises forfeited, by the state, acting through its attorney-general, upon the recommendation of the utilities commission of this state: Provided, this section shall not apply to any company which is supplying the public and is meeting the demands of the public for its services. (1913, c. 133, s. 2; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 1189.)

§ 55-129. Involuntary, by bankruptcy.—When a corporation chartered under the laws of this state is adjudged bankrupt under the laws of the United States or when it shall be made to appear to a judge of the superior court that all of the assets of the corporation of whatever kind or character have been lost to the stockholders by reason of foreclosure, assignment, or execution under judgment, and that the corporation is therefore unable to conduct the business for which it was organized, the charter of the corporation is forfeited without further action, unless the stockholders determine by appropriate resolutions to continue the corporate existence of the corporation after the adjudication in bankruptcy, foreclosure, assignment, or sale under execution, and furnish the secretary of state with a duly certified copy of the resolutions, all within six months after the adjudication, foreclosure, assignment or final sale under execution. The stockholders of a bankrupt corporation whose existence is continued by the foregoing procedure must pay all privilege taxes which have accrued against the corporation since the adjudication, together with a fee of one dollar allowed the secretary of state for recording and filing the certificate provided for in this section. (1915, c. 134, ss. 2, 3; 1931, c. 310; C. S. 1190.)

Editor's Note.—Under this section prior to the Act of 1931, corporate charters were automatically forfeited by an adjudication of bankruptcy unless the stockholders took certain specified action within six months. The amendment extends a like forfeiture to a corporation which is shown in the superior court to have lost its entire assets either through foreclosure, assignment or execution. 9 N. C. Law Rev. 363.

This section must be read in pari materia with § 55-132, the application of which also is necessary to determine the status of a corporation suffering a forfeiture of its charter by reason of bankruptcy. Sisk v. Old Hickory Motor Freight, 222 N. C. 631, 632, 24 S. E. (2d) 488.

§ 55-130. When franchises forfeited by neglect, etc., corporation dissolved; costs. — If it is adjudged that a corporation against which an action has been brought has forfeited by neglect, abuse, or surrender, its corporate rights, privileges and franchises, judgment shall be rendered that the corporation be excluded from such rights, privileges and franchises, and that it be dissolved. If judgment is rendered in such action against a corporation, or against persons claiming to be a corporation, the court may cause the costs to be collected by execution against the persons making the claim, or by attachment or process against the directors or other officers of the corporation. (Rev., ss. 1209, 1210; Code, ss. 617, 618; C. S. 1191.)

§ 55-131. Service of summons in action for dissolution.—In an action for the dissolution of a corporation, or for the appointment of a receiver thereof, the summons must be served on the corporation by service on an officer or agent upon whom other process can be served, and shall be served on the stockholders, creditors, dealers and any others interested in the affairs of the company by publishing a copy at least weekly for two successive weeks in some newspaper printed in the county in which the corporation has its principal place of business, or if there is no such newspaper published, by posting a copy of the summons at the door of the courthouse of such county, and publishing a copy for the time and in the manner aforesaid in a newspaper published nearest the county seat of the county in which the corporation has its principal place of business or in a newspaper published in the city of Raleigh. This publication is sufficient service on all the stockholders, creditors of, or dealers with, the corporation, and upon the corporation, if no officer can after due diligence be found in the state and it has no process agent in the state; and all

such stockholders, creditors or dealers or other parties interested may intervene in said proceedings and become parties thereto for themselves, or for others in like interest, under such rules as the court for the purpose of justice prescribes. (Rev., s. 1199; Code, s. 695; 1911, c. 173, s. 1; C. S. 1192.)

Cross References.—As to service of summons generally, see §§ 1-97, paragraph 1, 55-38, and 55-39. As to appointment of receiver, see § 55-147.

§ 55-132. Corporate existence continued three years. — All corporations whose charters expire by their own limitation, or are annulled by forfeiture or otherwise, shall continue to be bodies corporate for three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of their property, and to divide their assets; but not for the purpose of continuing the business for which the corporation was established. The superior court of the county in which the principal office of the corporation is located may, upon petition of said corporation, continue the corporate existence for the purposes of winding up the affairs, for such time as the court may deem proper. The provisions hereof shall also apply to corporations whose affairs have not on March 30, 1939, been wound up. (Rev., s. 1200; Code, s. 667; 1901, c. 2, s. 58; 1939, c. 250, s. 1; C. S. 1193.)

Cross Reference.—As to the status of corporation which has been merged with another, see § 55-166.

Editor's Note.—The 1939 amendment substituted the last two sentences for the former last sentence in this section.

In General.—This section expressly extends the life of the corporation for three years after dissolution, for the purpose of winding up its affairs. Smathers v. Bank, 135 N. C. 410, 413, 47 S. E. 893.

It covers cases of forfeiture not nearly so horrendous as bankruptcy. Sisk v. Old Hickory Motor Freight, 222 N. C. 631, 634, 24 S. E. (2d) 488.

Purpose.—The provisions of this section are free from any ambiguity. The mischief to be remedied was the confusion possibly resulting from the abrupt dissolution of the corporation from any cause. The plan adopted was the continuation of the corporate character solely for the purpose of winding up its affairs. General Electric Co. v. West Asheville Imp. Co., 73 Fed. 386, 388.

Construed with § 55-129.—It was not the intention of this section and § 55-129 to bring about a situation in which a corporation could be alive to its assets, but dead to its obligations, or enjoy the security of an indefeasible non est inventus during the time corporate existence is continued by statute for the purpose of suing and being sued. Sisk v. Old Hickory Motor Freight, 222 N. C. 631, 634, 24 S. E. (2d) 488.

Applies to All Corporations.—This section is not a provision of the charter of a particular corporation but a general provision of law applying to all corporations, and the repeal of this particular charter does not repeal this section pro tanto. Indeed, the repeal makes it applicable actively to the particular corporation, as a sort of statutory letters of administration; whereas before the repeal it was a passive provision. General Electric Co. v. West Asheville Imp. Co., 73 Fed. 386, 388.

Under this section, a corporation continues for three years to be a body corporate for the purpose of disposing of its property and dividing its assets, and the section is applicable to any corporation. Burnet v. Lexington Ice, etc., Co., 62 F. (2d) 906, 909.

Remedy Must Be Pursued within Three Years. — The statutory remedy is exclusive of all others, and must be pursued within the three years, and a failure to proceed within that period will be a complete defense, not only to the corporation, but to the stockholders, who by its charter, are made individually responsible in the event of its insolvency. VonGlahn v. DeRosset, 81 N. C. 468.

Where a corporation is actually dissolved, the lapse of more than three years from dissolution, will serve as a complete defense to actions against it. Standard Trust Co. v. Commercial National Bank, 240 Fed. 303, 306.

Same—Only Applies Where Charter Expired.—This provision has no application to a case where a corporation had ceased to do business but its charter had not expired or been annulled. Heggie v. Building & Loan Assn., 107 N. C. 581, 592, 12 S. E. 275.

Hence the action of a judgment creditor is not barred in three years after the corporation has ceased to do its regular business. Heggie v. Building & Loan Assn., 107 N. C. 581, 12 S. E. 275.

Deed from Dissolved Corporation.—Where the certificate of the probate of a deed from a corporation, dissolved upon certificate of the secretary of state, made within the time allowed by this section, recites as a fact judicially found that the deed was made in the name of the corporation by the order of the directors, the trustee's objection that it was not executed in the method required by sec. 55-133, is untenable; and the signature of the agent in charge, if made upon the mistake that he was in law the assignee of the mortgage, is only surplusage, and harmless. Lowdermilk v. Butler, 182 N. C. 502, 109 S. E. 571.

Liquidation by National Bank.—See Standard Trust Co. v. Commercial Nat. Bank, 240 Fed. 303.

Section Does Not Apply to Merger.—Where an old corporation is, by a transfer of all its property, franchises and privileges, merged into a new corporation, with the same stockholders and directors as the old, and assumes all the liabilities of the old corporation, this section does not apply so as to make the old corporation a necessary party to the action against the new. Friedenwald Co. v. Asheville Tobacco, etc., Co., 117 N. C. 544, 23 S. E. 490.

No Equity Jurisdiction.—This section and the two following sections, which continue the existence of defunct corporations for three years after the expiration of their charters for the purpose of bringing and defending suits and closing their general business, oust the former equity jurisdiction for the appointment of a receiver, at the instance of creditors to wind up the corporate affairs. VonGlahn v. DeRossett, 81 N. C. 468.

Cited in Smith v. Dicks, 197 N. C. 355, 148 S. E. 464.

§ 55-133. Directors to be trustees; powers and duties. — On the dissolution in any manner of a corporation, unless otherwise directed by an order of the court, the directors are trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property, and, after paying its debts, divide any surplus money and other property among the stockholders. The trustees have power to meet and act under the by-laws of the corporation, and, under regulations to be made by a majority, to prescribe the terms and conditions of the sale of such property, and they may sell all or any part for cash or partly on credit, or take mortgages or bonds for part of the purchase price for all or any part of the property. They have power to sue for and recover the said debts and property in the name of the corporation, and are suable in the same name for the debts owing by it, and are jointly and severally responsible for such debts only to the amount of property of the corporation which comes into their possession as trustees. Vacancies in the board of directors may be filled in accordance with the provisions of the by-laws of the corporation or the stockholders may fill such vacancies at a regular or duly called meeting. (Rev., ss. 1201, 1202; Code, s. 687; 1901, c. 2, ss. 59, 60; 1939, c. 250, s. 2; C. S. 1194.)

Cross Reference.—As to directors in general, see § 55-48.

Editor's Note.—The 1939 amendment added the last sentence of this section.

Trustees Sell in Corporate Name.—The certificate of the secretary of state for the dissolution of a corporation continues the corporation for three years, and the provisions of this section, that the directors as trustees may sell and convey the corporate property, does not exclude the idea that they may do so in the name of the corporation in whom the original legal title was originally vested. Lowdermilk v. Butler, 182 N. C. 502, 109 S. E. 571.

Confession of Judgment in Director's Favor.—A confession of judgment by an insolvent corporation in favor of a director who is a creditor, and upon a debt theretofore existing, is void as against other creditors. Hill v. Lumber Co., 113 N. C. 173, 18 S. E. 107.

Cited in Smith v. Dicks, 197 N. C. 355, 148 S. E. 464; Life Ins. Co. v. Edgerton, 206 N. C. 402, 411, 174 S. E. 96.

§ 55-134. Jurisdiction of superior court.—When a corporation is dissolved, in any manner whatsoever, the superior court, on application of a creditor or stockholder, may either continue the directors as trustees or appoint one or more persons receivers of the corporation. The court has jurisdiction of the application, and of all questions arising in the proceedings thereon, and may make, at any place in the district, any orders, injunctions, or decrees therein as justice and equity require. The powers of such trustees or receivers are as elsewhere given in this chapter, and may be continued as long as the court thinks necessary. (Rev., ss. 1203, 1204; Code, ss. 619, 668, 669; 1901, c. 2, ss. 61, 62; C. S. 1195.)

Cross References.—As to appointment of receiver, see § 55-147. As to powers and duties of receivers, see § 55-148.

When Section Applies.—Although by section 55-133 the directors, unless otherwise determined by order of some court having jurisdiction, are made trustees with power to settle or wind up the corporate business under this section, this entire matter of winding up the corporate business after dissolution may be taken charge of by the court, and must be at the instance of either the creditors or stockholders, or any one of them. White v. Kincaid, 149 N. C. 415, 422, 63 S. E. 109.

Who Is a "Creditor".—Any one who has a debt or demand against an insolvent corporation upon a contract, express or implied, comes within the meaning of the word "creditor" used in the statute, and may apply to the courts and obtain, in proper instances, the appointment of a receiver for the corporation. Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, 422, 70 S. E. 820.

Property In Custodia Legis.—The property of an insolvent corporation in a receiver's hands is in custodia legis, and the court has jurisdiction by virtue of its general equitable powers, and by express provision of this section. Lasley v. Scales, 179 N. C. 578, 103 S. E. 214.

Jurisdiction Over Foreign Corporation.—An insolvent corporation, with its property or plant located in this state, is subject to the appointment by our courts of a receiver to take charge of its assets here and administer them as a trust fund for its creditors, though it is incorporated under the laws of another state. Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, 422, 70 S. E. 820, approving Holshouser v. Copper Co., 138 N. C. 248, 50 S. E. 650.

Authority to Adjust Claims.—While in the statute relating to the winding up of the affairs of an insolvent corporation no specific directions are given as to mutual debts and credits, yet, under this section which provides that the court shall make such orders as justice and equity shall require and direct how claims shall be approved, the claims may be adjusted. Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371.

When Receiver Appointed.—When a corporation is insolvent or in imminent danger of insolvency, and especially when its business operations have practically been suspended owing to its financial condition, the court may, upon proper application of a creditor or stockholder, appoint a receiver of its assets to be administered for the benefit of all of its creditors. Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, 70 S. E. 820.

Judgment against Corporation.—Judgments against a corporation rendered upon process issued after it ceased to exist are of no validity. Dobson v. Simonton, 86 N. C. 492.

§ 55-135. Injunction; notice and undertaking.—An injunction to suspend the general and ordinary business of a corporation or to appoint a receiver shall not be granted without due notice of the application therefor to the corporation, except where the state is a party to the proceeding, unless the plaintiff gives a written undertaking, executed by two sufficient sureties to be approved by the judge, to the effect that the plaintiff will pay all damages, not exceeding the sum mentioned in the undertaking, which the corporation may sustain by reason of the injunction, or the appointment of the receiver, if the court finally decides that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court directs. (Rev., s. 1205; Code, s. 343; C. C. P., s. 194; C. S. 1196.)

Cross References.—As to injunctions generally, see § 1-485 et seq. As to receivers, see §§ 55-134 and 55-147 to 55-157.

§ 55-136. Wages for two months lien on assets.—In case of the insolvency of a corporation, partnership or individual, all persons doing labor or service of whatever character in its regular employment have a lien upon the assets thereof for the amount of wages due to them for all labor, work, and services rendered within two months next preceding the date when proceedings in insolvency were actually instituted and begun against the corporation, partnership or individual, which lien is prior to all other liens that can be acquired against such assets: Provided, that the lien created by this section shall not apply to multiple unit dwellings, apartment houses, or other buildings for family occupancy except as to labor performed on the premises upon which the lien is claimed. This section shall not apply to any single unit family dwelling. (Rev., s. 1206; 1901, c. 2, s. 87; 1937, c. 223; 1943, c. 501; C. S. 1197.)

Cross Reference.—As to mortgaged property subject to execution for labor, see § 55-44.

Editor's Note.—The 1937 amendment inserted the words "partnership or individual" twice in this section. Before this amendment it had been held that the section did not apply to the employee of an insolvent individual but only to the employee of an insolvent corporation. See In re Reade, 206 N. C. 331, 173 S. E. 342.

The 1943 amendment added the proviso.

An Ancillary Remedy.—This section, giving to laborers of insolvent corporations a specific lien upon the assets of the company for two months' wages at least, was not intended to militate against rights that they might otherwise have under the existing law for debts due them, but gives them a special lien for certain wages. Union Trust Co. v. Southern Sawmills etc., Co., 166 Fed. 193, 204.

Clear Expression of Intent.—The language used in this section is admirably fitted to give expression to the legislative intent with respect to the favored class of creditors to which it undertakes to accord preferential treatment in the distribution of the assets of an insolvent corporation, and small latitude is afforded for speculation. The favored creditors are "laborers and workmen and all persons doing labor or service of whatever character in the regular employment of certain corporations." Phoenix Iron Co. v. Roanoke Bridge Co., 169 N. C. 512, 513, 86 S. E. 184.

Prior Lien Holders Protected.—Property acquired by a private corporation subject to a valid and registered mortgage does not become an asset of the corporation except as subject to the prior lien; and the lien given to laborers on the assets of an insolvent corporation for work done under the conditions stated in this section cannot affect the vested rights obtained by the prior lien holders. Roberts v. Bowen Mfg. Co., 169 N. C. 27, 85 S. E. 45.

When Mortgagee Takes Subject to Laborer's Lien.—One who takes a mortgage upon corporation property for money loaned to operate it or to secure other debt does so with the knowledge that the lien of his mortgage is subject to be displaced in favor of laborers' liens . . . in case of insolvency. Humphrey Bros. v. Buell-Crocker Lbr. Co., 174 N. C. 514, 93 S. E. 971.

Contractor Not Included.—A contractor, furnishing his own teams, labor, etc., in hauling materials for the building of a bridge by a corporation, which has since become insolvent, within the two months next preceding the date of the institution of the proceedings in insolvency, is not engaged in doing labor or performing "service of whatever character" within the meaning of this section. Phoenix Iron Co. v. Roanoke Bridge Co., 169 N. C. 512, 86 S. E. 184.

Agent Having Authority to Deduct Salary.—Under this

section an agent with authority to make collections and to deduct his salary and expenses from the sums collected, has no lien for claims for salary and expenses owing before his appointment to the position. Cummer Lumber Co. v. Seminole Phosphate Co., 189 N. C. 206, 126 S. E. 511.

Notice Need Not Be Filed.—Under this section the laborer is not required to file a notice of his claim. Walker v. Lumber Co., 170 N. C. 460, 87 S. E. 331.

Service after Receivership.—This section is not intended to destroy the lien for such wages and services performed after the company goes into the hands of a receiver. The word "within" means "subsequent," that is, that after 60 days prior to the insolvency the laborers and workmen shall have a first lien for their wages. Walker v. Lumber Co., 170 N. C. 460, 462, 87 S. E. 331.

§ 55-137. Distribution of funds.—After payment of all allowances, expenses and costs, and the satisfaction of all general and special liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionately to the amount of their respective debts, and shall be entitled to distribution on debts not due, making in such case a rebate of interest when interest is not accruing on the same. Any surplus funds, after payment of the creditors and costs, expenses and allowances, shall be paid to the preferred stockholders according to their respective shares, and if there still be a surplus, it shall be divided and paid to the general stockholders proportionately, according to their respective shares. Upon the distribution of the assets of an insolvent corporation, judgment of dissolution shall be entered and a certified copy of the judgment filed in the office of the secretary of state, and also in the office of the clerk of the superior court of the county in which the principal office of the corporation is located, and the same shall be recorded in the Corporation Book and in the Record of Incorporations in these offices respectively. Thereupon the corporation is dissolved without being required to comply with § 55-121. (Rev., s. 1207; Code, s. 670; 1901, c. 2, ss. 63, 89; 1909, c. 15, s. 1; C. S. 1198.)

In General.—When the receiver shall have collected the assets he is required to pay all the debts, if the funds shall be sufficient, and, if not sufficient, to distribute the same ratably, among all the creditors who shall prove their claims. When once the court of equity, through its receiver, takes charge of the assets, they are to be distributed pro rata among the creditors, subject to such priorities as have already accrued. Merchants National Bank v. Newton Cotton Mills, 115 N. C. 507, 515, 20 S. E. 765.

No Conflict with Constitution.—The enactment of statutes regulating the manner in which corporations shall equitably discharge the claims of their creditors, or to subject all or a portion of their property to sale at the instance and for the benefit of creditors, is not in conflict with the constitutional provisions in respect to vested rights or the obligation of contracts. Bass v. Roanoke Navigation Co., 111 N. C. 439, 16 S. E. 402.

Real Property Does Not Revert.—Upon the dissolution or extinction of a corporation for any cause, the real property conveyed to it in fee does not revert to the original grantors or their heirs, and its personal property does not escheat to the state; and this is so whether or not the duration of the corporation was limited by its charter or general statute. Wilson v. Leary, 120 N. C. 90, 26 S. E. 630, overruling Fox v. Horah, 36 N. C. 358.

Creditors Come before Stockholders.—A corporation can not settle with its members, by the application of assets to the retirement or redemption of the stock of the shareholders, until it has first settled and discharged all its liabilities, and any agreement among the shareholders looking to such arrangement will be void as to creditors. Heggie v. Building & Loan Asso., 107 N. C. 581, 12 S. E. 275.

Costs.—It is error to tax the costs against first-mortgage creditors, who have established the priority of their lien over the rights of general creditors, in statutory proceedings to wind up the affairs of an insolvent corporation and to distribute its assets. Hickston Lumber Co. v. Gay Lumber Co., 150 N. C. 281, 63 S. E. 1048.

Cited in Smith v. Dicks, 197 N. C. 355, 148 S. E. 464.

§ 55-138. Debts not extinguished nor actions abated.—In case of the dissolution of a corporation, the debts due to and from it are not thereby extinguished, nor do actions against a corporation which is dissolved before final judgment abate by reason thereof, but no judgment shall be entered therein without notice to the trustees or receivers of the corporation. (Rev., ss. 1201, 1208; Code, s. 687; 1901, c. 2, ss. 59, 64; C. S. 1199.)

Cross Reference.—As to directors becoming trustees upon dissolution, see § 55-133.

Where a corporation has been served with summons and has filed answer, the action against it does not abate upon its subsequent dissolution, and its directors are made trustees of its property by §§ 55-132 and 55-133. Lertz v. Hughes Bros., 208 N. C. 490, 181 S. E. 342.

§ 55-139. Copy of judgment to be filed with secretary of state; costs.—A copy of every judgment dissolving a corporation or forfeiting its charter shall be forthwith filed by the clerk of the court in the office of the secretary of state, and a note thereof shall be made by the secretary of state on the charter or certificate of incorporation and in the index thereof, and be published by him in the annual report hereinafter provided for, the cost of which shall be taxed by the clerk of the superior court in the action wherein the corporation is dissolved. (Rev., s. 1211; 1901, c. 2, s. 65; C. S. 1200.)

Art. 12. Execution.

§ 55-140. How issued; property subject to execution.—If a judgment is rendered against a corporation, the plaintiff may sue out such executions against its property as is provided by law to be issued against the property of natural persons, which executions may be levied as well on the current money as on the goods, chattels, lands and tenements of such corporation. (Rev., s. 1212; 1901, c. 2, s. 66; C. S. 1201.)

Cross References.—As to execution in general, see § 1-302 et seq. As to incorporation by purchaser at execution sale of railroad, see §§ 60-62 and 55-161. As to incorporation by purchaser generally, see § 55-161.

Editor's Note—Levy on Franchise.—Prior to the enactment of the Revised Code, the franchise of a corporation, such as that of a railroad or navigation company, could not be levied upon and sold under a writ of fieri facias, or any other writ of execution known either to our common or statute law. Taylor v. Jerkins, 51 N. C. 315, 318; State v. Rives, 27 N. C. 297, 306.

To this section the Revised Code added the following: "And if the judgment or decree be against a railroad or other corporation authorized to receive fares or tolls, the franchise of such corporation, with all the rights and privileges thereof, so far as relates to the receiving of fares or tolls, and also all other corporate property, real or personal, may be taken on execution and sold, under rules regulating the sale of real estate." Rev. Code, ch. 26, sec. 9. See Taylor v. Jerkins. 51 N. C. 315, 317, 319; Gooch v. McGee, 83 N. C. 60, 66.

As will be seen this provision no longer constitutes a part of the section, and it is now held that the franchise and corporate property must go together. They cannot be separated. There cannot be a corporation without a franchise. James v. Western N. C. R. Co., 121 N. C. 523, 527, 28 S. E. 537.

So the real estate acquired by a public corporation in exercise of a delegated right of eminent domain, and necessary for uses in which the public is concerned, cannot be sold under execution apart from the franchise and its incidents, so as to give the purchaser a title to the property divested of all the duties and obligations assumed by the company. Gooch v. McGee, 83 N. C. 60.

The franchise of a water company is inseparable from its

plant and property. The public necessity requires that they should be sold together, for, in this case, the purchaser will take cum onere and the public will be protected. Pipe Co. v. Howland, 111 N. C. 615, 625, 16 S. E. 857.

Proceedings supplemental to execution lie against a private corporation created by a special act of the Legislature and organized for purposes of private gain for its shareholders. LaFountain v. Southern Underwriters' Asso., 79 N. C. 514.

Cited in Carolina Coach Co. v. Hartness, 198 N. C. 524, 527, 152 S. E. 489.

§ 55-141. Agent must furnish information as to property to officer.—Every agent or person having charge or control of any property of the corporation, on request of a public officer having for service a writ of execution against it, shall furnish to him the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, so far as he has knowledge of the same. (Rev., s. 1213; 1901, c. 2, s. 67; C. S. 1202.)

Cross Reference.—As to penalty for failure to furnish information, see § 55-144.

§ 55-142. Shares of stock subject to; agent must furnish information. — Any share or interest in any bank, insurance company, or other joint stock company, that is or may be incorporated under the authority of this state, or incorporated or established under the authority of the United States, belonging to the defendant in execution, may be taken and sold by virtue of such execution in the same manner as goods and chattels. The clerk, cashier, or other officer of such company who has at the time the custody of the books of the company shall, upon being shown the writ of execution, give to the officer having it a certificate of the number of shares or amount of the interest held by the defendant in the company; and if he neglects or refuses to do so, or if he willfully gives a false certificate, he shall be liable to the plaintiff for the amount due on the execution, with costs. (Rev., ss. 1214, 1215; 1901, c. 2, ss. 69, 70; C. S. 1203.)

Cross Reference.—As to shares of stock being liable for attachment, see § 1-458.

Editor's Note.—Before this section was passed it was held that shares of stock, not being goods or chattels, lands or tenements within the sense of the writ, could not be sold under a fi. fa. See Pool v. Glover, 24 N. C. 129.

§ 55-143. Debts due corporation subject to; duty and liability of agent.—If an officer holding an execution is unable to find other property belonging to the corporation liable to execution, he or the judgment creditor may elect to satisfy such execution in whole or in part out of any debts due the corporation; and it is the duty of any agent or person having custody of any evidence of such debt to deliver it to the officer, for the use of the creditor, and such delivery, with a transfer to the officer in writing, for the use of the creditor, and notice to the debtor, shall be a valid assignment thereof; and the creditor may sue for and collect the same in the name of the corporation, subject to such equitable setoffs on the part of the debtor as in other assignments. Every agent or person who neglects or refuses to comply with the provisions of this section and § 55-141 is liable to pay to the execution creditor the amount due on the execution, with costs. (Rev., s. 1216; 1901, c. 2, s. 68; C. S. 1204.)

§ 55-144. Violations of three preceding sections misdemeanor. — If any agent or person having charge or control of any property of a corporation, or any clerk, cashier, or other officer of a corporation, who has at the time the custody of the books of the company, or if any agent or person having custody of any evidence of debt due to a corporation, shall, on request of a public officer having in his hands for service an execution against the said corporation, willfully refuse to give to such officer the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, or shall willfully refuse to give to such officer a certificate of the number of shares, or amount of interest held by such corporation in any other corporation, or shall willfully refuse to deliver to such officer any evidence of indebtedness due or to become due to such corporation, he shall be guilty of a misdemeanor. (Rev., s. 3690; 1901, c. 2, ss. 67, 68, 70; C. S. 1205.)

§ 55-145. Proceedings when custodian of corporate books is a nonresident. — When the clerk, cashier, or other officer of any corporation incorporated under the laws of this state, who has the custody of the stock-registry books, is a nonresident of the state, it is the duty of the sheriff receiving a writ of execution issued out of any court of this state against the goods and chattels of a defendant in execution holding stock in such company to send by mail a notice in writing, directed to the nonresident clerk, cashier, or other officer at the postoffice nearest his reputed place of residence, stating in the notice that he, the sheriff, holds the writ of execution, and out of what court, at whose suit, for what amount, and against whose goods and chattels the writ has been issued, and that by virtue of such writ he seizes and levies upon all the shares of stock of the company held by the defendant in execution on the day of the date of such written notice. It is also the duty of the sheriff on the day of mailing the notice to affix and set upon any office or place of business of such company, within his county, a like notice in writing, and on the same day to serve like notice in writing upon the president and directors of the company, or upon such of them as reside in his county, either personally or by leaving the same at their respective places of abode. The sending, setting up, and serving of such notices in the manner aforesaid constitutes a valid levy of the writ upon all shares of stock in such company held by the defendant in execution, which have not at the time of the receipt of the notice by the clerk, cashier, or other officer, who has custody of the stock-registry books, been actually transferred by the defendant; and thereafter any transfer or sale of such shares by the defendant in execution is void as against the plaintiff in the execution, or any purchaser of such stock at any sale thereunder. (Rev., s. 1217; 1901, c. 2, s. 71; C. S. 1206.)

§ 55-146. Duty and liability of nonresident custodian.—The nonresident clerk, cashier, or other officer in such corporation, to whom notice in writing is sent as prescribed in § 55-145, shall send forthwith to the officer having the writ, a statement of the time when he received the notice and a certificate of the number of shares held by the defendant in the corporation at the time of the receipt, not actually transferred on the books of the corporation; and the sheriff, or other

officer, on receipt by him of this certificate, shall insert the number of shares in the inventory attached to the writ. If the clerk, cashier, or other officer in such corporation neglects to send the certificate as aforesaid or willfully sends a false one, he is liable to the plaintiff for double the amount of damages occasioned by his neglect, or false certificate, to be recovered in an action against him; but the neglect to send, or miscarriage of the certificate, does not impair the validity of the levy upon the stock. (Rev., s. 1218; 1901, c. 2, s. 72; C. S. 1207.)

Art. 13. Receivers.

§ 55-147. Appointment and removal.—When a corporation becomes insolvent or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate rights, or its corporate existence has expired by limitation, a receiver may be appointed by the court under the same regulations that are provided by law for the appointment of receivers in other cases; and the court may remove a receiver or trustee and appoint another in his place, or fill any vacancy. Everything required to be done by receivers or trustees is valid if performed by a majority of them. (Rev., ss. 1219, 1223; Code, s. 668; 1901, c. 2, ss. 73, 79; C. S. 1208.)

Cross References.—As to receivers in general, see §§ 1-501 to 1-507. As to powers and bonds of corporate receiver, see § 55-148. As to statute making this section applicable to banks, see § 53-22. As to service of summons in action for appointment of receiver, see § 55-131. As to jurisdiction of superior court over the appointment of receivers, see § 55-134. As to abatement of actions upon death of receiver, see § 1-74.

Broad Powers Conferred.—This article is so broad and comprehensive in its provisions regarding the appointment of receivers that it was not necessary to refer to the general power of a court of equity in such cases. Summit Silk Co. v. Kinston Spinning Co., 154 N. C. 421, 425, 70 S. E. 820.

Nature of Receivership.—Upon the insolvency of a corporation and the appointment of a receiver under the provisions of this section, the receiver represents the creditors as well as the owners, excluding the general creditors from taking any separate or effective steps on their account in furtherance of their claims; and the proceeding for the receivership is in the nature of a judicial process by which the rights of the general creditors are "fastened upon the property." Observer Co. v. Little, 175 N. C. 42, 94 S. E. 526.

Discretion of Court.—The selection of a receiver for an insolvent corporation is a matter largely in the discretion of the trial judge and will not generally be reviewed unless this discretionary power has been greatly abused, and though the practice of appointing the plaintiff attorney as such receiver is not commended, he will not be removed, as a matter of law, on appeal, though, as any other receiver, he may be removed upon application to the proper judge of the superior court. Mitchell v. Realty Co., 169 N. C. 516, 86 S. E. 358; Fisher v. Trust Co., 138 N. C. 90, 102, 50 S. E. 592, cited and approved. Mitchell v. Aulander Realty Co., 169 N. C. 516, 86 S. E. 358.

Effect of Appointment.—The appointment of a receiver for a company, who is directed to take control of all the property of the company, and to assume entire management of its affairs, has the effect of suspending all the officers of the company; and they can not interfere with the business of the company, and are entitled to no salaries during the continuance of the receivership. Lenoir v. Linville Improvement Co., 126 N. C. 922, 36 S. E. 185.

Title of Receiver Relates Back.—The courts have now, as a rule, come to the conclusion that the title of the receiver on his appointment dates back to the time of granting the order, even though certain preliminary conditions must first be performed and the receiver remains out of possession pending such performance. Worth v. Bank, 122 N. C. 397, 29 S. E. 775; Pelletier v. Lumber Co., 123 N. C. 596, 31 S. E. 855; Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461; Fisher v. Western Carolina Bank, 132 N. C. 769, 775, 44 S. E. 601.

Continuance of Receivership.—A receivership continues as long as the court may think it necessary to the performance of the duties pertaining thereto. Young v. Rollings, 90 N. C. 125.

Directors Duty When Receiver Appointed.—An order appointing a receiver of a defunct corporation with power to receive into possession all the effects of the company, and also investing him with the usual rights and powers of receivers, involves the correlative duty of delivering the same to him by the late officers of the company in whose hands the funds are, although not expressly required in the decretal order. Young v. Rollings, 90 N. C. 125.

Valid Liens Not Divested.—The title of a receiver relates only to the time of his appointment, and valid liens existing at that time are not divested thereby. Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461; Roberts v. Bowen Mfg. Co., 169 N. C. 27, 85 S. E. 45.

Where Assignee Appointed Receiver.—One to whom an insolvent bank made an assignment of its assets, and who on the same day, and at the suit of creditors, was appointed receiver, held the assets after such adjudication, not by virtue of the deed of assignment but as an officer of the court appointed to settle and wind up the affairs of such insolvent bank. Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371.

Receiver Appointed after Reorganization.—The organization of a new corporation at once dissolves the old one, and if there are creditors of the dissolved corporation they may cause the property of the defunct corporation to be applied to their debts by means of a receiver. Marshall v. Western N. C. R. R. Co., 92 N. C. 322.

Dissolution.—Assuming that a bank which had never been duly incorporated had a corporate existence as to those who bona fide dealt with it as a corporation, a receiver should be appointed to take charge of and preserve its effects, where it has voluntarily dissolved, and no one claims to own its stock, and all its supposed officers disclaim their offices. Dobson v. Simonton, 78 N. C. 63.

Fraudulent Disposal of Property.—If, during the existence of a corporation, its officers fraudulently or unlawfully disposed of any of its property, the creditors are entitled to have a receiver appointed to sue for and recover it. Latta v. Catawba Elect. Co., 146 N. C. 285, 59 S. E. 1028.

Cessation of Business.—Where a corporation had ceased operation, a stockholder had the right to maintain an action for the appointment of a receiver, although the corporation had not been dissolved in accordance with the provisions of the statute. Greenleaf v. Land, etc., Co., 146 N. C. 505, 60 S. E. 424.

Not Available in Federal Courts.—This section does not confer upon a stockholder or a creditor a substantive right, but merely gives a new remedy and such remedy is not available in the federal courts. See & Depew v. Fisheries Products Co., 9 Fed. (2d) 235, 236.

Adjudication of Bankruptcy during Insolvency Proceeding.—Proceedings against an insolvent corporation under this section do not preclude creditors from petitioning to have the corporation adjudged a bankrupt, notwithstanding the action of the state courts. In Re McKinnon Co., 237 Fed. 869, 872.

When Receiver Unnecessary.—It is unnecessary to have a receiver appointed in order for the assignee of a judgment creditor, and those thereunder beneficially interested, to maintain an action against officers and stockholders for misapplication of funds in distribution among the shareholders as dividends. Chatham v. Mecklenburg Realty Co., 180 N. C. 500, 105 S. E. 329.

Cited in Harris v. Hilliard, 221 N. C. 329, 20 S. E. (2d) 278.

§ 55-148. Powers and bond.—The receiver has power and authority to—

1. Demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the corporation.

2. Foreclose mortgages, deeds of trust, and other liens executed to the corporation.

3. Institute suits for the recovery of any estate, property, damages, or demands existing in favor of the corporation, and he shall, upon application by him, be substituted as party plaintiff in the

place of the corporation in any suit or proceeding pending at the time of his appointment.

4. Sell, convey, and assign all of the said estate, rights, and interest.

5. Appoint agents under him.

6. Examine persons and papers, and pass on claims as elsewhere provided in this article.

7. Do all other acts which might be done by the corporation, if in being, that are necessary for the final settlement of its unfinished business.

The powers of the receiver may be continued as long as the court thinks necessary, and the receiver shall hold and dispose of the proceeds of all sales of property under the direction of the court, and, before acting, must enter into such bond and comply with such terms as the court prescribes. (Rev., ss. 1222, 1231; Code, s. 668; 1901, c. 2, ss. 74, 84; C. S. 1209.)

Cross Reference.—As to foreclosure by receiver, see § 55-150.

Directors Superseded.—Appointment of receivers of a corporation on a creditors' bill supersedes the power of the directors to carry on the business of the corporation and the receivers take possession of the corporation until further order of the court. Abm. S. See & Depew Inc. v. Fisheries Products Co., 9 Fed. (2d) 235.

Power to Bring All Actions.—The receiver represents and, in a certain sense, succeeds to the rights of the corporation. There is no valid reason why he may not, representing the corporation and its creditors, bring any and all actions in respect to its assets, or rights of action, which it or its creditors could have brought. Smathers v. Bank, 135 N. C. 410, 415, 47 S. E. 893.

May Sue in Own Name.—The receiver may sue either in his own name or that of the corporation. In whichever name he may elect to bring the action, it is essentially a suit by the corporation, prosecuted by order of the court, for the collection of the assets. Smathers v. Bank, 135 N. C. 410, 413, 47 S. E. 893; Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; Gray v. Lewis, 94 N. C. 392.

Receiver May Plead Usury.—The plea of usury may be made by a receiver of an insolvent corporation against which a usurious contract is sought to be enforced. Riley v. Sears, 154 N. C. 509, 510, 70 S. E. 997.

Valid Existing Liens Protected.—The title of a receiver of a private corporation to the corporate property relates back only to the time of his appointment, and it cannot divest the property of valid liens existing at that time. Roberts v. Bowen Mfg. Co., 169 N. C. 27, 85 S. E. 45.

All Rights May Be Adjusted.—In the suit by the receivers may be adjudicated all the rights of the bank, its creditors and the defendant debtor, both legal and equitable, pertaining to the matters set out in the pleadings, and such judgment may be entered as will enforce the rights of the general creditors and also protect any equities that the defendant may be entitled to. Smathers v. Bank, 135 N. C. 410, 413, 47 S. E. 893; Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; Gray v. Lewis, 94 N. C. 392.

No Extraterritorial Power.—A receiver, appointed in a stockholder's action to sequester assets of the corporation against mismanagement of its officers and directors, has no extraterritorial power. See & Depew v. Fisheries Products Co., 9 Fed. (2d) 235, 236.

Priority of Receivers.—One receiver has no priority over another receiver previously appointed in another district on a creditors' bill. See & Depew v. Fisheries Products Co., 9 Fed. (2d) 235, 236.

Power after Charter Has Expired.—A receiver, appointed under the preceding section, to wind up the affairs of a corporation, can proceed to collect the assets and to prosecute and defend suits, after the corporation has ceased to exist by the expiration of its charter. Asheville Division v. Aston, 92 N. C. 579.

Same—Effect of Judgment.—Judgments against a corporation rendered upon process issued after it ceased to exist are of no validity; and the same may be impeached by a party interested in the administration of its assets. Dobson v. Simonton, 86 N. C. 492.

Conveyances.—While subsection 4 empowers receivers to convey the estate, the receiver of a corporation may not ordinarily dispose of a substantial part of the assets entrusted to him without authority of court, and sales are subject to confirmation unless authority to convey on specified terms is expressly given. Harrison v. Brown, 222 N. C. 610, 24 S. E. (2d) 470.

Sufficiency to Pass Title.—Where, under a court order, the receiver of an insolvent has conveyed lands according to the terms of a deed of trust by which the bank held the land, applying this and the following section the deed was sufficient in law to pass title. Wachovia Bank, etc., Co. v. Hudson, 200 N. C. 688, 158 S. E. 244.

Cited in Harris v. Hilliard, 221 N. C. 329, 20 S. E. (2d) 278.

§ 55-149. Title and inventory.—All of the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects, upon the appointment of a receiver, forthwith vest in him, and the corporation is divested of the title thereto. Within thirty days after his appointment he shall lay before the court a full and complete inventory of all estate, property, and effects of the corporation, its nature and probable value, and an account of all debts due from and to it, as nearly as the same can be ascertained, and shall make a report of his proceedings to the superior court at every civil term during the continuance of the trust. (Rev., ss. 1224, 1225; 1901, c. 2, ss. 75, 80; C. S. 1210.)

Cross Reference.—As to liability of property in receiver's hands for taxes, see § 55-160.

Prior Liens Not Divested.—It has been held, and is a generally accepted doctrine, that the appointment of a receiver does not divest the property of prior existing liens, but the court, through its receiver, receives such property impressed with all existing rights and equities, and the relative ranks of claims and standing of liens remain unaffected by the receivership. Pelletier v. Lumber Co., 123 N. C. 596, 31 S. E. 855; Battery Park Bank v. Western Carolina Bank, 127 N. C. 432, 37 S. E. 461; Fisher v. Western Carolina Bank, 132 N. C. 769, 44 S. E. 601; Garrison v. Vermont Mills, 154 N. C. 1, 69 S. E. 743; Witherell v. Murphy, 154 N. C. 82, 90, 69 S. E. 748.

Insurance Policies Not Forfeited.—The vesting of the property of a corporation in the receiver under this section does not constitute such a change in the "interest, title or possession," of the property as to forfeit insurance policies on the property. Southern Pants Co. v. Insurance Co., 159 N. C. 78, 74 S. E. 812.

Effect of Subsequent Judgment against Corporation.—The title to the property of a corporation vests in the receiver at the time he was duly appointed by the court, from which time the corporation is divested thereof, and a judgment against the corporation entered thereafter, but before the docketing of the order or the qualifying of the receiver thereunder, can acquire no lien in favor of the judgment creditor. Odell Hardware Co. v. Holt-Morgan Mills, 173 N. C. 308, 92 S. E. 8.

Same—Does Not Relate Back. — A judgment rendered against a corporation does not relate back, by implication of law, to the beginning of the term, so as to create a lien on the corporate property as against the vesting of the title in a receiver, under this section, who had in the meanwhile been appointed. Odell Hardware Co. v. Holt-Morgan Mills, 173 N. C. 308, 92 S. E. 8.

Effect of Unrecorded Conditional Sale Contract.—A receiver has the power of creditors armed with process to disregard or avoid the unrecorded condition in a contract of conditional sale. Observer Co. v. Little, 175 N. C. 42, 45, 94 N. C. 526.

Receiver Made Defendant.—"In an action brought by creditors, depositors or stockholders to recover assets belonging to the corporation, the title to which has vested in the receiver, upon his refusal to bring the action the receiver may properly be made a defendant, to the end that the recovery may be subject to orders and decrees by the court, in the judgment as to its application to the claims of creditors and depositors, or to its distribution among stockholders." Douglass v. Dawson, 190 N. C. 458, 463, 130 S. E. 195.

Applied in Teague v. Teague Furniture Co., 201 N. C. 803, 161 S. E. 530.

§ 55-150. Foreclosure by receivers and trustees of corporate mortgagees or grantees.—Where real estate has been conveyed by mortgage deed, or deed of trust to any corporation in this State au-

thorized to accept such conveyance for the purpose of securing the notes or bonds of the grantor, and such corporation thereafter shall be placed in the hands of a receiver or trustee in properly instituted court proceedings, then such receiver or trustee under and pursuant to the orders and the decrees of the said court or other court of competent jurisdiction may sell such real property pursuant to the orders and the decrees of the said court or may foreclose and sell such real property as provided in such mortgage deed, or deed of trust, pursuant to the orders and decrees of such court.

All such sales shall be made as directed by the court in the cause in which said receiver is appointed or the said trustee elected, and for the satisfaction and settlement of such notes and bonds secured by such mortgage deed or deed of trust or in such other actions for the sales of the said real property as the said receiver or trustee may institute and all pursuant to the orders and decrees of the court having jurisdiction therein.

All sales of real property made prior to April 10, 1931 by such receiver or trustee of and pursuant to the orders of the courts of competent jurisdiction in such cases, are hereby validated. (1931, c. 265.)

Editor's Note.—This statute, which became effective April 10, 1931, excepted pending litigation. The need for the statute is not apparent, in view of §§ 55-148 and 55-149, as construed in Wachovia Bank and Trust Co. v. Hudson, 200 N. C. 688, 158 S. E. 244, decided shortly after the act was ratified, unless it was because those statutes are limited to receiverships and are inapplicable, as the new statute is, to trusteeships as well. 9 N. C. Law Rev. 401.

§ 55-151. May send for persons and papers; penalty for refusing to answer.—The receiver has power to send for persons and papers, to examine any persons, including the creditors, claimants, president, directors, and other officers and agents of the corporation, on oath or affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions and its estate, money, goods, chattels, credits, notes, bills, choses in action, real and personal estate and effects of every kind; and also respecting its debts, obligations, contracts, and liabilities, and the claims against it; and if any person refuses to be sworn or affirmed, or to make answers to such questions as may be put to him, or refuses to declare the whole truth touching the subject-matter of the examination, the court may, on report of the receiver, commit such person as for contempt. (Rev., s. 1227; 1901, c. 2, s. 78; C. S. 1211.)

§ 55-152. Proof of claims; time limit. — All claims against an insolvent corporation must be presented to the receiver in writing; and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver directs, and shall produce such books and papers relating to the claim as shall be required. The receiver has power to examine under oath or affirmation all witnesses produced before him touching the claim, and shall pass upon and allow or disallow the claims or any part thereof, and notify the claimants of his determination. The court may limit the time within which creditors may present and prove to the receiver their respective claims against the corporation, and may bar all creditors and claimants failing to do so within the time limited from participating in the distribution of the assets of the corporation. The court may also prescribe what notice, by publication or otherwise, must be given to creditors of such limitation of time. (Rev., ss. 1228, 1229; 1901, c. 2, ss. 81, 82; C. S. 1212.)

Court May Extend Time for Filing.—The court has the discretion to permit the filing of claims subsequent to the time fixed after the appointment of the receiver. Odell Hdw. Co. v. Holt-Morgan Mills, 173 N. C. 308, 92 S. E. 8.

Creditor May Assign Claim.—After the appointment of a receiver a creditor may assign his claim, but such assignment is subject to the receiver's right to set off claims the bank may have against the creditor, and if the assignee of a claim is himself a debtor of the bank he cannot use the assigned claim as a set-off. Davis v. Industrial Mfg. Co., 114 N. C. 321, 322, 19 S. E. 371.

Cited in Kenny Co. v. Hinton Hotel Co., 208 N. C. 295, 180 S. E. 696.

§ 55-153. Report on claims to court; exceptions and jury trial.—It is the duty of the receiver to report to the term of the superior court subsequent to a finding by him as to any claim against the corporation, and exceptions thereto may be filed by any person interested, within ten days after notice of the finding by the receiver, and not later than within the first three days of the said term; and, if, on an exception so filed, a jury trial is demanded, it is the duty of the court to prepare a proper issue and submit it to a jury; and if the demand is not made in the exceptions to the report the right to a jury trial is waived. The judge may, in his discretion, extend the time for filing such exceptions. (Rev., s. 1230; 1901, c. 2, s. 83; C. S. 1213.)

§ 55-154. Property sold pending litigation.—When the property of an insolvent corporation is at the time of the appointment of a receiver incumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of incumbrance, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale, to be disposed of as the court directs. And the receiver or receivers making such sale is hereby authorized and directed to report to the resident judge of the district or to the judge holding the courts of the district in which the property is sold, the said sale for confirmation, the said report to be made to the said judge in any county in which he may be at the time; but before acting upon said report, the said receiver or receivers shall publish in some newspaper published in the county or in some newspaper of general circulation in the county, where there is no newspaper published in the county, a notice directed to all creditors and persons interested in said property, that the said receiver will make application to the judge (naming him) at a certain place and time for the confirmation of his said report, which said notice shall be published at least ten days before the time fixed therein for the said hearing. And the said judge is authorized to act upon said report, either confirming it or rejecting the sale; and if he rejects the sale it shall be competent for him to order a new sale and the said order shall have the same force and effect as if made at a regular

term of the Superior Court of the county in which the property is situated. (Rev., s. 1238; 1901, c. 2, s. 86; Ex. Sess. 1924, c. 13; C. S. 1214.)

Editor's Note.—Previous to 1924 this section consisted of the first sentence only of the present section. The addition was made by sec. 13, Extra Sess. Public Laws of 1924.

The amendment to this section effected by the Act of 1924 is applicable to suits pending at the time it took effect. Martin v. Vanlaningham, 189 N. C. 656, 127 S. E. 695.

Applicable to Pending Litigation.—The statute is a remedial one and relates only to the method of procedure in dealing with certain assets of an insolvent corporation. Such statutes, unless otherwise limited, are usually held to be applicable to pending litigation, where the language used clearly indicates that such construction was intended by the Legislature, and especially where no hardship or injustice results, and the rights of the parties are thereby better secured and protected. Martin v. Vanlaningham, 189 N. C. 656, 127 S. E. 695, 696.

§ 55-155. Compensation and expenses.—Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the court shall allow a reasonable compensation to the receiver for his services, not to exceed five per cent upon receipts and disbursements, and the costs and expenses of administration of his trust and of the proceedings in said court, to be first paid out of said assets. (Rev., s. 1226; 1901, c. 2, s. 88; C. S. 1215.)

In General.—The effect of this section is to take from the funds of the insolvent corporation a sufficient sum to pay all the costs, allowances and legitimate expenses, and then to distribute what is left according to priority. Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 281, 282, 63 S. E. 1048.

Commissions Limited.—A rate not exceeding 5 per cent on receipts and 5 per cent. on disbursements is the statutory limit of a receiver's commissions. Battery Park Bank v. Western Carolina Bank, 126 N. C. 531, 36 S. E. 39.

Commissions Part of Costs.—Commissions payable to a receiver are part of the costs and expenses of the suit in which he is appointed, and should be paid as such instead of being classed as a debt payable pro rata with other debts. Wilson Cotton Mills v. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770.

Same—Discretion of Court.—An allowance to a receiver is a part of the costs of the action and usually taxable against the losing party, but the court below, may, in its discretion, divide it between the parties, as in case of referees' fees. Simmons v. Allison, 119 N. C. 556, 26 S. E. 171.

First Assets Applied to Costs.—Under this section the first assets that are the property of the corporation must be applied to the costs of the proceedings in court, including the fees of the receiver and referee, and (except as to private corporations, Roberts v. Brown Mfg. Co., 169 N. C. 27, 33, 85 S. E. 45) receivers' certificates issued in operation of the plant, under the orders of the court, and liabilities incurred for labor, and torts. Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 281, 282, 63 S. E. 1048; Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N. C. 514, 521, 93 S. E. 971.

When Costs Prior to Mortgage.—One who takes a mortgage upon corporation property for money loaned to operate it or to secure other debts, past or prospective, does so with the knowledge that, under this section, the lien of his mortgage is subject to be displaced in favor of the expenses of receivership, but when the corporation has acquired the property subject to a valid registered mortgage then the costs of receivership are not prior to that mortgage. Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N. C. 514, 519, 93 S. E. 971.

Work Completed First.—The allowance of commissions to receivers appointed by the court, by consent, to finish the completed water-works, is premature before the work is finished, as it cannot be determined until then whether such allowance is excessive or too little. Delafield v. Mercer Constr. Co., 118 N. C. 105, 24 S. E. 10.

Appeal. — When the order of the court below allowing commissions to a receiver for services as such is appealed from, and there is no suggestion that the amount was excessive or based upon a wrong principle, the order will not be disturbed. Talbot v. Tyson, 147 N. C. 273, 60 S. E. 1125.

The allowance of commissions and counsel fees to a receiver by the superior court is prima facie correct, and the Supreme Court will alter the same only when they are clearly inadequate or excessive. Graham v. Carr, 133 N. C. 449, 45 S. E. 847.

§ 55-156. Debts provided for, receiver discharged.—When a receiver has been appointed, and it afterwards appears that the debts of the corporation have been paid, or provided for, and that there remains, or can be obtained by further contributions, sufficient capital to enable it to resume its business, the court may, in its discretion, a proper case being shown, discharge the receiver, and decree that the property, rights, and franchises of the corporation revert to it, and thereafter the corporation may resume control of the same, as fully as if the receiver had never been appointed. (Rev., s. 1220; 1901, c. 2, s. 76; C. S. 1216.)

Discharged Receiver Not a Party.—Where the receiver of an insolvent railroad company is discharged, he is not a proper party to an action against a foreclosure purchaser to recover for personal injuries received after his discharge. Howe v. Harper, 127 N. C. 356, 37 S. E. 505.

§ 55-157. Reorganization.—When a majority in interest of the stockholders of the corporation have agreed upon a plan for its reorganization and a resumption by it of the management and control of its property and business, the corporation may, with the consent of the court, upon the reconveyance to it of its property and franchises, either by deed or decree of the court, mortgage the same for an amount necessary for the purposes of the reorganization; and may issue bonds or other evidences of indebtedness, or additional stock, or both, and use the same for the full or partial payment of the creditors who will accept the same, or otherwise dispose of the same for the purposes of the reorganization. (Rev., s. 1221; 1901, c. 2, s. 77; C. S. 1217.)

Cross Reference.—As to reorganization in general, see § 55-161 et seq.

Duty of Fiduciaries.—In the reorganization of a corporation under this section, executors, trustees, and other fiduciaries, holding stock in the corporation, not only have the right, but it is their duty to assert whatever legal rights they may have, which in their opinion will be for the best interest of the estates involved. Commercial Nat. Bank v. Mooresville Cotton Mills, 222 N. C. 305, 22 S. E. (2d) 913.

Readjustment of Capital Structure.—This section gives the superior court, in a receivership, power to approve a plan for the reorganization of a corporation, which provides for the readjustment of the company's capital structure, when approved by a majority in interest of the stockholders; but it cannot affect either the rights of dissenting stockholders not parties to the receivership, or the vested rights of parties to the proceedings unless they fail to appear. Commercial Nat. Bank v. Mooresville Cotton Mills, 222 N. C. 305, 22 S. E. (2d) 913.

Consent of Creditors Unnecessary.—Where a corporation engaged in business transfers its entire property rights and franchises to a new company incorporated and organized by the same stockholders and directors as the old, and the new company continues the business and adopts the contracts of its predecessor, the effect of such a merger is to create a novation so far as the creditors of the old company are concerned and to substitute the new one as debtor, and in such case it is not necessary to obtain the consent of the creditors of the old company to the change. Friedenwald Co. v. Asheville Tobacco, etc., Co., 117 N. C. 544, 23 S. E. 490.

New Corporation Assumes Contracts of Old.—Where, by merger of an old into a new corporation, a novation of the debts of the old is created, the new corporation is, to all intents and purposes, the same body and answerable for its own contracts made under a different name. Friedenwald Co. v. Asheville Tobacco, etc., Co., 117 N. C. 544, 23 S. E. 490.

Art. 14. Taxes and Fees.

§ 55-158. Taxes for filing; secretary of state not to file corporate papers until prescribed fees, etc.,

paid.—On filing any certificate or paper relative to corporations in the office of the Secretary of State, the following tax shall be paid to the State Treasurer for the use of the State:

1. For certificates of incorporation, forty cents for each thousand dollars of the total amount of capital stock authorized but in no case less than forty dollars.

2. Increase of capital stock, forty cents for each thousand dollars of the total increase authorized, but in no case less than forty dollars.

3. Extension or renewal of corporate existence of any corporation, the same as required for the original certificate of incorporation by this section.

4. Change of name, change of nature of business, amended certificate of incorporation (other than those authorizing increase of capital stock), decrease of capital stock, increase or decrease of par value of, or number of shares, forty dollars.

5. For filing of officers and directors, two dollars.

6. Dissolution of corporation, change of principal place of business, five dollars.

7. For certificates of incorporation for any benevolent, religious, educational, charitable or social society or association having no capital stock, fifteen dollars.

Provided, no tax shall be required by corporations created by virtue of § 55-11 relating to public parks and drives; and these taxes shall not be cumulative, but when two or more taxes have been incurred at the same time the tax for all shall be the largest single tax.

The secretary of state shall not file any articles, certificates, applications, amendments, reports, or other papers relating to any corporation, domestic or foreign, organized under or subject to the provisions of this chapter until all fees, taxes, and charges provided to be paid in connection therewith shall have been paid to him. (Rev., s. 1233; 1901, c. 2, s. 96; 1911, c. 155, s. 5; 1929, c. 36; 1935, c. 10; 1937, c. 171; C. S. 1218.)

Cross References.—As to the requirements of the certificate of incorporation, see § 55-3. As to errors or omissions in the certificate, see § 55-8. As to amending the certificate before payment of stock, see § 55-30. As to tax upon certificate of incorporation or amendments when capital stock is without nominal or par value, see § 55-77. As to fees to be collected from merging corporations, see § 55-170. As to franchise or privilege tax on domestic and foreign corporations, see § 105-122.

Editor's Note.—The Act of 1929 amended this section to make it conform to Public Laws, Extra. Sess. 1920, c. 1, which increased the taxes provided for in the original section.

For an article dealing with taxation of North Carolina corporations in general, see 1 N. C. Law Rev. 203-215. This section is mentioned in the article on p. 205.

Prior to the amendment of 1935 no taxes were required of benevolent, religious, educational or charitable societies or associations having no capital stock, the same being exempted by the proviso at the end of the section. Thus subsection (7) is new.

The 1937 amendment added the last paragraph.

Cited in Carolina Coach Co. v. Hartness, 198 N. C. 524, 527, 152 S. E. 489; Atlantic Refin. Co. v. Virginia, 302 U. S. 22, 29, 58 S. Ct. 75, 82 L. Ed. 52.

§ 55-159. Fees to secretary of state and clerk of superior court.—The secretary of state shall collect and retain the following fees: For recording the certificate of incorporation, one dollar for the first three copy sheets and ten cents for each copy sheet in excess thereof, and for official seal one dollar; for copying, the same fees as for recording. There shall be paid the clerk of the superior court for recording the certificate of incorporation a fee of three dollars. (Rev., s 1234; Code, s. 680; 1893, c. 318, s. 4; 1901, c. 2, s. 96; 1917, c. 231, s. 84; C. S. 1219.)

§ 55-160. Property in receiver's hands liable for taxes.—When listed or unlisted taxes are duly assessed and charged against and are due and unpaid by a corporation with chartered rights, doing business or with property in this state, or against a person residing in, doing business, or having property in this state, it is competent for an officer or tax collector who has the tax list to levy upon, seize, and take possession of that part of the property belonging to the corporation or person necessary to pay such taxes, even though the property is in the hands of a receiver duly appointed; and the officer or collector need not apply to the court appointing the receiver, or with jurisdiction of the property or the receiver, for an order for the payment of said taxes. This section applies to all taxes, whether state, county, town or municipal, and shall be liberally construed in favor of and in furtherance of the collection of such taxes. (Rev., ss. 1236, 1237; Code, ss. 699, 670; C. S. 1220.)

Cross References.—As to duty of state board of assessment to prepare and keep record of the assessed valuation of the property of corporations, see § 105-349. As to liability of foreign corporations, see § 105-396.

Failure to Pay Taxes. — The State and county having, through the boards of commissioners sitting with the justices of the peace, assessed the property of a corporation for taxation and placed the tax list in the hands of the sheriff, who cannot find any property of the corporation upon which to levy, are creditors holding a debt against such corporation and are entitled to bring a proceeding in the nature of a creditor's bill against such corporation, with or without proceedings for its dissolution. State v. Georgia Co., 112 N. C. 34, 17 S. E. 10.

Attachment and Continuance of Lien.—The lien for taxes attaches to the real property taxed from the date provided in the statute, and the lien continues thereon until the taxes are paid, regardless into whose hands the property has passed, unless barred by some statute of limitations. Reichland Shale Products Co. v. Southern Steel, etc., Co., 200 N. C. 226, 156 S. E. 777.

Where City and County Have No Lien on Proceeds of Sale. — Where the receiver of a corporation sold personal property of the corporation, comprising its sole assets, under orders of the court, and deposited the proceeds of sale to his credit as receiver, and the city and county in which the corporation was located levied executions on the funds on deposit, claiming that they, respectively, were entitled to preferred claims against the funds for personal property taxes for several years prior to the appointment of the receiver, it was held that since under old § 7986 a lien for personal property taxes does not attach until levy thereon and no lien for taxes was created prior to the sale of the property free from tax liens by the receiver, the city and county have no lien on the proceeds of sale of the property and are not entitled to a preferred claim against the funds. Currie v. Southern Manufacturers Club, 210 N. C. 150, 185 S. E. 666.

Art. 15. Reorganization.

§ 55-161. Corporations whose property and franchises sold under order of court or execution.—When the property and franchises of a public-service corporation are sold under a judgment or decree of a court of this state, or of the district court of the United States, or under execution, to satisfy a mortgage debt or other encumbrance thereon, such sale vests in the purchaser all the right, title, interest and property of the parties to the action in which such judgment or decree was

made, to said property and franchise, subject to all the conditions, limitations and restrictions of the corporation; and the purchaser and his associates, not less than three in number, thereupon become a new corporation, by such name as they select, and they are the stockholders in the ratio of the purchase money by them contributed; and are entitled to all the rights and franchises and subject to all the conditions, limitations and penalties of the corporation whose property and franchises have been so sold. In the event of the sale of a railroad in foreclosure of a mortgage or deed of trust, whether under a decree of court or otherwise, the corporation created by or in consequence of the sale succeeds to all the franchises, rights and privileges of the original corporation only when the sale is of all the railroad owned by the company and described in the mortgage or deed of trust, and when the railroad is sold as an entirety. If a purchaser at any such sale is a corporation, such purchasing corporation shall succeed to all the properties, franchises, powers, rights, and privileges of the original corporation: Provided, that this shall not affect vested rights and shall not be construed to alter in any manner the public policy of the state now or hereafter established with reference to trusts and contracts in restraint of trade. (Rev., s. 1238; Code, ss. 697, 698; 1897, c. 305; 1901, c. 2, s. 99; 1913, c. 25, s. 1; 1919, c. 75; C. S. 1221.)

Cross References.—As to reorganization, see also § 55-157. As to purchaser of railroad property, see also §§ 60-62 and 60-63.

Railroad Property and Franchise Must Be Together. — The property of railroads must be kept in association with their franchises to preserve their value; to give credit to such corporations; to secure creditors and keep railroads in operation for the benefit of the public, which was the primary object of the Legislature in bestowing such corporate franchises. Such legislative purpose is clearly manifested in this section. Bradley v. Ohio River, etc., Co., 119 N. C. 918, 927, 26 S. E. 169; citing Gooch v. McGee, 83 N. C. 60, 67.

New Corporation Must Be Provided.—In order that the sale of the franchise and property of a corporation under the mortgage shall have the effect of a dissolution of such corporation as provided in this section, another corporation must be provided, as contemplated in section 60-62, to take its place, and assume and discharge the obligations to the public growing out of the grant of the franchise, and until that is done the old corporation continues to exist, and when it is done the new corporation will be a domestic corporation. James v. Western N. C. R. Co., 121 N. C. 523, 28 S. E. 537.

Meaning of "Encumbrance."—In this section the word "encumbrance" is not restricted, as in cases of real estate alone, to claims having specific liens on the property, but is extended to include any and all claims importing a liability to sale as a whole under a judicial decree. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

Effect of Sale of Railroad.—The sale of a railroad under a second mortgage and a conveyance thereunder subject to the first mortgage upon its franchise and corporate property did not extinguish the corporate existence of the company, nor release it from liability to the public for the manner in which it is operated. James v. Western N. C. R. Co., 121 N. C. 523, 28 S. E. 537.

Rights of Purchaser.—On the foreclosure of a mortgage given by a railroad company, the purchaser takes the rights that the company had acquired in relation to its right of way under its charter. Barker v. Railroad, 137 N. C. 214, 49 S. E. 115.

The purchaser of a railroad under this section takes the rights acquired by the former company under its charter, and also becomes liable for damages and assessments on account of the appropriation of lands for the right of way. Hendrick v. R. R., 101 N. C. 617, 8 S. E. 236.

Rights of Old Stockholders.—When the property, including the franchise, of a corporation is sold under judicial sale, conferring on the purchaser the right to reorganize, etc., the old stockholders have a right to share in the assets if there is a surplus; but the decree itself shuts off all their rights as such stockholders in the new corporation. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

Debts.—The principle that a corporation taking over another by reorganization, consolidation, amalgamation, or union is subject to the debts and liabilities of such corporation, rests upon the ground that the corporation so taken over either has not been paid a consideration, that the transaction was in fraud of creditors, or upon the presumption of a trust for creditors; consequently, the principle does not apply to the bona fide sale of only a part of the assets of a corporation which continues to exist and exercise its functions under its franchise. McAlister v. Express Co., 179 N. C. 556, 103 S. E. 129.

Use of Former Name.—Where a corporation has been practically reorganized under a different name, the fact that persons in negotiating for the sale of shares of stock in the reorganized corporation used the former name is immaterial, it appearing that the purchaser received the certificates he had contracted to purchase, and held them without objection, and must have known of the fact. Pritchard v. Daily, 168 N. C. 330, 84 S. E. 392.

Cited in Carolina Coach Co. v. Hartness, 198 N. C. 524, 528, 152 S. E. 489.

§ 55-162. New owners to meet and organize.— The persons for whom the property and franchises have been purchased shall meet within thirty days after the delivery of the conveyance made by virtue of said process or decree, and organize the new corporation, ten days written notice of the time and place of the meeting having been given to each of the said persons. At this meeting they shall adopt a corporate name and seal, determine the amount of the capital stock of the corporation, and shall have power and authority to make and issue certificates of stock in shares of such amounts as they see fit. The corporation may then, or at any time thereafter, create and issue preferred stock to such an amount, and at such time, as they may deem necessary. (Rev., ss. 1239, 1240; 1901, c. 2, ss. 100, 101, 102; C. S. 1222.)

Change of Name and Seal Not Required.—Where the purchasers of the entire property of a defunct corporation under the decree of a court have in other respects complied with the requirements of the statute as to reorganization, the fact that they have assumed to continue operations without changing the seal, or determining upon a different amount of capitalization, does not necessarily affect the fact of proper reorganization, there being no statutory requirement that they change them. Wood v. Staton, 174 N. C 245, 93 S. E. 794.

§ 55-163. Certificate to be filed with secretary of state.—It is the duty of the new corporation, within one month after its organization to make certificate thereof, under its common seal, attested by the signature of its president, specifying the date of the organization, the name adopted, the amount of capital stock, and the names of its president and directors, and transmit the certificate to the secretary of state, to be filed and recorded in his office, and there remain of record. A certified copy of this certificate so filed shall be recorded in the office of the clerk of the superior court of the county in which is located the principal office of the corporation, and is the charter and evidence of the corporate existence of the new corporation. (Rev., s. 1241; 1901, c. 2, s. 103; C. S. 1223.)

Failure to File with Secretary of State.—Where the purchasers reorganize within the requirements of this article except they failed to file the certificate with the Secretary of State within one month from its reorganization (as required by this section) as to whether the corporation was one de jure, the purchasers having acted in good faith, Quaere? But, it became at least a corporation de facto, and the individuals cannot be held to personal liability for debts contracted in the name of the corporation, except

to the extent the charter or act of incorporation provides. Wood v. Staton, 174 N. C. 245, 93 S. E. 794.

§ 55-164. Effect on liens and other rights.—Nothing contained in this article in any manner impairs the lien of a prior mortgage, or other encumbrance, upon the property or franchises conveyed under the sale, when by the terms of the process or decree under which the sale was made, or by operation of law, the sale was made subject to the lien of any such prior mortgage or other encumbrance. No such sale and conveyance or organization of such new corporation in any way affects the rights of any person, body politic, or corporate, not a party to the action in which the decree was made, nor of the said party except as determined by the decree. When a trustee has been made a party to such action and his cestui que trust, for reason satisfactory to the court, has not been made a party thereto, the rights and interest of the cestui que trust are concluded by the decree. (Rev., s. 1241; 1901, c. 2, s. 103; C. S. 1224.)

Art. 16. Consolidation or Merger.

§ 55-165. Consolidation or merger; proceedings for.—Any two or more corporations organized under the provisions of this chapter or existing under the laws of this state, for the purpose of carrying on any kind of business, may, as shall be specified in the agreement hereinafter required, be merged into one of such constituent corporations, herein designated as the surviving corporation, or may be consolidated into a new corporation to be formed by means of such consolidation of the constituent corporations, which new corporation is herein designated as the resulting or consolidated corporation; and the directors, or a majority of them, of such corporations as desire to consolidate or merge, may enter into an agreement signed by them and under the corporate seals of the respective corporations, prescribing the terms and conditions of consolidation or merger, the mode of carrying the same into effect, and stating such other facts required or permitted by the provisions of this chapter to be set out in certificates of incorporation, as can be stated in the case of a consolidation or merger, stated in such altered form as the circumstances of the case require, as well as the manner of converting the shares of each of the constituent corporations into shares of the surviving or consolidated corporation, with such other details and provisions as are deemed necessary. The agreement of merger or consolidation may also provide for the distribution of cash, property, or securities, in whole or in part, in lieu of shares of the surviving or consolidated corporation, to stockholders of the constituent corporations or any class of them.

Said agreement shall be submitted to the stockholders of each constituent corporation, at a separate meeting thereof, called for the purpose of taking the same into consideration; of the time, place and object of which meeting due notice shall be given by publication at least once a week for four successive weeks in one or more newspapers published in the county wherein each such corporation either has its principal office or conducts its business (and if there be no newspaper published in such county then in a newspaper published in an adjoining county), and a copy of such notice shall be mailed to the last known post office address of each stockholder of each such corporation, at least twenty days prior to the date of such meeting, and at said meeting said agreement shall be considered and a vote by ballot, in person or by proxy, taken for the adoption or rejection of the same; and if the votes of stockholders of each such corporation representing a majority of the outstanding shares of stock entitled to vote shall be for the adoption of the said agreement, then that fact shall be certified on said agreement by the secretary of each such corporation, under the seal thereof; and the agreement so adopted and certified shall be signed by the president or vice president and secretary or assistant secretary of each of such corporations under the corporate seals thereof and acknowledged by the president or vice president of each such corporation before any officer authorized by the laws of this state to take acknowledgments of deeds to be the respective act, deed and agreement of each of said corporations, and the agreement so certified and acknowledged shall be filed in the office of the secretary of state, and shall thence be taken and deemed to be the agreement and act of consolidation or merger of the said corporations; and a copy of said agreement and act of consolidation or merger, duly certified by the secretary of state under the seal of his office, shall also be recorded in the office of the clerk of the superior court of the county of this state in which the principal office of the surviving or consolidated corporation is, or is to be established, and in the offices of the clerks of the superior court of the counties of this state in which the respective corporations so merging or consolidating shall have their original certificates of incorporation recorded, or if any of the corporations shall have been specially created by a public act of the legislature, then said agreement shall be recorded in the county where such corporation shall have had its principal office, and also in the office of the register of deeds in each county in which either or any of the corporations entering into the merger or consolidation owns any real estate, and such record, or a certified copy thereof, shall be evidence of the agreement and act of consolidation or merger of said corporations, and of the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such consolidation or merger.

Any one or more corporations organized under the provisions of this chapter, or existing under the laws of this state, may consolidate or merge with one or more other corporations organized under the laws of any other state or states of the United States of America, if the laws under which said other corporation or corporations are formed shall permit such consolidation or merger. The constituent corporations may merge into a single corporation, which may be any one of said constituent corporations, or they may consolidate to form a new corporation, which may be a corporation of the state of incorporation of any one of said constituent corporations as shall be specified in the agreement hereinafter required. All the

constituent corporations shall enter into an agreement in writing which shall prescribe the terms and conditions of the consolidation or merger, the mode of carrying the same into effect, the manner of converting the shares of each of said constituent corporations into shares or other securities or obligations of the corporation resulting from or surviving such consolidation or merger and such other details and provisions as shall be deemed necessary or proper. There shall also be set forth in said agreement such other facts as shall then be required to be set forth in certificates of incorporation, or other similar document, by the laws of the state, under which the resulting corporation is to be formed or the surviving corporation is to continue to exist, as provided by said agreement, stated in such form as may be required or permitted by the laws of such state. Said agreement shall be authorized, adopted, approved, signed and acknowledged by each of said constituent corporations in accordance with the laws under which it was formed and, in the case of a North Carolina corporation, in the manner hereinbefore provided. The agreement so authorized, adopted, approved, signed and acknowledged shall be filed in the office of the secretary of state and said agreement shall thenceforth be taken and deemed to be the agreement and act of consolidation or merger of said constituent corporations for all purposes of the laws of this state. A copy of said agreement, duly certified by the secretary of state under the seal of his office, shall also be recorded as provided in this section with respect to the consolidation or merger of corporations of this state.

If the corporation resulting or surviving such consolidation or merger is to be governed by the laws of any state other than the laws of this state, it shall agree that it may be served with process or notice in this state in any proceeding for enforcement of any obligation of any constituent corporation of this state, including any amount to be paid dissatisfied stockholders of any corporation of this state as such amount may be determined pursuant to the provisions of § 55-167, and shall irrevocably appoint the secretary of state as its agent to accept service of process or notice in an action or proceeding for the enforcement of payment of any such obligation or any amount to be paid such dissatisfied stockholders and shall specify the address to which a copy of such process or notice shall be mailed by the secretary of state. Service of such process or notice shall be made by delivering to and leaving with the secretary of state duplicate copies thereof. The secretary of state shall forthwith send by registered mail one of such copies to such address so specified, unless such resulting or surviving corporation shall thereafter have designated in writing to the secretary of state a different address for such purpose, in which case it shall be mailed to the last address so designated. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270.)

Cross References.—As to illegal trusts and monopolies under the state law, see § 75-1 et seq. As to merger of railroads, see §§ 60-59 and 60-60. As to consolidation of banks, see § 53-12. As to consolidation of bank with building and loan association, see § 53-15. As to consolidation of state bank or trust company with national banking association, see § 53-16.

Editor's Note.—The North Carolina Law Review (Volume 3, page 133) has the following to say concerning this statute: "The whole enactment furnishes definite machinery for merger and consolidation, which heretofore has been lacking in our statutes. While the language in the first section, permitting any corporations, engaging in any kind of business, to merge, will have to be interpreted in its relation to competing and non-competing companies, and its relation to statutes covering trusts, monopolies, and combinations in restraint of trade under the Sherman Law, etc., the court will, perhaps, have an easier task of interpretation under the present language of the Act than would have been the case if the Legislature had attempted to define and restrict specifically."

In considering this statute in respect to the Sherman Anti-Trust Act, reference should be had to the full and comprehensive treatment of the interpretation, construction and operation of that act in 8 U. S. Encyc. Dig. (U. S. E.) 430 et seq.; 12 U. S. Encyc. Dig. (U. S. E.) 429 et seq.; 13 U. S. Encyc. Dig. (U. S. E.) 431 et seq.

The 1939 amendment changed the first paragraph of this section. For comment on the 1939 amendatory act, see 17 N. C. L. Rev. 346.

The 1943 amendment rewrote this section.

The statutes in this article prior to the 1943 amendment did not observe the distinction between "consolidation" and "merger," the terms being loosely applied. For a discussion of the distinction, see Carolina Coach Co. v. Hartness, 198 N. C. 524, 152 S. E. 489. See also 17 N. C. L. Rev. 346.

Statute Controls as to Merger or Consolidation.—Where two corporations enter into an agreement for their union and the continuation of business under the name of one with the combined assets of both, the statute controls as to whether there is a merger or a consolidation; and since the statute expresses the primary purpose of creating a new corporation it authorizes a consolidation and not a merger. Carolina Coach Co. v. Hartness, 198 N. C. 524, 152 S. E. 489, decided prior to the 1943 amendment.

Rights and Properties of Constituent Bodies.—Where an agreement of merger consolidating two corporations was executed and filed in the office of the secretary of state in proceedings conforming to the pertinent provisions of this and the following section, the result was that the merged corporations ceased to exist and the consolidated corporation came into being possessed of all the rights and vested with all the property of the constituent bodies. Morgan Mfg. Co. v. Commissioner of Internal Revenue, 124 F. (2d) 602, decided prior to the 1943 amendment.

§ 55-166. Consolidation or merger; status of old and new corporations.—When an agreement shall have been signed, acknowledged, filed and recorded, as in the preceding section is required, for all purposes of the laws of this state, the separate existence of all the constituent corporations, parties to said agreement, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, in accordance with the provisions of said agreement, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, of each of said constituent corporations, and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations, shall be vested in the corporation resulting from or surviving such consolidation or merger; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the resulting or surviving corporation as they were of the several and respective constituent corporations, and the title

to any real estate, whether vested by deed or otherwise, under the laws of this state, vested in any of such constituent corporations, shall not revert or be in any way impaired by reason of such consolidation or merger: Provided, however, that all rights of creditors and all liens upon the property of either or any of said constituent corporations shall be preserved unimpaired, limited in lien to the property affected by such lien at the time of the merger or consolidation, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said resulting or surviving corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

If the surviving or resulting corporation be a corporation of this state, then upon the agreement of merger or consolidation being signed, acknowledged, filed and recorded, as is provided in the preceding section, the certificate of incorporation, of the surviving corporation shall be deemed to be amended to the extent, if any, that changes in its certificate of incorporation are stated in the agreement of merger; and, in cases of consolidation, the statements set forth in the agreement of consolidation, and which are required or permitted to be set forth in certificates of incorporation of corporations organized under the laws of this state, shall be deemed to be the certificate of incorporation of the consolidated or resulting corporation: Provided, that such resulting or surviving corporation, if it be a corporation of this state, shall not, by reason of any merger or consolidation with any corporation formed under the laws of any other state, acquire authority to engage in any business or exercise any right or privilege which may not be engaged in or exercised by a corporation organized under the laws of this state.

The shares of stock of any of the constituent corporations, which are to be converted into shares or other securities or obligations of the surviving or resulting corporation, or for which cash is to be distributed, must be surrendered by the holders thereof to the surviving or resulting corporation before receiving the shares or other securities or obligations of such surviving or resulting corporation, or such cash distributions, and the shares so surrendered shall be cancelled by the surviving or resulting corporation, unless the agreement of merger or consolidation otherwise provides. If any certificate of stock in any of the constituent corporations shall have been lost, destroyed or misplaced, the owner thereof shall have the right to receive from the surviving or resulting corporation shares or other securities or obligations of the surviving or resulting corporation, or such cash distribution, as may be provided in said agreement of merger or consolidation, upon indemnifying such surviving or resulting corporation against loss, in the manner provided by law for the reissue of lost stock. If the person owning such lost, destroyed or misplaced certificate in one of the constituent corporations shall be dissatisfied with the terms of the merger and shall object thereto, he shall have the same right to have the value of his stock appraised and paid for, and to appeal to the courts, as is provided herein for other dissatisfied stockholders, upon giving security and indemnifying the surviving or resulting corporation against loss on account of the payment for such lost, destroyed or misplaced certificate of stock. (1925, c. 77, s. 1; 1943, c. 270.)

Cross Reference.—As to reissue of lost stock, see §§ 55-67, 55-68 and 55-97.

Editor's Note.—The 1943 amendment rewrote this section.

Cited in Carolina Coach Co. v. Hartness, 198 N. C. 524, 530, 152 S. E. 489.

§ 55-167. Consolidation or merger; payment for stock of dissatisfied stockholder.—If any stockholder, entitled to vote, in any corporation of this state consolidating or merging as aforesaid shall vote against the same, or if any stockholder in any such corporation, not entitled to vote, shall, at or prior to the taking of the vote, object in writing to such merger or consolidation, and if any such stockholder shall, within twenty days after the agreement of consolidation or merger has been filed and recorded in the office of the secretary of state, as hereinbefore provided, demand in writing from the surviving or resulting corporation payment of his stock, such surviving or resulting corporation shall, within thirty days thereafter, pay to him the fair value of his stock without regard to any depreciation or appreciation thereof in consequence of the merger or consolidation. In case the fair value of said stock is not paid within said thirty-day period, or such stockholder and the surviving or resulting corporation do not within said period enter into a written agreement for the payment of said stock, then such stockholder, within thirty days after the expiration of the aforesaid thirty-day period, shall apply by petition to the superior court of the county wherein the principal office of the constituent corporation, in which he is or was a stockholder, is or was located for the appointment of three appraisers to appraise the fair value of such stock. A summons as in other cases of special proceedings, together with a copy of the petition, must be served on the surviving or resulting corporation at least ten days prior to the hearing of the petition by the court. The award of the appraisers (or a majority of them), if no exceptions be filed thereto within ten days after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive. If either party file exceptions to said award within said ten days, the case shall be transferred to the civil issue docket of the superior court for trial during term and shall be there tried in the same manner, as near as may be practicable, as is provided in chapter forty for the trial of cases under the eminent domain law of this state, and with the same right of appeal to the supreme court as is permitted in said chapter. The court shall assess the cost of said proceedings as it shall deem equitable.

On the making of said demand in writing, as aforesaid, any such stockholder shall cease to be a stockholder in said constituent corporation and shall have no rights with respect to such stock, except the right to receive payment therefor, as aforesaid, and upon payment of the agreed value of said stock, or the value thereof as fixed by final judgment of the court, such stockholder shall

surrender the certificate or certificates representing his shares of stock to the surviving or resulting corporation. In the event the surviving or resulting corporation shall fail to pay the amount of said judgment within ten days after the same becomes final, said judgment may be collected and enforced in the manner prescribed by law for the enforcement of judgments.

Any stockholder in either or any of the constituent corporations, entitled to vote, who does not vote against the merger or consolidation, and any stockholder, not entitled to vote, who does not object thereto in writing as aforesaid, shall cease to be a stockholder in such constituent corporation and shall be deemed to have assented to the merger or consolidation, as the case may be, together with stockholders voting in favor of the merger or consolidation, in the manner and on the terms specified in the agreement of merger or consolidation; and any stockholder in either or any of said constituent corporations voting against said merger or consolidation, or objecting thereto in writing as hereinbefore provided, but who does not demand payment for his stock within the twenty-day period, as hereinbefore provided, or who does not apply to the court to have the value thereof determined as hereinbefore provided, shall likewise cease to be a stockholder in such constituent corporation and shall likewise be deemed to have consented to said merger or consolidation. (1925, c. 77, s. 1; 1943, c. 270.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 55-168. Consolidation or merger; pending actions saved.—Any action or proceeding pending by or against any of the corporations consolidated or merged may be prosecuted to judgment, as if such consolidation or merger had not taken place or the corporation resulting from or surviving such consolidation or merger may be substituted in its place. (1925, c. 77, s. 1; 1943, c. 270.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 55-169. Liability of corporations and rights of others unimpaired by consolidation or merger.—The liability of corporations created under this chapter, or existing under the laws of this state, or the stockholders or officers thereof, or the rights or remedies of the creditors thereof, or of persons doing or transacting business with such corporations, shall not, in any way, be lessened or impaired by the consolidation or merger of two or more of such corporations under the provisions of this article. (1925, c. 77, s. 1; 1943, c. 270.)

Editor's Note.—The 1943 amendment inserted the words "or merger."

§ 55-170. Powers of corporation resulting from or surviving consolidation or merger.—When two or more corporations are consolidated or merged, the corporation resulting from or surviving such consolidation or merger shall have power and authority to issue bonds or other obligations, negotiable or otherwise, and with or without coupons or interest certificates thereto attached, to an amount sufficient with its capital stock to provide for all the payments it will be required to make, or obligations it will be required to assume, in order to effect such consolidation or merger; to secure the payment of which bonds and obligations it shall be lawful to mortgage its corporate franchise, rights, privileges and property, real, personal, and mixed; and may issue its capital stock, with or without par value, or in classes, any class of which may be with or without par value, to the stockholders of such constituent corporations in exchange or payment for the original shares, in such amount as shall be necessary in accordance with the terms of the agreement of consolidation or merger in order to effect such consolidation or merger in the manner and on the terms specified in such agreement; provided, that the only fees that shall be collected from said surviving or resulting corporation shall be office or filing fees and charter fees upon any increase in the authorized capital stock of the surviving or resulting corporation in excess of that provided for in the charters of the constituent corporations when the authorized capital stock of said constituent corporations shall be added together. (1925, c. 77, s. 1; 1931, c. 209; 1943, c. 270.)

Cross Reference.—As to fiduciary powers and liabilities of merged banks or trust companies, see § 53-17.

Editor's Note.—Prior to the 1943 amendment this section related only to powers of consolidated corporations.

Cited in Carolina Coach Co. v. Hartness, 198 N. C. 524, 530, 152 S. E. 489.

§ 55-171. Merger of charitable and other corporations not under control of state.—Any two or more charitable, educational, social, ancestral, historical, penal or reformatory corporations not under the patronage and control of the state, and any two or more corporations without capital stock organized for the purpose of aiding in the work of any church, religious society or organization, or fraternal order, whether organized under special act or general laws, may consolidate into a single corporation, which shall be deemed the successor of each and all corporations joining in such consolidation, in the following manner:

(a) When authorized to do so by the conference, synod, convention or other body owning and/or controlling such corporation, the trustees or directors of such corporation by resolution adopted by majority vote at a meeting duly called and convened in accordance with the present charter, by-laws or other regulations for the conduct of such meetings of such corporation, and in the absence of such charter provision, by-laws or other regulations upon ten days' notice to each trustee or director of the time, place and object of the meeting, may authorize such corporation to make, enter into and execute a consolidation agreement with one or more other such corporations; that such consolidation agreement shall prescribe the terms and conditions of consolidation, the mode of carrying same into effect, and shall set forth in full the certificate of incorporation of the consolidated corporation; and the consolidation agreement so authorized shall be executed in the name and behalf of each such corporation entering into the consolidation by its president or vice-president, attested by its secretary or assistant secretary and its corporate seal thereto affixed, and the due execution thereof shall be acknowledged in the manner and before a notary public or other officer required by the general laws of North Carolina for the acknowledgment of corporate deeds; and there shall be attached to such

agreement of consolidation the written consent of a majority of the trustees or directors of each corporation entering into the consolidation.

(b) The agreement of consolidation, when authorized and executed as provided above and having attached thereto the aforesaid written consent, shall be filed in the office of the secretary of state. When so filed, the separate legal existence of each of the corporations joining in the consolidation thereupon shall be merged into the consolidated corporation, and thereafter there shall be only one corporation having as its charter the certificate of incorporation fully set forth in the agreement of consolidation.

(c) A copy of said agreement of consolidation, duly certified by the secretary of state under the seal of his office, shall be recorded in the office of the clerk of the superior court of the county in which the principal office of the consolidated corporation as fixed by its certificate of incorporation is located, and a like certified copy of the agreement of consolidation shall be recorded in the office of the clerk of the superior court of each county where any one or more of the corporations joining in the consolidation theretofore has had its principal office or place of business; and such certified copy shall be evidence of the existence of the consolidated corporation created by such agreement of consolidation and of the observance and performance of all antecedent acts and conditions necessary to the creation thereof. (1933, c. 408, s. 1.)

§ 55-172. Rights and powers of consolidated charitable, etc., corporations.—The consolidated corporation shall succeed to and be vested with all rights, privileges and powers, and all property, real, personal and mixed, tangible and intangible, and the title thereto, of each and all of the corporations joining in the consolidation as fully and effectually as the same were theretofore owned and held by each of the separate corporations, and the consolidated corporation shall be liable for the payment of all debts and liabilities of each and all of the separate corporations: Provided, such consolidation shall not affect liens or the priority of liens established against the separate property of any corporation prior to the consolidation. (1933, c. 408, s. 2.)

§ 55-173. Trust properties vested in new charitable, etc., corporation.—The consolidated corporation shall succeed to and be vested with all money, securities, property, real, personal and mixed, tangible and intangible, and the title thereto, theretofore owned, held and/or administered by each separate corporation upon the uses and trusts declared in any will, deed or other instrument, and the consolidated corporation shall handle, use and administer such trust funds upon the same uses and trusts and not otherwise; and the consolidated corporation shall be deemed to embrace each separate corporation and to constitute a continuation thereof, and no trust fund or other asset of a separate corporation shall be construed to revert and/or pass to other ownership on the ground that such separate corporation has ceased to exist for the purpose of administering such trust or otherwise. (1933, c. 408, s. 3.)

Art. 17. Severance of Certain Partially Merged Charitable, Educational or Social Corporations.

§ 55-174. Application of article.—This article shall apply only to a charitable, educational or social corporation, not under the patronage or control of the state nor under the patronage or control of any religious denomination, which has been formed by the de jure merger of two or more corporations of such character, the merger having been brought about either under §§ 55-165 to 55-173, or under other special or general laws, but where for any reason the merger has not been carried out in fact to the extent of the actual surrender of shares of stock or of other evidences of membership in the respective corporations and the issuance of new stock or new evidences of membership in the merged corporation. A charitable, educational or social corporation, organized by the merger of two such corporations, may be severed and restored to the status of the merging or original corporations by complying with the provisions of this article, with the exceptions above set out. (1937, c. 256, s. 1.)

§ 55-175. Resolution providing for severance; accounting.—At any regular or duly called meeting of the board of directors or other governing body of such merged corporation, a resolution may be adopted providing for the severance of the corporations and restoration to each of the original corporations of the properties owned by each at the time of the merger, and the restoration to the stockholders or members of the stock, rights and privileges owned by them in the merging corporations at the time of the merger, and providing for an accounting as between the respective corporations of their receipts, disbursements and obligations incurred since the attempted merger, the accounting to be on the assumption the corporations had never been merged. (1937, c. 256, s. 2.)

§ 55-176. Stockholders' meeting; notice; ratification of resolution.—Upon the adoption by the board of directors or other governing body of the merged corporations of such resolution of severance, a meeting shall be called by the said governing body of the members or stockholders of the merged corporation. A notice shall be sent to each stockholder or member of the merged corporation by registered mail at least ten days before the date of the stockholders' or members' meeting. Such notice shall be mailed to the last address of the stockholder or member as it appears on the records of the merged corporation. Such notice shall also be published once in a newspaper of general circulation in the county in which the corporation has its principal office at least ten days before the meeting, stating the substance of the resolution of severance and giving the time and place of the meeting. If at such meeting of stockholders or members a resolution shall be adopted ratifying the resolution of the board of directors or governing body, and providing for the severance of the merged corporation into its constituent corporations as they existed immediately prior to the merger, and such resolution shall be adopted by a majority of three-fourths of the total membership or total number of stockholders by shares, as the voting privilege

may be exercised in the merged corporation, then the merged corporation shall be severed, on compliance with the further procedural provisions of this article. (1937, c. 256, s. 3.)

§ 55-177. Election of officers for severed corporations.—On the adoption of such resolution of severance by the stockholders or members, the president of the merged corporation shall, either at said meeting or within ten days thereafter, appoint an acting chairman of the membership or stockholders of each corporation, and shall call a meeting of the members or stockholders of each corporation for the purpose of electing officers of each of the severed corporations, such meetings to be held in accordance with the charter and by-laws of the severed corporations as they existed prior to the merger. (1937, c. 256, s. 4.)

§ 55-178. Agreement between officers and directors for division and accounting.—The officers and directors of the several corporations shall thereupon enter into an agreement setting out in substantial detail the division of the properties of the merged corporation and providing for the accounting of all receipts and disbursements as between the severed corporations on the same basis as if the respective corporations had never been merged. Such agreement shall thereupon be submitted to the stockholders or members of the severed corporations at a meeting to be called in accordance with the charter or by-laws of the severed corporations. At such meeting such agreement shall become effective when approved by a majority of the stockholders or members. Thereupon said agreement shall be executed by the respective officers of the severed corporations, and deeds and other appropriate instruments shall be executed by the officers of the respective corporations to carry out the terms of the agreement. (1937, c. 256, s. 5.)

§ 55-179. Certificates of severance.—Upon the approval of the terms of the severance agreement, as provided in the preceding section, the president and board of directors of the respective corporations shall execute a certificate under the seal of the corporation setting forth in substance the terms of the resolution of severance adopted by the stockholders or members of the merged corporation provided for by § 55-176, and also setting forth the fact and date of the ratification of such severance agreement by the majority of the members or stockholders of the severed corporations, and shall file the same with the secretary of the state of North Carolina. Such certificate, duly certified by the secretary of state under the seal of his office, shall also be recorded in the office of the clerk of the superior court of the county in this state in which the principal office of the merged corporation was established, and also in the offices of the clerks of the superior court for each of the counties in which the respective severed corporations shall have or shall establish their principal offices. On the filing of such certificates in the office of the clerk or clerks of the superior courts, as herein provided, said severance shall be complete to all intents and purposes as if the merger had never taken place. Upon the recording of such certificate it shall be presumptive evidence of the statements of fact contained in said certificate, and after sixty days it shall be conclusive evidence of such statements of fact, except as to any stockholder or member who shall have demanded the value of his stock or membership. (1937, c. 256, s. 6.)

§ 55-180. Original rights restored; liabilities unaffected.—On the completion of the procedure set out in the previous section the stockholders or members in the respective corporations, or their representatives or assigns, as the case may be, shall to all intents and purposes be restored to the same rights and privileges which they, or their predecessors in interest, held in the original corporations: Provided, that any member or stockholder who has conveyed or for any reason forfeited his rights in the merged corporation shall not, by reason of the severance of the merged corporations, be restored to the rights he had in the original corporations at the time of the merger. Nothing contained in this article, however, shall be deemed to affect any debts, liabilities or obligations assumed or incurred by the merged corporation during the period of the merger, but each of the severed corporations shall, with respect to such debts or other obligations, remain liable jointly and severally. (1937, c. 256, s. 7.)

§ 55-181. Objection to severance and demand for payment for stock; failure to object deemed assent.—If any stockholder or member entitled to vote in the merged corporation shall vote against the severance at the stockholders' or members' meeting provided in § 55-176, or shall, prior to the taking of the vote at such meeting, object thereto in writing, and if such dissenting or objecting stockholder or member shall, within twenty days after such meeting, demand in writing from the merged corporation payment of his stock or of his interest in the merged corporation by reason of his membership therein, the merged corporation shall, within thirty days thereafter, pay to him the value of his stock or membership at the date of the adoption of the resolution of severance at the stockholders' or members' meeting. In case of disagreement as to the value thereof, it shall be lawful for any such stockholder or member, within thirty days after he has made demand in writing as aforesaid, or has voted against the resolution as aforesaid, and upon written notice to the merged corporation to appeal by petition to the superior court of the county in which the principal office of the merged corporation is located to appoint three appraisers to appraise the value of his stock or membership. The award of the appraisers, or a majority of them, if not opposed within ten days after the same shall have been filed in court, shall be confirmed by the court or clerk, and when confirmed shall be final and conclusive. If such report is opposed and excepted to, the exceptions shall be transferred to the civil issue docket of the superior court, and there tried in the same manner, as nearly as may be practicable, as is provided in § 40-20 for the trial of exceptions to the appraisal of land condemned for public purposes. The court shall assess against the merged corporation the costs of said proceeding. On the making of such demand in writing, as aforesaid, any such stockholder or member shall cease to be a stockholder or mem-

ber in said merged corporation, and shall have no rights with respect thereto, except the right to receive payment for the value of his stock or membership. Each stockholder or member in the merged corporation entitled to vote, who does not vote against the severance, and each stockholder or member at the time of the adoption of the resolution of severance provided in § 55-176 not entitled to vote, who does not object thereto in writing, as aforesaid, shall be deemed to have assented to the severance. (1937, c. 256, s. 8.)

§ 55-182. Pending litigation not affected.—Any action or proceeding pending by or against the merged corporation may be prosecuted to judgment as if such severance had not taken place, or the severed corporation, or either of them, may be substituted in its place. (1937, c. 256, s. 9.)

§ 55-183. Fees of secretary of state.—The fees to be charged by the secretary of state for filing the certificate of severance and the issuance of his certificate thereon shall be the same as provided by law for the filing of an original certificate of incorporation of charitable, educational or social corporations. (1937, c. 256, s. 10.)

Cross Reference.—As to fees charged for filing on original certificate of incorporation, see § 55-158.

Chapter 56. Electric, Telegraph, and Power Companies.

Art. 1. Acquisition and Condemnation of Property.

Art. 2. Intrastate Telegraph Messages.

Art. 1. Acquisition and Condemnation of Property.

§ 56-1. Use of public highways.—Any person, firm or co-partnership operating electric power lines for lights or power, or authorized by law to establish such lines, or any duly incorporated company possessing the power to construct telegraph or telephone lines, lines for the conveying of electric power or for lights, either or all, has the right to construct, maintain and operate such lines along any railroad or other public highway, but such lines shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway. (Rev., s. 1571; Code, s. 2007; 1874-5, c. 203, s. 2; 1899, c. 64, s. 1; 1903, c. 562; 1939, c. 228, s. 1; C. S. 1695.)

Cross Reference.—See also § 55-45.

Editor's Note.—The 1939 amendment added that part of this section preceding the words "any duly incorporated company."

Constitutionality.—The provisions of secs. 56-1 to 56-10, empowering electric power or lighting companies, etc., to condemn lands for the erection of poles, establishment of offices, and other appropriate purposes, are constitutitonal and valid. Wissler v. Yadkin River Power Co., 158 N. C. 465, 74 S. E. 460.

Application to Foreign Companies.—The right to construct and operate telegraph lines along any railroad or other public highway in the State, and to obtain the right of way therefor by a condemnatory proceeding, is expressly conferred upon any telegraph company incorporated by this or by any other State. North Carolina, etc., R. Co. v. Carolina Cent., etc., R. Co., 83 N. C. 489, 496; Yadkin River Power Co. v. Wissler, 160 N. C. 269, 271, 76 S. E. 267.

No Rights over Private Land.—This section applies to constructing lines along the highway and not to constructing the lines over private land. Wade v. Carolina Tel., etc., Co., 147 N. C. 219, 60 S. E. 987.

An Additional Burden.—A telegraph line along a railroad and on the right of way of the railroad is an additional burden upon the land, for which the landowner is entitled to just compensation. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022; Query v. Postal Tel. Cable Co., 178 N. C. 639, 101 S. E. 390; Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572 and cases cited. The same rule applies to electric light wires placed along the street. Brown v. Electric Co., 138 N. C. 533, 51 S. E. 62. But the construction of a street passenger railway does not impose any additional servitude upon the property fronting on the street so occupied. Hester v. Traction Co., 138 N. C. 288, 50 S. E. 411 and cases cited.

Cited in Hildebrand v. Southern Bell Tel., etc., Co., 216 N. C. 235, 4 S. E. (2d) 439.

§ 56-2. Electric and hydro-electric power companies may appropriate highways; conditions.—Every electric power or hydro-electric power corporation, person, firm or co-partnership which may exercise the right of eminent domain under the chapter Eminent Domain, where in the development of electric or hydro-electric power it shall become necessary to use or occupy any public highway, or any part of the same, after obtaining the consent of the public road authorities having supervision of such public highway, shall have power to appropriate said public highway for the development of electric or hydro-electric power: Provided, that said electric power or hydro-electric power corporation shall construct an equally good public highway, by a route to be selected by and subject to the approval and satisfaction of the public road authorities having supervision of such public highway: Provided further, that said company shall pay all damages to be assessed as provided by law, by the damming of water, the discontinuance of the road, and for the laying out of said new road. (1911, c. 114; 1939, c. 228, s. 2; C. S. 1696.)

Cross Reference.—As to what corporations, etc., may exercise the right of eminent domain, see § 40-2.

Editor's Note.—The 1939 amendment inserted the words

"person, firm or co-partnership" near the beginning of this section.

Where under the provisions of this section, a hydro-electric power company has appropriated a section of a public highway and built another section in lieu thereof, the provisions of the statute that the company pay all damages assessed as provided by law does not entitle the plaintiff to recover damages for the slight change in the road causing inconvenience to him in hauling wood, etc., to and from his market town. Crowell v. Tallassee Power Co., 200 N. C. 208, 156 S. E. 493.

§ 56-3. Powers granted corporations under chapter exercisable by persons, firms or co-partnerships.—All the rights, powers and obligations given, extended to, or that may be exercised by any corporation or incorporated company under this chapter shall be extended to and likewise be exercised and are hereby granted unto all persons, firms or co-partnerships engaged in or authorized by law to engage in the business herein described. Such persons, firms, co-partnerships and corporations engaging in such business shall be subject to the provisions and requirements of the public laws which are applicable to others engaged in the same kind of business. (1939, c. 228, s. 3.)

§ 56-4. Acquisition of right of way by contract. — Such telegraph, telephone, or electric power or lighting company has power to contract with any person or corporation, the owner of any lands or of any franchise or easement therein, over which its lines are proposed to be erected, for the right of way for planting, repairing and preservation of its poles or other property, and for the erection and occupation of offices at suitable distances for the public accommodation. This section shall not be construed as requiring electric power or lighting companies to erect offices for public accommodation. (Rev., s. 1572; Code, s. 2008; 1874-5, c. 203, s. 3; 1899, c. 64; 1903, c. 562, ss. 1, 2; C. S. 1697.)

Cross References.—As to recording deeds of easement, see § 47-27. As to right of directors of the various state institutions to grant easements to telegraph, telephone or power companies, see § 143-151.

Owner Must Grant Easement.—A railroad company, not being the owner of the soil, can not grant an easement to a telegraph company. Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572. See also Narron v. Wilmington etc., R. Co., 122 N. C. 856, 29 S. E. 356.

Easement by Adverse Possession.—Right of easement may be acquired by adverse and continuous user for the period of twenty years. Teeter v. Postal Tel. Cable Co., 172 N. C. 783, 90 S. E. 941.

§ 56-5. Grant of eminent domain; exception as to mills and water-powers.—Such telegraph, telephone, electric power or lighting company shall be entitled, upon making just compensation therefor, to the right of way over the lands, privileges and easements of other persons and corporations, and to the right to erect poles and towers, to establish offices, and to take such lands as may be necessary for the establishment of their reservoirs, ponds, dams, works, railroads, or sidetracks, or power-houses, with the right to divert the water from such ponds or reservoirs and conduct the same by flume, ditch, conduit, waterway or pipe line, or in any other manner, to the point of use for the generation of power at its said power-houses, returning said water to its proper channel after being so used. Nothing in this section authorizes interference with any mill or power plant actually in process of construction or in operation; or the taking of water-powers, developed or undeveloped, with the land adjacent thereto necessary for their development: Provided, however, that if the court, upon filing of the petition by such electric power or lighting company, shall find that any mill, excepting cotton mills now in operation, whether operated by water-power or otherwise, together with the lands and easements adjacent thereto or used in connection therewith, or that any water-power, developed or undeveloped, with land adjacent thereto necessary for its development, excepting any water-power, right or property of any person, firm or corporation engaged in the actual service of the general public where such water-power, right or property is being used or held to be used or to be developed for use in connection with or in addition to any power actually used by such person, firm or corporation serving the general public, is necessary for the development of any hydro-electric power plant which is to be operated for the purpose of generating electric power for sale to the general public, and that said electric power or lighting company is unable to agree for the purchase of such property with the owners thereof, and that the failure to acquire such property will affect the ability of such electric power or lighting company to supply power to the general public, and that the taking of such mill or water-power will be greatly more to the benefit of the public than the continued existence of such mill or the continuation of the existing ownership of such water-power, then the court, upon such finding, shall make an order authorizing the condemnation of such property and easements in all respects as in the cases of other property referred to in this section. Any provisions in conflict with this chapter in any special charters granted before January thirty-first, one thousand nine hundred and seven, in respect to the exercise of the right of eminent domain are repealed. (Rev., s. 1573; Code, s. 2009; 1874-5, c. 203, s. 4; 1899, c. 64; 1903, c. 562; 1907, c. 74; 1921, c. 115; 1923, c. 60; 1925, c. 175; C. S. 1698.)

Cross Reference.—As to the right of eminent domain in general, see chapter 40.

Editor's Note.—This section as it stood in 1919 expressly prohibited interference with any mill or power plant actually in process of construction or operation, also the taking of water powers, developed or undeveloped with the necessary adjacent land.

By ch. 60, Laws of 1923, the provision for condemning mills, when to the best interests of the public, was added. Cotton mills are excepted.

Ch. 175, Laws of 1925, added the power to condemn any waterpower developed or undeveloped which is not being held for use or actually used in the furnishing of power to the public. The 1925 act, which was ratified March 7, 1925, provided that it should not affect pending litigation.

Thus by these two amendments the Legislature has practically abolished the restrictions which existed in the section in 1919. See 1 N. C. Law Rev. 290; 3 N. C. Law Rev. 144.

The General Assembly originally inserted the proviso "water powers, developed or undeveloped, with the necessary land adjacent thereto for their development, shall not be taken," for the purpose of preventing the acquisition of all of the water powers by one or more of the great aggregations of capital. Blue Ridge Interurban R. Co. v. Hendersonville Light, etc., Co., 169 N. C. 471, 86 S. E. 296.

Right Granted for Public Benefit.—This power of eminent domain is conferred upon corporations affected with public use, not so much for the benefit of the corporations themselves, but for the use and benefit of the people at large. Wissler v. Yadkin River Power Co., 158 N. C. 465, 466, 74 S. E. 460.

Limitation of Right of Eminent Domain.—This section limits the right of eminent domain and any special power claimed by the charter must clearly appear. Yadkin River

Power Co. v. Whitney Co., 150 N. C. 31, 63 S. E. 188. See Blue Ridge Interurban R. Co. v. Hendersonville Light, etc., Co., 169 N. C. 471, 86 S. E. 296.

A Continuing Right.—The right of eminent domain is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 273, 76 S. E. 267; Thomason v. Railroad, 142 N. C. 318, 55 S. E. 205.

Effect of Federal Statute.—The Act of Congress, entitled "An act to aid in the construction of telegraphs and to secure to the government the use of the same for postal, military and other purposes," approved 24 July, 1866, does not give authority to enter private property without consent of the owner, but provides that where consent is obtained, no State legislation shall prevent the use of such postroads for telegraph purposes by such corporations as avail themselves of its privileges. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022.

Quasi-Public Corporations Have Power.—Where a charter is granted a corporation, conferring quasi-public as well as private powers, the corporation may proceed to condemn lands when so empowered, in pursuance of its business of a quasi-public nature, and this will not be denied it because it was authorized to conduct a business of a private character. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N. C. 248, 88 S. E. 349.

Compensation Essential.—Private property may not be taken for public use, directly or indirectly, without just compensation. Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022. See secs. 40-16, 40-17 as to fixing compensation.

Conflict of Claims.—Where the claims of two companies conflict the prior right belongs to that company which first defines and marks its route. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N. C. 248, 88 S. E. 349.

Effect of Subsequent Charter.—Where a legislative charter has been granted since this section was passed, the powers given therein are not subject to the restriction of this section. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 171 N. C. 248, 88 S. E. 349.

Extent of Rights Usually Determined by Companies.—The extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of facts tending to show bad faith on the part of the companies, or an oppressive or manifest abuse of their discretion. Love v. R. R., 81 N. C. 432, cited and distinguished. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 76 S. E. 267.

Burden of Proof on Defendant.—Where a quasi-public corporation brings action for condemnation, and the defendant resists upon the ground that the lands or power sought to be taken are protected by the statute, the burden of proof is upon the defendant to bring the lands or water power within the provision of the statute excepting them. Blue Ridge Interurban, R. Co. v. Hendersonville Light, etc., Co., 171 N. C. 314, 88 S. E. 245.

Cited in Blevins v. Northwest Carolina Utilities, 209 N. C. 683, 184 S. E. 517, opinion of Clarkson, J.

§ 56-6. Residences, etc., may be taken under certain cases.—Residence property or vacant lots adjacent thereto in towns or cities, or other residences, gardens, orchards, graveyards or cemeteries, may be taken under § 56-5 only when the company alleges, and upon the proceedings to condemn makes it appear to the satisfaction of the court, that it owns or otherwise controls not less than seventy-five per cent of the fall of the river or stream on which it proposes to erect its works, from the location of its proposed dam to the head of its pond or reservoir; or when the utilities commission, upon the petition filed by the company, shall, after due inquiry, so authorize. Nothing in this section repeals any part or feature of any private charter, but any firm or corporation acting under a private charter may operate under or adopt any feature of this section. (1907, c. 74; 1917, c. 108; 1933, c. 134, ss. 7, 8; C. S. 1699.)

§ 56-7. Condemnation on petition; parties' interests only taken; no survey required.—When such telegraph, telephone, electric power or lighting company fails on application therefor to secure by contract or agreement such right of way for the purposes aforesaid over the lands, privilege or easement of another person or corporation, it is lawful for such company, first giving security for costs, to file its petition before the superior court for the county in which said lands are situate, or into or through which such easement, privilege or franchise extends, setting forth and describing the parcels of land, privilege or easement over which the way, privilege or right of use is claimed, the owners of the land, easement or privilege, and their place of residence, if known, and if not known that fact shall be stated, and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to, and if the use or right sought be over or upon an easement or right of way, it shall be sufficient to give jurisdiction if the person or corporation owning the easement or right of way be made a party defendant.

Only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right of way of a railroad or railway company sought to be condemned extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such right of way extends.

It is not necessary for the petitioner to make any survey of or over the right of way, nor to file any map or survey thereof, nor to file any certificate of the location of its line by its board of directors. (Rev., s. 1574; Code, s. 2010; 1874-5, c. 203, s. 5; 1899, c. 64, s. 2; 1903, c. 562; C. S. 1700.)

The Petition.—Under this section it is not necessary that a petition asking for the condemnation of a right of way over the right of way of a railroad should state by what tenure the railroad company holds. Postal Tel. Cable Co. v. Southern R. Co., 89 Fed. 190.

Same—Company Alone Can File.—The company alone has the right to file petition in condemnation proceedings. The landowner is not given such right. Phillips v. Postal Tel.-Cable Co., 130 N. C. 513, 41 S. E. 1022.

Condemnation Not Confined to Right of Way.—The power of condemnation granted to these companies is not confined to a right of way, delimited by surface boundaries, but may be extended to cutting of trees or removing obstructions outside of these boundaries when required for the reasonable preservation and protection of their lines and other property. Yadkin River Power Co. v. Wissler, 160 N. C. 269, 275, 76 S. E. 267.

No Entry Until Damage Paid.—Under this section a telegraph company seeking to condemn a right of way for its line cannot be authorized to enter into possession and construct its line until the damages have been assessed and paid into court. Postal Tel. Cable Co. v. Southern R. Co., 89 Fed. 190.

Subsequent Purchaser May Recover.—A purchaser of land subsequent to the taking and erection thereon of a telegraph line may recover permanent damages for the easement taken, and the telegraph company thereby acquires the easement and right to maintain its line thereon. Phillips v. Postal Tel.-Cable Co., 130 N. C. 513, 41 S. E. 1022.

Permanent Damage Awarded.—Permanent damages may be awarded a landowner who is injured by telegraph poles placed on his land. Phillips v. Postal Tel.-Cable Co., 130 N. C. 513, 41 S. E. 1022; Lamberth v. Southern Power Co., 152 N. C. 371, 372, 67 S. E. 921. And the company then acquires an easement. Ibid.

Limitation of City Authority.—Authority granted by a city to the defendant electric company to remove a shade tree in front of the plaintiff's home in order to put up its poles and wires does not justify the act of the defendant in removing the tree, the city has no power to deprive the

plaintiff of his property for such purpose without compensation. Brown v. Electric Co., 138 N. C. 533, 51 S. E. 62.

When Jury Trial Necessary.—While ordinarily a jury trial is not required in condemnation proceedings, except as to the assessment of damages, the general rule does not apply where the pleadings put at issue the question as to whether the character of the lands is such as to be embraced within the right conferred, or within an exception to that right under the terms of a statute. Blue Ridge Interurban R. Co. v. Oates, 164 N. C. 167, 80 S. E. 398.

Judgment under Prior Act Necessary.—In order to acquire a vested right under a statute to condemn lands, which has subsequently been repealed, it is necessary to show a finality by judgment in the proceedings before the later act has become effective. Blue Ridge Interurban R. Co. v. Oates, 164 N. C. 167, 80 S. E. 398.

Condemnation of Railroad Right of Way.—The words "right of way," as used in the second paragraph of this section, are not used as synonymous with "easement," but, as applied to railroads, they include in their meaning the strip of land over which the track is laid through the country, and which is used in connection therewith, whether the railroad company owns only an easement therein or the title in fee. Postal Tel. Cable Co. v. Southern R. Co., 90 Fed. 30.

Same—Proceeding against Railroad Does Not Affect Owner.—Condemnation proceedings by a telegraph company against a railroad company to condemn the right of way, to which the landowner is not a party, gives no rights against the landowner, but gives rights only against the parties before the court. Phillips v. Postal Tel.-Cable Co., 130 N. C. 513, 41 S. E. 1022.

Same—Limitation of Federal Statute.—Rev. St. sec. 5263, authorizing telegraph companies to construct their lines over and along any military or post roads of the United States, does not give such companies the right to build their lines over the right of way of a railroad or other private property without the consent of the owner, or the condemnation of the right of way over such property in accordance with the laws of the state where situated. Postal Tel. Cable Co. v. Southern R. Co., 89 Fed. 190.

§ 56-8. Copy of petition to be served.—A copy of such petition, with a notice of the time and place the same will be presented to the superior court, must be served on the persons whose interests are to be affected by the proceeding at least ten days prior to the presentation of the same to the said court. (Rev., s. 1575; Code, s. 2011; 1874-5, c. 203, s. 6; 1899, c. 64, s. 3; C. S. 1701.)

Failure to Give Prosecution Bond.—Where it appears that the summons was served in time, but that the prosecution bond, made a prerequisite by sec. 1-109, was not, no vested right in the former statute can be acquired by the further prosecution of the condemnation proceedings. Blue Ridge Interurban R. Co. v. Oates, 164 N. C. 167, 80 S. E. 398.

§ 56-9. Proceedings as under eminent domain.—The proceedings for the condemnation of lands, or any easement or interest therein, for the use of telegraph, telephone, electric power or lighting companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in Article 2, entitled "Condemnation Proceedings," of the chapter Eminent Domain. (Rev., s. 1576; Code, s. 2012; 1899, c. 64; 1903, c. 562; C. S. 1702.)

Subsequent Provisions Not Incorporated.—The reference in this section to article 2 of the chapter on eminent domain incorporates into the telegraph statute the provisions of the railroad statute referred to, only as they existed at the time of the enactment, and not as thereafter amended. Postal Tel. Cable Co. v. Southern R. Co., 89 Fed. 190.

Proceedings Subsequent to Filing.—This section evidently refers to the proceedings subsequent to the filing of the petition and the service of the required notices. In other words, it refers to the proceedings after the parties are all before the court. Phillips v. Postal Tel.-Cable Co., 130 N. C. 513, 525, 41 S. E. 1022. Hence sec. 40-12, as to filing and service, does not apply. Id.

Cited in Carolina Power & Light Co. v. Reeves, 198 N. C. 404, 408, 151 S. E. 871.

§ 56-10. Commissioners to inspect premises.—In considering the question of damages when the interest sought is over an easement, privilege or right of way, the commissioners may inspect the premises or rest their finding on such testimony as to them may be satisfactory. (Rev., s. 1577; Code, s. 2013; 1874-5, c. 203, s. 9; C. S. 1703.)

Art. 2. Intrastate Telegraph Messages.

§ 56-11. Penalty for nondelivery of intrastate telegraph message.—Any telegraph company doing business in this state that shall fail to transmit and deliver any intrastate message within a reasonable time shall forfeit and pay to any one who may sue for same a penalty of twenty-five dollars. Such penalty shall be in addition to any right of action that any person may have for the recovery of damages. Proof of the sending of any message from one point in this state to another point in this state shall be prima facie evidence that it is an intrastate message. (1919, c. 175; C. S. 1704.)

Editor's Note.—Statutes in other states, similar to this section, have been held highly penal and not capable of being extended by implication to cases which do not come plainly within their terms.

It is generally held that "cipher" messages must be transmitted promptly, but that a regulation requesting that messages delivered for transmission must be in writing is reasonable. However, the sender is not bound by regulations to which he has not consented.

Ordinary Diligence Required.—Telegraph companies are only bound to the exercise of that degree of diligence which a man of ordinary prudence would use under like or similar circumstances. Betts v. Western Union Tel. Co., 167 N. C. 75, 83 S. E. 164; Barnes v. Postal Tel.-Cable Co., 156 N. C. 150, 72 S. E. 78 and cases cited.

Form of Action.—A party entitled to recover damages from a telegraph company for its failure in its duty to transmit and deliver a message may bring his action either in contract or in tort. Penn v. Western Union Tel. Co., 159 N. C. 306, 307, 75 S. E. 16.

Mental Anguish.—Mental anguish caused by the negligent delay or failure to deliver a telegram is allowed in intrastate messages, as an element of damage. Betts v. Western Union Tel. Co., 167 N. C. 75, 83 S. E. 164; Lawrence v. Western Union Tel. Co., 171 N. C. 240, 88 S. E. 226 and cases cited. And formerly mental anguish was allowed in interstate messages. Penn v. Western Union Tel. Co., 159 N. C. 306, 75 S. E. 16. But, by Act of Congress, 18th June, 1910, no recovery is allowed for mental anguish alone in interstate messages whether the negligence occurred in the State or elsewhere. Norris v. Western Union Tel. Co., 174 N. C. 92, 93 S. E. 465.

Sending Message Through Another State Does Not Avoid Liability.—A telegraph company accepting a telegram to be transmitted between points in this State, where a recovery for mental anguish is allowed, may not avoid such liability under the federal decisions by unnecessarily sending the message through another state, when it could have reasonably been otherwise transmitted. Speight v. Western Union Tel. Co., 178 N. C. 146, 100 S. E. 351.

Same—Burden of Proof.—Where a telegraph company has direct available facilities for transmitting an intrastate telegram altogether within the state, and relays it at offices in another state, the burden of proof is upon it to show that it was not done to evade the jurisdiction of the state court. Speight v. Western Union Tel. Co., 178 N. C. 146, 100 S. E. 351.

Validity of Company's Regulation.—A stipulation on the back of the message that in the case of unrepeated messages the sender cannot recover more than $50 is invalid in this state. Young v. Western Union Tel. Co., 168 N. C. 36, 84 S. E. 45; Brown v. Postal Tel. Co., 111 N. C. 187, 16 S. E. 179, citing numerous cases and text books.

Same—Sixty Day Limitation.—The regulations of a telegraph company requiring presentation of claims for damages within sixty days, etc., are valid, and enforceable, Penn v. Western Union Tel. Co., 159 N. C. 306, 75 S. E. 16, since this is not an attempt to restrict the liability of the company for negligence, Sherrill v. Western Union Tel. Co., 109 N. C. 527, 531, 14 S. E. 94.

Chapter 57. Hospital and Medical Service Corporations.

§ 57-1. Regulation and definition; application of other laws; profit and foreign corporations prohibited.—Any corporation heretofore or hereafter organized under the general corporation laws of the state of North Carolina for the purpose of maintaining and operating a non-profit hospital and/or medical service plan whereby hospital care and/or medical service may be provided in whole or in part by said corporation or by hospitals and/or physicians participating in such plan, or plans, shall be governed by this chapter and shall be exempt from all other provisions of the insurance laws of this state, heretofore enacted, unless specifically designated herein, and no laws hereafter enacted shall apply to them unless they be expressly designated therein.

The term "hospital service plan" as used in this chapter includes the contracting for certain fees for, or furnishing of, hospital care, laboratory facilities, X-ray facilities, drugs, appliances, anesthesia, nursing care, operating and obstetrical equipment, accommodations and/or any and all other services authorized or permitted to be furnished by a hospital under the laws of the state of North Carolina and approved by the North Carolina Hospital Association and/or the American Medical Association.

The term "medical service plan" as used in this chapter includes the contracting for the payment of fees toward, or furnishing of, medical, obstetrical, surgical and/or any other professional services authorized or permitted to be furnished by a duly licensed physician.

The term "hospital service corporation" as used in this chapter is intended to mean any non-profit corporation operating a hospital and/or medical service plan, as herein defined. Any corporation heretofore or hereafter organized and coming within the provisions of this chapter, the certificate of incorporation of which authorizes the operation of either a hospital or medical service plan, or both, may, with the approval of the commissioner of insurance, issue subscribers contracts or certificates approved by the commissioner of insurance, for the payment of either hospital or medical fees, or the furnishing of such services, or both, and may enter into contracts with hospitals or physicians, or both, for the furnishing of fees or services respectively under a hospital or medical service plan, or both.

No hospital service corporation within the meaning of this chapter shall be converted into a corporation organized for pecuniary profit. Every such corporation shall be maintained and operated for the benefit of its members and subscribers as a coöperative corporation.

No foreign or alien hospital or medical service corporation as herein defined shall be authorized to do business in this state. (1941, c. 338, s. 1; 1943, c. 537, s. 1.)

Editor's Note.—For comment on this enactment, see 19 N. C. Law Rev. 487.

The '1943 amendment, which made this section applicable to medical service corporations, changed the first, fourth and sixth paragraphs and inserted the second and third paragraphs.

Cited in Cato v. Hospital Care Ass'n, 220 N. C. 479, 17 S. E. (2d) 671.

§ 57-2. Incorporation. — Any number of persons not less than seven, desiring to form a non-profit hospital service corporation, shall incorporate under the provisions of the general laws of the state of North Carolina governing corporations, but subject to the following provisions:

1. The certificate of incorporation of each such corporation shall have endorsed thereon or attached thereto, the consent of the commissioner of insurance, if he shall find the same to be in accordance with the provisions of this chapter.

2. A statement of the services to be rendered by the corporation and the rates currently to be charged therefor which said statement shall be accompanied by two copies of each contract for services which the corporation proposes to make with its subscribers, and two copies of the type of contract which said corporation purposes to make with participating hospitals, shall have been furnished the commissioner of insurance; provided, however, that if the articles of incorporation of

any such corporation within the meaning of this chapter, shall have been filed with the secretary of state prior to the effective date of this chapter, the approval thereof by the commissioner of insurance shall be evidenced by a separate instrument in writing filed with the secretary of state. (1941, c. 338, s. 2.)

Cross Reference.—As to general laws governing incorporation, see chapter 55.

§ 57-3. Hospital and physician contracts.—Any corporation organized under the provisions of this chapter may enter into contracts for the rendering of hospital service to any of its subscribers by hospitals approved by the American Medical Association and/or the North Carolina Hospital Association, and may enter into contracts for the furnishing of, or the payment in whole or in part for, medical services rendered to any of its subscribers by duly licensed physicians. All obligations arising under contracts issued by such corporations to its subscribers shall be satisfied by payments made directly to the hospital or hospitals and/or physicians rendering such service, unless otherwise authorized by the commissioner of insurance. Nothing herein shall be construed to discriminate against hospitals conducted by other schools of medical practice. (1941, c. 338, s. 3; 1943, c. 537, s. 2.)

Editor's Note.—The 1943 amendment added the provisions relating to contracts with physicians.

§ 57-4. Supervision of commissioner of insurance; form of contract with subscribers; schedule of rates.—No hospital service corporation shall enter into any contract with subscribers unless and until it shall have filed with the commissioner of insurance a specimen copy of the contract or certificate and of all applications, riders, and endorsements for use in connection with the issuance or renewal thereof to be formally approved by him as conforming to the section of this chapter entitled "Subscribers Contracts," and conforms to all rules and regulations promulgated by the commissioner of insurance under the provisions of this chapter. The commissioner of insurance shall, within a reasonable time after the filing of any such form, notify the corporation filing the same either of his approval or of his disapproval of such form.

No corporation subject to the provisions of this chapter shall enter into any contract with a subscriber after the enactment hereof unless and until it shall have filed with the commissioner of insurance a full schedule of rates to be paid by the subscribers to such contracts and shall have obtained the commissioner's approval thereof. The commissioner may refuse approval if he finds that such rates are excessive, inadequate or discriminatory or if he finds the form of subscriber's contract is unfair or discriminatory. At all times such rates and form of subscriber's contract shall be subject to modification and approval of the commissioner of insurance under rules and regulations adopted by the commissioner, in conformity to this chapter. (1941, c. 338, s. 4.)

§ 57-5. Application for certificate of authority or license.—No corporation subject to the provisions of this chapter shall issue contracts for the rendering of hospital or medical service to subscribers, until the commissioner of insurance has, by formal certificate or license, authorized it to do so. Application for such certificate of authority or license, shall be made on forms to be supplied by the commissioner of insurance, containing such information as he shall deem necessary. Each application for such certificate of authority or license, as a part thereof shall be accompanied by duplicate copies of the following documents duly certified by at least two of the executive officers of such corporation:

(a) Certificate of incorporation with all amendments thereto.

(b) By-laws with all amendments thereto.

(c) Each contract executed or proposed to be executed by and between the corporation and any participating hospital, and/or physicians under the terms of which hospital and/or medical service is to be furnished to subscribers to the plan.

(d) Each form of contract, application, rider, and endorsement, issued or proposed to be issued to subscribers to the plan, or in renewal of any of contracts with subscribers to the plan, together with a table of rates charged or proposed to be charged to subscribers for each form of such contract.

(e) Financial statement of the corporation which shall include the amounts of each contribution paid or agreed to be paid to the corporation for working capital, the name or names of each contributor and the terms of each contribution. (1941, c. 338, s. 5; 1943, c. 537, s. 3.)

Editor's Note.—The 1943 amendment inserted the words "or medical" in line three. And it inserted in subsection (c) the words "and/or physicians," also the words "and/or medical."

§ 57-6. Issuance of certificate. — Before issuing any such license or certificate the commissioner of insurance may make such an examination or investigation as he deems expedient. The commissioner of insurance shall issue a certificate of authority or license upon the payment of an annual fee of one hundred dollars ($100.00) and upon being satisfied on the following points:

(a) The applicant is established as a bona fide non-profit hospital service corporation.

(b) The rates charged and benefits to be provided are fair and reasonable.

(c) The amounts provided as working capital of the corporation are repayable only out of earned income in excess of amounts paid and payable for operating expenses and hospital and medical expenses and such reserve as the department of insurance deems adequate, as provided hereinafter.

(d) That the amount of money actually available for working capital be sufficient to carry all acquisition costs and operating expenses for a reasonable period of time from the date of the issuance of the certificate. (1941, c. 338, s. 6; 1943, c. 537, s. 4.)

Editor's Note.—The 1943 amendment inserted the words "and medical" in line four of subsection (c).

§ 57-7. Subscriber contracts; required and prohibited provisions.—1. Every contract made by a corporation subject to the provisions of the chapter shall be for a period not to exceed twelve months, and no contract shall be made providing for the inception of benefits at a date later than

one year from the date of the contract. Any such contract may provide that it shall be automatically renewed for a similar period unless there shall have been one month's prior written notice of termination by either the subscriber or the corporation.

2. No contract between any such corporation and a subscriber, shall entitle more than one person to benefits except that a contract issued and marked as a "family contract" may provide that benefits will be furnished to a husband and wife, or husband, wife and their child or children not over eighteen years of age.

3. Every contract entered into by any such corporation with any subscriber thereto shall be in writing and a certificate stating the terms and conditions thereof shall be furnished to the subscriber to be kept by him. No such certificate form shall be made, issued or delivered in this state unless it contains the following provisions:

(a) A statement of the amount payable to the corporation by the subscriber and the times at which and manner in which such amount is to be paid; this provision may be inserted in the application rather than in the certificate. Application need not be attached to certificate.

(b) A statement of the nature of the benefits to be furnished and the period during which they will be furnished.

(c) A statement of the terms and conditions, if any, upon which the contract may be cancelled or otherwise terminated at the option of either party.

(d) A statement that the contract includes the endorsements thereon and attached papers, if any, and together with the application contains the entire contract.

(e) A statement that if the subscriber defaults in making any payment, under the contract, the subsequent acceptance of a payment by the corporation at its home office shall reinstate the contract, but with respect to sickness and injury, only to cover such sickness as may be first manifested more than ten days after the date of such acceptance.

4. In every such contract made, issued or delivered in this state:

(a) All printed portions shall be plainly printed;

(b) The exceptions from the contract shall appear with the same prominence as the benefits to which they apply; and

(c) If the contract contains any provision purporting to make any portion of the articles, constitution or by-laws of the corporation a part of the contract, such portion shall be set forth in full.

5. A hospital service corporation may issue a master group contract with the approval of the commissioner of insurance provided such contract and the individual certificates issued to members of the group, shall comply in substance to the other provisions of this chapter. Any such contract may provide for the adjustment of the rate of the premium or benefits conferred with the approval of the commissioner of insurance, based upon the experience thereunder at the end of the first year or any subsequent year of insurance thereunder and such readjustment may be made retroactive only for such policy year. If such master group contract is issued, altered or modified, the subscribers' contracts issued in pursuance thereof are altered or modified accordingly, all laws and clauses in subscribers' contracts to the contrary notwithstanding. Nothing in the chapter shall be construed to prohibit or prevent the same. Forms of such contract shall at all times be furnished upon request of subscribers thereto. (1941, c. 338, s. 7.)

§ 57-8. Investments and reserves. — No hospital service corporation shall invest in any securities other than securities permitted by the laws of this state for the investment of assets of life insurance companies, banks, trust companies, executors, administrators and guardians.

Every such corporation after the first full year of doing business after the passage of this chapter shall accumulate and maintain, in addition to proper reserves for current administrative liabilities and whatever reserves are deemed adequate and proper by the commissioner of insurance for unpaid hospital and/or medical bills, and unearned membership dues, a special contingent surplus or reserve at the following rates annually of its gross annual collections from membership dues, exclusive of receipts from cost plus plans, until said reserve shall equal three times its average monthly expenditures for hospital and/or medical claims and administrative and selling expenses.

1. 1st $200,000.00 .....4%
2. Next $200,000.00 .....2%
3. All above $400,000.00 ....1%

Any such corporation may accumulate and maintain a contingent reserve in excess of the reserve hereinabove provided for, not to exceed an amount equal to three times the average monthly expenditures for hospital and/or medical claims and administrative and selling expenses.

In the event the commissioner of insurance finds that special conditions exist warranting an increase or decrease in the reserves or schedule of reserves, hereinabove provided for, it may be modified by the commissioner of insurance accordingly, provided however, when special conditions exist warranting an increase in said schedule of reserves, said schedule shall not be increased by the commissioner of insurance until a reasonable length of time shall have elapsed after notice of such increase. (1941, c. 338, s. 8; 1943, c. 537, s. 5.)

Cross References.—As to investments by banks, see §§ 53-44, 53-45 and 53-60. As to investments by executors, administrators and guardians, see §§ 36-1 to 36-5.

Editor's Note.—The 1943 amendment inserted the words "and/or medical" in the second and third paragraphs.

§ 57-9. Reports filed with commissioner of insurance.—Every such corporation shall annually on or before the first day of March of each year, file in the office of the commissioner of insurance a sworn statement verified by at least two of the principal officers of the said corporation showing its condition on the thirty-first day of December, then next preceding; which shall be in such form and shall contain such matter as the commissioner of insurance shall prescribe. In case any such corporation shall fail to file any such annual statement as herein required, the said commissioner of insurance shall be authorized and empowered to suspend the certificate of authority issued to such

corporation until such statement shall be properly filed. (1941, c. 338, s. 9.)

§ 57-10. Visitations and examinations. — The commissioner of insurance or any deputy or examiner or other person whom he may appoint, shall have the power of visitations and examination into the affairs of any such corporation and free access to all the books, papers and documents that relate to the business of the corporation, and may summon and qualify witnesses under oath to examine its officers, agents, or employees or other persons in relation to the affairs, transactions and conditions of the corporation, the actual expense of which shall be paid by the association so examined. (1941, c. 338, s. 10.)

§ 57-11. Expenses. — All acquisition expenses in connection with the solicitation of subscribers to such hospital and/or medical service plan and administration costs including salaries paid to officers of the corporations, if any, shall at all times be subject to inspection by the commissioner of insurance. (1941, c. 338, s. 11; 1943, c. 537, s. 6.)

Editor's Note.—The 1943 amendment inserted the words "and/or medical" in line three.

§ 57-12. Licensing of agents. — Every agent of any hospital service corporation authorized to do business in this state under the provisions of this chapter shall be required to obtain annually from the commissioner of insurance a license under the seal of his office showing that the company for which he is agent is licensed to do business in this state and that he is an agent of such company and duly authorized to do business for it. And every such agent, on demand, shall exhibit his license to any officer or to any person from whom he shall solicit hospital service. For said license, each agent shall annually pay the sum of one ($1.00) dollar. Before a license is issued to an agent, hereunder, the agent and the company for which he desires to act, shall apply for the license on forms to be prescribed by the commissioner of insurance, and before he issues a license to such agent, the commissioner of insurance shall satisfy himself by examination, or otherwise, that the person applying for a license as an agent is a person of good moral character, that he intends to hold himself out in good faith as a hospital and/or medical service agent and has sufficient knowledge of the business proposed to be done; that he has not wilfully violated any of the insurance laws of the state, and that he is a proper person for such position, and that such license, if issued, shall serve the public's interest. For said examination applicant shall pay the sum of ten ($10.00) dollars: Provided, that where an applicant has already paid the ten ($10.00) dollar examination fee prescribed in sub-section three of section 105-121, such applicant shall not be required to pay an additional examination fee. All agents operating as such for corporation subject to the provisions of this chapter on the date of its ratification are deemed qualified to act as such without the examination herein provided for. Licenses issued hereunder shall be subject to revocation by the commissioner of insurance for cause and if any person shall assume to act as an agent or broker without obtaining the license herein provided for, or makes any false statements or representations concerning the said hospital and/or medical service, knowingly or wilfully, he shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred ($100.00) dollars nor more than five hundred ($500.00) dollars for each offense. (1941, c. 338, s. 12; 1943, c. 537, s. 7.)

Editor's Note.—The 1943 amendment inserted in the fourth sentence the words "or otherwise," and also the words "and/or medical." It added the proviso to the fifth sentence, and inserted in the last sentence the words "and/or medical."

§ 57-13. Revocation of certificate of authority; dissolution.—Whenever the commissioner of insurance shall find as a fact that any corporation subject to the provisions of this chapter, is being operated for profit or fraudulently conducted, or is not complying with the provisions of this chapter, he shall be authorized to revoke the certificate of authority or license theretofore granted and may at any time thereafter institute or cause to be instituted the necessary proceedings under the laws of this state looking to the dissolution of such corporation, and any dissolution, liquidation, merger, or reorganization of a corporation or corporations subject to the provisions of this chapter shall be under the supervision of the commissioner of insurance who shall have all powers with respect thereto granted to him under the insurance laws of this state. If, at any time, a corporation organized under the provisions of this chapter is financially unable to comply with the provisions of this chapter or to comply with any of the provisions of any of the hospital contracts or subscribers' contracts issued by said corporation in pursuance of this chapter, the commissioner of insurance shall have the right without court action, to transfer all its assets, liabilities, and obligations, to any other corporation, whether organized under the provisions of this chapter, or not, under such contract of reinsurance with such transferee corporation, that he deems to the best interests of the corporation, its members and creditors whose assets, obligations and liabilities, are transferred. This action on the part of the commissioner of insurance is without prejudice to the rights of the corporations whose assets, liabilities and obligations are so transferred, to institute other and proper legal remedies, and to question the action so taken by the commissioner of insurance as herein provided, provided, however, that the action taken by the commissioner of insurance herein shall not be affected pending a final determination by the court with reference thereto. (1941, c. 338, s. 13; 1943, c. 537, s. 8.)

Editor's Note.—The word "affected" in the next to the last line of this section erroneously appeared as "effected" in the 1941 act. The proper correction was made in codifying the act and subsequently the 1943 act also made the correction.

§ 57-14. Taxation. — Every corporation subject to the provisions of this chapter is hereby declared to be a charitable and benevolent corporation and all of its funds and property shall be exempt from every state, county, district, municipal and school tax or assessment, and all other taxes

and license fees, from the payment of which charitable and/or benevolent institutions are now or shall be hereafter exempt. For the purpose of raising revenues sufficient to defray the expenses of the administration of this chapter, and in lieu of all other taxes an annual franchise or privilege tax is hereby levied upon every corporation subject to the provisions of this chapter at the rate of one-third of one per cent of the gross annual collections from membership dues exclusive of receipts from cost plus plans. The general assembly of North Carolina does hereby appropriate the sum of four thousand dollars ($4,000.00) annually from its general funds to be paid over to the department of insurance of this state for its use in the discharge of the duties by this chapter imposed upon the commissioner of insurance of this state. (1941, c. 338, s. 14.)

Editor's Note.—For comment on this provision, see 19 N. C. L. Rev. 518.

§ 57-15. Amendments to certificate of incorporation.—Every such corporation subject to the provisions of this chapter shall, prior to any amendments of its certificate of incorporation, file with the commissioner of insurance, two copies of the proposed amendment. Every amendment to a certificate of incorporation of any corporation subject to the provisions of this chapter, shall have annexed thereto the approval of the commissioner of insurance before the same shall be filed with the secretary of state. (1941, c. 338, s. 15.)

Cross Reference.—As to amendments generally, see § 55-31.

§ 57-16. Cost plus plans. — Any corporation organized under the provisions of this chapter shall be authorized as agent of any other corporations, firm, group, partnership, or association, doing business in this state, to administer on behalf of such corporation, firm, group, partnership, or association, doing business in this state, any employee group hospitilization or medical service plan, promulgated by such corporation, firm, group, partnership, or association, on a cost plus administrative expense basis, provided only that administrative costs of such a cost plus plan administered by a corporation organized under the provisions of this chapter, acting as an agent as herein provided, shall not exceed the remuneration received therefor, and provided further that the corporation organized under this chapter administering such a plan shall have no liability to the subscribers or to the hospitals for the success or failure, liquidation or dissolution of such group hospitalization or medical service plan and provided further, that nothing herein contained shall be construed to require of said corporation, firm, group, partnership, or association, conformity to the provisions of this chapter if such employee group hospitalization is administered by a corporation organized under this chapter, on a cost plus expense basis. The administration of any cost plus plans as herein provided, shall not be subject to regulation or supervision by the commissioner of insurance. (1941, c. 338, s. 16; 1943, c. 537, s. 9.)

Editor's Note.—The 1943 amendment inserted in line twenty-one the words "or medical service plan."

§ 57-17. Pre-existing hospital service corporations.—No corporations organized under the laws of this state prior to the ratification of this chapter, for the purposes herein provided, shall be required to reincorporate as provided for herein, and the provisions of this chapter shall apply to said corporations only with regard to operations by said corporations with respect to subscribers' contracts, participating hospital contracts, reserves, investments, reports, visitations, expenses, taxation, amendments to charters, supervision of commissioner of insurance, application for certificate, issuance of certificates, licensing of agents after the date of the passage of this chapter, provided, however, as soon as practical hereafter and in accordance with rules and regulations adopted by the commissioner of insurance said corporations shall conform to this chapter as near as practical with respect to subscribers' contracts, endorsements, riders, and applications entered into prior to the ratification of this chapter. (1941, c. 338, s. 17.)

§ 57-18. Construction of chapter as to single employer plans; associations exempt.—Nothing in this chapter shall be construed to affect or apply to hospital or medical service plans which limit their membership to employees and the immediate members of the families of the employees of a single employer and which plans are operated by such employer or such limited group of the employees; nor shall this chapter be construed to affect or apply to any non-stock, non-profit medical service association which was, on January first, one thousand nine hundred and forty-three, organized solely for the purpose of, and actually engaged in, the administration of any medical service plan in this state upon contracts and participating agreements with physicians, surgeons, or medical societies, whereby such physicians or surgeons underwrite such plan by contributing their services to members of such association upon agreement with such association as to the schedule of fees to apply and the rate and method of payment by the association from the common fund paid in periodically by the members for medical, surgical and obstetrical care; and such hospital service plans, and such medical service associations as are herein specifically described, are hereby exempt from the provisions of this chapter. The commissioner of insurance may require from any such hospital service plan or medical service association such information as will enable him to determine whether such hospital service plan or medical service association is exempt from the provisions of this chapter. (1941, c. 338, s. 18; 1943, c. 537, s. 10.)

Editor's Note.—The 1943 amendment extended the exemption to the specified medical service plans and medical service associations.

Chapter 58. Insurance.

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SUBCHAPTER I. INSURANCE DEPARTMENT.

Art. 1. Title and Definitions.

§ 58-1. Title of the chapter.—This chapter may be cited and shall be known as the Insurance Law. (Rev., s. 4677; 1899, c. 54; C. S. 6260.)

Purpose of Chapter. — Our statute-law makes elaborate and minute provisions for the protection of its people from imposition under the guise of insurance, and our insurance department is created and charged with the special duty of seeing that these provisions are complied with. State v. Arlington, 157 N. C. 640, 73 S. E. 122.

§ 58-2. Terms defined.—When consistent with the context and not obviously used in a different sense, the term "company" or "insurance company," as used in this chapter, includes all corporations, associations, partnerships, or individuals engaged as principals in the business of insurance; the word "domestic" designates those companies incorporated or formed, and with home office, in this state; and the word "foreign," when used without limitation, includes all those formed by authority of any other state or government, and whose home office is not located in this state. (Rev., s. 4678; 1899, c. 54, s. 1; C. S. 6261.)

Insurances Contemplated. — The insurance law clearly contemplates both incorporated and unincorporated companies. State v. Arlington, 157 N. C. 640, 73 S. E. 122.

§ 58-3. Contract of insurance.—A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity for, the destruction, loss, or injury of something in which the other party has an interest. (Rev., s. 4679; 1899, c. 54, s. 2; C. S. 6262.)

Cited in Charleston, etc., Ry. Co. v. Lassiter & Co., 207 N. C. 408, 413, 177 S. E. 9.

Art. 2. Commissioner of Insurance.

§ 58-4. Department established. — The insurance department is hereby established as a separate and distinct department, which is charged with the execution of laws relating to insurance and other subjects placed under the department. (Rev., s. 4680; 1899, c. 54, s. 3; 1901, c. 391, s. 1; C. S. 6263.)

Cited in O'Neal v. Wake County, 196 N. C. 184, 189, 145 S. E. 28.

§ 58-5. Commissioner's election and term of office.—The chief officer of the insurance department shall be called the commissioner of insurance; whenever in the statutes of this state the words "insurance commissioner" appear, they shall be deemed to refer to and to be synonymous with the term "commissioner of insurance." He shall be elected by the people in the manner prescribed for the election of members of the general assembly and state officers, and the result of the election shall be declared in the same manner and at the same time as the election of state officers is now declared. His term of office begins on the first day of January next after his election, and is for four years or until his successor is elected and qualified. If a vacancy occurs during the term, it shall be filled by the governor for the unexpired term. (Rev., ss. 4680, 4681; 1907, c. 868; 1943, c. 170; C. S. 6264.)

Cross References.—As to commissioner taking oath and being inducted into office, see § 147-4. As to oaths prescribed for public officers, see §§ 11-6, 11-7, 11-11, Const. Art. VI, s. 7. As to penalty for failure, see § 128-5.

Editor's Note.—The 1943 amendments substituted "commissioner of insurance" for "insurance commissioner" in the first sentence, and added the part of the sentence appearing after the semi-colon. By virtue of this amendatory act the words "insurance commissioner" wherever appearing in this chapter have been changed to "commissioner of insurance."

§ 58-6. Salary of commissioner.—The salary of the commissioner of insurance shall be six thousand dollars a year, payable monthly. (Rev., s. 2756; 1899, c. 54, ss. 3, 8; 1901, c. 710; 1903, c. 42; 1903, c. 771, s. 3; 1907, c. 830, s. 10; 1907, c. 994; 1909, c. 839; 1913, c. 194; 1915, cc. 158, 171; 1917, c. 70; 1919, c. 247, s. 4; 1921, c. 25, s. 1; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 342, C. S. 3874.)

§ 58-7. Bond of commissioner.—The commissioner of insurance, before he enters upon the execution of his official duties, must give a bond to the state in the sum of twenty-five thousand dollars, with sufficient surety, to be approved by the state treasurer, conditioned upon the faithful performance of the duties of his office during his term of office; this bond extends to the faithful execution of the office of commissioner of insurance by the person elected or appointed thereto until a new election or appointment of commissioner of insurance is made and a new bond given. (Rev., s. 293; 1899, c. 54, s. 55; 1905, c. 430, s. 2; C. S. 6265.)

§ 58-8. Seal of department.—The commissioner of insurance, with the approval of the governor, shall devise a seal, with suitable inscription, for his office, a description of which, with the certificate of approval by the governor, shall be filed in the office of the secretary of state, with an impression thereof, which seal shall thereupon become the seal of office of the commissioner of the insurance department. The seal may be renewed whenever necessary. (Rev., s. 4682; 1899, c. 54, s. 11; C. S. 6266.)

§ 58-9. Duties of commissioner.—The commissioner of insurance shall:

(1) See that all laws relating to the companies, associations, and orders under the insurance department are faithfully executed.

(2) Furnish to each of the companies incorporated by this state and to the attorneys or general agents of companies and associations incorporated by other states and foreign governments, doing business in this state, printed forms for all statements required by law.

(3) Perform all duties now imposed upon him by law in regard to the examination, supervision, and conduct of companies and associations and orders.

(4) Upon a proper application by any citizen of this state, give a statement or synopsis of the provisions of any insurance contract offered or issued to such citizen.

He may administer the oaths in the discharge of his official duty. (Rev., s. 4689; 1899, c. 54, s. 8; 1905, c. 430, s. 3; C. S. 6269.)

Cross References.—As to control of insurance commissioner over building and loan associations, see §§ 54-24 to 54-33. As to duties with regard to Fireman's Relief Fund, see § 118-1 et seq. As to certain duties with regard to fire inspection and prevention, see §§ 69-1 to 69-7. As to approval for merger of building and loan or insurance corporation, see § 53-15.

§ 58-10. Commissioner to provide books; make inspection; compensation.—The commissioner of insurance shall provide all books and blanks of every kind required to carry out the provisions of the law for inspection of buildings in towns and cities, and he or his deputy shall make inspections of the cities and towns of the state. Whenever the commissioner has reason to believe that the local inspectors are not doing their duty he or his deputy shall make special trips of inspection and take proper steps to have all the provisions of law relative to the investigation of fires and the prevention of fire waste enforced. (Rev., s. 4690; 1905, c. 506, s. 6; 1925, c. 89; C. S. 6270.)

§ 58-11. Reports and records kept for public inspection.—The commissioner of insurance shall keep on file in his office, for the inspection of the public, all the reports received by him in obedience to law. He shall keep and preserve in a permanent form a record of his proceedings, including a concise statement of the result of all official examinations of companies, a report of the condition of receiverships of insolvent companies, an exhibit of the financial condition and business methods as disclosed by the official examinations of the same, or by their several statements; and such other information and comments in relation to insurance and the public interest therein as he deems fit and proper to preserve. He shall keep the records of fires and matters connected therewith as required by § 69-1 of the chapter on Fire Protection, a record of the policies insuring property of the state, as required by § 58-189 of this chapter, and a record of the proceedings attending the service of process on him as agent for a foreign insurance company, as required by § 58-154. (Rev., s. 4683; 1899, c. 54, ss. 9, 77; 1907, c. 1000, s. 1; C. S. 6271.)

§ 58-12. Original documents and certified copies as evidence.—Every certificate, assignment, or conveyance executed by the commissioner, in pursuance of any authority conferred on him by law and sealed with his seal of office, may be used as evidence and may be recorded in the proper recording offices, in the same manner and with like effect as a deed regularly acknowledged or proved before an officer authorized by law to take the probate of deeds; and all copies of papers in the office of the commissioner, certified by him and authenticated by his official seal, shall be evidence as the original. (Rev., s. 4684; 1899, c. 54, s. 11; C. S. 6272.)

§ 58-13. Admissibility as evidence of agent's authority.—In any case or controversy arising in any court of original jurisdiction within this state wherein it is necessary to establish the question as to whether any insurance or other corporation or agent thereof is or has been licensed by the state insurance department to do business in this state, the certificate of the commissioner of insurance under the seal of his office shall be admissible in evidence as proof of such corporation or agent's authority as conferred by the state insurance department. (1929, c. 289, s. 1.)

§ 58-14. Reports of commissioner to the governor and general assembly.—The commissioner

shall biennially submit to the general assembly, through the governor, a report of his official acts. The commissioner shall, from time to time, report to the general assembly any change which in his opinion should be made in the laws relating to insurance and other subjects pertaining to his department. On or before the first day of February of each year in which the general assembly is in session he shall make to the governor the recommendations called for in this section, to be transmitted to the general assembly, with the last annual report of this department, including receipts and disbursements. (Rev., ss. 4687, 4688; 1899, c. 54, ss. 6, 7, 10; 1901, c. 391, s. 2; 1911, c. 211, s. 2; 1927, c. 217, s. 5; C. S. 6273.)

Editor's Note.—Before the amendment of 1927 the commissioners by this section were required to submit annually to the governor a report of their official acts, etc.

§ 58-15. Authority over all insurance companies; no exemptions from license.—Every insurance company, association or order, as well as every bond, investment, dividend, guarantee, registry, title guarantee, debenture, or such other like company (not strictly an insurance company, as defined in the general insurance laws), must be licensed and supervised by the commissioner of insurance, and must pay all licenses, taxes, and fees as prescribed in the insurance laws of the state for the class of company, association, or order to which it belongs. No provision in any statute, public or private, may relieve any company, association, or order from the supervision prescribed for the class of companies, associations, or orders of like character, or release it from the payment of the licenses, taxes, and fees prescribed for companies, associations, and orders of the same class; and all such special provisions or exemptions are hereby repealed. It is unlawful for the commissioner of insurance to grant or issue a license to any company, association, or order, or agent for them, claiming such exemption from supervision by his department and release for the payment of license, fees, and taxes. (Rev., s. 4691; 1903, c. 594, ss. 1, 2, 3; C. S. 6274.)

A fraternal insurance order incorporated under the laws of another state, but with branch offices in this state, comes within the meaning of this section and must be licensed and supervised by the insurance commissioner. State v. Arlington, 157 N. C. 640, 73 S. E. 122.

Cited in Fuller v. Lockhart, 209 N. C. 61, 182 S. E. 733.

§ 58-16. Examinations to be made. — Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance the commissioner shall be satisfied, by such examination and evidence as he sees fit to make and require, that the company is otherwise duly qualified under the laws of the state to transact business therein. As often as once in three years he shall personally or by his deputy visit each domestic insurance company and thoroughly inspect and examine its affairs, especially as to its financial condition and ability to fulfill its obligations and whether it has complied with the laws. He shall also make an examination of any such company whenever he deems it prudent to do so, or upon the request of five or more of the stockholders, creditors, policyholders, or persons pecuniarily interested therein, who shall make affidavit of their belief, with specifications of their reasons therefor, that the company is in an unsound condition. Whenever the commissioner deems it prudent for the protection of policyholders in this state he shall in like manner visit and examine, or cause to be visited and examined by some competent person appointed by him for that purpose, any foreign insurance company applying for admission or already admitted to do business in this state, and such company shall pay the proper charges incurred in this examination, including the expenses of the commissioner or his deputy and the expenses and compensation of his assistants employed therein. For these purposes the commissioner or his deputy or persons making the examination shall have free access to all the books and papers of the insurance company that relate to its business, and to the books and papers kept by any of its agents, and may summon, administer oaths to, and examine as witnesses, the directors, officers, agents, and trustees of any such company, and any other person, in relation to its affairs, transactions, and condition. (Rev., s. 4692; 1899, c. 54, s. 13; C. S. 6275.)

§ 58-17. Oath required for compliance with law.—Before issuing license to any insurance company to transact the business of insurance in this state, the commissioner of insurance shall require, in every case, in addition to the other requirements provided for by law, that the company file with him the affidavit of its president or other chief officer that it has not violated any of the provisions of this chapter for the space of twelve months last past, and that it accepts the terms and obligations of this chapter as a part of the consideration of the license. (Rev., s. 4693; 1899, c. 54, s. 110; 1901, c. 391, s. 8; C. S. 6276.)

§ 58-18. Investigation of charges.—Upon complaint being filed by a citizen of this state that a company authorized to do business in the state has violated any of the provisions of this chapter, the commissioner of insurance shall diligently investigate the matter, and, if necessary, examine, under oath, by himself or his accredited representatives, at the head office located in the United States, the president and such other officer or agents of such companies as may be deemed proper; also all books, records, and papers of the same. He or his deputies shall have power to summon witnesses, and to compel them to appear before him, or either of them, and to testify under oath in relation to any matter which is, by the provisions of this law, a subject of inquiry and investigation, and may require the production of any book, paper, document, or other matter whatsoever deemed pertinent or necessary to such inquiry with the same force and effect as is possessed by courts of record in this state. (Rev., s. 4694; 1899, c. 54, s. 111; 1903, c. 438, s. 11; 1921, c. 136, s. 4; 1925, c. 275, s. 6; C. S. 6277.)

Cross Reference.—As to penalties for using funds of insurance companies for political purposes, see § 163-206.

Editor's Note.—Prior to the amendment of 1921 this section provided that a bond to secure expense or cost could be required by the commissioner from the complaining party. By the amendment of 1921, $5000 was appropriated to carry out this section. By the amendment of 1925 the provisions for a bond and for an appropriation were omitted.

§ 58-19. Collection of expenses of examination.—If any company, authorized to do business in

this state under this chapter, fails or refuses to pay the expenses of examination upon the presentation of a bill therefor by the commissioner of insurance, the commissioner shall at once institute appropriate action against the company for the recovery of the same. (Rev., s. 4695; 1899, c. 54, s. 113; C. S. 6278.)

§ 58-20. Commissioner to prescribe forms and furnish blanks for returns.—The commissioner of insurance shall furnish blank forms for statements in order to secure full information as to the standing, condition, and other information desired of companies under his department. These forms shall contain such questions and be in such form as the commissioner may prescribe. (Rev., s. 4708; 1899, c. 54, s. 104; C. S. 6279.)

§ 58-21. Annual statements to be filed with commissioner.—Every insurance company, association, or order—domestic, through its officers, and foreign, through its general agent—shall file in the office of the commissioner of insurance, on or before the first day of March in each year, in form and detail as the commissioner of insurance prescribes, a statement showing the business standing and financial condition of such company, association, or order on the preceding thirty-first day of December, signed and sworn to by the chief managing agent or officer thereof, before the commissioner of insurance or some officer authorized by law to administer oaths. The commissioner of insurance shall, in December of each year, furnish to each of the insurance companies authorized to do business in the state two or more blanks adapted for their annual statements. (Rev., s. 4698; 1899, c. 54, ss. 72, 73, 83, 90, 97; 1901, c. 706, s. 2; 1903, c. 438, s. 9; C. S. 6280.)

§ 58-22. Punishment for making false statement.—If any insurance company in its annual or other statement required by law shall wilfully misstate the facts, the insurance company and the person making oath to or subscribing the same shall severally be punished by a fine of not less than five hundred nor more than one thousand dollars. (Rev., s. 3493; 1899, c. 54, s. 97; C. S. 6281.)

§ 58-23. Commissioner to examine statements and publish abstracts.—It is the duty of the commissioner of insurance to receive and thoroughly examine each annual statement required by this chapter, and, if made in compliance with the laws of this state, to publish, at the expense of the company, an abstract of the same in one of the newspapers of the state, which newspaper may be selected by the general agent making the statement, if within thirty days after the filing of the statement he notifies the commissioner of insurance, in writing, of the name of the paper selected by him. (Rev., s. 4699; 1899, c. 54, s. 74; 1901, c. 391, s. 6; C. S. 6282.)

§ 58-24. Commissioner to file reports of companies; copy to superior court clerk; certified list of licenses.—The commissioner of insurance shall keep on file in his office, for the inspection of the public, all the reports received by him in obedience to this chapter, and shall certify to the clerk of the superior court of each county an abstract of each annual statement at the expense of the company making the same, and receive therefor from each company the sum of four dollars: Provided, the commissioner of insurance may, in lieu of said abstract, file with the clerks of the courts a copy of the advance sheets of his report or the full report, or both; and he shall also certify, at like expense, to such clerks, on the first day of May of each year, a list of the licenses in force at such dates and those that have expired without renewal or that have been revoked, and each clerk shall file such certified abstracts and lists in stub books, to be kept for that purpose, furnished by the commissioner of insurance, which books shall be open for the inspection of the public. There shall be no tax for any seal on the certificates required by this section. (Rev., s. 4700; 1899, c. 54, s. 77; 1901, c. 391, s. 6; 1903, c. 438, s. 7; 1915, c. 166, s. 9; 1931, c. 74; C. S. 6283.)

Editor's Note.—The Act of 1931 struck out the words "each alternate month" formerly appearing in lines fourteen and fifteen of this section and inserted in lieu thereof "May each year."

§ 58-25. Record of business kept by companies and agents; commissioner may inspect.—All companies, agents, or brokers doing any kind of insurance business in this state must make and keep a full and correct record of the business done by them, showing the number, date, term, amount insured, premiums, and the persons to whom issued, of every policy or certificate or renewal. Information from these records must be furnished to the commissioner of insurance on demand, and the original books of records shall be open to the inspection of the commissioner, his deputy or clerk, when demanded. (Rev., s. 4696; 1899, c. 54, s. 108; 1903, c. 438, s. 11; C. S. 6284.)

§ 58-26. Commissioner may employ actuary or accountant.—It is the duty of the commissioner of insurance, when in his judgment it is necessary in order that he may be fully advised as to the exact financial condition of any insurance company and the manner in which its business has been or is being conducted, to employ an independent actuary to make a technical calculation of the business and policies of the company, or a skilled accountant to examine and check up the books of the company, and the services shall be paid for as other bills against the state, out of the treasury, where payment is not otherwise provided for. (1907, c. 1000, s. 2; C. S. 6285.)

§ 58-27. Books and papers required to be exhibited.—It is the duty of any person having in his possession or control any books, accounts, or papers of any company, order, or person licensed under this chapter, to exhibit the same to the commissioner of insurance or to any deputy, actuary, accountant, or persons acting with or for the commissioner of insurance. Any person who shall refuse, on demand, to exhibit the books, accounts, or papers, as above provided, or who shall knowingly or wilfully make any false statement in regard to the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (Rev., ss. 3494, 4697; 1899, c. 54, s. 76; 1907, c. 1000, s. 3; C. S. 6286.)

Art. 3. General Regulations for Insurance.

§ 58-28. State law governs insurance contracts.—All contracts of insurance on property, lives, or interests in this state shall be deemed to be made therein; and all contracts of insurance the applications for which are taken within the state shall be deemed to have been made within this state and are subject to the laws thereof. (Rev., s. 4806; 1899, c. 54, s. 2; 1901, c. 705, s. 1; C. S. 6287.)

Editor's Note.—See 13 N. C. Law Rev. 213, for note on "Validity of Statutes Localizing Insurance Contracts." See also page 41 for the law of contracts in general.

General Consideration. — The section is constitutional. Williams v. Life Ass'n, 145 N. C. 128, 28 S. E. 802. It did not have a retroactive effect. Id.

Application Taken out of State.—When neither party was a resident of the state at the time of the contract of insurance and the application was taken out of the state the rule of lex loci contractu will apply. Keesler v. Mutual Ben. Life Ins. Co., 177 N. C. 394, 99 S. E. 97.

Place Determined by Application. — Policies of insurance issued by foreign companies, the applications for which are taken in this State, are to be construed in accordance with the laws of this State. Horton v. Life Ins. Co., 122 N. C. 498, 29 S. E. 944. True although the insurance company may under its charter be allowed privileges which are contrary to statutes of this state. Wilson v. Supreme Conclave, 174 N. C. 628, 94 S. E. 443. See Cordell v. Brotherhood of Locomotive Firemen, etc., 208 N. C. 632, 182 S. E. 141.

A contract of insurance based upon the application of insured made while residing in this state, must be construed in accordance with the laws of this state rather than the laws in force at the time of the inception of the contract in the state in which insurer is incorporated. Pace v. New York Life Ins. Co., 219 N. C. 451, 14 S. E. (2d) 411.

Effect of Stipulation Making Policy a Foreign Contract.—A provision in a contract of insurance that, "This contract shall be governed by, subject to, and construed only according to the laws of the State of New York, the home office of said association," is void in so far as the courts of this State are concerned. Blackwell v. Life Ass'n, 141 N. C. 117, 53 S. E. 833. See Cordell v. Brotherhood of Locomotive Firemen, etc., 208 N. C. 632, 182 S. E. 141.

Laws in Force Become Part of Insurance Contract. — Laws in force at the time of executing a policy of insurance are binding on the insurer and become a part of the insurance contract. Fuller v. Lockhart, 209 N. C. 61, 182 S. E. 733.

Applied in Fountain v. Mutual Life Ins. Co., 55 F. (2d) 120; Wells v. Jefferson Standard Life Ins. Co., 211 N. C. 427, 190 S. E. 744; Petty v. Pacific Mut. Life Ins. Co., 212 N. C. 157, 193 S. E. 228.

§ 58-29. No insurance contracts except under this chapter.—It is unlawful for any company to make any contract of insurance upon or concerning any property or interest or lives in this state, or with any resident thereof, or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this chapter. (Rev., s. 4807; 1899, c. 54, s. 2; C. S. 6288.)

Application to Foreign Contract Insuring Local Property.—The issuance of one or more policies of fire insurance, by a corporation, created and existing under the laws of another State, not by or through any agent, does not constitute "doing business" in the State of North Carolina, so as to require a resident process agent under section 55-38. Ivy River Land, etc., Co. v. National Fire, etc., Co., 192 N. C. 115, 119, 133 S. E. 424.

Contract Valid as to Insured.—When a statute or valid regulation in restraint only of the company's action is made for protection of the policy holder, a recovery may ordinarily be had, though the contract is in breach of the regulation. Robinson v. Life, etc., Co., 163 N. C. 415, 79 S. E. 681; Blount v. Fraternal Ass'n, 163 N. C. 167, 79 S. E. 299; Morgan v. Fraternal Ass'n, 170 N. C. 75, 86 S. E. 975.

The statute does not impose on the insured the duty of showing the authority of the company or its agent, as the statute is for the protection of the policy holder, and a recovery can be had by the insured although as to the insurer the contract may be void. Gazzam v. Ins. Co., 155 N. C. 330, 71 S. E. 434.

Applied in Wells v. Jefferson Standard Life Ins. Co., 211 N. C. 427, 190 S. E. 744.

Cited in Charleston, etc., Ry. Co. v. Lassiter & Co., 207 N. C. 408, 413, 177 S. E. 9; Petty v. Pacific Mut. Life Ins. Co., 212 N. C. 157, 193 S. E. 228.

§ 58-30. Statements in application not warranties.—All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy. (Rev., s. 4808; 1901, c. 705, s. 2; C. S. 6289.)

Purpose.—The purpose of the statute is to prevent insurance companies from escaping the payment of honest losses upon technicalities and strict construction of contracts. Cottingham v. Maryland Motor Car Ins. Co., 168 N. C. 259, 261, 84 S. E. 274.

Material Representations.—In an application for a policy of life insurance every fact stated will be deemed material, which would materially influence the judgment of the insurance company either in accepting the risk or in fixing the premium rate. Bryant v. Metropolitan Life Ins. Co., 147 N. C. 181, 60 S. E. 983; Gardner v. North State Mut. Life Ins. Co., 163 N. C. 367, 79 S. E. 806.

"The company is entitled to have the policy canceled on bringing suit within the proper time, especially where, even if the misrepresentations are not intentional, the policy, when delivered, plainly discloses the untruthfulness of the representations." Mutual Life Ins. Co. v. Leaksville Woolen Mills, 172 N. C. 534, 90 S. E. 574, 576, citing Hancock Mut. Life Ins. Co. v. Houpt, (C. C.) 113 Fed. 572; New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934.

It is not necessary, to defeat a recovery, that a material misrepresentation by the applicant must contribute in some way to the loss for which indemnity is claimed. Bryant v. Metropolitan Life Ins. Co., 147 N. C. 181, 60 S. E. 963.

The false representation of the relationship between insured and beneficiary is, as a matter of law, immaterial. Howell v. American Nat. Ins. Co., 189 N. C. 212, 218, 126 S. E. 603.

Where the application declares that the statements the applicant makes below are true and there is no evidence that the company or its agents were aware of any facts to the contrary, all of the misrepresentations made as to the prior attendance of physicians, disease, surgical operations, and the like, are deemed material. Mutual Life Ins. Co. v. Leaksville Woolen Mills, 172 N. C. 534, 90 S. E. 574; Alexander v. Metropolitan Life Ins. Co., 150 N. C. 536, 64 S. E. 432.

Answers made in response to questions in the application as to applications for other insurance, where the applicant declares that they are true and offers them as an inducement to the issuance of the policy, are deemed material as a matter of law. Fountain v. Mutual Life Ins. Co., 55 F. (2d) 120, 123.

A statement in an application for reinstatement of an insurance policy that applicant, in the year previous, had not had any injury, sickness, or ailment of any kind, and had not required the services of a physician, being a statement of fact within the knowledge of applicant, is a material representation as a matter of law. Petty v. Pacific Mut. Life Ins. Co., 212 N. C. 157, 193 S. E. 228.

A representation by insured that he had never consulted a physician or been in a hospital is material, and testimony of physicians that insured was not in sound health at the date of the delivery of the policy is competent on the issue of fraud. Potts v. Life Ins. Co., 206 N. C. 257, 174 S. E. 123.

Misrepresentations admitted, of which the court will take judicial notice, must be deemed material as a matter of law; and their making is sufficient ground for canceling of the policy, whatever may be proved in extenuation of the conduct of insured in making them. Jeffress v. New York Life Ins. Co., 74 F. (2d) 874, 876.

A treatment for a mere temporary indisposition may well be regarded as immaterial where an applicant fully discloses medical treatment for a serious ailment administered at or about the same time. Id.

Under this section, a failure to disclose the fact that insured had had some time previous to her application one-half degree of fever due to a mild form of malaria and from which she had entirely recovered, taken in connection with the further fact that she was at the time of the application in sound health and otherwise insurable, was held not material. Wells v. Jefferson Standard Life Ins. Co., 211 N. C. 427, 430, 190 S. E. 744.

Same—Question for Jury.—Where the insured had hernia at the time of his application, and, without specific question as to this, stated he was in sound physical and mental condition, "no exceptions," and there is evidence tending to show that the hernia did not affect the soundness of his health, it was for the jury to determine whether his representation was false and material. Hines v. New England Casualty Co., 172 N. C. 225, 90 S. E. 131.

Whether a misrepresentation is made with fraudulent intent by insured, or whether it is material, so that insurer would not have issued the policy had it known the truth, are ordinarily questions for the jury. Harrison v. Metropolitan Life Ins. Co., 207 N. C. 487, 177 S. E. 423.

Sufficiency of Evidence.—Where the evidence shows that insured was suffering with an incurable disease, but the uncontradicted evidence shows he was ignorant of this fact, and that he had been assured by a physician whom he had consulted, that there was nothing the matter with him at the date of application, there is no evidence from which the jury could find that the statement made by the applicant in the application was fraudulent and this section is applicable. Missouri State Life Ins. Co. v. Hardin, 208 N. C. 22, 179 S. E. 2.

Fraud is not essential under this section and as a general rule recovery will not be allowed if the statements made and accepted as inducements to the contract of insurance are false and material. Wells v. Jefferson Standard Life Ins. Co., 211 N. C. 427, 429, 190 S. E. 744.

False Material Representations, Although Not Fraudulent, Void Policy.—For the reason that the representations were material to the issuance of the certificate and notwithstanding the evidence for the plaintiff which tended to show that the representations, although false, were not fraudulent, under the provisions of this section, and of the certificate, the certificate of insurance was null and void and of no effect. Inman v. Sovereign Camp, W. O. W., 211 N. C. 179, 181, 189 S. E. 496.

False Representations Known to Insurer.—If the insurance company knew that the representations made by the insured were false, it cannot take advantage of the misrepresentations and set this policy aside on the grounds that the representations were material or fraudulent. Gardner v. North State Mut. Life Ins. Co., 163 N. C. 367, 368, 79 S. E. 806.

Suppression of Material Facts.—Where insured, in her application failed to disclose that she had been treated within five years prior to the application by a physician, and the policy provided that insurer might cancel same for misleading statements in the application, the failure of plaintiff to disclose the treatment by the physician on the application was not a suppression of material fact in light of the evidence, and was not adequate cause for cancellation of the policy. Anthony v. Teachers' Protective Union, 206 N. C. 7, 173 S. E. 6.

Fraudulent Representations. — A material representation shall avoid the policy if it is also false and calculated to influence the company, if without notice of its falsity, in making the contract at all, or in estimating the degree and character of the risk, or in fixing the premiums. Gardner v. North State Mut. Life Ins. Co., 163 N. C. 367, 375, 79 S. E. 806.

After a contract of life insurance has become effective, its terms may not be contradicted so as to affect its continued validity; but it may be shown that the delivery of the policy was made upon false representations in the application therefor, as to the health of the insured and as to his not having been subjected to contagious diseases for a prior period of one year, and the like, for such matters bear upon the question as to whether the policy had ever taken effect as a contract of insurance. Gardner v. North State Mut. Life Ins. Co., 163 N. C. 367, 79 S. E. 806.

Same—Effect on Binding Slips.—Where an insurance company has given a "binding slip" to an applicant for insurance, it only protects the applicant against the contingency of his sickness intervening its date and the delivery of the policy, if the application for insurance is accepted, and as such slip does not insure of itself, it does not affect the right of the insurer to avail itself of all defenses it may have, under the policy, after its delivery, to avoid payment thereof by reason of material misrepresentations made in the application for it. Gardner v. North State Mut. Life Ins. Co., 163 N. C. 367, 79 S. E. 806.

Where insured stated she was not pregnant and died of childbirth in less than nine months, it is held that this statement does not preclude recovery, in view of the evidence that insurer issued its policies on the life of the insured when it knew she was 33 years of age, had been married about a year, and that ordinarily pregnancy might be expected, and it required an additional premium on that account. Wells v. Jefferson Standard Life Ins. Co., 211 N. C. 427, 430, 190 S. E. 744.

Burden Is on Insurer to Prove Misrepresentation. — By offering in evidence the policy of insurance and the insurer's admission of its execution and delivery and of the death of the insured, the beneficiaries made out a prima facie case, and the burden was then upon the insurer to rebut it by proof of the alleged misrepresentation. And though the beneficiaries, in anticipation of the defense, elected to offer testimony as to misrepresentations, this did not change this rule as to the burden of proof. Wells v. Jefferson Standard Life Ins. Co., 211 N. C. 427, 431, 190 S. E. 744.

Fraternal Benefit Associations.—Fraternal benefit associations fall within the provision of this section as to representations. Gray v. Woodmen of the World, 179 N. C. 210, 102 S. E. 195.

§ 58-31. Stipulations as to jurisdiction and limitation of actions.—No company or order, domestic or foreign, authorized to do business in this state under this chapter, may make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit or action thereon may be brought, nor may it limit the time within which such suit or action may be commenced to less than one year after the cause of action accrues or to less than six months from any time at which a plaintiff takes a nonsuit to an action begun within the legal time. All conditions and stipulations forbidden by this section are void. (Rev., s. 4809; 1899, c. 54, ss. 23, 106; 1901, c. 391, s. 8; C. S. 6290.)

Editor's Note.—The provision that limits the time to not less than one year after the cause of action accrues is construed by the court to mean not twelve months after loss but twelve months after all restrictions preventing suit are removed. If sixty days are allowed for proof of loss the insured would have twelve months after the expiration of the sixty days in which to bring suit. Any restriction in the policy preventing the insured from bringing action prevents the twelve month limit in which action must be brought from running against him.

Limitations Not in Conflict.—A stipulation in a policy as to time of bringing action is a contractual limitation, and has been held by the Supreme Court to be valid when it does not conflict with any provision of the statute. Parker v. Insurance Co., 143 N. C. 339, 344, 55 S. E. 717.

Construed with Standard Fire Insurance Policy.—The provisions of a standard fire insurance policy, as set out in section 58-177, must be construed with the provision of this section, and when the action is brought within the time herein prescribed it will not be barred. Modlin v. Atlantic Fire Ins. Co., 151 N. C. 35, 45, 65 S. E. 605. Under this policy the insured has sixty days to file his proof of loss and then, according to the provisions of this section and section 58-177, he has twelve months within which to commence his suit. Muse v. London Assur. Corp., 108 N. C. 240, 13 S. E. 94; Dibbrell v. Georgia Home Ins. Co., 110 N. C. 193, 14 S. E. 783; Lowe v. United States Mut. Acci. Ass'n, 115 N. C. 18, 20 S. E. 169; Gerringer v. North Carolina Home Ins. Co., 133 N. C. 407, 414, 45 S. E. 773.

Not Construed as a Statute of Limitations.—The standard policy is not regulated by the statute of limitations, and the disabilities which stop the running of the statute, have no effect upon it. Hence, the imprisonment of the insured will not give him right to recover when he has delayed his action for more than a year. This rule applies likewise to minors. Holly v. London Assur. Co., 170 N. C. 4, 86 S. E. 694.

As the stipulation of the standard policy is a contract, and not a statute of limitations, it may be waived, or the party for whose benefit it was provided may be estopped by his conduct from insisting upon its enforcement. Dibbrell v. Georgia Home Ins. Co., 110 N. C. 193, 14 S. E. 783.

Construed with Accident Policies. — The stipulations in accident insurance policies that proceedings shall not be begun until ninety days after proof of loss do not contravene this section, when the policy also states that the insured may bring his action within 12 months after the accident, this being construed to mean that he will have twelve months after the cause of action accrues. Heilig v. Aetna Life Ins. Co., 152 N. C. 358, 67 S. E. 927.

Fraternal Orders.—Provisions of the constitution and by-laws of a fraternal order of insurance, that suits shall not be brought or maintained for any cause or claim arising out of

the benefit certificate of a member unless within one year from the time the right of action accrues, are valid. Faulk v. Fraternal Mystic Circle, 171 N. C. 301, 88 S. E. 431.

Surety Bond.—Contracts of indemnity against loss or surety bonds for the faithful performance of a building contract are regarded in the nature of contracts of insurance and any conflicting restriction in such contract as to the time of bringing an action to recover damages for the breach of the contract is void. Guilford Lumber Mfg. Co. v. Johnson, 177 N. C. 44, 97 S. E. 732.

Limitation Must Be Plead.—A limitation in a surety bond as to the time in which an action may be maintained against the surety thereon, after notice of default, is contractual, and affects the remedy, and it is necessary that the surety plead it in the action for it to be available as a defense. Ideal Brick Co. v. Gentry, 191 N. C. 636, 132 S. E. 800.

Nonsuit.—In case a nonsuit is entered and it does not appear on record when the nonsuit was entered it will be presumed that it was within six months prior to the date on which action was commenced. Parker v. Insurance Co., 143 N. C. 339, 55 S. E. 717.

§ 58-32. Insurance as security for a loan by the company. — Where an insurance company, as a condition for a loan by such company, of money upon mortgage or other security, requires that the borrower insure either his life or that of another, or his property, or the title to his property, with the company, and assign or cause to be assigned to it a policy of insurance as security for the loan, and agree to pay premiums thereon during the continuance of the loan, whether the premium is paid annually, semiannually, quarterly, or monthly, such premiums shall not be considered as interest on such loans, nor will any loan be rendered usurious by reason of any such requirements, where the rate of interest charged for the loan does not exceed the legal rate and where the premiums charged for the insurance do not exceed the premiums charged to other persons for similar policies who do not obtain loans. (1915, c. 8; 1917, c. 61; C. S. 6291.)

Does Not Exempt from Usury Laws.—This section was held not to exempt insurance companies from the provisions of § 24-1 and § 24-2, relating to usury, the purport and effect of the section being merely to allow insurance companies to require as a condition precedent to the loan of money that the borrower take out a policy of insurance and assign same as security for the loan. Cowan v. Security Life, etc., Co., 211 N. C. 18, 188 S. E. 812.

If this section did provide that insurance companies should be exempt from § 24-1 and § 24-2, it would be void as in violation of Art. I, sec. 7, of the Constitution. Id.

A ten-year endowment policy comes within the provisions of this section, when such endowment policy provides that the face amount thereof shall be paid to the beneficiary if insured dies during the ten-year period while the policy is in force. Id.

§ 58-33. Companies must do business in own name.—Every insurance company, foreign or domestic, must conduct its business in the state in, and the policies and contracts of insurance issued by it shall be headed or entitled only by, its proper or corporate name. (Rev., s. 4811; 1899, c. 54, s. 18; C. S. 6292.)

§ 58-34. Publication of assets and liabilities; penalty for failure.—When any company publishes its assets it must in the same connection and with equal conspicuousness publish its liabilities computed on the basis allowed for its annual statements; and any publications purporting to show its capital must exhibit only the amount of such capital as has been actually paid in cash. Any company or agent thereof violating the provision of this section shall be punished by a fine of not less than fifty nor more than two hundred dollars. (Rev., ss. 3492, 4812; 1899, c. 54, ss. 18, 96; C. S. 6293.)

§ 58-35. Liabilities and reserve fund determined. —To determine the liability of an insurance company, other than life and real estate title insurance, upon its contracts, and thence the amount such company must hold as a reserve for reinsurance, the commissioner of insurance shall take the actual unearned portion of the premiums written in its policies. In case of the insolvency of any company, the reserve on outstanding policies may, with the consent of the commissioner, be used for the reinsurance of its policies to the extent of their pro rata part thereof. (Rev., s. 4704; 1899, c. 54, s. 67; 1901, c. 391, s. 5; 1907, c. 1000, s. 4; C. S. 6294.)

Section Constitutional.—This section in no way impinges on the Constitution. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N. C. 69, 78, 185 S. E. 449.

Unearned premiums are a liability of the company. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N. C. 69, 78, 185 S. E. 449.

§ 58-36. Corporation or association maintaining office in state required to qualify and secure license.—Any corporation or voluntary association, other than an association of companies, the members of which are licensed in this state, issuing contracts of insurance and maintaining a principal, branch, or other office within this state, whether soliciting business in this state or in foreign states, shall qualify under the insurance laws of this state applicable to the type of insurance written by such corporation or association and secure license from the commissioner of insurance as provided under this chapter on insurance, as amended, and the officers and agents of any such corporation or association maintaining offices within this state and failing to qualify and secure license as herein provided shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (1937, c. 39.)

§ 58-37. Revocation of license of foreign company; publication of notice.—If the commissioner of insurance is of the opinion, upon examination or other evidence, that a foreign insurance company is in an unsound condition, or, if a life insurance company, that its actual funds, exclusive of its capital, are less than its liabilities; or that it has failed to comply with the law, or if it, its officers or agents, refuse to submit to examination or to perform any legal obligation in relation thereto, he shall revoke or suspend all certificates of authority granted to it or its agents, and shall cause notification thereof to be published in one or more newspapers published in this state; and no new business may thereafter be done by it or its agents in this state while such default or disability continues, or until its authority to do business is restored by the commissioner. (Rev., s. 4701; 1899, c. 54, s. 14; 1901, c. 176, s. 1; C. S. 6295.)

§ 58-38. Revocation of license of domestic company; injunction and receiver.—If, upon examination, the commissioner of insurance is of the opinion that any domestic insurance company is insolvent, or has exceeded its powers, or failed to comply with any provision of law, or that its condition is such as to render its further proceeding

hazardous to the public or to its policyholders, he shall revoke its license, and, if he deems it necessary, shall apply to a judge of the superior court to issue an injunction restraining it in whole or in part from further proceeding with its business. The judge may issue the injunction forthwith, or upon notice and hearing thereon, and after a full hearing of the matter may dissolve or modify the injunction or make it permanent, and may make all orders and judgments needful in the matter, and may appoint agents or a receiver to take possession of the property and effects of the company and to settle its affairs, subject to such rules and orders as the court from time to time prescribes. (Rev., s. 4702; 1899, c. 54, s. 14; C. S. 6296.)

§ 58-39. Revocation of license for violation of law or impaired assets.—1. The authority of a domestic or foreign insurance company may be revoked if it violates or neglects to comply with any provision of law obligatory upon it, and whenever in the opinion of the commissioner of insurance its condition is unsound, or its assets above its liabilities, exclusive of capital and inclusive of reserve or unearned premiums estimated as provided by this chapter, are less than the amount of its original capital or required unimpaired funds.

2. If the commissioner of insurance is satisfied at any time that any statements made by any company licensed under this chapter are untrue, or if a general agent fails or refuses to obey the provisions of this chapter, the commissioner of insurance may revoke and cancel the license of such company or agent.

An insurance company violating any provision of this chapter, or refusing to submit to the examination provided for in § 58-18, when requested, forfeits its right to do business in this state for twelve months thereafter, and the commissioner of insurance shall immediately revoke the license issued to such insurance company to do business in this state. (Rev., ss. 4703, 4705; 1899, c. 54, ss. 66, 75, 112; 1901, c. 391, s. 5; C. S. 6297.)

§ 58-40. Agents and adjusters must procure license.—Every agent or adjuster of any insurance company authorized to do business in this state shall be required to obtain annually from the commissioner of insurance a license under the seal of his office, showing that the company for which he is agent or proposes to adjust is licensed to do business in this state, and that he is an agent of such company and duly authorized to do business for it. And every such agent or adjuster, on demand, shall exhibit his license to any officer or to any person from whom he shall solicit insurance. (Rev., s. 4706; 1899, c. 54, s. 81; 1901, c. 391, s. 7; 1903, c. 438, s. 8, c. 774; 1915, c. 109, s. 7, c. 166, s. 1; C. S. 6298.)

Cross Reference.—As to punishment for violating this section, see § 58-47.

Validity of Contract When Agent Not Licensed.—Where a foreign insurance company, authorized to do business here under our laws, issues its policy on property situated within the State, but through an agency in another State which is unauthorized to write it here, because of not having obtained the license required by law the policy is valid as to the right of action of the insured thereon. Hay v. Union Fire Ins. Co., 167 N. C. 82, 83 S. E. 241.

Agent of Fraternal Insurance Order.—This section is applicable to all agents including an organizer of a fraternal insurance order operating in North Carolina. State v. Arlington, 157 N. C. 640, 643, 73 S. E. 122.

Cited in Charleston, etc., Ry. Co. v. Lassiter & Co., 207 N. C. 408, 413, 177 S. E. 9.

§ 58-41. Application for license.—Before a license is issued to an insurance agent or adjuster in this state, the agent or adjuster and the company for which he desires to act shall apply for the license on forms to be prescribed by the commissioner of insurance; and before he issues a license to such agent or adjuster, the commissioner of insurance shall satisfy himself that the person applying for license as an agent or adjuster is a person of good moral character, that he intends to hold himself out in good faith as an insurance agent or adjuster, and has sufficient knowledge of the business proposed to be done, that he has not wilfully violated any of the insurance laws of this state, and that he is a proper person for such position, and that such license, if issued, shall serve the public's interests. (1913, c. 79, s. 1; 1915, c. 109, ss. 6, 7, c. 166, s. 7; 1931, c. 185; C. S. 6299.)

Editor's Note.—The Act of 1931 added at the end of this section the following: "and that such license, if issued, shall serve the public's interests."

Agent Is within Unemployment Compensation Act, see Unemployment Compensation Comm. v. Jefferson Standard Life Ins. Co., 215 N. C. 479, 2 S. E. (2d) 584.

§ 58-42. Revocation of agent's or adjuster's license.—When the commissioner of insurance is satisfied that any insurance agent or adjuster licensed by this state has wilfully violated any of the insurance laws of this state, or has wilfully overinsured property of any of the citizens of the state, or has wilfully misrepresented any policy of insurance, or has dealt unjustly with or wilfully deceived any citizen of this state in regard to any insurance policies, or has exercised coercion in obtaining an application for or in selling insurance, or has failed or refused to pay over to the company which he represents, or has represented, any money or property in the hands of such agent or adjuster belonging to the company, when demanded, or has become in any way disqualified according to any of the provisions necessary for obtaining or holding such license as set out in § 58-41, or has in any other way become unfit for such position, the commissioner may revoke, and it shall be his duty to revoke, the license of such agent or adjuster for all the companies which he represents in this state for such length of time as he may decide, not exceeding one year. The commissioner of insurance shall give to the agent or adjuster ten days' notice of the revocation of such license, and shall give the reasons therefor; and the agent or adjuster shall have the right to have such revocation reviewed by any judge of the superior court of Wake county upon appeal. For the purpose of investigation under this section, the commissioner of insurance shall have all the power conferred upon him by § 58-171. (1913, c. 79, ss. 2, 3; 1915, c. 166, s. 7; 1929, c. 301, s. 1; 1943, c. 434; C. S. 6300.)

Cross Reference.—As to insurance agents and brokers wrongfully converting money being guilty of larceny, see § 14-96.

Editor's Note.—The amendment of 1929 added disqualification because of nonresidence as set out in section 58-43, to the grounds for revocation.

The 1943 amendment inserted after the word "policies" in

line nine the words "or has exercised coercion in obtaining an application for or in selling insurance."

§ 58-43. Nonresident agents forbidden; exception.—No nonresident of the state shall be licensed to do business in the state, except as a special agent or organizer, and then only when he reports his business for record as North Carolina business to some general or district agent of his company in the state, or having territory within the state. (Rev., s. 4707; 1899, c. 54, s. 108; 1903, c. 438, s. 11; C. S. 6301.)

§ 58-44. Resident agents required; discrimination.—All business done in this state by steam-boiler, liability, accident, health, live-stock, marine, leakage, credit, plate-glass, and fidelity insurance companies shall be by their regularly authorized agents residing in the state, or transacted through applications of such agents; and all policies so issued must be countersigned by such agents, who may pay not exceeding fifty per centum of the regular commissions allowed on the premiums collected on such business to a licensed nonresident broker. It shall be unlawful for any salaried officer, manager, or other representative of any company, unless a bona fide resident agent, to do or perform for or on behalf of his company any act which by the insurance laws of this State is required to be performed by a licensed resident agent. It shall be unlawful for the commissioner of insurance to license as a resident agent any person unless he is fully satisfied that such a person is a bona fide resident of this State, and is not being licensed for the purpose of evading the resident agent's law. No such companies nor their agents may make any discrimination in favor of individuals or insurants, and the provisions hereafter set forth in this chapter with respect to discrimination by life insurance companies shall apply to the companies above named and their agents. (Rev., s. 4810; 1899, c. 54, ss. 107, 108; 1903, c. 438, s. 11; 1911, c. 196, s. 5; 1913, c. 140, s. 3; 1921, c. 136, s. 3; 1925, c. 70, s. 1; C. S. 6302.)

Editor's Note.—Prior to amendment of 1921, Public Laws, c. 136, section 3, no provision was made as to what brokerage fee should be paid by a resident agent. By amendment of 1921 five per cent was allowed for such fee.

The Public Laws of 1925 in amending this statute states that the section as amended by section 3 shall be changed without further designation of the amending act. Obviously this refers to section 3 of the Act of 1921, supra. This later amendment allowed fifty per cent commission as brokerage fee, and required that the local agent be a resident of the state, making it unlawful for the insurance commissioner to license as a resident agent anyone unless he is fully satisfied that such person is a bona fide resident of the state.

Cited in Charleston, etc., Ry. Co. v. Lassiter & Co., 207 N. C. 408, 413, 177 S. E. 9.

§ 58-45. Agents personally liable, when.—An insurance agent is personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for any company not authorized to do business in the state. A person or citizen of the state who fills up or signs any open policy, certificate, blank or coupon of, or furnished by, an unlicensed company, agent, or broker, the effect of which is to bind any insurance in an unlicensed company on property in this state, is the agent of such company, and personally liable for all licenses and taxes due on account of such transaction. (Rev., s. 4813; 1899, c. 54, s. 70; 1903, c. 438, s. 7; C. S. 6303.)

§ 58-46. Payment of premium to agent valid; obtaining by fraud a crime.—An insurance agent or broker who acts for a person other than himself negotiating a contract of insurance is, for the purpose of receiving the premium therefor, the company's agent, whatever conditions or stipulations may be contained in the policy or contract. Such agent or broker knowingly procuring by fraudulent representations payment, or the obligation for the payment, of a premium of insurance, shall be punished by a fine of not less than one hundred nor more than five hundred dollars, or be imprisoned for not more than one year. (Rev., ss. 3486, 4814; 1899, c. 54, s. 69; C. S. 6304.)

Where Broker Fails to Deliver Funds.—Where the insurer has credited the amount of the unearned premium to its broker's account, who in turn has credited the amount to account of the broker who has procured the employer's application for the insurance, the insurer is liable to the employer for the amount of the unearned premium not actually paid to the employer by the broker. Hughes v. Lewis, 203 N. C. 775, 166 S. E. 909.

Where Policy Requires Receipt.—Where a policy provided that premiums were payable to a duly authorized agent only in exchange for insurer's official receipt and where plaintiff's evidence showed payment of a note given for a premium to insurer's agent without obtaining the note or insurer's official receipt, and there was no evidence that insurer received any part of the payment, in insured's action to recover the premium paid after insurer had declared the policy forfeited, it was held that insurer's motion to nonsuit was properly allowed, payment to the agent under the circumstances not constituting payment to insurer. Mills v. New York Life Ins. Co., 209 N. C. 296, 183 S. E. 289.

§ 58-47. Punishment for violating this chapter or for agent acting without license.—If any person shall assume to act as insurance agent or broker without license therefor as required by law, or shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this state, or as principal or agent shall violate any provisions of law contained in this chapter, the punishment for which is not provided for elsewhere, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred nor more than five hundred dollars for each offense. (Rev., s. 3484; 1899, c. 54, s. 94; 1907, c. 1000, s. 8; C. S. 6305.)

Purpose of Section.—The entire, certainly the chief, purpose of this legislation is to protect people from harmful imposition in contracts and dealings of this character, and the evil which the statute is designed to prevent is as threatening in the case of a bogus as a real company, perhaps more so. State v. Arlington, 157 N. C. 640, 646, 73 S. E. 122.

Applicability to Fraternal Insurance Agents.—The agent of a fraternal insurance order is punishable under this section. State v. Arlington, 157 N. C. 640, 643, 73 S. E. 122.

Same—Acts Constituting Violation.—The conduct of a person in publishing advertisements circulating his cards, taking money, issuing receipts, assuming to represent a fraternal insurance order, comes within the permissible and proper meaning of the words used in the statute and clearly within the mischief contemplated. State v. Leeper, 146 N. C. 655, 61 S. E. 585; State v. Harrison, 145 N. C. 408, 417, 59 S. E. 867; State v. Arlington, 157 N. C. 640, 646, 73 S. E. 122.

Same—Indictment.—A bill of indictment for the offences provided for by this section will not be held fatally defective because it contains no direct averment that a fraternal order for which the business has been solicited is a company subject to the insurance regulations, when otherwise sufficient. State v. Arlington, 157 N. C. 640, 641, 73 S. E. 122.

§ 58-48. Agent failing to exhibit license.—If any agent of any insurance company shall, on demand

of any person from whom he shall solicit insurance, fail to exhibit a certificate from the commissioner of insurance bearing the seal of his office, and dated within one year from such demand, he shall be fined five dollars or imprisoned ten days for each offense. (Rev., s 3485; 1899, c. 54, s. 81; C. S. 6306.)

§ 58-49. Agents making false statements. — If any solicitor, agent, examining physician, or other person shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any publication for insurance, or shall make any such statement for the purpose of obtaining fee, commission, money, or benefit in any corporation transacting business in this state, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days nor more than one year, or both, at the discretion of the court. (Rev., s. 3487; 1899, c. 54, s. 60; C. S. 6307.)

§ 58-50. Agents signing certain blank policies.— If any agent, commissioned or otherwise, of any fire, marine, health, live-stock, leakage, credit, steam-boiler, liability, accident, plate-glass, or fidelity insurance company shall sign any blank contract or policy of insurance, upon conviction thereof he shall be fined for each offense not less than one hundred dollars nor more than two hundred dollars. (Rev., s. 3488; 1899, c. 54, ss. 108, 109; 1911, c. 196, s. 6; C. S. 6308.)

§ 58-51. Adjuster acting for unauthorized company.—If any person shall act as adjuster on a contract made otherwise than as authorized by the laws of this state, or by any insurance company or other person not regularly licensed to do business in the state, or shall adjust or aid in the adjustment, either directly or indirectly, of a loss by fire on property located in this state, incurred on a contract not authorized by the laws of the state, he shall be deemed guilty of a misdemeanor and shall, upon conviction, be fined not less than two hundred dollars nor more than five hundred dollars, or imprisoned not less than six months nor more than two years, or both, in the discretion of the court. (Rev., s. 3482; 1899, c. 54, s. 114; C. S. 6309.)

§ 58-52. Agent violating insurance law.—If any person, either as principal or agent, or pretending to be such, shall solicit, examine, or inspect any risk, or shall examine into, adjust, or aid in adjusting any loss, or shall receive, collect, or transmit any premium of insurance, or shall do any other act in the soliciting, making, or executing any contract of insurance of any kind otherwise than the law permits, he shall be deemed guilty of a misdemeanor, and on conviction shall pay a fine of not less than two hundred dollars nor more than five hundred dollars, or be imprisoned not less than one nor more than two years, or both, at the discretion of the court. (Rev., s. 3490; 1899, c. 54, s. 115; C. S. 6310.)

§ 58-53. Informer to receive half of penalty. —The person, if other than the commissioner of insurance or his deputy, upon whose complaint a conviction is had for violation of the law prohibiting insurance in or by foreign companies not authorized to do business in the state, or for soliciting, examining, inspecting any risk, or receiving, collecting, or transmitting any premium, or adjusting or aiding in the adjustment of a loss, under a contract made otherwise than as authorized by the laws of this state, is entitled to one-half of the penalty recovered therefor. (Rev., s. 4831; 1899, c. 54, s. 93; C. S. 6311.)

§ 58-54. Forms to be approved by commissioner of insurance.—It is unlawful for any insurance company, association, order or society doing business in this state to issue, sell, or dispose of any policy, contract, or certificate, or use applications in connection therewith, until the forms of the same have been submitted to and approved by the commissioner of insurance of North Carolina, and copies filed in the insurance department. (1907, c. 879; 1913, c. 139; C. S. 6312.)

Validity of Unapproved Policy.—The statute does not purport to deal with the validity of the contract of insurance, but with the insurance company. It does not say a policy shall be void unless approved by the Insurance Commissioner, but that it shall be unlawful for the company to issue such policy, and the reason for the language used is obvious. Blount v. Royal Fraternal Ass'n, 163 N. C. 167, 170, 79 S. E. 299.

Art. 4. Deposit of Securities.

§ 58-55. Deposits held in trust by commissioner or treasurer. — 1. Deposits by domestic company.—The commissioner of insurance or the treasurer, in their official capacity, shall take and hold in trust deposits made by any domestic insurance company for the purpose of complying with the laws of any other state to enable the company to do business in that state. The company making the deposits is entitled to the income thereof, and may, from time to time, with the consent of the commissioner of insurance or treasurer, and when not forbidden by the law under which the deposit was made, change in whole or in part the securities which compose the deposit for other solvent securities of equal par value. Upon request of any domestic insurance company such officer may return to the company the whole or any portion of the securities of the company held by him on deposit, when he is satisfied that they are subject to no liability and are not required to be longer held by any provision of law or purpose of the original deposit.

2. Deposits by foreign company.—The commissioner or treasurer may return to the trustees or other representatives authorized for that purpose any deposit made by a foreign insurance company, when it appears that the company has ceased to do business in the state and is under no obligation to policyholders or other persons in the state for whose benefit the deposit was made.

3. Action to enforce or terminate the trust.—An insurance company which has made a deposit in this state pursuant to this chapter, or its trustees or resident managers in the United States, or the commissioner of insurance, or any creditor of the company, may at any time bring an action in the superior court of Wake county against the state and other parties properly joined therein, to enforce, administer, or terminate the trust created by the deposit. The proc-

ess in this action shall be served on the officer of the state having the deposit, who shall appear and answer in behalf of the state and perform such orders and judgments as the court may make in such action. (Rev., s. 4709; 1899, c. 54, s. 17; 1901, c. 391, s. 2; 1903, c. 438, s. 1; 1903, c. 536, s. 4; C. S. 6313.)

Cross Reference.—As to Workmen's Compensation Security Fund, see §§ 97-105 to 97-122.

§ 58-56. Deposits subject to approval and control of commissioner.—The deposits of securities required to be made by any insurance company of this state shall be approved by the commissioner of insurance of the state, and he may examine them at all times, and may order all or any part thereof changed for better security, and no change or transfer of the same may be made without his assent. (Rev., s. 4710; 1903, c. 536, s. 5; C. S. 6314.)

§ 58-57. Deposits by foreign companies required and regulated.—A foreign company, if incorporated or associated under the laws of any government or state other than the United States or one of the United States, shall not be admitted to do business in this state until, in addition to complying with the conditions by law prescribed for the licensing and admission of such companies to do business in this state, it has made a deposit with the treasurer or commissioner of insurance of this state, or with the financial officer of some other state of the United States, of a sum not less than the capital required of like companies under this chapter. This deposit must be in exclusive trust for the benefit and security of all the company's policyholders and creditors in the United States, and may be made in the securities, but subject to the limitations, specified in this chapter with regard to the investment of the capital of domestic companies formed and organized under the provisions of this chapter. The deposit shall be deemed for all purposes of the insurance law the capital of the company making it. (Rev., s. 4711; 1899, c. 54, s. 64; 1903, c. 438, s. 6; C. S. 6315.)

§ 58-58. Deposits by life companies not chartered in United States. — Every life insurance company organized under the laws of any other country than the United States must have and keep on deposit with some state insurance department or in the hands of trustees, in exclusive trust for the security of its contracts with policyholders in the United States, funds of an amount equal to the net value of all its policies in the United States and not less than two hundred thousand dollars. (Rev., s. 4712; 1899, c. 54, s. 56; C. S. 6316.)

§ 58-59. Registration of bonds deposited in name of treasurer.—The commissioner of insurance is hereby empowered, upon the written consent of any insurance company depositing with the commissioner or the state treasurer under any law of this State, any state, county, city, or town bonds or notes which are payable to bearer, to cause such bonds or notes to be registered as to the principal thereof in lawful books of registry kept by or in behalf of the issuing state, county, city or town, such registration to be in the name of the treasurer of North Carolina in trust for the company depositing the notes or bonds and the State of North Carolina, as their respective interest may appear, and is further empowered to require of any and all such companies the filing of written consent to such registration as a condition precedent to the right of making any such deposit or right to continue any such deposit heretofore made. (1925, c. 145, s. 2.)

§ 58-60. Notation of registration; release. — Bonds or notes so registered shall bear notation of such registration on the reverse thereof, signed by the registering officer or agent, and may be released from such registration and may be transferred on such books of registry by the signature of the State Treasurer. (1925, c. 145, s. 3.)

§ 58-61. Expenses of registration. — The necessary expenses of procuring such registration and any transfer thereof shall be paid by the company making the deposits. (1925, c. 145, s. 4.)

Art. 5. License Fees and Taxes.

§ 58-62. Commissioner to report and pay monthly. — On or before the tenth day of each month the commissioner of insurance shall furnish to the auditor a statement in detail of the taxes and license fees received by him during the previous month, and shall pay to the treasurer the amount in full of such taxes and fees. The auditor may examine the accounts of the commissioner of insurance and check them up with said statement. (Rev., s. 4714; 1899, c. 54, s. 82; 1901, c. 391, s. 7; 1905, c. 430, s. 4; C. S. 6317.)

§ 58-63. Schedule of fees and charges.—The commissioner of insurance shall collect and pay into the state treasury fees and charges as follows:

1. For filing and examining statement preliminary to admission, twenty dollars; for filing and auditing annual statement, ten dollars; for filing any other papers required by law, one dollar; for each certificate of examination, condition, or qualification of company or association, two dollars; for each seal when required, one dollar; for filing charter and other papers of a fraternal order, preliminary to admission, twenty-five dollars.

2. To be paid to the publisher, for the publication of each financial statement, nine dollars.

3. The commissioner shall receive for copy of any record or paper in his office ten cents per copy sheet and one dollar for certifying same, or any fact or data from the records of his office; for making and mailing abstracts to the clerks of the superior courts in the counties of the state, four dollars; for examination of any foreign company, twenty-five dollars per diem and all expenses, and for examining any domestic company, actual expenses incurred; for the examination and approval of charters of companies, five dollars; also, to defray the expense of computing the value of the policies of domestic life insurance companies, one cent for every thousand dollars of the whole amount insured by its policies so valued. The traveling and other expenses of accountants, and other examiners when engaged in the work of examination shall be paid by the companies, associations, or orders under investigation. For the investigation of tax returns and the collection of any

delinquent taxes disclosed by such investigation, the commissioner may, in lieu of the above per diem charge, assess against any such delinquent company the expense of the investigation and collection of such delinquent tax, a reasonable percentage of such delinquent tax, not to exceed ten per centum (10%) of such delinquency, and in addition thereto.

4. He shall collect all other fees and charges due and payable into the state treasury by any company, association, order, or individual under his department. (Rev., s. 4715; 1899, c. 54, ss. 50, 68, 80, 81, 82, 87, 90, 92; 1901, c. 391, s. 7; c. 706, s. 2; 1903, c. 438, ss. 7, 8; 1903, c. 536, s. 4; 1903, cc. 680, 774; 1905, c. 588, s. 68; 1913, c. 140, s. 1; 1919, c. 186, s. 6; 1921, c. 218; 1935, c. 334; 1939, c. 158, s. 208; C. S. 6318.)

Cross Reference.—As to franchise and license taxes on insurance companies, see § 105-121.

§ 58-64. License fees for more than one class of insurance.—No insurance company admitted to do business in the state shall be authorized to transact more than one class or kind of insurance therein, unless it pays the license fees for each class. But upon the payment of the largest license fees provided for any one business done a life insurance company may do a health business, and a fire insurance company may insure against loss or damage to property by lightning, wind, hail, or tornado, use and occupancy, and for non-occupancy, and may insure vessels, freights, goods, money, effects, and money lent on bottomry or respondentia against the perils of the sea and other perils usually insured against by marine insurance, including risks of inland navigation and transportation; and may also insure against loss or damage by water to any goods or premises arising from leakage of sprinklers and water pipes. No insurance company may be required to pay license fees amounting in the aggregate to more than three hundred and fifty dollars per annum. (Rev., s. 4717; 1899, c. 54, s. 65; 1901, c. 391, s. 5; 1903, c. 438, s. 6; C. S. 6320.)

§ 58-65. Licensing of underwriters reinsurance agencies.—An underwriters agency, composed of two or more companies, proposing to do a reinsurance business only in the state may be licensed without a separate license for each company, upon filing with the commissioner of insurance a statement of each company, the amount proposed to be assumed by them, and such other information as he may call for, showing that the companies are solvent and propose to conduct the business in a way that would be safe and fair to the citizens of the state. (1919, c. 186, s. 6; C. S. 6318.)

§ 58-66. Licenses run from April first; pro rata payment.—The license required of insurance companies shall continue for the next ensuing twelve months after April first of each year, unless revoked as provided in this chapter; but the commissioner of insurance may, when the annual license tax exceeds twenty-five dollars, receive from applicants after April first so much of the license fee required by law as may be due pro rata for the remainder of the year, beginning with the first day of the current month. (Rev., s. 4718; 1899, c. 54, s. 78; C. S. 6321.)

Cross Reference.—For franchise and license taxes on insurance companies, see § 105-121.

§ 58-67. Statements of gross receipts filed and tax paid.—Every general agent shall, within the first thirty days of January and July of each year, make a full and correct statement, under oath of himself and of the president, secretary, or some officer at the home or head office of the company in this country, of the amount of the gross receipts derived from the insurance business under this chapter obtained from residents of this state, or on property located therein during the preceding six months, and shall, within the first fifteen days of February and August of each year, pay to the commissioner of insurance the tax imposed upon such gross receipts. (Rev., s. 4719; 1899, c. 54, s. 79; 1901, c. 391, s. 7; 1903, c. 438, s. 8; C. S. 6322.)

Cross Reference.—The gross receipts tax referred to is imposed by § 105-121.

§ 58-68. Policyholders to furnish information.—To enable the commissioner of insurance the better to enforce the payment of the taxes imposed by this chapter and by § 105-121 every corporation, firm, or individual doing business in the state shall, upon demand of the commissioner, furnish to him, upon blanks to be provided by him, a statement of the amount of all insurance held by them, giving the name of the company, number, and amount of policies and the premiums paid on each, and such other information as the commissioner calls for, or shall file an affidavit with the commissioner that all their insurance is placed in companies licensed to do business in this state. (Rev., s. 4720; 1899, c. 54, s. 79; 1901, c. 391, s. 7; 1903, c. 438, s. 8; C. S. 6323.)

SUBCHAPTER II. INSURANCE COMPANIES.

Art. 6. General Domestic Companies.

§ 58-69. Application of this chapter and general laws.—The general provisions of law relative to the powers, duties, and liabilities of corporations apply to all incorporated domestic insurance companies where pertinent and not in conflict with other provisions of law relative to such companies or with their charters. All insurance companies of this state shall be governed by this chapter, notwithstanding anything in their special charters to the contrary, provided notice of the acceptance of this chapter is filed with the commissioner of insurance. (Rev., s. 4721; 1899, c. 54, s. 19; C. S. 6324.)

§ 58-70. Extension of existing charters.—Domestic insurance companies incorporated by special acts, whose charters are subject to limitation of time, shall, after the limitation expires, and upon filing statement and paying the taxes and fees required for an amendment of the charter, continue to be bodies corporate, subject to all general laws applicable to such companies. (Rev., s. 4722; 1899, c. 54, s. 20; C. S. 6325.)

§ 58-71. Certificate required before issuing policies.—No domestic insurance company may issue policies until upon examination of the commissioner of insurance, his deputy or examiner, it is found to have complied with the laws of the state, and until it has obtained from the commissioner of insurance a certificate setting forth that fact and authorizing it to issue policies. The issuing

of policies in violation of this section renders the company liable to the forfeiture prescribed by law, but such policies are binding upon the company. (Rev., s. 4723; 1899, c. 54, ss. 21, 99; 1903, c. 438, s. 10; C. S. 6326.)

§ 58-72. Purposes of organization. — Insurance companies, associations, or orders may be formed as provided in §§ 58-73 and 58-74 for any one of the following purposes:

1. Fire and Storm.—To insure against loss or damage to property by fire, lightning, wind, hail, or tornado, use and occupancy, and for nonoccupancy, upon the stock or mutual plan.

2. Marine.—To insure, upon the stock or mutual plan, vessels, freights, goods, money, effects, and money lent on bottomry or respondentia against the perils of the sea and other perils usually insured against by marine insurance, including risks of inland navigation and transportation.

3. Life.—To carry on the business commonly known as life insurance on the stock or mutual plan, contract for the payment of endowments or annuities, or make and enter into such other contracts conditioned upon the continuance or cessation of human life.

4. Sickness. — Against disablement resulting from sickness and every insurance appertaining thereto.

5. Accident. — Against injury, disablement, or death resulting from traveling or general accident and every insurance appertaining thereto.

6. Fidelity and Surety.—Guaranteeing the fidelity of persons holding places of public or private trust, and guaranteeing the performance of contracts other than insurance policies, and guaranteeing and executing all bonds, undertakings, and contracts of suretyship. And a company is authorized to execute such bonds, undertakings, and contracts of suretyship by itself, though a statute requires two or more sureties.

7. Plate-glass.—Upon glass against breakage.

8. Liability.—Insuring any one against loss or damage resulting from accident to or injury, fatal or nonfatal, suffered by an employee or other person, for which the person insured is liable.

9. Boiler and Machinery.—Upon steam boilers and upon pipes, engines, and machinery connected therewith or operated thereby, against explosion and accident and against loss or damage to life, person, or property resulting therefrom. And a company is authorized to make inspection of and to issue certificates of inspection upon such boilers, pipes, engines, and machinery.

10. Burglary.—Against loss by burglary or theft, or both.

11. Credit.—To carry on the business commonly known as credit insurance or guaranty, either by agreeing to purchase uncollectible debts or otherwise to insure against loss or damage from the failure of persons indebted to the insured to meet their liabilities.

12. Sprinkler.—To insure against loss or damage by water to any goods or premises arising from the breakage or leakage of sprinklers and water-pipes. And a company is authorized to make inspection of and to issue certificates of inspection upon such sprinklers and pipes.

13. Accidents to Vehicles.—To insure against loss or damage to property arising from accidents to elevators, automobiles, bicycles, and vehicles, except rolling stock of railways.

14. Live-stock. — To insure horses and other live-stock against death and damage.

15. Real estate title.—For the purpose of examining titles to real estate and furnishing information in relation thereto, and of insuring owners and others interested therein against loss by reason of encumbrances and defective title.

16. Miscellaneous.—Against any other casualty authorized by the charter of the company, not included under the heads of life, fire, marine, or title insurance, which is a proper subject of insurance. No corporation so formed may transact any other business than that specified in its charter and articles of association. (Rev., s. 4726; 1899, c. 54, ss. 24, 26; 1903, c. 438, s. 1; 1911, c. 111, s. 1; C. S. 6327.)

§ 58-73. Manner of creating such corporations. —The procedure for organizing such corporations is as follows: The proposed incorporators, not less than ten in number, a majority of whom must be residents of the state, shall subscribe articles of association setting forth their intention to form a corporation; its proposed name, which must not so closely resemble the name of an existing corporation doing business under the laws of this state as to be likely to mislead the public, and must be approved by the commissioner of insurance; the class of insurance it proposes to transact and on what business plan or principle; the place of its location within the state, and if on the stock plan, the amount of its capital stock. The words "insurance company," "insurance association," or "insurance society" must be a part of the title of any such corporation, and also the word "mutual," if it is organized upon the mutual principle. The certificate of incorporation must be subscribed and sworn to by the incorporators before an officer authorized to take acknowledgment of deeds, who shall forthwith certify the certificate of incorporation, as so made out and signed, to the commissioner of insurance of the state at his office in the city of Raleigh. The commissioner of insurance shall examine the certificate, and if he approves of it and finds that the requirements of the law have been complied with, shall certify such facts, by certificate on such articles, to the secretary of state. Upon the filing in the office of the secretary of state of the certificate of incorporation and attached certificates, and the payment of a charter fee in the amount required for private corporations, and the same fees to the secretary of state, the secretary of state shall cause the certificate and accompanying certificates to be recorded in his office, and shall issue a certificate in the following form:

Be it known that, whereas (here the names of the subscribers to the articles of association shall be inserted) have associated themselves with the intention of forming a corporation under the name of (here the name of the corporation shall be inserted), for the purpose (here the purpose declared in the articles of association shall be inserted), with a capital (or with a permanent fund) of (here the amount of capital or permanent fund fixed in the articles of association shall be inserted), and have complied with the provisions of the

statute of this state in such case made and provided, as appears from the following certified articles of association: (Here copy articles of association and accompanying certificates). Now, therefore, I (here the name of the secretary shall be inserted), secretary of state, hereby certify that (here the names of the subscribers to the articles of association shall be inserted), their associates and successors, are legally organized and established as, and are hereby made, an existing corporation under the name of (here the name of the corporation shall be inserted), with such articles of association, and have all the powers, rights, and privileges and are subject to the duties, liabilities, and restrictions which by law appertain thereto.

Witness my official signature hereunto subscribed, and the seal of the state of North Carolina hereunto affixed, this the ..... day of ....., in the year ..... (in these blanks the day, month, and year of execution of this certificate shall be inserted; and in the case of purely mutual companies, so much as relates to capital stock shall be omitted).

The secretary of state shall sign the certificate and cause the seal of the state to be affixed to it, and such certificate of incorporation and certificate of the secretary of state has the effect of a special charter and is conclusive evidence of the organization and establishment of the corporation. The secretary of state shall also cause a record of his certificate to be made, and a certified copy of this record may be given in evidence with the same effect as the original certificate. (Rev., s. 4727; 1899, c. 54, s. 25; 1903, c. 438, ss. 2, 3; C. S. 6328.)

§ 58-74. First meeting; organization; license.—The first meeting for the purpose of organization under such charter shall be called by a notice signed by one or more of the subscribers to the certificate of incorporation, stating the time, place, and purpose of the meeting; and at least seven days before the appointed time a copy of this notice shall be given to each subscriber, left at his usual place of business or residence, or duly mailed to his postoffice address, unless the signers waive notice in writing. Whoever gives the notice must make affidavit thereof, which affidavit shall include a copy of the notice and be entered upon the records of the corporation. At the first meeting, or any adjournment thereof, an organization shall be effected by the choice of a temporary clerk, who shall be sworn; by the adoption of by-laws; and by the election of directors and such other officers as the by-laws required; but at this meeting no person may be elected director who has not signed the certificate of incorporation. The temporary clerk shall record the proceedings until the election and qualification of the secretary. The directors so chosen shall elect a president, secretary, and other officers which under the by-laws they are so authorized to choose. The president, secretary, and a majority of the directors shall forthwith make, sign, and swear to a certificate setting forth a copy of the certificate of incorporation, with the names of the subscribers thereto, the date of the first meeting and of any adjournments thereof, and shall submit such certificate and the records of the corporation to the commissioner of insurance, who shall examine the same, and who may require such other evidence as he deems necessary. If upon his examination the commissioner of insurance approves of the by-laws and finds that the requirements of the law have been complied with, he shall issue a license to the company to do business in the state, as is provided for in this chapter. (Rev., s. 4728; 1899, c. 54, s. 25; 1903, c. 438, ss. 2, 3; C. S. 6329.)

§ 58-75. By-laws; classification and election of directors.—A domestic company may adopt by-laws for the conduct of its business not repugnant to law or its charter, and therein provide for the division of its board of directors into two, three, or four classes, and the election thereof at its annual meetings so that the members of one class only shall retire and their successors be chosen each year. Vacancies in any such class may be filled by election by the board for the unexpired term. (Rev., s. 4724; 1899, c. 54, s. 22; C. S. 6330.)

§ 58-76. Power to purchase, hold, and convey real estate.—Any company organized by special charter or under the provisions of the general insurance laws of this state may purchase, hold, and convey real estate for the sole purposes and in the manner herein set forth:

1. Such as is necessary for its immediate use in the transaction of its business.

2. Property mortgaged to it in good faith as security for loans previously contracted or for money due.

3. Property conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts.

3½. (A) Real estate acquired for the purpose of leasing the same to any person, firm, or corporation for a period not exceeding thirty years, or real estate already leased for an unexpired period not exceeding thirty years, under an agreement (1) that the lessee shall at its own cost erect, or where under the lessee or its predecessor in title has at its own cost already erected thereon, free of liens, a building or other improvements satisfactory to the owner; (2) that the said improvements shall remain on the said property during the period of the lease, with provision that at the termination of the lease the ownership of such improvements, free of liens, shall vest in the owner of the real estate; and (3) that during the term of the lease the tenant shall keep and maintain the said improvements in good repair. Real estate acquired pursuant to the provisions of this subsection (A) shall not be treated as an admitted asset unless and until the improvements herein required shall have been constructed and the lease agreement entered into in accordance with the terms of this subsection, nor shall real estate acquired pursuant to this subsection (A) be treated as an admitted asset in an amount exceeding the amount actually invested reduced each year by equal decrements sufficient to write off at least seventy-five per cent of the investment at the normal termination of the lease. The total investments of any company under this subsection (A) shall not exceed three per cent of its assets.

(B) Subject to approval of the commissioner of insurance, real estate for recreation, hospitalization, convalescent and retirement purposes of its

employees only. Such investment under this subsection (B) shall not exceed five per cent of the company's surplus.

No investment shall be made by any company pursuant to this subdivision 3½ which will cause such company's investment in all real property owned by it to exceed ten per cent of its assets.

4. It is unlawful for any such incorporated company to purchase or hold real estate in any other case or for any other purpose; and such real estate acquired, and not necessary for the accommodation of the company in the convenient transaction of its business, shall be sold and disposed of within five years after the company has acquired title, and it is not lawful for it to hold the real estate for a longer period than that mentioned, unless it acquired such real estate prior to March sixth, one thousand eight hundred and ninety-nine, or procures a certificate from the commissioner of insurance that the interest of the company will suffer materially by a forced sale of such real estate, in which event the time for the sale may be extended to such a time as the commissioner of insurance directs in the certificate. Nothing contained herein prevents any insurance company from improving and conveying its real estate, notwithstanding the lapse of five years from its acquisition thereof, without having procured such certificate from the commissioner of insurance. (Rev., s. 4725; 1899, c. 54, s. 22; 1903, c. 536, s. 2; 1943, c. 385; C. S. 6331.)

Editor's Note.—The 1943 amendment inserted subdivision 3½.

§ 58-77. Amount of capital required. — The amount of capital requisite to the formation and organization of companies under the provisions of this subchapter is as follows: Companies to insure plate-glass, not less than twenty-five thousand dollars. Companies issuing health policies, policies against damage by hail, or insuring marine risks or inland risks upon the stock plan, or insuring live-stock, not less than fifty thousand dollars. Companies for the purpose of transacting life or fire insurance on the stock plan, fidelity insurance, accident insurance, steamboiler insurance, credit insurance, sprinkler insurance, and insurance against loss by accident to vehicles, not less than one hundred thousand dollars; but life or accident companies on the industrial plan, issuing policies not over five hundred dollars, may be allowed to transact business with as little capital as fifty thousand dollars. Companies may be so formed to insure mechanics' tools and apparatus against loss by fire for an amount not exceeding two hundred and fifty dollars in a single risk, with a capital of not less than ten thousand dollars, divided into shares of the par value of ten dollars each. (Rev., s. 4729; 1899, c. 54, s. 26; 1903, c. 438, s. 4; 1907, c. 1000, s. 5; 1913, c. 140, s. 2; 1929, c. 284, s. 1; C. S. 6332.)

Editor's Note.—By the amendment of 1929 the capital stock required was materially increased.

§ 58-78. Capital stock fully paid in cash.—The capital stock shall be paid in cash within twelve months from the date of the charter or certificate of organization, and no certificate of full shares and no policies may be issued until the whole capital is paid in. A majority of the directors shall certify on oath that the money has been paid by the stockholders for their respective shares and is held as the capital of the company invested or to be invested as required by § 58-79. (Rev., s. 4730; 1899, c. 54, s. 27; C. S. 6333.)

§ 58-79. Investment of capital.—Such capital shall be invested only as follows:

1. In first mortgages of real estate in this state.

2. In bonds of the United States or of any of the states whose bonds do not sell for less than par.

3. In the bonds or notes of any city, county, or town of this state whose net indebtedness does not exceed five per centum of the last preceding valuation of the property therein for purposes of taxation. The term "net indebtedness" excludes any debt created to provide an electric light plant and equipment, sewerage system, and a supply of water for general domestic use, and allows credit for the sinking fund of a county, city, town, or district available for the payment of its indebtedness.

4. Any insurance company having a capital stock of more than one hundred thousand dollars may, with the consent of the commissioner of insurance, after investing one hundred thousand dollars of the capital as provided in this section, invest the balance in such other securities or in such safe manner as may be approved by the commissioner.

5. Any real-estate title insurance company organized for any of the purposes set forth in article fourteen of this chapter, and having a capital stock of more than fifty thousand dollars, may, with the consent of the commissioner of insurance, after investing fifty thousand dollars of the capital, as provided in this section, invest the balance thereof in any such other securities including preferred stock in solvent corporations and including a reasonable investment not to exceed one-fourth of the total capital stock in abstract or title plants; and no such company shall guarantee or insure in any one risk more than forty per cent of its combined capital and surplus without first having the approval of the commissioner of insurance of North Carolina, which approval shall be endorsed upon the policy. If the capital stock of such company does not exceed fifty thousand dollars, it may, with the consent of the commissioner of insurance, after having invested three-fourths of its capital stock as now provided by law, invest the balance thereof in abstracts of titles of property situated in one or more of the cities or counties of this state. (Rev., s. 4731; 1899, c. 54, s. 27; 1907, c. 798; 1907, c. 998; 1911, c. 32; 1913, c. 200; 1923, c. 73; 1925, c. 187; C. S. 6334.)

Cross References.—As to authority to invest in bonds guaranteed by the United States, see § 53-44. As to authority to invest in bonds or notes secured by mortgages insured by the Federal Housing Administration, see § 53-45. See also § 53-60 as to investments in Federal Farm Loan bonds, and see § 142-29 as to investments in refunding bonds of North Carolina.

§ 58-80. Valuation of bonds and other evidences of debt; discretion of commissioner of insurance.—All bonds or other evidences of debt having a fixed term and rate held by any life insurance company, assessment life association, or fraternal beneficiary association authorized to do business in this state may, if amply secured

and not in default as to principal and interest, be valued as follows: If purchased at par, at the par value; if purchased above or below par, on the basis of the purchase price adjusted so as to bring the value to par at maturity, and so as to yield in the meantime the effective rate of interest at which the purchase was made: Provided, that the purchase price shall in no case be taken at a higher figure than the actual market value at the time of purchase; and provided further, that the commissioner of insurance shall have full discretion in determining the method of calculating values according to the foregoing rule. (1921, c. 220; C. S. 6334(a).)

§ 58-81. Authority to increase or reduce capital stock.—The commissioner of insurance shall, upon application, examine the proceedings of domestic companies to increase or reduce their capital stock, and when found conformable to law shall issue certificates of authority to such companies to transact business upon such increased or reduced capital. He shall not allow stockholders' obligations of any description as part of the assets or capital of any stock insurance company unless the same are secured by competent collateral. (Rev., s. 4732; 1899, c. 54, s. 15; C. S. 6335.)

§ 58-82. Assessment of shares; revocation of license.—When the net assets of a company organized under this article do not amount to more than three-fourths of its original capital, it may make good its capital to the original amount by assessment of its stock. Shares on which such an assessment is not paid within sixty days after demand shall be forfeitable and may be canceled by vote of the directors and new shares issued to make up the deficiency. If such company does not, within three months after notice from the commissioner of insurance to that effect, make good its capital or reduce the same, as allowed by this article, its authority to transact new business of insurance shall be revoked by the commissioner. (Rev., s. 4733; 1899, c. 54, s. 28; 1903, c. 438, s. 4; C. S. 6336.)

§ 58-83. Increase of capital stock.—Any company organized under this article may issue pro rata to its stockholders certificates of any portion of its actual net surplus it deems fit to divide, which shall be considered an increase of its capital to the amount of such certificates. The company may, at a meeting called for the purpose, vote to increase the amount and number of shares of its capital stock, and to issue certificates therefor when paid for in full. In whichever method the increase is made, the company shall, within thirty days after the issue of such certificates, submit to the commissioner of insurance a certificate setting forth the amount of the increase and the facts of the transaction, signed and sworn to by its president and secretary and a majority of its directors. If the commissioner of insurance finds that the facts conform to the law, he shall endorse his approval thereof; and upon filing such certificate so endorsed with the secretary of state, and the payment of a fee of five dollars for filing the same, the company may transact business upon the capital as increased, and the commissioner of insurance shall issue his certificate to that effect. (Rev., s. 4734; 1899, c. 54, s. 29; C. S. 6337.)

§ 58-84. Reduction of capital stock.—When the capital stock of a company organized under this article is impaired, the company may, upon a vote of the majority of the stock represented at a meeting legally called for that purpose, reduce its capital stock and the number of shares thereof to an amount not less than the minimum sum required by law, but no part of its assets and property shall be distributed to its stockholders. Within ten days after such meeting the company must submit to the commissioner of insurance a certificate setting forth the proceedings thereof and the amount of the reduction and the assets and liabilities of the company, signed and sworn to by its president, secretary, and a majority of its directors. The commissioner of insurance shall examine the facts in the case, and if they conform to law, and in his judgment the proposed reduction may be made without prejudice to the public, he shall endorse his approval upon the certificate. Upon filing the certificate so endorsed with the secretary of state and paying a filing fee of five dollars, the company may transact business upon the basis of the reduced capital as though it were original capital, and its charter shall be deemed to be amended to conform thereto, and the commissioner of insurance shall issue his certificate to that effect. The company may, by a majority vote of its directors, after the reduction, require the return of the original certificates of stock held by each stockholder in exchange for new certificates it may issue in lieu thereof for such number of shares as each stockholder is entitled to in the proportion that the reduced capital bears to the original capital. (Rev., s. 4735; 1899, c. 54, s. 30; C. S. 6338.)

§ 58-85. Dividends declared; liability of stockholders for unlawful dividends.—No stock company organized under this article may pay a cash or stock dividend except from its actual net surplus computed as required by law in its annual statements, nor may any such company which has ceased to do new business of insurance divide any portion of its assets, except surplus, to its stockholders, until it has performed or canceled its policy obligations. No dividend shall be paid by any company incorporated in this state when its capital stock is impaired, or when such payment would have the effect of impairing its capital stock; and any dividend so paid subjects the stockholders receiving it to a joint and several liability to the creditors of said company to the extent of the dividend so paid. (Rev., s. 4736; 1899, c. 54, s. 31; 1903, c. 536, s. 3; C. S. 6339.)

§ 58-86. Loans insufficiently secured. — Whenever it appears by examination, as authorized by law, that an insurance company, organized under the laws of this state, holds, as collateral security for the payment of any loan, any stock, bond, or security of whatever description, which has not a cash market value of at least twenty-five per centum more than the amount of such loan, the commissioner of insurance may require the reduction of the loan or an increase of the collateral security, so that the security shall be at least twenty-five per centum in excess of the amount

loaned. If the company fail to comply with this requirement within ten days after receiving written notice thereof from the commissioner, it is the duty of the commissioner to disallow the loan and to deduct the amount thereof from the assets of the company. If it appears, upon examination, that any such insurance company holds, as security for any loan, a mortgage upon real estate which is not a first lien, or that the value of the real estate is less than fifty per centum in excess of the loan which it is mortgaged to secure, the commissioner of insurance may disallow the loan and deduct the amount thereof from the assets of the company holding it, after having given the company at least twenty days notice, in writing, to change or conform the loan to the requirements of this section. (Rev., s. 4737; 1903, c. 536, ss. 6, 7, 8; C. S. 6340.)

Art. 7. Guaranty Fund for Domestic Companies.

§ 58-87. Guaranty fund established.—Any insurance company formed as provided in the preceding article, or now existing by virtue of any of the laws of North Carolina, may establish a guaranty fund of not less than twenty-five thousand dollars nor more than two hundred thousand dollars, in the following manner: The company may receive from any person, firm, or corporation, money, bonds, or other securities, in such amount as may be agreed upon, for the purpose of providing a guaranty fund, to be used as hereinafter provided, for payment of the claims of policyholders. Upon the receipt of such bonds, money, or other securities by an insurance company, it shall issue its certificate, in writing, authenticated as required by law for certificates of stock, stating the amount, terms, and conditions of repayment of such money or the return of such bonds or other securities, the name of the payee or depositor, and the certificate shall also state upon its face that it is issued under the provisions of this section. The money, bonds, or other securities, when so paid to or deposited with such insurance company, become a part of the guaranty fund of the company, and are liable for all the claims of policyholders after the general assets of the company have been exhausted. This guaranty fund is not liable for the claims or debts due to stockholders or the general creditors of such insurance company. No insurance company shall create a guaranty fund, as provided in this article, except upon the approval of a majority of its stockholders authorized at any regular or special meeting called for the purpose. (1909, c. 922, s. 1; C. S. 6341.)

§ 58-88. Separate accounts; application of fund.—Every insurance company which establishes a guaranty fund under the provisions of this article must keep a separate account of the same on its books, together with a full and true list of any securities held therefor. The money and securities belonging to the guaranty fund must be invested in the same manner as is now provided by law for the investment of other assets of insurance companies; but any bond or other securities received by any such insurance company as a part of its guaranty fund may be deposited with the commissioner of insurance, as is now allowed by law, subject to the further provisions of this article. An insurance company receiving said money or securities as a part of its guaranty fund, as herein provided, may pay to the person, firm, or corporation from whom the same is received a semi-annual dividend of not more than three and one-half per cent on the amount of said money or securities. The guaranty fund herein provided for shall be applied to the payment of claims of policyholders only when the insurance company has exhausted its cash on hand and the invested assets, exclusive of uncollected premium; and when the guarantee is in any way impaired the directors may make good the whole or any part of such impairment, by assessment upon the contingent funds of the company at the date of such impairment, if any are available. (1909, c. 922, s. 1; C. S. 6342.)

§ 58-89. Reduction or retirement of fund.—The guaranty fund shall be retired when the permanent fund of the company equals two per centum of the amount insured upon all policies in force; and such guaranty fund may be reduced or retired by vote of the directors of the company and the assent of the commissioner of insurance, if the net assets of the company above the reinsurance reserve and all other claims and obligations, exclusive of the guaranty fund, for two years immediately preceding and including the date of its last annual statement, are not less than twenty-five per centum of the fund. Due notice of this proposed action on the part of the directors of the company must be mailed to each director of the company not less than thirty days before the meeting when such action may be taken, and must also be advertised in two newspapers of general circulation, to be approved by the commissioner of insurance, not less than twice a week for a period of not less than four weeks before the meeting. No insurance company with a guaranty fund, as hereinbefore provided, which has ceased to do new business, may return or retire any part of the guaranty fund or divide to its stockholders any part of its general assets, except incomes from its investments, until it shall have performed, reinsured, or canceled its policy obligations. (1909, c. 922, s. 1; C. S. 6343.)

§ 58-90. Insolvency; return of fund. — In the event of insolvency or voluntary liquidation of any such insurance company, the amount of the guaranty fund shall be returned to the persons, firms, or corporations, their heirs, executors, administrators, successors, or assigns, from which the same was received, in full or pro rata, as the case may be, before any amount shall be paid from the assets of said company to its stockholders. The intention of this section is that the liability of the company for the repayment or the return of its guaranty fund, as evidenced by its certificates therefor, as hereinbefore provided, shall be preferred in the distribution of its assets to the stockholders and general creditors of the company, other than its policy obligations. (1909, c. 922, s. 1; C. S. 6344.)

§ 58-91. Conversion to guaranty fund.—Any insurance company now doing business as a domestic insurance company under the laws of this state which has received any money or securities to be held as a guaranty capital, guaranty sur-

plus, or guaranty fund, may convert the same into a guaranty fund, as hereinbefore provided, by mutual agreement between the board of directors of the insurance company and the parties from whom the money or securities have been received, subject, however, to the approval of the commissioner of insurance, and thereupon certificates shall be issued therefor, as hereinbefore provided, and the same shall thereafter be held subject to the rights and liabilities provided in this article. (1909, c. 922, s. 2; C. S. 6345.)

Art. 8. Mutual Insurance Companies.

§ 58-92. Mutual fire insurance companies organized; requisites for doing business.—Mutual fire insurance companies may be formed under this article, but no policy may be issued by a purely mutual fire insurance company, or by a mutual fire insurance company with a guaranty capital of less than fifty thousand dollars, until not less than two hundred thousand dollars of insurance, in not less than two hundred separate risks upon property located in North Carolina, has been subscribed for and entered on its books: but in the formation of mutual fire insurance companies to operate in no more than two counties of this state, whether town or farmers' mutuals, the requirement as to amount of insurance shall be twenty-five thousand dollars in risks owned by at least twenty-five adult residents of such towns or counties; but where there is an association or corporation for the purpose of interinsurance or mutual protection between members of said association or corporation, which members or stockholders are engaged in the same line of business, the requirement shall be fifty instead of two hundred separate risks. No policy may be issued under this section until the president and the secretary of the company have certified under oath that every subscription for insurance in the list presented to the commissioner of insurance for approval is genuine, and made with an agreement with every subscriber for insurance that he will take the policies subscribed for by him within thirty days after the granting of a license to the company by the commissioner of insurance to issue policies. (Rev., s. 4738; 1899, c. 54, ss. 25, 32, 34; 1901, c. 391, s. 3; 1903, c. 438, s. 4; 1911, c. 93; C. S. 6346.)

Cross Reference.—Mutual life and health insurance companies are largely governed by this article. See § 58-101.

§ 58-93. Assessments kept in treasury; certain officers debarred from commissions.—Every mutual or assessment company or association organized or doing business in the state on the assessment plan shall keep in its treasury at least one assessment sufficient to pay one average loss. No officer or other person whose duty it is to determine the character of the risk, and upon whose decision the application shall be accepted or rejected by a mutual fire insurance company, shall receive as any part of his compensation a commission upon the premiums, but his compensation shall be a fixed salary and such share in the net profits as the directors may determine. Nor shall such officer or person be an employee of any officer or agent of the company. (Rev., s. 4738; 1899, c. 54, s. 32; 1903, c. 438, s. 4; C. S. 6347.)

§ 58-94. Policyholders are members of mutual fire companies.—Every person insured by a mutual fire insurance company is a member while his policy is in force, entitled to one vote for each policy he holds, and must be notified of the time and place of holding its meetings by a written notice or by an imprint upon the back of each policy, receipt, or certificate of renewal, as follows:

The insured is hereby notified that by virtue of this policy he is a member of the ..... insurance company, and that the annual meetings of the company are held at its home office on the ..... day of ....., in each year, at ..... o'clock.

The blanks shall be duly filled in print and are a sufficient notice. A corporation which becomes a member of such company may authorize any person to represent it, and this representative has all the rights of an individual member. A person holding property in trust may insure it in such company, and as trustee assume the liability and be entitled to the rights of a member, but is not personally liable upon the contract of insurance. Members may vote by proxies, dated and executed within three months, and returned and recorded on the books of the company three days or more before the meeting at which they are to be used; but no person as proxy or otherwise may cast more than twenty votes. (Rev., s. 4739; 1899, c. 54, s. 33; C. S. 6348.)

This section is an enabling statute to protect a trustee from liability. Fuller v. Lockhart, 209 N. C. 61, 70, 182 S. E. 733.

The policyholders in a mutual fire insurance company are not stockholders therein, and are in no way liable for the debts of the company beyond the contingent liability fixed in the policy. Fuller v. Lockhart, 209 N. C. 61, 70, 182 S. E. 733.

This and § 58-97 do not indicate legislative intent to prohibit county boards of education insuring property in mutual companies by failing to expressly grant such authority. Id.

§ 58-95. Directors in mutual fire companies.—Every mutual fire insurance company shall elect by ballot a board of not less than seven directors, who shall manage and conduct its business and hold office for one year or for such term as the by-laws provide and until their successors are qualified. Two-thirds at least of the directors must be citizens of the state, and after the first election members only are eligible, but no director is disqualified from serving the term he was chosen for by reason of the expiration or cancellation of his policy. In companies with a guaranty capital, one-half of the directors shall be chosen by and from the stockholders. (Rev., s. 4739; 1899, c. 54, s. 33; C. S. 6349.)

§ 58-96. Mutual fire companies with a guaranty capital.—A mutual fire insurance company formed as provided in this article, or a mutual fire insurance company now existing, may establish a guaranty capital or surplus of not less than twenty-five thousand dollars nor more than two hundred thousand dollars, divided into shares of one hundred dollars each, which shall be invested in the same manner as is provided in this subchapter for the investment of the capital stock of certain insurance companies. The stockholders of the guaranty capital of a company or owners of guaranty surplus are entitled to a semiannual dividend of not more than three and one-half per centum on their respective shares, if the net profits or un-

used premiums left after all expenses, losses, and liabilities then incurred, together with the reserve for reinsurance, as provided for, are sufficient to pay the same. The guaranty capital or surplus shall be applied to the payment of losses only when the company has exhausted its cash in hand and the invested assets, exclusive of uncollected premiums, and when thus impaired, the directors may make good the whole or any part of it by assessments upon the contingent funds of the company at the date of such impairment. Shareholders and members of such companies are subject to the same provisions of law in respect to their right to vote as apply respectively to shareholders in stock companies and policyholders in purely mutual companies. This guaranty capital or surplus shall be retired when the permanent fund of the company equals two per centum of the amount insured upon all policies in force, and may be reduced or retired by vote of the policyholders of the company and the assent of the commissioner of insurance, if the net assets of the company above its reinsurance reserve and all other claims and obligations, exclusive of guaranty capital or surplus, for two years immediately preceding and including the date of its last annual statement, is not less than twenty-five per centum of the guaranty capital or surplus. Due notice of such proposed action on the part of the company must be mailed to each policyholder of the company not less than thirty days before the meeting when the action may be taken, and must also be advertised in two papers of general circulation, approved by the commissioner of insurance, not less than three times a week for a period of not less than four weeks before such meeting. No insurance company with a guaranty capital or surplus, which has ceased to do new business, shall divide to its stockholders any part of its assets or guaranty capital or surplus, except income from investments, until it has performed or canceled its policy obligations. (Rev., s. 4740; 1899, c. 54, s. 34; 1911, c. 196, s. 3; C. S. 6350.)

§ 58-97. Dividends and assessments; liability of policyholders.—The directors of a mutual fire insurance company may from time to time, by vote, fix and determine the amount to be paid as a dividend upon policies expiring during each year. Each policyholder is liable to pay his proportional share of any assessments which are made by the company in accordance with law and his contract on account of losses incurred while he was a member, if he is notified of such assessments within one year after the expiration of his policy. Any mutual fire insurance company doing business with a fixed annual premium may in its by-laws and policies fix the contingent liability of its members for the payment of losses and expenses not provided for by its cash funds, which contingent liability must not be less than a sum equal to the cash premium written in his policy and in addition thereto. The by-laws may also provide for policies to be issued for cash premiums without contingent liability of policyholders; provided, that no mutual fire insurance company shall issue any policy without contingent liability until and unless it possesses a surplus of at least one hundred thousand dollars. The total amount of the liability of the policyholder must be plainly and legibly stated upon the back of each policy. Whenever any reduction is made in the contingent liability of members, it applies proportionally to all policies in force: Provided this section shall not apply to farmers mutual fire insurance companies. (Rev., s. 4741; 1899, c. 54, s. 35; 1935, c. 89; C. S. 6351.)

Editor's Note.—Prior to the amendment the contingent liability was required to be not less than a sum equal to five times the cash written in its policy. The third from the last sentence of this section relating to provisions in by-laws was added by the amendment. The proviso at the end of the section was also added.

This section provides the terms and method of how mutual insurance can operate in this state. Those who purchase mutual insurance have their rights fixed. Fuller v. Lockhart, 209 N. C. 61, 70, 182 S. E. 733.

Cited in Paramore v. Farmers' Mut. Fire Ins. Ass'n, 207 N. C. 300, 306, 176 S. E. 585.

§ 58-98. Waiver of forfeiture in policies assigned or pledged; notice of assignment; payment of assessment or premium by assignee or mortgagee.—When any policy of insurance is issued by any mutual insurance company or association organized under the laws of this state and such policy is assigned or pledged as collateral security for the payment of a debt, such company or association, by its president and secretary or other managing officers, may insert in such policy so assigned or pledged, or attach thereto as a rider thereon, a provision or provisions to be approved by the commissioner of insurance, whereby any or all conditions of the policy which work a suspension or forfeiture and especially the provisions of the statute which limits such corporation to insure only property of its members, may be waived in such case for the benefit of the assignee or mortgagee. In case any such company or association shall consent to such assignment of any policy or policies, or the proceeds thereof, it may nevertheless at any time thereafter, by its president and secretary or such other officer as may be authorized by the board of directors, cancel such policy by giving the assignee or mortgagee not less than ten days notice in writing: Provided, however, a longer period may be agreed upon by the company or association and such assignee or mortgagee. And the president and secretary of such company or association, with the approval of the commissioner of insurance, may agree with the assignee or mortgagee upon an assessment or premium to be paid to the insurer in case the insured shall not pay the same, which shall not be less than such a rate or sum of money as may be produced by the average assessments or premiums made or charged by like company or association during a period of five years next preceding the year of such agreement and assignment. When an assignment is made as herein provided the policy or policies so assigned or pledged, subject to the conditions herein, shall remain in full force and effect for the benefit of the assignee or mortgagee, notwithstanding the title or ownership of the assured to the property insured, or to any interest therein, shall be in any manner changed, transferred or encumbered. (Ex. Sess. 1920, c. 79; C. S. 6351(a).)

§ 58-99. Guaranty against assessments prohibited.—If any director or other officer of a mu-

tual fire insurance company, either officially or privately, shall give a guarantee to a policyholder thereof against an assessment to which such policyholder would otherwise be liable, he shall be punished by a fine not exceeding one hundred dollars for each offense. (Rev., s. 3496; 1899, c. 54, s. 100; C. S. 6352.)

Cited in Paramore v. Farmers' Mut. Fire Ins. Ass'n, 207 N. C. 300, 306, 176 S. E. 585.

§ 58-100. Manner of making assessments; rights and liabilties of policyholders.—When a mutual fire insurance company is not possessed of cash funds above its reinsurance reserve sufficient for the payment of insured losses and expenses, it must make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment therefor in proportion to their several liabilities. The company shall cause to be recorded in a book kept for that purpose the order for the assessment, together with a statement which must set forth the condition of the company at the date of the order, the amount of its cash assets and deposits, notes, or other contingent funds liable to the assessment, the amount the assessment calls for, and the particular losses or liabilities it is made to provide for. This record must be made and signed by the directors who voted for the order before any part of the assessment is collected, and any person liable to the assessment may inspect and take a copy of the same. When, by reason of depreciation or loss of its funds or otherwise, the cash assets of such company, after providing for its other debts, are less than the required premium reserve upon its policies, it must make good the deficiency by assessment in the manner above provided. If the directors are of the opinion that the company is liable to become insolvent they may, instead of such assessment, make two assessments, the first determining what each policyholder must equitably pay or receive in case of withdrawal from the company and having his policy canceled; the second, what further sum each must pay in order to reinsure the unexpired term of his policy at the same rate as the whole was insured at first. Each policyholder must pay or receive according to the first assessment, and his policy shall be canceled unless he pays the sum further determined by the second assessment, in which case his policy continues in force; but in neither case may a policyholder receive or have credited to him more than he would have received on having his policy canceled by a vote of the directors under the by-laws. (Rev., s. 4742; 1899, c. 54, ss. 36, 37; C. S. 6353.)

Forfeiture and Waiver.—It is clear that failure to pay assessments, in accordance with the terms of a contract works a forfeiture of the policy. It is equally well settled that a company may by acts of unequivocal character waive such forfeiture. Perry v. Farmers Mut. Life Ins. Co., 132 N. C. 283, 287, 43 S. E. 837.

An acceptance of an overdue assessment by a fire insurance company, after the property is burned, the company having notice thereof, is a waiver of the forfeiture of the policy. Perry v. Farmers Mut. Life Ins. Co., 132 N. C. 283, 43 S. E. 837.

Where mutual fire insurance company relies on failure to pay assessment in order to defeat recovery on policy, it must show that the assessment was legally made in conformity with the provisions of this section, and where it fails to so show and plaintiff insurer testifies that she did not get notice of the assessment or of the cancellation of the policy, peremptory instructions against insurer on the affirmative defense are without error. Abernethy v. Mecklenburg Farmers' Mut. Fire Ins. Co., 213 N. C. 23, 195 S. E. 30.

Right of Insured to Withdraw.—Where the members of mutual insurance companies have enjoyed the protection which membership affords, they cannot, after a loss has been sustained, withdraw and refuse to pay their portion of the loss. Perry v. Farmers Mut. Fire Ass'n, 139 N. C. 374, 51 S. E. 1025.

Payments of Claims.—The right of each policyholder in the defendant company is to have an assessment made to pay his loss, and he has no claim upon an amount paid to another policyholder. Perry v. Farmers Mut. Fire Ass'n, 139 N. C. 374, 51 S. E. 1025.

§ 58-101. Mutual life and health companies.—Life and health insurance companies and associations organized in this state to do business on the mutual plan shall be governed as to the commencement of business, election of members, guaranty capital, dividends, and assessments as provided in this article for mutual fire insurance companies, where applicable. (Rev., s. 4743; 1903, c. 536, s. 1; C. S. 6354.)

§ 58-102. Dividends on, and redemption of, guaranty capital of life companies.—The stockholders of the guaranty capital of any domestic life insurance company are entitled to such annual dividends not exceeding eight per centum, payable from the net surplus, as have been agreed upon in the subscription thereof. Such company may redeem its guaranty capital by appropriation of net surplus for that purpose whenever its members so vote. (Rev., s. 4744; 1899, c. 54, s. 58; 1903, c. 438, s. 5; C. S. 6355.)

Art. 9. Conversion of Stock Corporations into Mutual Corporations.

§ 58-103. Domestic stock life insurance corporations authorized to convert into mutual corporations; procedure.—Any domestic stock life insurance corporation may become a mutual life insurance corporation, and to that end may carry out a plan for the acquisition of shares of its capital stock: Provided, however, that such plan (first) shall have been adopted by a vote of a majority of the directors of such corporation; (second) shall have been approved by a vote of the holders of two-thirds of the stock outstanding at the time of issuing the call for a meeting for that purpose; (third) shall have been submitted to the commissioner of insurance and shall have been approved by him in writing, and (fourth) shall have been approved by a majority vote of the policyholders (including, for the purpose of this article, the employer or the president, secretary or other executive officer of any corporation or association to which a master group policy has been issued, but excluding the holders of certificates or policies issued under or in connection with a master group policy) voting at said meeting, called for that purpose, at which meeting only such policyholders whose insurance shall then be in force and shall have been in force for at least one year prior to such a meeting shall be entitled to vote; notice of such a meeting shall be given by mailing such notice, postage prepaid, from the home office of such corporation at least thirty days prior to such meeting to such policyholders at their last known post-office addresses: Provided, that personal delivery of such written notice to any policyholder may be in lieu of mailing the same; and such meeting shall be otherwise provided for and conducted in such

manner as shall be provided in such plan: Provided, however, that policyholders may vote in person, by proxy, or by mail; that all such votes shall be cast by ballot, and a representative of the commissioner of insurance shall supervise and direct the methods and procedure of said meeting and appoint an adequate number of inspectors to conduct the voting at said meeting who shall have power to determine all questions concerning the verification of the ballots, the ascertainment of the validity thereof, the qualifications of the voters, and the canvass of the vote, and who shall certify to the said representative and to the corporation the results thereof, and with respect thereto shall act under such rules and regulations as shall be prescribed by the commissioner of insurance; that all necessary expenses incurred by the commissioner of insurance or his representative shall be paid by the corporation as certified to by said commissioner. Every payment for the acquisition of any shares of the capital stock of such corporation, the purchase price of which is not fixed by such plan, shall be subject to the approval of the commissioner: Provided, that neither such plan, nor any payment thereunder, nor any payment not fixed by such plan, shall be approved by the commissioner, if the making of such payment shall reduce the assets of the corporation to an amount less than the entire liabilities of the corporation, including therein the net values of its outstanding contracts according to the standard adopted by the commissioner of insurance, and also all other funds, contingent reserves and surplus which the corporation is required by order or direction of the commissioner of insurance to maintain, save so much of the surplus as shall have been appropriated or paid under such plan. (1937, c. 231, s. 1.)

Editor's Note.—For a discussion of act from which this article is codified, see 15 N. C. Law Rev. 359.

§ 58-104. Stock acquired to be turned over to voting trust until all stock acquired; dividends repaid to corporation for beneficiaries.—If a domestic stock life insurance corporation shall determine to become a mutual life insurance corporation it may, in carrying out any plan to that end under the provisions of § 58-103, acquire any shares of its own stock by gift, bequest or purchase. And until all such shares are acquired, any shares so acquired shall be acquired in trust for the policyholders of the corporation as hereinafter provided, and shall be assigned and transferred on the books of the corporation to not less than three nor more than five trustees, and be held by them in trust and be voted by such trustees at all corporate meetings at which stockholders have the right to vote until all of the capital stock of such corporation is acquired, when the entire capital stock shall be retired and canceled; and thereupon, unless sooner incorporated as such, the corporation shall be and become a mutual life insurance corporation without capital stock. Said trustees shall be appointed and vacancies shall be filled as provided in the plan adopted under § 58-103. Said trustees shall file with the corporation and with the commissioner of insurance a verified acceptance of their appointments and declaration that they will faithfully discharge their duties as such trustees. After the payment of such dividends to stockholders or former stockholders as may have been provided in the plan adopted under § 58-103, all dividends and other sums received by said trustees on said shares of stock so acquired, after paying the necessary expenses of executing said trust, shall be immediately repaid to said corporation for the benefit of all who are or may become policyholders of said corporation and entitled to participate in the profits thereof, and shall be added to and become a part of the surplus earned by said corporation, and be apportionable accordingly as a part of said surplus among said policyholders. (1937, c. 231, s. 2.)

Art. 10. Assessment Companies.

§ 58-105. Copies of charter and by-laws filed.—Every corporation, society, or organization of this or any other state or country, transacting business under this department upon the coöperative or assessment plan, must file with the commissioner of insurance, before beginning to do business in this state, a copy of its charter or articles of association, and the by-laws, rules, or regulations referred to in its policies or certificates and made a part of such contract. By-laws or regulations not so filed with the commissioner of insurance will not avoid or affect any policy or certificate issued by such company or association. (Rev., s. 4790; 1899, c. 54, s. 86; C. S. 6356.)

Cross Reference.—As to fraternal orders and societies, see § 58-263 et seq.

§ 58-106. Contracts must accord with charter and by-laws.—Every policy or certificate or renewal receipt issued to a resident of this state by any corporation, association, or order transacting therein the business of insurance upon the assessment plan must be in accord with the provisions of the charter and by-laws of such corporation, association, or order, as filed with the commissioner of insurance. It is unlawful for any such domestic or foreign insurance company or fraternal order to transact or offer to transact any business not authorized by the provisions of its charter and the terms of its by-laws, or, through an agent or otherwise, to offer or issue any policy, renewal certificate, or other contract whose terms are not in clear accord with the powers, terms, and stipulations of its charter and by-laws. (Rev., s. 4791; 1899, c. 54, s. 84; 1903, c. 438, s. 9; C. S. 6357.)

Duty and Liability under By-laws.—The by-laws of an assessment association when assented to by the members, as provided in this chapter, constitute the measure of duty and liability of the parties, provided they are reasonable and not in violation of any principle of public law. Duffy v. Fidelity Mut. Life Ins. Co., 142 N. C. 103, 55 S. E. 79.

Duty and Liability under Charter.—The contract of insurance must conform to the charter and by-laws, and these are as authorized by the state of its origin. Hollingsworth v. Supreme Council, 175 N. C. 615, 96 S. E. 81; Caldwell Land, etc., Co. v. Board, 174 N. C. 634, 94 S. E. 406, cited and distinguished.

Assessment companies are prohibited from issuing policies or transacting business not authorized by their charters. Brenizer v. Royal Arcanum, 141 N. C. 409, 418, 53 S. E. 835.

§ 58-107. "Assessment plan" printed on application and policy; waiver by commissioner.—Every policy or certificate issued to a resident of the state by any corporation transacting in the state the business of life insurance upon the assessment plan, or admitted to do business in this state on the assessment plan, shall print in bold type and

in red ink, near the top of the front page of the policy, upon every policy or certificate issued upon the life of any such resident of the state, the words "issued upon the assessment plan"; and the words "assessment plan" shall be printed conspicuously in red ink in and upon every application, circular, card, and any and all printed documents issued, circulated, or caused to be circulated by such corporation within the state, save and except, however, in advertising in newspapers within the state, in which case the words may be printed in black. The commissioner of insurance may waive the provisions of this section as to assessment companies or associations who conduct their business on an annual premium basis and maintain a full reserve of at least four per cent, based on any recognized table of mortality, and at all times maintain a net surplus over and above all liabilities and available for the payment of claims, sufficient to preclude the possibility of an extra assessment being levied against policyholders. Said waiver must be in writing and the commissioner of insurance may revoke it at any time for cause. (1913, c. 159, s. 1; 1929, c. 93, s. 1; 1933, c. 34; C. S. 6358.)

Editor's Note.—The amendment of 1929 added the last sentence of this section.

Public Laws 1933, c. 34, changed the waiver provision of this section to apply to associations maintaining a reserve of four per cent, rather than three and one-half per cent, based on any recognized Mortality Table, rather than the American Experience Mortality Table.

§ 58-108. Revocation for noncompliance.—If any corporation or association transacting insurance business in this state on the assessment plan or issuing any policy upon the life of a resident of North Carolina upon the assessment plan shall fail or refuse to comply with the foregoing section, the commissioner of insurance shall forthwith suspend or revoke all authority of such corporation or association and of its agents to do business in this state. (1913, c. 159, s. 2; C. S. 6359.)

§ 58-109. Deposits and advance assessments required.—Every domestic insurance company, association, order, or fraternal benefit society doing business on the assessment plan shall collect and keep at all times in its treasury one regular loss assessment sufficient to pay one regular average loss; and no such company, association, order, or fraternal benefit society shall be licensed by the commissioner of insurance unless it makes and maintains with him for the protection of its obligations at least five thousand dollars in United States or North Carolina bonds, in farm loan bonds issued by federal loan banks, or in the bonds of some city, county, or town of North Carolina to be approved by the commissioner of insurance, or deposit with him a good and sufficient bond, secured by a deed of trust on real estate situated in North Carolina and approved by him, or by depositing with the commissioner of insurance a bond in an amount of not less than five thousand ($5,000) dollars, issued by any corporate surety company authorized to do business in this state. Such companies, associations, orders, or societies now doing business in this state and not issuing policies or certificates for more than two hundred dollars, shall be permitted to deposit five hundred dollars on the first day of July, one thousand nine hundred and thirteen, and five hundred dollars each six months thereafter until the required amount is deposited; and the last named association when hereafter organized may be allowed by the commissioner of insurance to make such deposit in like installments. The commissioner of insurance may increase the amount of deposit to the amount of reserve on the contracts of the association or society. The provisions of this section shall not apply to the farmers mutual fire insurance associations now doing business in the state and restricting their activities to not more than two adjacent counties. (Rev., s. 4792; 1913, c. 119, s. 1; 1917, c. 191, s. 2; 1933, c. 47; C. S. 6360.)

Cross References.—As to other bonds insurance companies are authorized to invest in, see §§ 53-44, 53-45. As to investments in refunding bonds of North Carolina, see § 142-29.

Editor's Note.—Public Laws of 1933, c. 47, inserted the clause at the end of the first sentence of the section and also added the sentence appearing at the end of the section.

§ 58-110. Deposits by foreign assessment companies or order.—Each foreign insurance company, association, order, or fraternal benefit society doing business in this state on the assessment plan shall keep at all times deposited with the commissioner of insurance or in its head office in this state, or in some responsible banking or trust company, one regular assessment sufficient to pay the average loss or losses occurring among its members in this state during the time allowed by it for the collection of assessments and payment of losses. It shall notify the commissioner of insurance of the place of deposit and furnish him at all times such information as he requires in regard thereto; and no such company, association, order, or fraternal benefit society shall be licensed by the commissioner unless it makes and maintains with him for the protection of its obligations at least five thousand dollars in United States or North Carolina bonds, in farm loan bonds issued by federal land banks, or in the bonds of some county, city, or town in North Carolina to be approved by the commissioner of insurance, or a good and sufficient bond or note, secured by deed of trust on real estate situate in North Carolina, and approved by the commissioner. The provisions of this section do not apply to associations, orders, or fraternal benefit societies operating in not more than two adjacent counties in the state and paying a benefit of not exceeding two hundred dollars, but the amount to be deposited by said societies is within the discretion of the commissioner of insurance, but must be not less than one hundred dollars. (Rev., s. 4713; 1899, c. 54, s. 84; 1903, c. 438, s. 9; 1913, c. 119, ss. 2, 3; 1917, c. 191, s. 2; C. S. 6361.)

Cross References.—As to other bonds insurance companies are authorized to invest in, see §§ 53-44, 53-45. As to investments in refunding bonds of North Carolina, see § 142-29.

§ 58-111. Must pay death benefits in coin instead of services.—No corporation, society, or organization now doing business in this state or that may hereafter be authorized to do business in this state upon a mutual or assessment insurance plan and issuing contracts to its members providing benefits in excess of one hundred dollars ($100) in the event of death of its members or policy holders shall issue any contract to such members provid-

ing for the payment of benefits in merchandise or service to be rendered to such member or his beneficiary; but all contracts hereafter issued by any such corporation, society, or organization, shall provide by the terms of its contract for the payment of such benefits only in lawful currency or coin. (1931, c. 71.)

Cross Reference.—As to mutual burial associations in which benefits do not exceed $100.00, see § 58-224 et seq.

§ 58-112. Revocation of license.—If any such corporation, association, or order at any time fails to comply with the provisions of §§ 58-109 and 58-110 or shall issue policies or certificates not in accord with its charter and by-laws, as provided in this article, the commissioner of insurance shall forthwith suspend or revoke all authority to it, and of all its agents or officers, to do business in this state, and shall publish such revocation in some newspaper published in this state. (Rev., s. 4793; 1899, c. 54, s. 85; C. S. 6362.)

Art. 11. Fidelity Insurance Companies.

§ 58-113. May act as fiduciaries.—Any corporation licensed by the commissioner of insurance, where such powers or privileges are granted it in its charter, may be guardian, trustee, assignee, receiver, executor or administrator in this state without giving any bond; and the clerks of the superior courts or other officers charged with the duty, or clothed with the power of making such appointments, are authorized to appoint such corporation to any such office, whether the corporation is a resident of this state or not. (Rev., s. 4799; 1899, c. 54, s. 47; 1903, c. 438, s. 5; C. S. 6376.)

Cross References.—As to fiduciaries in general, see § 32-1 et seq. See § 58-116 and note.

Applied in Quinton v. Cain, 203 N. C. 162, 165 S. E. 543.

§ 58-114. License to do business.—Before any such corporation is authorized to execute any bond, obligation, or undertaking, or act in any fiduciary capacity without bond, it must be licensed by the commissioner of insurance of the state, which the commissioner is authorized to do when satisfied that such company or corporation is safe and solvent and has complied with the laws of this state applicable to such companies, and if a foreign company, that it has also complied with the conditions, rules, and regulations governing the admission of foreign insurance companies to do business in this state; but if such corporation be engaged in the business of commercial banking then such license shall be issued by the Commissioner of Banks and all other provisions of this article pertaining to corporations engaged in the business of banking shall apply to such corporations but shall be exercised and enforced by the Commissioner of Banks. For such license the licensee shall pay to the Banking Commission an annual license fee of two hundred ($200.00) dollars, which shall be remitted to the State Treasurer for the use of the Commissioner of Banks in the supervision of banks acting in a fiduciary capacity in so far as it may be necessary and the surplus, if any, shall remain in the State treasury for the use of the general fund of the State. (Rev., s. 4800; 1899, c. 54, s. 46; 1901, c. 706, s. 1; 1931, c. 387; C. S. 6377.)

Cross Reference.—See § 58-116 and note.

Editor's Note.—The Act of 1931 added all of this section beginning with the word "but" in line thirteen.

Applied in Quinton v. Cain, 203 N. C. 162, 165 S. E. 543.

§ 58-115. Examination as to solvency. — The commissioner shall examine into the solvency of such corporation, and shall, if he deem it necessary, at the expense of the corporation, make or cause to be made an examination at its home office of its assets and liabilities. (Rev., s. 4801; 1899, c. 54, s. 46; 1901, c. 706; C. S. 6378.)

Cross Reference.—See § 58-116 and note.

§ 58-116. Certificate of solvency equivalent to justification. — After any such corporation has been licensed by the commissioner, the certificate of the commissioner that it has been admitted to do business in the state and is licensed by the commissioner of insurance and is solvent to an amount not less than one hundred thousand dollars, shall be, until revoked by him, equivalent to the justification of sureties, and full evidence of its authority to give such bonds or undertakings. There shall be no charge for the seal of this certificate. (Rev., s. 4802; 1899, c. 54, s. 46; 1901, c. 706; C. S. 6379.)

There is a presumption that the Insurance Commissioner has complied with the law in licensing a bank to act as administrator, and where there is evidence that a bank, on the date it was appointed administrator, was solvent in an amount in excess of $100,000, the contention of an administrator d. b. n. appointed upon the bank's insolvency that the bank had not complied with the provisions of this section and those preceding it cannot be sustained. Security Nat. Bank v. Bridgers, 207 N. C. 91, 176 S. E. 295.

§ 58-117. Clerk of superior court notified of license and revocation.—The commissioner of insurance, upon granting license to any such corporation, shall immediately notify the clerk of the superior court of each county in the state that such corporation has been licensed under this chapter; and whenever the commissioner is satisfied that any corporation licensed by him has become insolvent, or is in imminent danger of insolvency, he shall revoke the license granted to it, and notify the clerk of the superior court of each county of such revocation; and after such notification the right of such corporation to hold any office, or be surety on any bond, as permitted by this chapter, ceases. (Rev., s. 4803; 1899, c. 54, s. 50; C. S. 6380.)

§ 58-118. Resident agents required.—All business done in this state by any fidelity insurance company must be done through regularly authorized agents residing in this state, or through applications of such agents; and all policies so issued must be countersigned by such agents. (Rev., s. 4804; 1899, c. 54, s. 108; 1903, c. 438, s. 11; C. S. 6381.)

§ 58-119. Limitation of liability assumed.—No stock corporation transacting fidelity or surety business in this State shall expose itself to any loss on any one fidelity or surety risk or hazard in an amount exceeding ten per centum of its capital and surplus, unless it shall be protected in excess of that amount by

(a) Reinsurance in a corporation authorized to transact a fidelity and surety business in this State: Provided, that such reinsurance is in such form as to enable the obligee or beneficiary to maintain an action thereon against the company

reinsured jointly with such reinsurer and, upon recovering judgment against such reinsured, to have recovery against such reinsurer for payment to the extent in which it may be liable under such reinsurance and in discharge thereof; or

(b) The co-suretyship of such a corporation similarly authorized; or

(c) By deposit with it in pledge or conveyance to it in trust for its protection of property; or

(d) By conveyance or mortgage for its protection; or

(e) In case a suretyship obligation was made on behalf or on account of a fiduciary holding property in a trust capacity, by deposit or other disposition of a portion of the property so held in trust that no future sale, mortgage, pledge or other disposition can be made thereof without the consent of such corporation; except by decree or order of a court of competent jurisdiction;

Provided: (1) That such corporation may execute what are known as transportation or warehousing bonds for United States Internal Revenue taxes to an amount equal to fifty per centum of its capital and surplus; (2) that, when the penalty of the suretyship obligation exceeds the amount of a judgment described therein as appealed from and thereby secured, or exceeds the amount of the subject matter in controversy or of the estate in the hands of the fiduciary for the performance of whose duties it is conditioned, the bond may be executed if the actual amount of the judgment or the subject matter in controversy or estate not subject to supervision or control of the surety is not in excess of such limitation; and (3) that, when the penalty of the suretyship obligation executed for the performance of a contract exceeds the contract price, the latter shall be taken as the basis for estimating the limit of risk within the meaning of this section.

No such corporation shall, anything to the contrary in this section notwithstanding, execute suretyship obligations guaranteeing the deposits of any single financial institution in an aggregate amount in excess of ten per centum of the capital and surplus of such corporate surety, unless it shall be protected in excess of that amount by credits in accordance with sub-division (a), (b), (c) or (d) of this section: Provided, nothing in this section shall be construed to make invalid any contract entered into by such corporation with another person, firm, corporation or municipal corporation notwithstanding any provisions of this section. (1911, c. 28; 1931, c. 285; C. S. 6382.)

Editor's Note.—The Act of 1931 struck out the former section and substituted in lieu thereof the above. That Act, which was ratified April 16, 1931, provided that nothing therein should affect, modify or qualify the liability of any such fidelity or surety company with respect to any contract of such company in force at the time of its ratification. The old statute placed the limit at ten per centum of the capital and surplus of the surety company, unless "suitable and sufficient collateral agreements of indemnity" were made, mentioning ostensibly as such "suitable agreements" a pledge deposit or conveyances in trust. The 1931 enactment provided the same per centum limit, but made specific the necessary protective arrangement for a liability in excess of said per centum: reinsurance, co-suretyship, pledge deposits, or conveyance in trust on mortgage. It also provided that the actual amount involved in three types of secured transactions—appeal bond, executor's bond, and bond for performance contract—shall be the basis for estimating the risk, for the purpose of the statutory limitation, although the professed penalty of the suretyship obligation exceeds such actual amount. Depository bonds are specifically mentioned as coming witnin the limits set down. It seems advisable to have cleared up the ambiguity of the loose phrase in the old statute describing the conditions under which the limited liability could be exceeded and to have furnished a test for determining the amount of the risk in at least three transactions. But as to the test for the risk assumed in other types, quaere. 9 N. C. Law Rev. 394.

Joint-Control Agreements.—It would seem that in cases coming within the purview of this section, and perforce to the extent thereof, joint-control agreements between fiduciaries and their sureties are sanctioned in this State by act of Assembly. Pierce v. Pierce, 197 N. C. 348, 148 S. E. 438; Leonard v. York, 202 N. C. 704, 706, 163 S. E. 878.

Art. 12. Promoting and Holding Companies.

§ 58-120. Terms defined.—As the terms are used in this article, "promoting corporation" means a corporation or joint-stock association, engaged in the business of organizing or promoting or endeavoring to organize or promote the organization of an insurance corporation or corporations, or in any way assisting therein; "holding corporation" means a corporation or joint-stock association, which holds or is engaged in the acquisition of the capital stock or a major portion thereof of one or more insurance corporations for the purpose of controlling the management thereof, as voting trustee or otherwise; and "securities" means the shares of capital stock, subscription, certificates, debenture bonds, and any and all other contracts or evidences of ownership of or interest in insurance corporations, or in promoting or holding corporations. (1913, c. 182, s. 1; C. S. 6383.)

§ 58-121. Certificate of authority to sell securities required.—No individual, partnership, association, or corporation, as the agent of another or as a broker, shall sell or offer for sale, or in any way assist in the sale in this state of the securities of any promoting or holding corporation, or of any insurance corporation, which is not at that time lawfully engaged or authorized to engage in the transaction of the business of insurance in this state, without first procuring, as hereinafter provided, a certificate of authority from the insurance department to sell such securities; nor shall any individual, partnership, association, or corporation sell or offer for sale in this state the securities of any promoting or holding corporation, or of any insurance corporation which is not at the time of such sale or offer of sale lawfully engaged or authorized to engage in the transaction of the business of insurance in the state, unless such corporation has first procured from the commissioner of insurance, as hereinafter provided, a certificate that the corporation has fully complied with the provisions of this article, and is authorized to sell the securities. Every certificate issued by the commissioner of insurance pursuant to the provisions of this article shall state in bold type that the commissioner in no way recommends the securities thereby authorized to be sold, and shall be renewable annually, upon written application, filed on or before the first day of April of each year, and may be revoked for cause at any time by the commissioner. The commissioner shall prepare and furnish upon request suitable blank forms of application for the certificates required by this article. (1913, c. 182, s. 2; C. S. 6384.)

§ 58-122. Application for certificate by agent.—Every individual, partnership, association, or corporation desiring or intending to sell or to offer for sale in this state the securities of insurance corporations or of any holding or promoting corporation shall file with the commissioner of insurance an application for a certificate of such authority. This application must contain a statement, verified by oath, setting forth the name and address of the applicants' previous business experience, date and place of birth or organization, and such other information as the commissioner requires. It is the duty of the commissioner to examine the application and to make any further inquiry or examination of the applicant as he deems advisable. If upon examination the commissioner finds the applicant, or if a corporation, the officers and directors thereof, to be trustworthy persons of good business credit, he may issue to the applicant a certificate of authority to sell or offer for sale in this state the securities of any insurance corporation, and of any promoting or holding corporation previously authorized under this article, which shall be mentioned therein. (1913, c. 182, s. 3; C. S. 6385.)

§ 58-123. Application for certificate by corporation.—Every such unauthorized insurance corporation, and every promoting or holding corporation, whose securities are offered for sale in this state, must file with the commissioner of insurance copies of all securities to be offered for sale, and an application for certificate of authority under this article which shall contain a statement in detail of the plans and purposes of such corporation, the amount and par value of the securities to be offered for sale, and the selling price thereof, the manner in which the money paid in therefor is to be spent or employed, the rate of commission to be paid for the sale of such securities, the salaries to be paid to the officers of such corporation, and such other information as the commissioner of insurance requires. No change shall thereafter be made in the form or character of the securities to be offered for sale, or in the plans or purposes of any such corporation, without the approval thereof in writing by the commissioner. It is the duty of the commissioner to examine the application and other documents filed, and to make any further inquiry or examination of the corporation as he deems advisable. If upon examination the commissioner finds that the plans and purposes of the corporation are proper, that its condition is satisfactory, that the amount of its securities is reasonable, that the price at which such securities are to be sold is adequate, and that the manner in which the money is paid in therefor, the rate of commissions to be paid and the salaries of officers are fair, he may issue a certificate that the corporation has complied with all the provisions of this article, and is authorized to sell or offer its securities for sale in this state. (1913, c. 182, s. 4; C. S. 6386.)

§ 58-124. Approval of advertising matter; misrepresentation.—No printed matter may be used in connection with the sale of securities of any such promoting, holding, or insurance corporation, for advertising purposes, or in the dissemination of information with reference thereto, unless it is first submitted to the commissioner of insurance and approved by him in writing. No such corporation, and no officer, director, or agent thereof, or any other person, copartnership, association, or corporation may issue, circulate, or employ or cause or permit to be used, issued, circulated, or employed any circular or statement, whether printed or oral, misrepresenting or exaggerating the earnings of insurance corporations or the value of their corporate stock or other securities, or the profits to be derived either directly or indirectly from the organization and management of insurance corporations, or of organizing or holding corporations. No insurance or other corporation, and no individual, copartnership, or association transacting business in this state shall place or offer to place insurance in any corporation in connection with the sale or purchase of the securities of any insurance corporation or of any promoting or holding corporation. (1913, c. 182, s. 5; C. S. 6387.)

Art. 13. Rate-Making Companies.

§ 58-125. Information to be filed with commissioner of insurance. — Every corporation, association, board, or bureau which now exists or hereafter may be formed, and every person who maintains, or hereafter may maintain, a bureau or office for the purpose of suggesting, approving or making rates to be used by more than one underwriter for insurance, including surety bonds, on property or risks of any kind located in this state, shall file with the commissioner of insurance a copy of the articles of agreement, association or incorporation and the by-laws and all amendments thereto under which such person, association, or bureau operates or proposes to operate, together with his or its business address and a list of the members or insurance corporations represented or to be represented by him or it, as well as such other information concerning such rating organization and its operations as may be required by the commissioner of insurance. (1913, c. 145, s. 1; 1915, c. 166, s. 8; C. S. 6388.)

Cross References.—As to certain insurance contracts exempt from this article, see § 58-131. As to compensation rating and inspection bureau for Workmen's Compensation Insurance, see §§ 97-102 to 97-104.

§ 58-126. Examination by commissioner of insurance; reports.—Every such person, corporation, association, or bureau, whether before or after the filing of the information specified in the preceding section, shall be subject to the visitation, supervision, and examination of the commissioner of insurance, who shall cause to be made an examination thereof as often as he deems it expedient, and at least once in three years. For such purpose he may appoint as examiners one or more competent persons, and upon such examination he, his deputy, or any examiner authorized by him shall have all the powers given to the commissioner of insurance, his deputy, or any examiner authorized by him by law, including the power to examine under oath the officers and agents and all persons deemed to have material information regarding the business or manner of operation by every such person, corporation, association, bureau, or board. The commissioner of

insurance shall make public the results of such examination, and shall report to the legislature in his annual report on the methods of such rating organization and the manner of its operation. (1913, c. 145, s. 2; C. S. 6389.)

§ 58-127. Schedule of rates filed.—Every such person, corporation, association, or bureau, as well as every insurance company doing business in the state, shall file with the commissioner of insurance, whenever he may call therefor, any and every schedule of rates or such other information concerning such rates as may be suggested, approved, or made by any such rating organization for the purposes specified in § 58-125, or by such company for its own use. (1913, c. 145, s. 3; 1915, c. 166, s. 8; C. S. 6890.)

§ 58-128. Certain conditions forbidden; no discrimination.—No such person, corporation, association, or bureau shall fix or make any rate or schedule of rates which is to or may apply to any risk within this state, on the condition that the whole amount of insurance on such risk or any specified part thereof shall be placed at such rates, or with the members of or subscribers to such rating organization; nor shall any such person, association, or corporation authorized to transact the business of insurance within this state, fix or make any rate or schedule of rates or charge a rate which discriminates unfairly between risks within this state of essentially the same hazard, or if such rate be a fire insurance rate, which discriminates unfairly between the risks in the application of like charges or credits or which discriminates unfairly between risks of essentially the same hazards and having substantially the same degree of public protection against fire. Whenever it is made to appear to the satisfaction of the commissioner of insurance that such discrimination exists, he may, after a full hearing, either before himself or before any salaried employee of the insurance department whose report he may adopt, order such discrimination removed; and all such persons, corporations, associations, or bureaus affected thereby shall immediately comply therewith; nor shall such persons, corporations, associations, or bureaus remove such discrimination by increasing the rates on any risk or class of risks affected by such order unless it is made to appear to the satisfaction of the commissioner of insurance that such increase is justifiable. (1913, c. 145, s. 4; C. S. 6391.)

§ 58-129. Record to be kept; hearing on rates.—Every such rating organization shall keep a careful record of its proceedings and shall furnish upon demand to any person upon whose property or risk a rate has been made, or to his authorized agent, full information as to such rate, and if such property or risk be rated by schedule, a copy of such schedule; it shall also provide such means as may be approved by the commissioner of insurance whereby any person affected by such rate may be heard, either in person or by agent, before the governing or rating committee or other proper executive of such rating organization on an application for a change in such rate. (1913, c. 145, s. 5; C. S. 6392.)

§ 58-130. Hearing on rates before commissioner of insurance.—Any person, firm, or corporation aggrieved by any rating of a fire insurance company, bureau, or board, may file a complaint in writing with the commissioner of insurance stating in detail the grounds upon which the complainant asks relief. The commissioner shall set a time, not earlier than seven days after the date of the notice, and a place for a hearing upon the complaint. After due hearing the commissioner shall make a finding as to whether the established rate is excessive or unfair, and shall make such recommendations as he deems advisable. The finding and recommendations in each case shall be made a matter of record, and shall be open to public inspection. (1915, c. 166, s. 8; C. S. 6393.)

§ 58-131. Certain insurance contracts excepted.—This article shall not apply to any contract of life insurance, nor to any contract of insurance upon or in connection with marine or transportation risks or hazards other than contracts for automobile insurance, nor to contracts of insurance upon property or risks located without this state, nor title and credit insurance. (1913, c. 145, s. 6; 1935, c. 152; C. S. 6394.)

Editor's Note.—Prior to the amendment of 1935 this section excepted contracts made on a mutual or coöperative plan. The act further provided that nothing therein shall authorize the Commissioner of Insurance to raise the rates of any mutual insurance company doing business in North Carolina, and that farmers mutual fire insurance companies shall not be required to file such rates.

Art. 14. Real Estate Title Insurance Companies.

§ 58-132. Purpose of organization.—Companies may be formed in the manner provided in this subchapter, with a capital of not less than fifty thousand dollars, for the purpose of examining titles to real estate, of furnishing information in relation thereto, and of insuring owners and others interested therein against loss by reason of encumbrances and defective title. Such companies shall not be subject to the provisions of this chapter except as regards the manner of their formation and as provided in this article. (Rev., s. 4745; 1899, c. 54, s. 38; 1901, c. 391, s. 3; 1923, c. 71; C. S. 6395.)

Notice to Agent.—Where the agent for the insurer was notified prior to the issuance of the renewal policy sued on that the property had been sold by the former owner to another and was requested to issue the renewal policy in the name of the new owner, the policy containing a standard loss payable clause in favor of the holder of the mortgage on the property, the mortgagee was not required to notify the insurer of the change in ownership, it appearing to the mortgagee that such notice had been given the insurer's agent prior to the inception of the policy, the agent in such case being the insurer's alter ego. Mahler v. Milwaukee Mechanics' Ins. Co., 205 N. C. 692, 172 S. E. 204.

§ 58-133. Certificate of authority to do business.—Before any such company may issue any policy or make any contract or guarantee of insurance, it shall file with the commissioner of insurance a certified copy of the record or the certificate of its organization in the office of the secretary of state, and obtain from the commissioner of insurance his certificate that it has complied with the laws applicable to it and that it is authorized to do business. (Rev., s. 4745; 1899, c. 54, s. 38; 1901, c. 391, s. 3; C. S. 6396.)

§ 58-134. Annual statement and license required.—Every such corporation shall, on or before the thirtieth day of January of each year, file in the office of the commissioner of insurance a statement, such as he may require, showing its condition and its affairs for the year ending on the preceding thirty-first day of December, signed and sworn to by its president or secretary or treasurer and one of its directors. For neglect to file such annual statement or for making a wilfully false statement it shall be liable to the same penalties imposed upon other insurance companies. The commissioner of insurance shall annually license such companies and their agents, and have the same power and authority to visit and examine such corporations as he has in the case of other domestic insurance companies; and the duties and liabilities of such corporations and their agents in reference to such examinations are the same as those of other domestic insurance companies. (Rev., s. 4745; 1899, c. 54, s. 38; 1901, c. 391, s. 3; C. S. 6397.)

Cross Reference.—As to examinations to be made by the commissioner, see § 58-16.

Art. 15. Title Insurance Companies and Land Mortgage Companies Issuing Collateral Loan Certificates.

§ 58-135. Issuance of collateral loan certificates; security.—Any domestic land mortgage company or title insurance company having a paid in capital and surplus of at least two hundred thousand ($200,000.00) dollars, may, under the supervision and control of the commissioner of insurance, issue collateral loan certificates, or other certificates of indebtedness secured by the deposit of first mortgages on real estate with the commissioner, or under his direction, or secured by the deposit with the commissioner, or under his direction, of collateral trust bonds secured by first mortgages, the principal and interest of which said mortgages is guaranteed by a surety company having assets of at least ten million ($10,000,000.00) dollars, upon a basis not to exceed one hundred ($100.00) dollars for each one hundred ($100.00) dollars of liability under the collateral loan certificates or other certificates of indebtedness outstanding and secured by such first mortgages or collateral trust bonds. (1927, c. 204, s. 1.)

§ 58-136. Licenses.—Any domestic land mortgage company, or title insurance company, wishing to do business under the provisions of this article upon making written application and submitting proof satisfactory to the commissioner of insurance that its business, capital and other qualifications comply with the provisions of this article, upon paying to the commissioner of insurance, the sum of two hundred dollars as a license fee and all other fees assessed against such company may be licensed to do business in this State under the provisions of this article until the first day of the following April and may have its license renewed for each year thereafter so long as it complies with the provisions of this article and such rules and regulations as may be promulgated by the commissioner of insurance. For each such renewal such company shall pay to the commissioner of insurance the sum of two hundred dollars and all other fees assessed against such company and such renewal shall continue in force and effect until a new license be issued or specifically refused unless revoked for good cause. The commissioner of insurance, or any person appointed by him, shall have the power and authority to make such rules and regulations and examinations not inconsistent with the provisions of this article, as may be in his discretion necessary or proper to enforce the provisions hereof and secure compliance with the terms of this article. For any examination made hereunder the commissioner of insurance shall charge the land mortgage companies or title insurance companies examined with the actual expense of such examination. (1927, c. 204, s. 2.)

§ 58-137. Annual statements furnished. — Every such domestic land mortgage company or title insurance company doing business in this State under this article shall annually file with the commissioner of insurance on or before the first day of March in each year a full and complete sworn statement of its financial condition on the thirty-first day of December next preceding. Such statement shall plainly exhibit all real and contingent assets and liabilities and a complete account of its income and disbursements during the year and shall also exhibit the amount of real estate mortgages deposited by such land mortgage company or title insurance company for the protection of the certificates issued under this article. The commissioner of insurance is hereby empowered to require such further information as may be reasonably necessary to satisfy him that the statements contained in the sworn statements are true and correct. (1927, c. 204, s. 3.)

Art. 16. Reciprocal or Inter-Insurance Exchanges.

§ 58-138. Exchange of insurance contracts authorized; power of attorney.—Individuals, partnerships, and corporations of this state hereby designated as subscribers, are authorized to exchange reciprocal or inter-insurance contracts with each other, or with individuals, partnerships, and corporations of other states and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the laws, excepting life insurance. Such contracts may be executed by an attorney, agent, or other representative, herein designated attorney, duly authorized and acting for such subscribers.

The attorney in fact for each of such exchanges shall be required to obtain a written power of attorney executed by each of the subscribers and have the same in his or its possession before any contracts of insurance of any kind or description shall be issued or renewed to subscribers, and a full copy of the provisions of the power of attorney used at the exchange and on file with the commissioner of insurance under the requirements of § 58-139, subsection four, shall be incorporated into and made a part of all contracts or policies issued to subscribers in this state. (1913, c. 183, ss. 1, 2; 1937, c. 130; C. S. 6398.)

Editor's Note.—The 1937 amendment added the second paragraph.

§ 58-139. Statement to be filed with commis-

sioner of insurance.—The subscribers, so contracting among themselves, shall, through their attorney, file with the commissioner of insurance of this state a declaration verified by oath of such attorney, setting forth:

1. The name or title of the office at which such subscribers propose to exchange such indemnity contracts. This name or title shall not be so similar to any other name or title previously adopted by a similar organization, or by any insurance corporation or association, as in the opinion of the commissioner of insurance is calculated to result in confusion or deception. The office or offices through which such indemnity contracts shall be exchanged shall be classified as reciprocal or inter-insurance exchanges.

2. The kind or kinds of insurance to be effected or exchanged.

3. A copy of the form of policy, contract, or agreement under or by which the insurance is to be effected or exchanged.

4. A copy of the form of power of attorney or other authority of such attorney under which the insurance is to be effected or exchanged.

5. The location of the office or offices from which such contracts or agreements are to be issued.

6. That applications have been made for indemnity upon at least one hundred separate risks, aggregating not less than one and one-half million dollars as represented by executed contracts or bona fide applications, to become concurrently effective, or, in case of liability or compensation insurance, covering a total pay roll of not less than one and one-half million dollars: Provided, that when the attorney maintains the central office in this state the commissioner of insurance may authorize an exchange with a less number of risks and a smaller amount of indemnity to be exchanged and an amount of cash deposits less than twenty-five thousand dollars.

7. That there is on deposit with such attorney and available for payment of losses a sum of not less than twenty-five thousand dollars. (1913, c. 183, s. 3; C. S. 6399.)

§ 58-140. Agreement for service of process.—At the time of filing the declaration provided for by the preceding section, the attorney shall file with the commissioner of insurance an instrument in writing, executed by him for the subscribers, conditioned that upon the issuance of certificate of authority provided for in this article, service of process may be had upon the commissioner of insurance in all suits in this state arising out of such policies, contracts, or agreements, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through such attorney. Three copies of such process shall be served, and the commissioner of insurance shall file one copy, forward one copy to the attorney, and return one copy with his admission of service. (1913, c. 183, s. 4; C. S. 6400.)

§ 58-141. Statement as to amount of risks.—There shall be filed with the commissioner of insurance of this state by such attorney a statement under his oath showing the maximum amount of indemnity upon any single risk, and the attorney shall, whenever and as often as the same shall be required, file with the commissioner of insurance a statement verified by his oath to the effect that he has examined the commercial rating of such subscribers as shown by the reference book of a commercial agency having at least one hundred thousand subscribers, and that from such examination or from other information in his possession it appears that no subscriber has assumed on any single risk an amount greater than ten per cent of the net worth of such subscriber. (1913, c. 183, s. 5; C. S. 6401.)

§ 58-142. Certificate issued by commissioner.—Upon the filing of the foregoing papers, and upon the payment of fees as provided for in this article, the commissioner of insurance shall examine and pass upon the same, and if found correct, and in accordance with this article, issue a certificate of authority, which shall expire on the first day of April next succeeding. (1913, c. 183, s. 6; C. S. 6402.)

§ 58-143. Reserve fund.—There shall at all times be maintained as a reserve a sum in cash or convertible securities equal to fifty per centum of the aggregate net annual deposits collected and credited to the accounts of the subscribers on policies having one year or less to run and pro rata on those for longer periods. For the purpose of said reserve, net annual deposits shall be construed to mean the advance payments of subscribers after deducting therefrom the amounts specifically provided in the subscribers' agreements, for expenses. Said sum shall at no time be less than twenty-five thousand dollars, and if at any time fifty per cent of the aggregate deposits so collected and credited shall not equal that amount, then the subscribers, or their attorney for them, shall make up any deficiency. (1913, c. 183, s. 7; C. S. 6403.)

§ 58-144. Annual reports; examination by commissioner.—The attorney shall make an annual report to the commissioner of insurance for each calendar year, showing the financial condition of affairs at that office where such contracts are issued, and shall furnish such additional information and reports as may be required; but the attorney shall not be required to furnish the names and addresses of any subscribers. The business affairs and assets of the reciprocal or inter-insurance exchanges shall be subject to examination by the commissioner of insurance. (1913, c. 183, s. 8; C. S. 6404.)

§ 58-145. Corporations empowered to exchange insurance.—Any corporation now or hereafter organized under the laws of this state shall, in addition to the rights, powers, and franchises specified in its articles of incorporation, have full power and authority to exchange insurance contracts of the kind and character herein mentioned through exchanges complying with this article. (1913, c. 183, s. 9; C. S. 6405.)

§ 58-146. Punishment for failing to comply with law.—Any attorney or representative who shall, except for the purpose of applying for certificate of authority as herein provided, exchange any contracts of indemnity of the kind and character specified in this article, or directly or indirectly solicit or negotiate any applications for same without first complying with the foregoing pro-

visions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than one hundred dollars nor more than five hundred dollars. (1913, c. 183, s. 10; C. S. 6406.)

§ 58-147. Certificate to attorney; revocation.—Each attorney by or through whom are issued any policies or contracts for indemnity of the character referred to in this article shall procure from the commissioner of insurance annually a certificate of authority, stating that all the requirements of this article have been complied with, and upon such compliance and the payment of the fees and taxes required by this article, the commissioner of insurance shall issue such certificate of authority. The commissioner of insurance may revoke or suspend any certificate of authority issued hereunder in case of breach of any of the conditions imposed by this article after reasonable notice has been given the attorney in writing so that he may appear and show cause why such action should not be taken. (1913, c. 183, s. 11; C. S. 6407.)

§ 58-148. Application of general insurance law.—Nothing in the general insurance laws, except as herein provided and as may specifically apply to such contracts and exchanges, shall be construed to extend to inter-insurance or reciprocal exchanges licensed under this article. (1913, c. 183, s. 13; C. S. 6409.)

Art. 17. Foreign Insurance Companies.

§ 58-149. Admitted to do business.—Foreign insurance companies, upon complying with the conditions herein set forth applicable to them, may be admitted to transact in this state, by constituted agents resident herein, any class of insurance authorized by the laws in force relative to the duties, obligations, prohibitions, and penalties of insurance companies, and subject to all laws applicable to the transaction of such business by foreign insurance companies and their agents. (Rev., s. 4746; 1899, c. 54, s. 61; C. S. 6410.)

Rights of Insurer after Admission.—When a foreign insurance company has complied with all the laws of the state, the courts of this state are open to it for the purpose of enforcing liabilities of policy holders. Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N. C. 116, 32 S. E. 404.

§ 58-150. Conditions of admission. — A foreign insurance company may be admitted and authorized to do business when it:

1. Deposits with the commissioner of insurance a certified copy of its charter or certificate of organization and a statement of its financial condition and business, in such form and detail as he requires, signed and sworn to by its president and secretary or other proper officer, and pays for the filing of this statement the sum required by law.

2. Satisfies the commissioner of insurance that it is fully and legally organized under the laws of its state or government to do the business it proposes to transact; that it has, if a stock company, a fully paid-up and unimpaired capital, exclusive of stockholders' obligations of any description, of an amount not less than $100,000 (but nothing in this subsection applies to companies now authorized to do business in this state); and if a mutual company, other than life, that its net cash assets are equal to the capital required of like companies on the stock plan; or that it possesses net cash assets of not less than $100,000 or net cash assets of not less than $50,000, with, also, invested assets of not less than $100,000, and in each case with additional contingent assets of not less than $300,000, and that such capital or net assets are well invested and immediately available for the payment of losses in this state; and that it insures on any single hazard a sum no larger than one-tenth of its net assets.

3. By a duly executed instrument filed in his office constitutes and appoints the commissioner of insurance and his successor its true and lawful attorney, upon whom all lawful processes in any action or legal proceeding against it may be served, and therein agrees that any lawful process against it which may be served upon such attorney shall be of the same force and validity as if served on the company; and the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this state. Copies of this instrument, certified by the commissioner of insurance, are sufficient evidence thereof, and service upon such attorney is sufficient service upon the principal.

4. Appoints as its agent or agents in this state some resident or residents thereof.

5. Obtains from the commissioner of insurance a certificate that it has complied with the laws of the state and is authorized to make contracts of insurance. It must also comply with the provisions of this chapter as to deposits and reinsurance by such companies. (Rev., s. 4747; 1899, c. 54, s. 62; 1901, c. 391, s. 5; 1903, c. 438, s. 6; C. S. 6411.)

Cross Reference.—As to deposits required of foreign companies, see §§ 58-57, 58-110, 58-182.

Subsection 3—Power of Attorney Is Irrevocable.—The statute requires the power of attorney executed to the State Insurance Commissioner appointing him attorney upon whom process may be served to be irrevocable not "as long as the company continues to do business" in this State, but as long as "any liability of the company remains outstanding" in this State, and the contract with the State as expressed in the power of attorney filed by the company so specifies. No amount of authorities having a more or less fancied analogy can overcome these plain words of the statute and of the power of attorney drawn and filed in conformity thereto. Biggs v. Life Ass'n, 128 N. C. 7, 37 S. E. 955; Insurance Co. v. Scott, 136 N. C. 157, 48 S. E. 581.

Service of process upon State Commissioner is valid notwithstanding the insurance company attempted to annul the power of attorney conferred upon him under this section. Biggs v. Life Ass'n, 128 N. C. 5, 37 S. E. 955.

Same—Non-Resident Insured.—This section was intended to protect residents of this state and does not apply to policies issued before the statute and transferred to a resident of another state. The service on the commissioner is not valid when the insurance company has ceased doing business in the state and had no further liabilities therein. Williams v. Mutual Reserve Fund Life Ins. Ass'n, 145 N. C. 128, 58 S. E. 802.

Subsection 4—Brokerage Makes Agency.—Where a citizen of this State applies for a policy in a foreign company through a broker here, and the application is accepted and the policy is delivered, the broker will be deemed to be the agent of the company, and the contract to be made here, subject to the laws of this State. Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N. C. 116, 32 S. E. 404.

Power of Corporation to Sue and Be Sued.—Where a foreign insurance corporation has fully complied with the provisions of this section, and has moved its head office to this State and has domesticated here, it acquires the right to sue and be sued in the courts of this State as a domestic corporation. Occidental Life Ins. Co. v. Lawrence, 204 N. C. 707, 169 S. E. 636.

Cited in Fuller v. Lockhart, 209 N. C. 61, 182 S. E. 733.

§ 58-151. Limitation as to classes of business.—No insurance company admitted to do business in the state may be authorized to transact more than one class or kind of insurance therein, unless it has the requisite capital for such business engaged in, and such a company may undertake two or more of the classes of insurance set out in article six, § 58-72, of this chapter, upon providing for each additional kind at least fifty thousand dollars additional capital. But if life, fire, and credit insurance is added to any other line or lines, the additional capital shall be one hundred thousand dollars each, and the company shall pay the license taxes and fees for each class or kind of insurance provided by this chapter. (Rev., s. 4748; 1899, c. 54, s. 65; 1901, c. 391, s. 5; 1903, c. 438, s. 6; 1911, c. 111, s. 2; C. S. 6412.)

§ 58-152. Retaliatory laws.—When, by the laws of any other state or nation, any taxes, fines, penalties, licenses, fees, deposits of money or of securities, or other obligations or prohibitions are imposed upon insurance companies of this state doing business in such other state or nation or upon their agents therein greater than those imposed by this state upon insurance companies of such other state, then, so long as such laws continue in force, the same taxes, fines, penalties, licenses, fees, deposits, obligations and prohibitions, of whatever kind, shall be imposed upon all such insurance companies of such other state or nation doing business within this state and upon their agents here. Nothing herein repeals or reduces the license, fees, taxes, and other obligations now imposed by the laws of this state or to go into effect with the companies of any other state or nation unless some company of this state is actually doing or seeking to do business in such state or nation. When an insurance company organized under the laws of any state or country is prohibited by the laws of such state or country or by its charter from investing its assets other than capital stock in the bonds of this state, then and in such case the commissioner of insurance is authorized and directed to refuse to grant a license to transact business in this state to such insurance company. (Rev., s. 4749; 1899, c. 54, s. 71; 1903, c. 536, s. 11; 1927, c. 32; C. S. 6413.)

Editor's Note.—The Public Laws of 1927 inserted in the first sentence of this section the clause reading: "greater than those imposed by this state upon insurance companies of such other state."

Not Repealed by Implication. — This section was not impliedly repealed by the Revenue Acts of 1923 or 1925 (Pub. Laws 1923, c. 4, § 903; 1925 c. 101, § 903). The amendment of the section by Pub. Laws 1927, c. 32 was legislative recognition that it is still in force. Atlantic Life Ins. Co. v. Wade, 195 N. C. 424, 142 S. E. 474.

§ 58-153. Service of legal process upon commissioner of insurance.—The service of legal process upon any insurance, bonding and/or surety company, admitted and authorized to do business in this state under the provisions of this chapter, shall be made by leaving the same in the hands or office of the commissioner of insurance, and no service upon a company that is licensed to do business in this state is valid unless made upon the commissioner of insurance, the general agent for service, or some officer of the company. As a condition precedent to a valid service of process and of the duty of the commissioner in the premises, the plaintiff shall pay to the commissioner of insurance at the time of service the sum of one dollar, which the plaintiff shall recover as taxable costs if he prevails in his action. In any action of which a justice of the peace has jurisdiction, summons may be served on any licensed agent of such company, returnable in not less than ten days from date of service; if there is no such agent in the county, then the summons may be served as provided for in other actions against foreign corporations in a court of a justice of the peace. (Rev., s. 4750; 1899, c. 54, ss. 16, 62; 1903, c. 438, s. 6; 1927, c. 167, s. 1; 1931, c. 287; C. S. 6414.)

Cross Reference.—As to other ways in which a foreign insurance company may be served with a copy of process, see §§ 1-97, 55-38.

Editor's Note.—Prior to the amendment of 1927 this section applied only to foreign insurance companies. By this amendment the word "foreign" was struck out.

There are three ways in which a foreign insurance corporation may be served with a copy of process. Sections 1-97, 55-38 and 58-153. The cases which follow in this note indicate when the method provided by the particular section shall be employed. Reference should be made to secs. 1-97 and 55-38 and the annotations thereto.

The Act of 1931 inserted the words "bonding and/or surety" in line three of this section.

Conditions Precedent to Doing Business in the State.—One of the conditions precedent upon which a foreign insurance company is authorized to do business in this State is that such company will file a duly executed instrument with the Insurance Commissioner, appointing him its attorney, upon whom all lawful process against said company can be served. Biggs v. Life Ass'n, 128 N. C. 5, 6, 37 S. E. 955.

Annullment of Power of Attorney.—The service of a licensed insurance company made upon the commissioner is valid although the insurance company may have attempted to annul the power of attorney, for the statute requires power of attorney to be irrevocable so long as the insurance company has any liabilities in the state. Biggs v. Life Ass'n, 128 N. C. 5, 37 S. E. 955; Moore v. Mutual Reserve Fund Life Ass'n, 129 N. C. 31, 39 S. E. 637; Hinton v. Mutual Reserve Fund Life Ass'n, 135 N. C. 314, 47 S. E. 474.

Section Provides Cumulative Method.—Service of summons on a foreign insurance company doing business in this State is not restricted to the method prescribed by this section but may be made in the manner stated in section 55-38 or section 1-97. Pardue v. Absher, 174 N. C. 676, 94 S. E. 414.

Unlicensed Companies.—Service can be made under this section only on licensed insurance companies. If it does not affirmatively appear that the insurance company is licensed, service under section 1-97 may be made. Parker v. Insurance Co., 143 N. C. 339, 55 S. E. 717. And service under section 55-38 or section 1-97 will not be invalid because of this section. Fisher v. Traders Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667.

However, a foreign insurance company that has no agent in this state and is not licensed or transacting business here cannot be served with process either under this section or § 55-38. Ivy River Land, etc., Co. v. National Fire, etc., 192 N. C. 115, 116, 133 S. E. 424. For this section only provides for service on licensed companies doing business in the state and sec. 55-38 only provides for unlicensed companies doing business in the state.

Service on Fraternal Society.—In an action against a foreign fraternal insurance society doing business in this state, service of summons on the commissioner of insurance brings the corporation into court. Brenizer v. Royal Arcanum, 141 N. C. 409, 53 S. E. 835.

§ 58-154. Commissioner to notify company of service of process.—When legal process is served upon the commissioner of insurance as attorney for an insurance company under the provisions of this chapter, he shall immediately notify the company of such service by registered letter directed to its secretary and shall state whether or not complaint was served with the process, or, in case of a foreign country, to its resident manager, if any in the United States; and must with-

in two days after such service forward in the same manner a copy of the process, together with copy of complaint, if any, served on him to such secretary or manager designated by the company by written notice filed in the office of the commissioner: Provided, that the thirty days fixed by statute within which to file answer when complaint is served with summons shall not begin to run until ten days after such service on the commissioner of insurance. The commissioner must keep a record of all such proceedings which shall show the day and hour of such service of process on such commissioner, and whether complaint was served with such process. (Rev., s. 4751; 1899, c. 54, s. 16; 1927, c. 167, s. 2; C. S. 6415.)

§ 58-155. Action to enforce compliance with this chapter.—Compliance with the provisions of this chapter as to deposits, obligations, and prohibitions, and the payment of taxes, fines, fees, and penalties by foreign insurance companies, may be enforced in the ordinary course of legal procedure by action brought in the superior court of Wake county by the attorney-general in the name of the state upon the relation of the commissioner of insurance. (Rev., s. 4752; 1899, c. 54, s. 102; 1903, c. 438, s. 10; C. S. 6416.)

SUBCHAPTER III. FIRE INSURANCE.

Art. 18. General Regulations of Business.

§ 58-156. Riders insuring against damage to sprinkler systems, water damage, etc., permitted. — All insurance companies authorized to transact fire insurance business in this state may, in addition to the business which they are now authorized by law to do, insure sprinklers, pumps, and other apparatus erected or put in position for the purpose of extinguishing fires, against damage, loss, or injury resulting from accidental causes other than fire; and may also insure any property which such companies are authorized to insure against loss or damage by fire, against damage, loss, or injury by water or otherwise, resulting from the accidental breaking of or injury to such sprinklers, pumps, or other apparatus, arising from causes other than fire. Contracts of insurance of this kind, provided for in this section, shall not be incorporated in any contract of insurance against loss or damage by fire, but may be contained in riders attached thereto, the conditions of which shall be prescribed by the commissioner of insurance. (Rev., s. 4754; 1899, c. 54, s. 24; 1907, c. 1000, s. 6; C. S. 6417.)

§ 58-157. Performance of contracts as to devices not prohibited.—Nothing contained in this chapter shall be construed as prohibiting the performance of any contract hereafter made for the introduction or installation of automatic sprinklers or other betterments or improvements for reducing the risk by fire or water on any property located in this State, and containing provisions for obtaining insurance against loss or damage by fire or water, for a specified time at a fixed rate; provided, every policy issued under such contract shall be as provided by law. (1929, ch. 145, s. 1.)

§ 58-158. Policies limited as to amount and term.—No insurance company or agent shall knowingly issue any fire insurance policy upon property within this state for an amount which, together with any existing insurance thereon, exceeds the fair value of the property, nor for a longer term than seven years. Policies issued in violation of this section are binding upon the company issuing them, but the company is liable for the forfeitures by law prescribed for such violation. (Rev., s. 4755; 1899, c. 54, ss. 39, 99; 1903, c. 438, s. 10; C. S. 6418.)

Cross Reference.—As to forfeiture prescribed, see § 58-173.

Determining Amount of Loss.—A statement of an agent acting for his company in writing fire insurance, made after an inspection of the property to be insured, is competent upon the question of the amount of the loss, in the action of the insured to recover upon the policy issued, especially as this section requires that the insurer should know the true value of the property, etc., to be insured before issuing the policy thereon. Queen v. Dixie Fire Ins. Co., 177 N. C. 34, 97 S. E. 741.

Construction of Policy.—Where plaintiffs' property consisted of one building containing three stores, and the insurer contended that the policy issued covered only one of the stores and not the entire building, it appearing that that amount of the policy was greatly in excess of the value of the one store, but was about the value of the entire building, and that insured paid the premium based upon the amount for which the policy was issued, it was held that in construing the policy it would not be presumed that insurer charged a premium based upon a valuation greatly in excess of the value of the property insured in violation of this and § 58-175, but that the policy covered the entire building. Williams v. Greensboro Fire Ins. Co., 209 N. C. 765, 185 S. E. 21.

§ 58-159. Limit of liability on total loss.—When buildings insured against loss by fire and situated within the state are totally destroyed by fire, the company is not liable beyond the actual cash value of the insured property at the time of the loss or damage; and if it appears that the insured has paid a premium on a sum in excess of the actual value, he shall be reimbursed the proportionate excess of premium paid on the difference between the amount named in the policy and the ascertained values, with interest at six per centum per annum from the date of issue. (Rev., s. 4756; 1899, c. 54, s. 40; C. S. 6419.)

§ 58-160. Policies for the benefit of mortgagees.—Where by an agreement with the insured, or by the terms of a fire insurance policy taken out by a mortgagor, the whole or any part of the loss thereon is payable to a mortgagee of the property for his benefit, the company shall, upon satisfactory proof of the rights and title of the parties, in accordance with such terms or agreement, pay all mortgagees protected by such policy in the order of their priority of claim, as their claims appear, not beyond the amount for which the company is liable, and such payments are, to the extent thereof, payment and satisfaction of the liabilities of the company under the policy. (Rev., s. 4757; 1899, c. 54, s. 41; C. S. 6420.)

Editor's Note.—See 13 N. C. Law Rev. 98.

Two or More Mortgages. — Where the owner of lands borrows money thereon under two separate mortgages from different persons, one registered prior to the other, and the mortgagor contracts with each to take out certain policies of fire insurance for their benefit, the rights of the mortgagees to the proceeds under the policies will be determined by the contracts as executed in the loss payable clauses in the policies, and where they are of the New York standard form, and made payable to the mortgagees "as interest may appear," the mortgagee under the prior registered mortgage has a superior lien on the proceeds to the one having the later registered security. Wayne Nat. Bank v. National Bank, 197 N. C. 68, 147 S. E. 691.

Where mortgagor procured insurance for benefit of mortgagee, whose mortgage was registered December 14, 1920, and for the benefit of subsequent mortgagee whose mortgage was not executed until May 11, 1925, claim of first mortgagee should first be paid out of funds derived from policy under this section, providing that where, by terms of fire policy taken out by mortgagor, loss is payable to mortgagee for his benefit, company shall pay all mortgages in order of their priority of claim, and in view of section 47-20, by which priority is given to mortgage which was first recorded. Wayne Nat. Bank v. National Bank, 197 N. C. 68, 147 S. E. 691.

Where Neither Mortgagee Has Claim to Priority.—If neither of two mortgagees, for whom insurance has been procured, has any priority of claim or of liens, the proceeds of the policies will ordinarily be divided between them in proportion to their respective claims. Wayne Nat. Bank v. National Bank, 197 N. C. 68, 147 S. E. 691.

Cited in Peeler v. United States Casualty Co., 197 N. C. 286, 291, 148 S. E. 261.

§ 58-161. Fire loss reported to commissioner before payment.—Every insurance company transacting business in this state shall, upon receiving notice of loss by fire of property in North Carolina, on which it is liable under a policy of insurance, notify the commissioner of insurance thereof, either directly or through some bureau or association approved by the commissioner, and no insurance upon any such property shall be paid by any company until one week after this notification. A company violating this section may be fined by the commissioner of insurance the sum of ten dollars for each offense, and for refusal to comply with its provisions its license may be canceled by the commissioner. (Rev., s. 4822; 1899, c. 54, s. 40; 1903, c. 438, s. 4; 1915, c. 166, s. 4; C. S. 6421.)

§ 58-162. Reinsurance restricted and regulated.—When an application for license, renewal of license, or for admission to this state, is made by a company, whether of this state, of another state of the United States, or of a foreign country, for the transaction of business of fire insurance herein, the company shall, as one of the prerequisites of license and admission, file a sworn declaration signed by its president and secretary, or officers corresponding thereto, that it will not reinsure any risk or part thereof taken by it on any property located in this state with any company not authorized to transact the business of fire insurance in the state. Every fire insurance company admitted shall annually and at such other times as the commissioner of insurance requires, in addition to all returns now required by law of it or its agents or managers, make a return to the commissioner of insurance, in such form and detail as is prescribed by him, of all reinsurance contracted for or effected by it directly or indirectly upon property located in this state, this return to be certified by the oath of its president and secretary, if a company of one of the United States, and if a company of a foreign country, by its president and secretary or by officers corresponding thereto, as to such reinsurance contracted for or effected through the foreign office, and by the United States manager as to such reinsurance effected by the United States branch. If any company, domestic or foreign, directly or indirectly, reinsure any risk taken by it on any property located in this state in any company not duly authorized to transact business herein, or if it refuses or neglects to make the returns required by this section, the commissioner of insurance shall revoke its authority to transact business in this state. The provisions of this section also apply to companies licensed to do reinsurance business only. It is unlawful for any company reinsuring risks on property located in this state to reinsure such risks or parts thereof except in companies authorized by the laws of this state to do business. (Rev., s. 4770; 1899, c. 54, s. 63; 1901, c. 391, s. 5; C. S. 6422.)

§ 58-163. Penalty for reinsuring in unauthorized company.—If any fire insurance company shall, directly or indirectly, reinsure any risk taken by it on any property located in North Carolina in any company not duly authorized to transact business herein, the insurance agent and the company effecting or acting in the negotiation of such reinsurance shall severally be punished by a fine of five hundred dollars. (Rev., s. 3495; 1899, c. 54, ss. 63, 98; C. S. 6423.)

§ 58-164. No action lies on policy of unlicensed company.—No action may be maintained in any court in the state upon a policy or contract of fire insurance issued upon property situated in the state by any company, association, partnership, individual, or individuals that have not been authorized by the commissioner of insurance to transact such insurance business. (Rev., s. 4763; 1899, c. 54, s. 105; C. S. 6424.)

Action by the Insured.—"The statute does not make the policy void in the hands of the assured. The defendant company could not take advantage of its own wrong by receiving the premium and not being responsible." Hay & Bro. v. Union Fire Ins. Co., 167 N. C. 82, 83, 85 S. E. 241.

Action by Licensed Companies.—When such foreign corporation has complied with our laws, our courts are open to it for the enforcement of its rights—and should it become insolvent and pass into the hands of a receiver—he, by comity, will be allowed to sue here to enforce the liability of a policy holder. Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N. C. 116, 32 S. E. 404.

Policies Issued by Brokers.—This section allows an outside company, that is, one that has not complied with our laws, to be sued but not to sue. Its evident purpose was to allow such companies to adjust their fire losses without thereby making themselves liable for penalties or taxes. It certainly never intended to permit such companies to practically nullify our insurance laws by the legal fiction of doing business through a broker instead of an agent. Our insurance laws, applicable equally to domestic and to foreign corporations, are intended not simply for purposes of revenue, but primarily for the protection of our people. Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N. C. 116, 119, 32 S. E. 404.

§ 58-165. Citizens authorized to procure policies in unlicensed foreign companies.

1. What applicant must show.—The commissioner of insurance, upon the annual payment of a fee of twenty dollars, may issue licenses to citizens of this state, subject to revocation at any time, permitting the person named therein to procure policies of fire insurance on property in this state in foreign insurance companies not authorized to transact business in the state. Before the person named in such a license may procure any insurance in such companies or on any property in this state, he must execute and file with the commissioner of insurance an affidavit that he is unable to procure in companies admitted to do business in the state the amount of insurance necessary to protect such property, and may only procure insurance under such license after he has procured insurance in companies admitted to do business in this state to the full amount which those companies are willing to

write on the property; but such licensed person shall not be required to offer any portion of such insurance to any company which is not possessed of cash assets amounting to at least twenty-five thousand dollars, or one which has, within the preceding twelve months, been in an impaired condition.

2. Account and report.—Each person so licensed must keep a separate account of the business done under the license, a certified copy of which account he shall forthwith file with the commissioner of insurance, showing the exact amount of such insurance placed by any person, firm, or corporation, the gross premium charged thereon, the companies in which the same is placed, the date and terms of the policies, and also a report in the same detail of all such policies canceled and the gross return premium thereon.

3. Bond filed.—Before receiving such license the applicant therefor shall execute and deliver to the commissioner of insurance a bond in the penal sum of one thousand dollars, with such sureties as the commissioner of insurance may approve, with a condition that the licensee will faithfully comply with all the requirements of this section, and will file with the commissioner of insurance, in January of each year, a sworn statement of the gross premiums charged for insurance procured or placed, and the gross returned premiums on such insurance canceled under such license during the year ending on the thirty-first day of December next preceding, and at the time of filing such statement will pay into the treasury of the state a sum equal to five per centum of such gross premiums, less return premiums, so reported, or pay such tax at the time of taking out and delivering such policy or policies.

4. Broker may obtain license.—Any broker licensed under this section may, upon application to the commissioner of insurance, be allowed to place policies of insurance with any mutual fire insurance company not doing or licensed to do business in this state, not paying commissions upon business, not having agents to solicit business, and doing only one class of fire insurance business, if he files with the insurance department a certified copy of the charter of each such company, a statement of its financial condition on a blank of the department, and certificate of its authority to do business at its home office, and also receives from the commissioner of insurance a license for each company to do business through him on the payment by him of the license, taxes, and fees required by law. All such contracts of insurance placed through any such broker are valid and legal, and the risks upon which such policies are placed may be examined and inspected by regular agents or inspectors licensed by the insurance department upon the application of the broker writing the insurance.

5. Each resident broker, authorized to procure insurance in nonadmitted companies, shall pay an annual license tax of twenty dollars, and also a tax of five per cent on his gross premium receipts. (Rev., ss. 4715, 4769; 1899, c. 54, ss. 68, 95; 1903, c. 438, s. 7, c. 680; C. S. 6425.)

Liability of the Insurer.—Where a citizen of this State applies for a policy in a foreign company through a broker here, and the application is accepted and the policy is delivered, the broker will be deemed to be the agent of the company, and the contract to be made here, subject to the laws of this State. Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N. C. 116, 32 S. E. 404.

An insurance company that issues policies to residents of this state, but does not issue them through a broker in this state is not subject to an action under this section. Ivy River Land, etc., Co. v. National Fire, etc. Co., 192 N. C. 115, 133 S. E. 424.

§ 58-166. Punishment for failure to file affidavit and statements.—If any person licensed to procure insurance in an unauthorized foreign company shall procure, or act in any manner in the procurement or negotiation of, insurance in any unauthorized foreign company, and shall neglect to make and file the affidavit and statements required by the preceding section, he shall forfeit his license and be punished by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment for not more than one year, or by both. (Rev., ss. 3483, 4769; 1899, c. 54, ss. 68, 95; C. S. 6426.)

Referred to in Ivy River Land, etc., Co. v. National Fire Ins. Co., 192 N. C. 115, 133 S. E. 424.

§ 58-167. Tax deducted from premium; reports filed.—When any person or corporation shall insure any property located in this state with an insurance company not licensed to do business in this state, it shall be the duty of such person or corporation to deduct from the premium charged on the policy or policies issued for such insurance five per centum of the premium and remit the same to the commissioner of insurance of the state, at the same time reporting to the commissioner of insurance the name of the company or companies issuing the policy or policies, the location of the property insured, and the premium charged. The commissioner of insurance shall pay the said amounts to the treasurer of the state. If such report is not made on or before the thirtieth days of July and January of each year for the business done prior to July first and January first preceding, there shall be added to the amount of taxes thereon the sum of one per centum on the first day of each month thereafter. (1915, c. 109, s. 8; C. S. 6427.)

Referred to in Ivy River Land, etc., Co. v. National Fire, etc., Co., 192 N. C. 115, 133 S. E. 424.

§ 58-168. Resident agents required. — Foreign fire insurance companies legally authorized to do business in this state through regularly commissioned and licensed agents located in the state shall not make contracts of fire insurance on property herein, except through such resident agents as are regularly commissioned by them and licensed to write policies of fire insurance in this state. This section does not apply to direct insurance covering the rolling stock of railroad corporations or property in transit while in the possession and custody of railroad corporations or other common carriers. (Rev., s. 4764; 1899, c. 54, s. 107; 1901, c. 391, s. 8; C. S. 6428.)

§ 58-169. Policies through nonresident agent prohibited.—Every fire insurance company authorized to do business in the state is prohibited from authorizing or allowing any person, agent, firm, or corporation who is a nonresident of this state, to issue or cause to be issued, except through a licensed agent, any policy of insurance

on property located in the state. (Rev., s. 4765; 1903, c. 488, s. 1; 1905, c. 170; C. S. 6429.)

Validity as to Insured.—Where a foreign insurance company, authorized to do business here under our laws, issues its policy on property situated within the State, but through an agency in another State which is unauthorized to write it here, because of this section, the policy is valid as to the right of action of the insured thereon. Hay & Bros. v. Union Fire Ins. Co., 167 N. C. 82, 83 S. E. 241.

§ 58-170. Licensed agents not to pay commissions to nonresident or unlicensed persons.—Any person, firm, or corporation licensed by the commissioner of insurance to act as a fire insurance agent in this state is prohibited from paying directly or indirectly any commission, brokerage, or other valuable consideration on account of any policy covering property in this state, to any person, firm, or corporation who is a nonresident of the state, or to any person, firm, or corporation not duly licensed by the commissioner of insurance as a fire insurance agent; but a fire insurance agent licensed in the state may pay a commission not exceeding fifty per centum of the regular commissions allowed upon the issuance of such policies to a licensed nonresident broker. The commissioner of insurance is authorized to license a non-resident as a broker when he applies therefor on a proper blank of the department and makes affidavit that he will not during the fiscal year place directly or indirectly any fire insurance on any property located in North Carolina except through licensed resident agents of the state, that he is a broker in good faith and proposes to hold himself out as such. The fee for this license and seal is ten dollars. (Rev., s. 4766; 1903, c. 488, s. 2; 1905, c. 170, s. 2; 1923, c. 4, s. 70; 1925, c. 70, s. 6; C. S. 6430.)

§ 58-171. Revocation of license for violation; power of commissioner.—When the commissioner of insurance has information of a violation of any of the provisions of §§ 58-169 and 58-170, he shall immediately investigate or cause to be investigated such violation, and if a fire insurance company has violated any of such provisions he shall immediately revoke its license for not less than three nor more than six months for a first offense, and for each offense thereafter for not less than one year. If a person, firm, or corporation licensed by the commissioner of insurance as a fire insurance agent violates or causes to be violated any of the provisions of those sections, he shall for the first offense have his license revoked for all companies for which he has been licensed for not less than three nor more than six months, and for the second offense he shall have his license revoked for all companies for which he is licensed, and he shall not thereafter be licensed for any company for one year from the date of the revocation. For the purpose of enforcing the provisions of those sections the commissioner of insurance is authorized and empowered to examine persons, administer oaths, and send for papers and records. A failure or refusal on the part of any fire insurance company, person, firm, or corporation licensed to do business in this state to appear before the commissioner of insurance when requested to do so, or to produce records and papers, or answer under oath, subjects such company, person, firm, or corporation to the penalties of this section. (Rev., s. 4767; 1903, c. 488, ss. 3, 4; C. S. 6431.)

§ 58-172. Agreements restricting agent's compensation; penalty.—It is unlawful for any fire insurance company, association, or partnership doing business in this state employing an agent who is employed by another fire insurance company, association, or partnership, either directly or through any organization or association, to enter into, make or maintain any stipulation or agreement in restraint of or limiting the compensation which said agent may receive from any other fire insurance company, association, or partnership, or forbidding or prohibiting reinsurance of the risks of a domestic fire insurance company in whole or in part by any company holding membership in or coöperating with such bureau or board. The penalty for any violation of this section shall be a fine of not less than two hundred and fifty dollars nor more than five hundred dollars and the forfeiture of license to do business in this state for a period of twelve months thereafter. (Rev., ss. 3491, 4768; 1905, c. 424; 1915, c. 166, ss. 2, 3; C. S. 6432.)

§ 58-173. Punishment for issuing fire policies contrary to law.—Any insurance company or agent who makes, issues, or delivers a policy of fire insurance in wilful violation of the provisions of this chapter which prohibit a domestic insurance company from issuing policies before obtaining certificate and authority from the commissioner of insurance; or which prohibit the issuing of a fire insurance policy for more than the fair value of the property or for a longer term than seven years; or which prohibit stipulations in insurance contracts restricting the jurisdiction of courts, or limiting the time within which an action may be brought to less than one year after the cause of action accrues or to less than six months after a nonsuit by the plaintiff, shall forfeit for each offense not less than fifty nor more than two hundred dollars; but the policy shall be binding upon the company issuing it. (Rev., s. 4832; 1899, c. 54, s. 99; 1903, c. 438, s. 10; C. S. 6433.)

Art. 19. Fire Insurance Policies.

§ 58-174. Terms and conditions must be set out in policy.—In all insurance against loss by fire the conditions of insurance must be stated in full, and the rules and by-laws of the company are not a warranty or a part of the contract, except as incorporated in full into the policy. (Rev., s. 4758; 1899, c. 54, s. 42; C. S. 6434.)

§ 58-175. Items to be expressed in policies; agent to inspect risks.—Upon request there shall be printed, stamped, or written on each fire policy issued in this state the basis rate, deficiency charge, the credit for improvements, and the rate at which written, and whenever a rate is made or changed on any property situated in this state upon request a full statement thereof showing in detail the basis rate, deficiency charges and credits, as well as rate proposed to be made, shall be delivered to the owner or his representative having the insurance on the property in charge, by the company, association, their agent or representative, with a notice to the effect that the rate is promulgated and filed

with the insurance department. Every agent of a fire insurance company shall, before issuing a policy of insurance on property situated in a city or town, inspect the same, informing himself as to its value and insurable condition. (1915, c. 109, s. 3; 1925, c. 70, s. 3; C. S. 6435.)

§ 58-176. Standard policy adopted.—No fire insurance company shall issue fire insurance policies on property in this state other than those of the standard form filed in the office of the commisioner of insurance of the state, known and designated as the standard fire insurance policy of the state of North Carolina, except as follows: (a) A company may print on or in its policies its name, location, and date of incorporation, the amount of its paid-up capital stock, the names of its officers and agents, the number and date of the policy, and if it is issued through an agent, the words: "This policy shall not be valid until countersigned by the duly authorized manager or agent of the company at .....," and after the words "Standard Fire Insurance Policy of the State of North Carolina," on the back of the form, the names of such other states as have adopted this standard form. (b) A company may use in its policies written or printed forms of description and specification of the property insured. (c) A company insuring against damage by lightning may print in the clause enumerating the perils insured against, the additional words, "also any damage by lightning, whether fire ensues or not," and in the clause providing for an apportionment of loss in case of other insurance, the words, "whether by fire, lightning, or both." (d) A company insuring against damage by windstorm, cyclones and tornadoes may print in the clause enumerating the perils insured against, the additional words, "also any damage by windstorm, cyclones and tornadoes, whether fire ensues or not," and in the clause providing for apportionment of loss in case of other insurance, the words, "whether by fire, windstorm, cyclones, tornadoes or all." Such company may also print after the other conditions of the standard fire policy such provisions and conditions especially applicable to windstorms, cyclones, and tornadoes. The company may also make such change in the heading and preliminary statements of such combined policy form as may be necessary, all in such form as may be approved by the commissioner of insurance. (e) A company may write or print upon the margin or across the face of a policy, or write or print in type not smaller than long primer or ten point Roman-faced, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form, and all such slips, riders, and provisions must be signed by the officers or agents of the company so using them. The iron safe or any similar clause requiring the taking of inventories, the keeping of books and producing the same in the adjustment of any loss, shall not be used or operative in the settlement of losses on buildings, furniture and fixtures, or any property not subject to any change in bulk and value. (f) Every mutual company shall cause to appear in the body of its policy the total amount for which the assured may be liable under the charter of the company. (g) The company may print on or in its policy, with the approval of the commissioner of insurance, if the same is not already included in such standard form, any provision which any such corporation is required by law to insert in its policies not in conflict with the provisions of such standard form. Such provisions shall be printed apart from the other provisions, agreements, or conditions of the policy, under a separate title, as follows: "Provisions Required by Law to be Inserted in This Policy." (Rev., s. 4759; 1899, c. 54, s. 43; 1901, c. 391, s. 4; 1907, c. 800, s. 1; 1915, c. 109, s. 10; 1925, c. 70, s. 5; C. S. 6436.)

Cross Reference.—See § 58-177 and notes thereto.

Validity and Binding Effect.—The terms and conditions of the standard form of a fire insurance policy, as provided for in this section and the section following, and the stipulations as to a valid waiver thereof, are valid and binding on the parties. Midkiff v. North Carolina Home Ins. Co., 197 N. C. 139, 147 S. E. 812.

§ 58-177. Form of standard policy.—The standard form of policy must be plainly printed, no part of it may be in type smaller than that used in printing the form on file in the office of the commissioner of insurance, and shall be as follows:

[Space for insertion of name of company or companies issuing the policy and other matter permitted to be stated at the head of the policy.]

Amount $.... Rate .... Premium $ ....

In consideration of the stipulations herein named and of .... dollars premium does insure .... and legal representatives, to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair and without compensation for loss resulting from interruption of business or manufacture, for the term of ..... from the ..... day of ....., 19 ...., at noon, to the ..... day of ....., 19 ...., at noon, against all direct loss and damage by fire and by removal from premises endangered by fire except as herein provided, to an amount not exceeding ..... dollars to the following described property while located and contained as described herein, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere, to wit:

[Space for description of property.]

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, which are hereby made a part of the policy, together with such other provisions, stipulations, and conditions as may be endorsed hereon or added hereto as herein provided.

In witness whereof, this company has executed and attested these presents.

[Space for date and for signatures and titles of officers and agents.]

Fraud, misrepresentation, etc.—This entire policy is void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Property which cannot be insured.—This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money, notes or securities.

Hazards not covered.—This company shall not be liable for loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises.

This entire policy is void, unless otherwise provided by agreement in writing added hereto—

Ownership, etc.—(a) if the interest of the insured is other than unconditional and sole ownership; or (b) if the subject of insurance is a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings are commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed; or (d) if any change, other than by the death of an insured, takes place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy is assigned before a loss.

Unless otherwise provided by agreement in writing added hereto, this company is not liable for loss or damage occurring—

Other insurance.—(a) while the insured has any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or

Increase of hazard.—(b) while the hazard is increased by any means within the control or knowledge of the insured; or

Repairs, etc.—(c) while mechanics are employed in building, altering, or repairing the described premises beyond a period of fifteen days; or

Explosives, gas, etc.—(d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used, or allowed on the described premises fireworks, greek fire, phosphorus, explosives, benzine, gasoline, naphtha, or any other product of petroleum of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; or

Factories.—(e) if the subject of insurance is a manufacturing establishment while operated in whole or in part between the hours of ten p. m. and five a. m., or while it ceases to be operated beyond a period of ten days; or

Unoccupancy.—(f) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days; or

Excepted property.—(g) to bullion, manuscripts, mechanical drawings, dyes, or patterns; or

Explosion, lightning.—(h) by explosion or lightning, unless fire ensues, and, in that event, for loss or damage by fire only.

Chattel mortgage.—Unless otherwise provided by agreement in writing added hereto this company is not liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, and during the time of such encumbrance this company is liable only for loss or damage to any other property insured hereunder.

Fall of building.—If a building, or any material part thereof, falls, except as the result of fire, all insurance by this policy on such building or its contents immediately ceases.

Added clauses.—The extent of the application of insurance under this policy and of the contribution to be made by this company in case of loss or damage, and any other agreement not inconsistent with or a waiver of any of the conditions or provisions of the policy, may be provided for by rider added hereto.

Waiver.—No one has power to waive any provision or condition of this policy except such as by the terms of the policy is the subject of agreement added hereto, nor shall any such provision or condition be waived unless the waiver is in writing added hereto, nor shall any provision or condition of this policy or any forfeiture be waived by any requirement, act, or proceeding on the part of this company relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto.

Cancellation of policy.—This policy will be canceled at any time at the request of the insured, in which case the company shall, upon demand and surrender of the policy, refund the excess of paid premium above the customary short rates for the expired time. The policy may be canceled at any time by the company by giving to the insured a five days written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation must state that the excess premium (if not tendered) will be refunded on demand.

Pro rata liability.—This company will not be liable for a greater proportion of any loss or damage than the amount hereby insured bears to the whole insurance covering the property, whether valid or not and whether collectible or not.

Noon.—The word "noon" herein means noon of standard time at the place of loss or damage.

Mortgagee.—If loss or damage is made payable, in whole or in part, to a mortgagee, this policy may be canceled as to such interest by giving to the mortgagee a ten days written notice of cancellation. Upon failure of the insured to render proof of loss, such mortgagee shall, as if named as insured hereunder, but within sixty days after such failure, render proof of loss and

be subject to the provisions hereof as to appraisal and time of payment. On payment to a mortgagee of any sum for loss or damage hereunder, if this company claims that as to the mortgagor or owner no liability existed, it shall, to the extent of such payment, be subrogated to the mortgagee's right of recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue; or it may pay the mortgage debt and require an assignment thereof and of the mortgage. Except as stated in this paragraph, the agreement between a mortgagee and this company shall be only as stated by rider added hereto.

Requirements in case of loss.—The insured shall give immediate notice, in writing, to this company, of any loss or damage, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and the insured shall, within sixty days after the fire, unless such time is extended in writing by this company, render to this company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof, and the amount of loss or damage thereto; all encumbrances thereon; all other contracts of insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; and by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged. The insured, as often as is reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as is reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals are lost, at such reasonable time and place as is designated by this company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal.—In case the insured and this company fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this company, the umpire shall be selected by a judge of a court of record in the state in which the property insured is located. The appraisers shall then appraise the loss and damage, stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only to the umpire. An award in writing, so itemized, of any two, when filed with this company, shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him, and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options.—It is optional with this company to take all, or any part, of the articles at the agreed or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of the like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required; but

Abandonment.—There can be no abandonment to this company of any property.

When loss payable.—The amount of loss or damage for which this company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this company and ascertainment of the loss or damage is made either by agreement between the insured and this company expressed in writing or by the filing with this company of an award as herein provided.

Suit.—No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity unless the insured has complied with all the requirements of this policy, nor unless commenced within twelve months next after the fire.

Subrogation. — This company may require from the insured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this company.

Standard Fire Insurance Policy of the State of .....

Expires .....

Property .....

Amount . . . . . $ .....

Premium . . . . . $ .....

No.....

It is important that the written portions of all policies covering the same property read exactly alike. If they do not, they should be made uniform at once. (Rev., s. 4760; 1899, c. 54, s. 43; 1901, c. 391, s. 4; 1915, c. 109, s. 9; C. S. 6437.)

I. The Application and Contract in General.
II. Title or Interest of Insured.
III. Certain Other Conditions.
IV. Liability of Company in Case of Loss.
V. Liability of Agent.

Cross Reference.

See § 58-31 and notes thereto.

I. THE APPLICATION AND CONTRACT IN GENERAL.

Editor's Note.—See 13 N. C. Law Rev. 98.

Part of Law.—The material provisions of the standard form of a fire insurance policy written in accordance with this section are those of the law. Greene v. Insurance Co., 196 N. C. 335, 145 S. E. 616.

Rights of Parties Determined from Instrument.—When a policy of insurance, in the form prescribed by this section, has been issued by an insurance company and accepted by the insured, and has thereby become effective for all purposes as their contract, the rights and liabilities of both the insurer and the insured, under the policy, must be ascertained and determined in accordance with its terms and provisions. These terms and provisions have been prescribed by statute, and are valid in all respects; they are just both to the insurer and to the insured. Each is presumed to know all the terms, provi-

sions and conditions which are included in the policy. Both are ordinarily bound by them. Lancaster v. Ins. Co., 153 N. C. 285, 69 S. E. 214; Midkiff v. North Carolina Home Ins. Co., 197 N. C. 139, 141, 147 S. E. 812.

Same—Loss—Payable Clause.—The rights of the parties under a loss-payable clause in a policy of fire insurance will be determined in accordance with the terms and provisions of the contract, which derive no extra validity by reason of the fact that the form is prescribed by law. Atlantic Joint Stock Land Bank v. Foster, 217 N. C. 415, 8 S. E. (2d) 235.

Agreements in the policy contrary to statutory provisions are void. Buckner v. United States Fire Ins. Co., 209 N. C. 640, 184 S. E. 520.

Binder Slips Not Contrary to Law.—Our statute, by establishing a standard form of fire insurance, does not prevent the binding effect of a parol agreement of insurance, looking to the delivery of the policy according to the form prescribed and evidenced by a written memorandum thereof, called a binder; and when such is shown to have been made in a manner to bind the company, it is in force from that time, and thereafter the insured is responsible for the loss in accordance with the terms of the statutory form of policy. Lea v. Atlantic Fire Ins. Co., 168 N. C. 478, 84 S. E. 813.

Oral Contract with Agent.—In the absence of fraud an insurance company cannot be held liable upon a parol contract alleged to have been made by its agent, which is contradictory of and totally inconsistent with the standard form prescribed by statute. Hardin v. Liverpool, etc., Ins. Co., 189 N. C. 423, 127 S. E. 353.

Right to Cancel.—Either party to the contract may cancel the standard form policies without the consent of the other, by following the provisions of the policy applicable; the expression in other forms of policies that the policy "may be canceled" is construed as reading, "shall be canceled." Roberta Mfg. Co. v. Royal Exch. Assur. Co., 161 N. C. 88, 76 S. E. 865.

The provision in this section is for the protection of the insured, and the insurer cannot effect cancellation until the expiration of five days from the receipt of the written notice by plaintiff, and whether plaintiff intends to waive this provision and does waive it by returning the policy as requested is for the determination of the jury. Wilson v. National Union Fire Ins. Co., 206 N. C. 635, 174 S. E. 745.

Applied in Pettit v. Wood-Owen Trailer Co., 214 N. C. 335, 199 S. E. 279.

II. TITLE OR INTEREST OF INSURED.

Unconditional Ownership.—The provision in a policy of fire insurance written in accordance with the standard statutory form, that the policy should be void if the insured was not the unconditional owner of the property in fee simple is not waived by a written agreement providing that the agreement was solely for the purpose of determining the loss and to save time to the parties and that it should not operate as a waiver of any conditions or provisions of the policy. Sasser v. Pilot Fire Ins. Co., 203 N. C. 232, 165 S. E. 684.

The requirement of "unconditional and sole ownership" in a policy of fire insurance in the standard form as required by this section, is statutory as well as contractual. Roberts v. American Alliance Ins. Co., 212 N. C. 1, 192 S. E. 873, 113 A. L. R. 310.

Right of Insurer to Know of Encumbrances.—"In referring to this principle of law in Weddington v. Piedmont Fire Ins. Co., 141 N. C. 234, 54 S. E. 271, Mr. Justice Walker says: 'The validity of a provision in a policy of insurance against the creating of encumbrances without the consent of the insurer can hardly be contested at this late day. It has now become the settled doctrine of the courts that the facts in regard to title, ownership, encumbrances, and possession of the insured property are all important to be known by the insurer, as the character of the hazard is often affected by these circumstances.'" Watson v. North Carolina Home Ins. Co., 159 N. C. 638, 640, 75 S. E. 1105.

Misrepresentations as to Title.—Misrepresentations as to title of part of the premises insured avoids the entire contract of insurance. Cuthberton v. North Carolina Home Ins. Co., 96 N. C. 480, 2 S. E. 258, citing note in 19 L. R. A. 212.

Existing Lien Will Not Violate Provision.—The stipulation in a fire policy for sole and unconditional ownership is not violated by the existence of a lien on the property. Lancaster v. Southern Ins. Co., 153 N. C. 285, 69 S. E. 214.

Mortgagee Not Liable for Premiums.—The provision in the loss payable clause of a fire insurance policy taken out by the mortgagor that the mortgagee will pay the premium on demand should the mortgagor not do so, is held to be a condition upon which the mortgagee may receive the benefit of the protection afforded by the policy as a special contract made in his favor, and not as a covenant that he will pay the premium on demand of the insurer, upon the mortgagor's default; and upon the mortgagee's refusal or neglect to pay the premiums in default upon the insurer's demand, the latter may after ten days' written notice cancel the policy. Whitehead v. Wilson Knitting Mills, 194 N. C. 281, 139 S. E. 456, 56 A. L. R. 674, and cases there cited.

Title under Executory Contract.—A vendee of land occupying it under an executory contract, on which he has paid a portion of the price, and on which he has erected a building is an "unconditional and sole owner" in fee simple within the conditions of a fire policy providing that it shall be void if the interest of the insured is other than sole ownership of fee title. Jordan v. Hanover Fire Ins. Co., 151 N. C. 341, 66 S. E. 206.

Mortgage Invalidates Policy.—Where the insured fails to state that the property was mortgaged, when in fact it was mortgaged, the policy providing that the contract of insurance would be void if the insured property was mortgaged, invalidates the policy, though the omission was made without the intent to deceive. Hayes v. United States Fire Ins. Co., 132 N. C. 702, 44 S. E. 404.

Execution of a mortgage on the insured property so affects title, as will avoid an insurance policy then existing thereon and forfeit its benefit, if made without the knowledge or consent of the insurance company, and not attested as prescribed by the policy contract, unless the company thereafter, by its acts, conduct and statements has waived the effect of the mortgage and is estopped to assert its forfeiture. Modlin v. Atlantic Fire Ins. Co., 151 N. C. 35, 65 S. E. 605.

Assignment for Creditors.—Making an assignment for creditors avoids a policy containing an unconditional ownership clause. Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869.

The commencement of foreclosure against insured property terminates the policy, there being in the policy a provision to that effect. Hayes v. United States Fire Ins. Co., 132 N. C. 702, 44 S. E. 404.

Removal of Encumbrance before Loss.—Where the owner of an unencumbered automobile insures it under a statutory form of policy, stipulating, among other things, that the policy would be void if the interest of the assured be other than unconditional or sole ownership, or if the property be or become encumbered by a chattel mortgage, and thereafter gives a mortgage thereon which is canceled four days before the destruction of the machine by fire, this loss coming within the terms of the policy, the cancellation of the mortgage revives the original status of the policy, the temporary violation of the stipulation being immaterial, and puts the policy again in force, the effect of the mortgage being to invalidate the policy during the continuance of the lien, or to suspend the obligation of the insurance company during the violation of the stipulation. Cottingham v. Maryland Motor Car Ins. Co., 168 N. C. 259, 84 S. E. 274.

Waiver.—Where a policy of fire insurance has been issued under the statutory standard form, the condition therein of sole and unconditional ownership of the insured cannot be held to have been waived by the insurer or its agent in the absence of knowledge that the insured's ownership was otherwise than stated in the policy contract. Hardin v. Liverpool, etc., Ins. Co., 189 N. C. 423, 127 S. E. 353. But where the agent issues the policy with full knowledge of the state of the title the condition is waived. Gerringer v. North Carolina Home Ins. Co., 133 N. C. 407, 45 S. E. 773. As to waiver of other conditions, see the next succeeding analysis line of this note.

A breach of the condition that the policy is void if the insured has not the sole and unconditional title is valid and enforceable by the company without the necessity of disclaiming liability upon notice or knowledge of its infraction, and inaction on its part in this respect is not a waiver thereof. Smith v. National Ben Franklin Fire Ins. Co., 193 N. C. 446, 137 S. E. 310.

III. CERTAIN OTHER CONDITIONS.

Additional Insurance—In General.—The condition against additional insurance on the property is valid and enforceable. Black v. Atlantic Home Ins. Co., 148 N. C. 169, 61 S. E. 672.

And when under a fire insurance policy the insured has violated the provision of the policy by placing more concurrent insurance on the property than the policy permits, the policy is invalid in accordance with the statutory form. Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869.

Where a standard fire insurance policy under this section, provides that the policy should be void if the insured procures other contemporaneous insurance on the same property during the term covered, unless the insurer agrees thereto and a writing to that effect is attached to the policy contract, the provision is valid and binding. Johnson v. Aetna Ins. Co., 201 N. C. 362, 160 S. E. 454.

A policy of fire insurance was issued to the devisee of the fee in property subject to a charge in favor of other beneficiaries under the will. Thereafter the guardian of such other beneficiaries took out a policy to protect the interest of his wards. It was held that the insurer issuing the policy to the guardian may not avoid liability thereon, on the ground of the additional insurance issued to the owner of the fee, since such additional insurance was not issued to or for the benefit of those insured under its policy. Bryan v. Old Colony Ins. Co., 213 N. C. 391, 196 S. E. 345.

Same—Waiver of Condition by Agent.—Where the insured before taking out additional insurance mentioned his intention to the companies' subagent who had issued its policy to the insured, and was told that it was all right, this constituted a waiver of the condition. Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236.

The Iron-Safe Clause.—The "iron-safe clause" in policies of insurance is upheld by the courts as a reasonable contract limitation upon the insurer's risk. Coggins v. Aetna Ins. Co., 144 N. C. 7, 56 S. E. 506.

A substantial compliance with this provision will suffice. Arnold v. Indemnity Fire Ins. Co., 152 N. C. 232, 67 S. E. 574. And an inventory of a stock of general merchandise containing the number of articles and cost of each class at a date made about one month before the fire, and testified to as being practically the same as on the date of the fire, is a substantial compliance with the inventory provision in the standard form of a fire insurance policy, and is competent as evidence upon the trial. Mortt v. Liverpool, etc., Ins. Co., 192 N. C. 8, 133 S. E. 337. See also, Coggins v. Aetna Ins. Co., 144 N. C. 7, 56 S. E. 506.

Same—Waiver.—If the company, knowing the insured has not complied with this provision, collects the premiums and recognizes the validity and binding force and effect of the policy it has issued, it should not be heard to insist upon the introduction of records, the keeping of which it has thus tacitly waived. Bullard v. Pilot Fire Ins. Co., 189 N. C. 34, 37, 126 S. E. 179.

Proof of Loss.—A clause in a policy requiring proof of loss and forbidding the bringing of any suit upon the policy until sixty days thereafter is a continuing one, and does not mean that failure to file proof within sixty days of the fire works a forfeiture of the policy. Higson v. North River Ins. Co., 152 N. C. 206, 209, 67 S. E. 509.

The insurer's denial of liability upon its fire insurance policy is a waiver of its right to require the proof of loss therein specified. Profitt Mercantile Co. v. State Mut. Fire Ins. Co., 176 N. C. 545, 97 S. E. 476.

As to limitations, see post, this note, "Liability of Company in Case of Loss," IV.

Operating Mill at Night.—Where an insured mill was operated at night, in violation of a policy, but under a permit from the insurance agent, such operation was no defense to an action on the policy for a loss happening three months after the violation had ceased. Strause v. Palatine Ins. Co., 128 N. C. 64, 38 S. E. 256, cited in note in 45 L. R. A., N. S., 126.

Permit When House Unoccupied.—The statutory form of a standard fire insurance policy requiring a permit to be issued for the house insured when unoccupied for more than ten days is a provision materially affecting the risk, and must be obtained in accordance with the requirements of the policy to make the insurer liable for damages by fire occurring after ten days vacancy, and after the policy has been issued and is in binding effect, the local agent of the insurer is without authority to bind his principal by acts and parol representations made contrary to the terms of the written instrument. Greene v. Insurance Co., 196 N. C. 335, 145 S. E. 616.

Waiver of Stipulations.—Argall v. Old North State Ins. Co., 84 N. C. 355, holds that a breach of a condition in the policy will not avoid it, if the insurer has knowledge thereof, and does not object, in which case the breach is considered as waived. Scottish Fire Ins. Co. v. Stuyvesant Ins. Co., 161 N. C. 485, 489, 76 S. E. 728.

An agent of a fire insurance company whether general or local, cannot waive the requirements of a standard policy except in the form prescribed by the statute. Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869.

"The rule applying to a state of facts is thus stated in Bullard v. Pilot Fire Ins. Co., 189 N. C. 34, 126 S. E. 179: 'The provision restricting the agent's power to waive conditions does not, as a general rule, refer to or include conditions existing at the inception of the contract, but to those arising after the policy is issued. Conditions which form a part of the contract of insurance at its inception may be waived by the agent of the insurer, although they are embraced in the policy when it is delivered; and the local agent's knowledge of such conditions is deemed to be the knowledge of his principal.' Hayes v. United States Fire Ins. Co., 132 N. C. 702, 44 S. E. 404; Weddington v. Piedmont Fire Ins. Co., 141 N. C. 234, 54 S. E. 271; Johnson v. Rhode Island Ins. Co., 172 N. C. 142, 90 S. E. 124; Fireman's Fund Ins. Co. v. Rowland Lumber Co., 186 N. C. 269, 119 S. E. 362." Smith v. National Ber. Franklin Fire Ins. Co., 193 N. C. 446, 448, 137 S. E. 310.

Sending a check in payment of the claim may constitute a waiver, whether received or not, of unfulfilled conditions. Roper v. National Fire Ins. Co., 161 N. C. 151, 76 S. E. 869. As to waiver of stipulations as to title of property insured, see ante, this note, "Title or Interest of Insured," II.

The terms and conditions of standard form of a fire insurance policy and the stipulations as to a valid waiver thereof are valid and binding on the parties. Midkiff v. North Carolina Home Ins. Co., 197 N. C. 139, 147 S. E. 812.

IV. LIABILITY OF COMPANY IN CASE OF LOSS.

Companies Option.—A provision in a policy of fire insurance, by which, in case of loss, it is made optional with the insurer to repair, rebuild, or replace the property destroyed, by giving notice within a certain time, constitutes a contract exclusively between insurer and insured; and neither a judgment creditor nor a mortgagee can interpose to prevent its performance; and if the insurer has not given notice of an intention to repair, etc., within the time specified, no one but the insured can take advantage of it and require the payment of the insurance money instead. Stamps v. Commercial Fire Ins. Co., 77 N. C. 209, 24 Am. Rep. 443, cited in note in 26 L. R. A. 857.

Damage by Water—An insurance company is liable on a fire insurance policy for damages done to goods by water used in saving them from destruction by fire. Whitehurst v. Fayetteville Mut. Ins. Co., 51 N. C. 352.

Loss by Theft.—Losses by theft consequent on the removal of goods are fairly within the contract to insure against fire. Whitehurst v. Fayetteville Mut. Ins. Co., 51 N. C. 352, cited in note in 35 L. R. A., N. S., 892.

Amount Recoverable.—In an action on a policy of insurance, the measure of the amount the insured is entitled to recover is the fair cash value of the property at the time and place of the loss. Fowler v. Old North State Ins. Co., 74 N. C. 89; Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62; Boyd v. Royal Ins. Co., 111 N. C. 372, 16 S. E. 389.

Limitations.—Under the valid provision of a standard fire insurance policy, approved by statute, the period limited to twelve months from the time of loss by fire in which an action may be maintained is not waived by the time taken under an agreement for an appraisal and award for the damage sustained by the insured. Tatham & Co. v. Liverpool, etc., Ins. Co., 181 N. C. 434, 107 S. E. 450.

Subrogation.—"It is held in Phoenix Ins. Co. v. Erie, etc., Transp. Co., 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873, that when goods injured are totally lost, actually, or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by law of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or privity with such person. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter. In the court of common law, it can only be asserted in his name; and even in a court of equity, or of admiralty, it can only be asserted in his right. In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured." Lumberman's Mut. Ins. Co. v. Southern R. Co., 179 N. C. 255, 262, 102 S. E. 417; Cunningham v. Seaboard Air Line R. Co., 139 N. C. 427, 51 S. E. 1029; Fidelity Ins. Co. v. Atlantic Coast Line R. Co., 165 N. C. 136, 80 S. E. 1069; Powell v. Wake Water Co., 171 N. C. 290, 88 S. E. 426.

Upon paying the loss by fire, insurer is entitled to subrogation to the rights of insured against the third person tort-feasor causing the loss, to the extent of the amount paid, both by provision of this section and under equitable principles. Buckner v. United States Fire Ins. Co., 209 N. C. 640, 184 S. E. 520.

This section does not provide that insurer should be subrogated to rights of the mortgagee against the mortgagor,

and under the facts of this case insurer is not entitled to the subrogation claimed upon any equitable principle, and insurer's subrogation receipt from the mortgagee is not valid or binding as against the owner mortgagor. Id.

Where the mortgagee has insured the mortgaged property, and where the mortgagor has assumed the risk of loss under his contract of purchase, the insurer having paid the loss is subrogated to the rights of the mortgagee. Stuyvesant Ins. Co. v. Reid, 171 N. C. 513, 88 S. E. 779.

V. LIABILITY OF AGENT.

Where the general agent of a fire insurance company for a limited territory, through the negligence of an employee, fails to write into the policy a statement required to make it valid, the agents are liable in damages to the insured for loss by fire, in an action based solely on that ground, and not upon the invalid contract of insurance negligently issued by them. Case v. Ewbanks, Ewbanks & Co., 194 N. C. 775, 140 S. E. 709.

Where a nonresident defendant fire insurance company has upon petition removed a cause from the State to the Federal Court upon a policy of insurance that was void in that jurisdiction, but not in the jurisdiction of the court of this State, and the Federal Court has adjudicated that the plaintiff could not recover under the contract for a loss by fire, the plaintiff may thereafter bring action in the State court against the agents and recover damages from them occasioned by their own neglect in not inserting a provision in the policy that would have rendered it valid, the subject-matter of the latter action being based upon negligence and not on the policy contract, and the application of the doctrine of the election of remedies has no force. Case v. Ewbanks, Ewbanks & Co., 194 N. C. 775, 140 S. E. 709.

§ 58-178. Size of policy; notice; umpire; statement and blanks; policy issued to husband or wife on joint property.—No provisions of this chapter limit insurance companies to use of any particular size or manner of folding the paper upon which their policies are issued. If notice in writing signed by the insured, or his agent, is given before loss or damage by fire to the agent of the company of any fact or condition stated in paragraphs (a), (b), (c), (d), (e), (f), of the standard form of policy set out in § 58-177, it is equivalent to an agreement in writing added thereto, and has the force of the agreement in writing referred to in the foregoing form of policy with respect to the liability of the company and the waiver; but this notice does not affect the right of the company to cancel the policy as therein stipulated.

The resident judge of the superior court of the district in which the property insured is located is designated as the judge of the court of record to select the umpire referred to in the foregoing form of policy. When any company demands or requires the insured, under any fire insurance policy, to furnish a statement in writing as prescribed in the standard policy form, after a fire or loss occurs, the company or its representative shall furnish to the insured a blank or blanks in duplicate to be used for the purpose, which blanks shall be of standard form such as the commissioner of insurance has approved. The failure to furnish these blanks is a waiver of the provision requiring such statement. Any policy of fire insurance issued to husband or wife, on buildings and household furniture owned by the husband and wife, either by entirety, in common, or jointly, either name of one of the parties in interest named as the assured or beneficiary therein, shall be sufficient and the policy shall not be void for failure to disclose the interest of the other, unless it appears that in the procuring of the issuance of such policy, fraudulent means or methods were used by the insured or owner thereof. (Rev., s. 4761; 1899, c. 54, s. 43; 1907, c. 578, s. 1; 1915, c. 109, s. 11; 1929, c. 60, s. 1; C. S. 6438.)

Editor's Note.—The amendment of 1929 added the last sentence to this section.

§ 58-179. Penalty for issuing policy not of standard form.—Any insurance company which causes to be issued, and any agent who makes, issues, or delivers a policy of fire insurance other than of the standard form, in wilful violation of this chapter, shall forfeit for each offense not less than fifty nor more than two hundred dollars; but the policy shall be binding upon the company issuing it. (Rev., ss. 4762, 4833; 1899, c. 54, s. 44; C. S. 6439.)

§ 58-180. Effect of failure to give notice of encumbrance.—No policy of insurance issued upon any property shall be held void because of the failure to give notice to the company of a mortgage or deed of trust existing thereon or thereafter placed thereon, except during the life of the mortgage or deed of trust. (1915, c. 109, s. 4; C. S. 6440.)

Cross Reference.—See § 58-177 and notes thereto.

§ 58-181. Additional or coinsurance clause.—No fire insurance company licensed to do business in this state may issue any policy or contract of insurance covering property in this state which shall contain any clause or provision requiring the insured to take out or maintain a larger amount of insurance than that expressed in such policy, nor in any way provide that the insured shall be liable as a co-insurer with the company issuing the policy for any part of the loss or damage which may be caused by fire to the property described in such policy, and any such clause or provision shall be null and void, and of no effect: Provided, the coinsurance clause or provision may be written in or attached to a policy or policies issued when there is stamped on the face of such policy the words "coinsurance contract." The rate for the insurance with and without the coinsurance clause shall be furnished the owner upon request. (1915, c. 109, s. 5; 1925, c. 70, s. 4; C. S. 6441.)

Cross Reference.—See § 58-177 and notes thereto.

Art. 20. Deposits by Foreign Fire Insurance Companies.

§ 58-182. Amount and nature of deposits required.—Unless otherwise provided in this article, every fire insurance company chartered by any other state or foreign government shall, by their general agent or through some authorized officer, deliver under oath to the commissioner of insurance of this state a statement of the amount of capital stock of the company, and deposit with him bonds of the United States, or of the state of North Carolina, or of the cities or counties of this state, or first mortgages on real estate situated in this state to be approved by the commissioner of insurance, as follows: Companies whose capital stock is five hundred thousand dollars or less, ten thousand dollars; companies whose capital stock is more than five hundred thousand dollars and not over one million dollars, twenty thousand dollars; companies whose capital stock is in excess of one million dollars, twenty-five thousand dollars; and every insurance company writing a fidelity, surety or casualty business in this state

shall be required to deposit with the state securities of the same class enumerated above in the following amounts: Companies whose premium income derived from this state is less than $100,000.00 per annum, $25,000.00; companies whose premium income is in excess of $100,000.00 per annum, $50,000.00; and the commissioner of insurance shall thereupon give the agent a receipt for the same. With securities so deposited the company shall at the same time deliver to the commissioner of insurance a power of attorney authorizing him to transfer said securities or any part thereof for the purpose of paying any of the liabilities provided for in this article. The commissioner of insurance shall require each company to make good any depreciation or reduction in value of the securities. The securities required to be deposited by each insurance company in this article shall be delivered for safekeeping by the commissioner of insurance to the treasurer of the state, who shall receipt him therefor. For securities so deposited the faith of the state is pledged that they shall be returned to the parties entitled to receive them or disposed of as hereinafter provided for. The securities deposited by any company under this article shall not, on account of such securities being in this state, be subjected to taxation, but shall be held exclusively and solely for the protection of contract holders. (1909, c. 923, s. 1; 1911, c. 164, s. 1; Ex. Sess. 1913, c. 62, ss. 1, 2, 3; 1915, c. 166, s. 6; 1933, c. 60; C. S. 6442.)

Editor's Note.—Public Laws of 1933, c. 60, inserted the clause, about the middle of the section, requiring special deposits from casualty and surety companies.

See 11 N. C. Law Rev. 234, for brief review of this section as amended in 1933.

§ 58-183. Right of company to receive interest on deposits.—The commissioner of insurance, at the time of receiving the securities, shall give to the company authority to draw the interest thereon, as the same may become due and payable, for the use of the company, and this authority shall continue in force until the company fails to pay any liability arising upon any policy made in favor of any person, firm, or corporation which shall be, at the time the liability arises, a resident of this state, or which shall own property in the state covered by policies issued. In case of such failure the corporation charged with the payment of such interest shall be forthwith notified, and thereafter the interest, so long as the liability exists, shall be payable to the commissioner of insurance, to be applied, if necessary, to the payment of such liability. (1909, c. 923, s. 2; C. S. 6443.)

§ 58-184. Sale of deposits for payment of liabilities.—If the company fails to pay any of its liabilities on its contracts according to the terms thereof, after the liabilities have been adjusted between the parties in the manner prescribed by the contracts, if any manner is prescribed thereby, or after the same have been ascertained in any manner agreed upon by the parties or by the judgment, order, or decree of the court having jurisdiction of the subject, the commissioner of insurance shall, upon application of the party to whom the debt or money is due, and upon satisfactory proof that the notice herein required has been given to the company, proceed to sell at public auction such an amount of the securities as, with the interest in his hands, will pay the sum due and expenses of sale, and out of the proceeds of sale pay said sums and expenses; and the company shall be required forthwith to make good any deficit in the amount of the deposit caused by such sale. The party making application shall give to the company or to its agent in this state twenty days notice of his intention to apply to the commissioner of insurance for the sale of securities. The commissioner of insurance shall advertise the sale of the securities for thirty days prior to the day of the sale in some daily newspaper published in the city of Raleigh, and shall state in the advertisement the securities to be sold and the company depositing them, and shall mail a copy to the company. (1909, c. 923, s. 3; C. S. 6444.)

§ 58-185. Lien of policyholders; action to enforce.—Upon the securities deposited with the commissioner of insurance by any such insurance company, the holders of all contracts of the company who are citizens or residents of this state at such time, or who hold policies issued upon property in the state, shall have a lien for the amounts due them, respectively, under or in consequence of such contracts for losses, equitable values, return premiums, or otherwise, and shall be entitled to be paid ratably out of the proceeds of said securities, if such proceeds be not sufficient to pay all of said contract holders. When any company depositing securities as aforesaid becomes insolvent or bankrupt or makes an assignment for the benefit of its creditors, any holder of such contract may begin an action in the superior court of the county of Wake to enforce the lien for the benefit of all the holders of such contracts. The commissioner of insurance shall be a party to the suit, and the funds shall be distributed by the court, but no cost of such action shall be adjudged against the commissioner of insurance. (1909, c. 923, s. 4; C. S. 6445.)

Cited in Boney v. Central Mut. Ins. Co., 213 N. C. 470, 196 S. E. 837, 117 A. L. R. 231.

§ 58-186. Substitution for securities paid. — Where the principal of any of the securities so deposited is paid to the commissioner of insurance, he shall notify the company or its agent in this state, and pay the money so received to the company upon receiving other securities of the character named in this article to an equal amount, or, upon the failure of the company for thirty days after receiving notice to deliver such securities to an equal amount to the commissioner of insurance, he may invest the money in any such securities and hold the same as he held those which were paid. (1909, c. 923, s. 5; C. S. 6446.)

§ 58-187. Return of deposits.—If such company ceases to do business in this state, and its liabilities, whether fixed or contingent upon its contracts, to persons residing in this state or having policies upon property situated in this state have been satisfied or have been terminated, upon satisfactory evidence of this fact to the commissioner of insurance the state treasurer shall deliver to such company, upon the order of the commissioner of insurance, the securities in his possession belonging to it, or such of them as

remain after paying the liabilities aforesaid. (1909, c. 923, s. 6; C. S. 6447.)

§ 58-188. Deposit required before license granted; exception.—When any fire insurance company files an application with the commissioner of insurance to be admitted to do business in this state, he shall require of it a compliance with the provisions of this article before issuing a license to such company; but this article shall not apply to companies licensed to do a reinsurance business only. (1909, c. 923, s. 7; 1915, c. 166, s. 6; C. S. 6448.)

Art. 21. Insuring State Property.

§ 58-189. Commissioner of insurance to procure insurance.—It is the duty of the commissioner of insurance to prepare a schedule of the different properties of the state and to procure policies of insurance thereon according to these schedules for such amounts as he is able to provide for with the provisions and appropriations for the insurance of state property, and to inspect and pass upon all policies of insurance issued upon the public buildings or other property belonging to the state, as regards the form of contract, rate, description, and such other things as are necessary to have the policies in proper form. He shall keep a record in his department, showing the number and date of policy, the name of company, the amount insured, the amount of premium, date of expiration, the property insured, and its location. (Rev., s. 4825; 1901, c. 710, ss. 1, 2; 1903, c. 771, s. 1; 1905, c. 441; C. S. 6449.)

§ 58-190. Payment of premiums by state treasurer.—When the commissioner of insurance has placed the insurance on state property as provided for in this article and approved the bill for the same, the bill shall be paid out of the insurance appropriation of the department for which the insurance is effected, in an amount sufficient to insure the property up to fifty per centum of the scheduled value of such property, but this shall not apply to insurance on property of, or in charge of, the agricultural department and state prison. (Rev., s. 4827; 1905, c. 441, s. 2; 1919, c. 155; Ex. Sess. 1921, c. 61; 1923, c. 248; 1929, c. 100; C. S. 6450.)

§ 58-191. Payment of premiums by officers in charge.—The insurance on the property of, or in charge of, the agricultural department and the state's prison shall be for the amount agreed upon by the commissioner of insurance and the officer or officers having such property in charge, and the premiums shall be paid out of the special funds of the agricultural department and state's prison on the order of the commissioner of insurance. Before such board, public officer, or other person charged with the custody or safekeeping of any public building or other property of the state may pay any sum of money as premium for a policy of insurance thereon, they shall receive and file among their records a certificate of the commissioner of insurance that he has examined and approved of the policies of insurance, giving the number, amount, date, and term of such policies, the property covered, and the names of the companies in which they are written. (Rev., ss. 4826, 4827; 1901, c. 710, ss. 1, 2; 1903, c. 771, ss. 2, 3; 1905, c. 441, s. 2; C. S. 6451.)

§ 58-192. Information furnished commissioner by officers in charge.—It is the duty of the different officers or boards having in their custody any property belonging to the state to inform the commissioner, giving him in detail a full description of same, and to keep him informed of any changes in such property or its location or surroundings. (Rev., s. 4828; 1901, c. 710, ss. 1, 2; 1903, c. 771, s. 2; C. S. 6452.)

§ 58-193. Commissioner to inspect state property; plans submitted.—It is the duty of the commissioner at least once in each year, or oftener, if deemed necessary, to visit, inspect, and thoroughly examine each state institution or other state property with a view to its protection from fire, as well as to the safety of its inmates or the property therein in case of fire, and call to the attention of the board or officer having the same in charge any defect noted by him or any improvement deemed necessary. No board, commission, superintendent, or other person or persons authorized and directed by law to select plans and erect buildings for the use of the state of North Carolina or any institution thereof or for the use of any county, city, or incorporated town or school district shall receive and approve of any plans until they are submitted to and approved by the commissioner of insurance of the state as to the safety of the proposed buildings from fire, as well as the protection of the inmates in case of fire. (Rev., s. 4829; 1901, c. 710, ss. 1, 2; 1903, c. 771, s. 3; 1909, c. 880; 1919, c. 186, s. 3; C. S. 6453.)

§ 58-194. Report required of commissioner.—The commissioner of insurance must submit annually to the governor a full report of his official action under this article, with such recommendations as commend themselves to him, and it shall be embodied in or attached to his biennial report to the general assembly. (Rev., s. 4830; 1901, c. 710, ss. 1, 2; 1903, c. 771, s. 4; C. S. 6454.)

SUBCHAPTER IV. LIFE INSURANCE.

Art. 22. General Regulations of Business.

§ 58-195. Life insurance company defined; requisites of contract.—All corporations, associations, partnerships, or individuals doing business in this state, under any charter, compact, agreement, or statute of this or any other state, involving the payment of money or other thing of value to families or representatives of policy and certificate holders or members, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract, or pledge for the payment of endowments or annuities, or who employ agents to solicit business, are life insurance companies, in all respects subject to the laws herein made and provided for the government of life insurance companies, and shall not make any such insurance, guaranty, contract, or pledge in this state with any citizen, or resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment, and the consideration therefor. (Rev., s. 4773; 1899, c. 54, s. 55; C. S. 6455.)

Editor's Note.—Many of the decided cases pertaining to

life insurance are necessarily determined by construing the particular policy issued in a given case, others depend upon the adjudication of certain principles of the law of contracts and agency. None of these cases directly construes any provision of this code and are consequently not set out here. The searcher will find a complete and comprehensive treatment of the subject in the digests.

§ 58-196. Foreign companies; requirements for admission.—A company organized under the laws of any other of these United States for the transaction of life insurance may be admitted to do business in this state if it complies with the other provisions of this chapter regulating the terms and conditions upon which foreign life insurance companies may be admitted and authorized to do business in this state, and, in the opinion of the commissioner of insurance, is in sound financial condition and has policies in force upon not less than five hundred lives for an aggregate amount of not less than five hundred thousand dollars. Any life company organized under the laws of any other country than the United States, in addition to the above requirements, must make and maintain the deposit required of such companies by article four of this chapter. (Rev., s. 4774; 1899, c. 54, s. 56; C. S. 6456.)

§ 58-197. Soliciting agent represents the company.—A person who solicits an application for insurance upon the life of another, in any controversy relating thereto between the insured or his beneficiary and the company issuing a policy upon such application, is the agent of the company and not of the insured. (1907, c. 958, s. 1; C. S. 6457.)

This section does not attempt to prescribe the extent of the agent's authority or to convert a special or limited agency into one with general powers. Fountain v. Mutual Life Ins. Co., 55 F. (2d) 120, 125. See also Provident Mut. Life Ins. Co. v. Parsons, 70 F. (2d) 863.

Insurer Liable for Delay of Agent.—"If the defendant's agent wrongfully failed to deliver the policy within a reasonably short time after its receipt, during which time the plaintiff's intestate was in good health and ready, able, and willing to pay the premium on delivery, as stipulated, and plaintiff's intestate having thereafter become ill, the defendant could not withhold the delivery so as to release it from responsibility. American Trust Co. v. Life Ins. Co., 173 N. C. 558, 563, 92 S. E. 706." Fox v. Volunteer State Life Ins. Co., 185 N. C. 121, 124, 116 S. E. 266.

§ 58-198. Discrimination between insurants forbidden.—A life insurance company doing business in this state shall not make any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount of payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon, nor pay or allow as inducement to insurance any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance; nor give, sell, or purchase, or offer to give, sell, or purchase as inducement to insurance or in connection therewith any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits to accrue therein, or anything of value whatsoever not specified in the policy. (Rev., s. 4775; 1899, c. 54, s. 57; 1903, c. 438, ss. 5, 10; 1911, c. 196, s. 7; C. S. 6458.)

Purpose of Section.—"The express provision and obvious purpose and policy of the statute are to prevent discrimination among policy holders of like class and expectancy, and, in aid and furtherance of this desirable purpose, to secure publicity by requiring that all the stipulations of the contract and all agreements between the insurant and the company in reference thereto shall be plainly expressed in the policy." Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 102, 65 S. E. 746.

The purpose of the statute is to require the parties to incorporate in the contract of insurance anything which may pertain to the validity of the contract at the time it is written. New York Life Ins. Co. v. Guyes, 22 F. Supp. 454, 457.

Collateral Agreements with Agents of Insurer.—Transactions up to the issuance of a policy of life insurance merge therein upon its issuance and acceptance by the insured, and, under this section, the terms and conditions of the insurance must be plainly expressed in the policy as issued, and collateral agreements with local agents are not binding unless included in the policy. Graham v. Mutual Life Ins. Co., 176 N. C. 313, 97 S. E. 6.

A valid contract or policy of life insurance is severable from an invalid collateral agreement made at one and the same time, respecting a benefit prohibited by statute. Security Life, etc., Co. v. Costner, 149 N. C. 293, 63 S. E. 304.

When a collateral agreement delivered to insured with his policy of life insurance provided for the reduction of his premiums to be paid thereon, and is claimed to be the sole inducement moving him to take the policy, it is necessary for these inducements so claimed to be specified in the policy contract. Otherwise the collateral agreement is prohibited by the statute and not enforceable. Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 65 S. E. 746.

It would seem that an agreement by a local agent that the policy would be in effect from the date of application and payment of the first premium where the policy provided it would be effective from delivery would be in contravention of this section. Jones v. Gate City Life Ins. Co., 216 N. C. 300, 4 S. E. (2d) 848.

Same—Effect on Note Given in Payment of Policy. — When the insured has given his note for the premiums on his life insurance policy, and has received for one year, in this manner, the benefits of the insurance, he cannot avoid paying his note upon the ground of his having collaterally contracted with the company for deduction of certain amount by way of renewal commissions in violation of the provisions of this section. Security Life, etc., Co. v. Costner, 149 N. C. 293, 63 S. E. 304.

Contract Not Void under Statute.—This section does not declare that contracts, made in violation of its provisions, shall be void. Security Life, etc., Co. v. Costner, 149 N. C. 293, 297, 63 S. E. 304.

"It would seem that the insured has a right to presume that the insurer has complied with all the requirements of law. Accordingly, it is held by the great weight of authority that when the insured attempts to enforce such a contract, made in good faith, against the unlicensed insurer, the latter will be estopped to escape liability under the contract by pleading his own infraction of law." Robinson v. Security Life, etc., Co., 163 N. C. 415, 421, 79 S. E. 681.

But a policyholder cannot enforce against the insurance company a severable collateral agreement to his policy contract of life insurance which is prohibited by this statute, upon the principle that the law was not passed for the benefit of the company resisting recovery, but for the protection of the policyholders when it appears that the agreement is executory in character and gives him a preference over the general body of policyholders for whose benefit the statute was passed. In such cases, the parties are in pari delicto. Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 65 S. E. 746.

"In Security Life, etc., Co. v. Costner, 149 N. C. 293, 63 S. E. 304, the Court held that when a policy had been issued in connection with a contract of this character and retained by the beneficiary for a year, an action by the company on the notes executed for the annual premiums could be sustained, and this on the ground that, on the facts there appearing, the policy and the contract, which it was claimed conferred illegal benefits, were severable, and that defendant, having received the benefits of the policy as an executed consideration, could be made to pay the stipulated price." Smathers v. Bankers Life Ins. Co., 151 N. C. 98, 102, 65 S. E. 746.

The exercise of an option given by a mutual life insurance company to one of its policyholders of greater value than that given to the others is an illegal and void discrimination, prohibited by our statute and general principles of law. Graham v. Mutual Life Ins. Co., 176 N. C. 313, 97 S. E. 6.

Oral Contract.—"Under the law of North Carolina as declared by the supreme court of this state, it is held that an oral contract of insurance would be upheld as a general rule, yet when such contract is in the form of a written policy subsequently accepted by the insured, the oral contract merges into the written one and the written policy stands as embodying the contract, the rights of the parties must be determined by its terms and conditions." New York Life Ins. Co. v. Guyes, 22 F. Supp. 454, 456.

§ 58-199. Misrepresentations of policy forbidden.—No life insurance company doing business in this state, and no officer, director, solicitor, or other agent thereof, shall make, issue, or circulate, or cause to be made, issued, or circulated any estimate, illustration, circular, or statement of any sort misrepresenting the terms of the policy issued by it or the dividends or share of surplus to be received thereon, or shall use any name or title of any policy or class of policies misrepresenting the true nature thereof. Nor shall any such company, agent, or broker make any misrepresentation to any person insured in said company or in any other company for the purpose of inducing or tending to induce such person to lapse, forfeit, or surrender his said insurance. (1913, c. 95; C. S. 6459.)

§ 58-200. Medical examination required.—No life insurance company organized under the laws of or doing business in this State shall enter into any contract of insurance in any twelve months' period in an amount in excess of five thousand dollars ($5,000) upon any one life within this State without having previously made or caused to be made a prescribed medical examination of the insured by a registered medical practitioner; and provided further, that where there has been no medical examination the policy shall not be rendered void nor shall payment be resisted on account of any misrepresentation as to the physical condition of the applicant, except in cases of fraud; and provided further, that this section shall not apply to contracts of insurance issued under the group plan. (Rev., s. 4779; 1899, c. 54, s. 58; 1903, c. 438, s. 5; 1919, c. 186, s. 5; 1925 c. 82; 1927, c. 13, s. 1; C. S. 6460.)

It was not the purpose of this section to permit a recovery on an insurance policy issued without medical examination irrespective of the facts surrounding the transaction; otherwise the expression "except in cases of fraud" would have neither meaning nor significance. Potts v. Life Ins. Co., 206 N. C. 257, 260, 174 S. E. 123.

"In cases of fraud" a policy issued without medical examination stands upon the same footing as policies issued upon such examination. Id.

Statute a Part of Contract.—The provisions of this section, that where a policy of life insurance in a sum less than $5,000 is issued without a medical examination, insurer may not avoid same for insured's misrepresentations as to health except in cases of fraud, enter into and become a part of all such policies written in this State after the enactment of the statute. Headen v. Metropolitan Life Ins. Co., 206 N. C. 270, 173 S. E. 349.

Scope of Section.—Where the application contained false representations as to matters other than the physical condition of the applicant, this section, if applicable at all, is not determinative of the question whether the insurer was liable on a policy issued in reliance on false though not fraudulent representations. Inman v. Sovereign Camp, W. O. W., 211 N. C. 179, 181, 189 S. E. 496.

Policy Cannot Be Avoided unless Misrepresentations Were Fraudulently Made.—Where the jury finds that insured in a policy issued without medical examination was suffering with certain diseases stipulated in the policy as grounds for avoidance, but that insured did not procure the policy by false and fraudulent statements, insurer may not avoid liability under the policy, the provisions of the policy in conflict with the statute being unavailing to insurer. Eckard v. Metropolitan Life Ins. Co., 210 N. C. 130, 185 S. E. 671.

But Fraud Need Not Be Alleged in Direct Terms.—Where in an action upon an insurance policy it was conceded without deciding that the provisions of this section cover an application for reinstatement of a lapsed policy as well as an initial contract, it was held that the insurer's answer set out elements of fraudulent misrepresentation sufficient to raise an issue, it not being necessary that fraud be alleged in direct terms. Petty v. Pacific Mut. Life Ins. Co., 210 N. C. 500, 187 S. E. 816.

Fraud Need Not Be Proved if Policy Not Issued under This Section.—A policy not issued under the provisions of this section may be avoided for material misrepresentations which induce insurer to take the risk which it would not otherwise have taken, even in the absence of fraud, and therefore insurer need not prove that the misrepresentations were intentionally made. Equitable Life Assur. Soc. v. Ashby, 215 N. C. 280, 1 S. E. (2d) 830.

Policy Not Void.—The law is thus declared by Justice Hoke in Morgan v. Royal Fraternal Ass'n, 170 N. C. 75, 86 S. E. 975: "But the authorities are to the effect that, when a statute or valid regulation in restraint only of the company's action is made for the protection of the policyholder, a recovery may ordinarily be had, though the contract is in breach of the regulation."

In Blount v. Royal Fraternal Ass'n, 163 N. C. 167, 79 S. E. 299, Justice Allen says, referring to section 58-54: "The statute does not purport to deal with the validity of the contract of insurance, but with the insurance company." This section does not purport to invalidate the policy, but is a regulation of law imposed upon the insurance company. If it had been the intention of the Legislature, in enacting this section, to invalidate the contract and to deny recovery thereon, it would have so enacted. Ober v. Katzenstein, 160 N. C. 439, 440, 76 S. E. 476; Tobacco Co. v. American Tobacco Co., 144 N. C. 352, 57 S. E. 5; Robinson v. Security Life, etc., Co., 163 N. C. 415, 79 S. E. 681; McNeal v. Life, etc., Ins. Co., 192 N. C. 450, 452, 135 S. E. 300.

The fact that the insured was not in sound health at the time the policy was issued (without medical examination) contrary to a provision in the policy is insufficient, to avoid the policy under this section. Holbrook v. Insurance Co., 196 N. C. 333, 145 S. E. 609.

Except in cases of fraud, the insurer may not declare a forfeiture under the provisions of a policy that the insurer should not be liable if insured was not in sound health at the time of the delivery of the policy, or had not been in good health for two years prior thereto, etc., since such provisions of the policy are in conflict with this section and therefore void. Headen v. Metropolitan Life Ins. Co., 206 N. C. 270, 173 S. E. 349.

Death by Apoplexy within One Year.—A provision in a policy of life insurance that the insurer would not be liable except for the return of the premium paid in case the insured died from apoplexy within one year from the date of the issuance of the policy is valid and enforceable in the insurer's favor, this section not being applicable to the facts of this case. Holbrook v. American Nat. Ins. Co., 196 N. C. 333, 145 S. E. 609, cited and distinguished. Gilmore v. Imperial Life Ins. Co., 199 N. C. 632, 155 S. E. 566.

Section Not Applicable.—The policy in suit was issued for less than $5,000 after medical examination of insured. After it had lapsed for nonpayment of premiums, it was reinstated on written application of insured without a medical examination. Held: Although the policy was reinstated without a medical examination, the original policy was issued after medical examination, and this section has no application, and insurer is not required to show fraud, but is entitled to cancellation of the policy upon a showing of material misrepresentations in the application for reinstatement. Petty v. Pacific Mut. Life Ins. Co., 212 N. C. 157, 193 S. E. 228.

Applied in Missouri State Life Ins. Co. v. Hardin, 208 N. C. 22, 179 S. E. 2; Butler v. New York Life Ins Co., 213 N. C. 384, 196 S. E. 317; Pugh v. Prudential Ins. Co., 212 N. C. 372, 193 S. E. 278.

Cited in Headen v. Metropolitan Life Ins. Co., 206 N. C. 860, 861, 175 S. E. 282.

§ 58-201. Domestic companies to report outstanding policies; reinsurance fund calculated.—It is the duty of every life insurance company incorporated by the laws of this state to make returns in January of each year to the commissioner of insurance, showing all its policies and annuity

bonds in force on the first day of that month, with such particulars of the same as are necessary for the valuation thereof as hereinafter directed. The commissioner of insurance shall thereupon compute, or cause to be computed, the value of such policies and bonds, or what is known as the reinsurance fund therefor, according to the American experience table of mortality and interest at the rate of four and a half per centum, or according to the actuaries' mortality and four per centum interest, or according to any other recognized standard of valuation as he deems best for the security of the business and the safety of the persons insured. Upon this valuation being made and a certificate thereof furnished by the commissioner of insurance, each company shall pay to such officer, to defray the expenses thereof, the sum of one cent for every thousand dollars of the whole amount insured by its policies so valued. The reserve fund hereinbefore provided for shall not be available for or used for any other purpose than the discharge of policy obligations, but is a trust fund to be held and expended only for the benefit of policyholders. In case of the insolvency of the company, the reserve on outstanding policies may, with the consent of the commissioner of insurance, be used for the reinsurance of its policies to the extent of their pro rata part thereof. (Rev., s. 4777; 1903, c. 536, s. 4; 1905, c. 410; 1907, c. 1000, s. 7; C. S. 6461.)

§ 58-202. Reinsurance of risks regulated.—No domestic life insurance company may reinsure its risks without the permission of the commissioner of insurance, except to the extent of one-half of any individual risk. The receiver of any life insurance company organized under the laws of this state, when the assets of the company are sufficient for that purpose, and the consent of two thirds of its policyholders has been secured in writing, may reinsure all the policy obligations of such company in some other solvent life insurance company, or, when the assets are insufficient to secure the reinsurance of all the policies in full, he may reinsure such a percentage of each and every policy outstanding as the assets will secure; but there must be no preference or discrimination as against any policyholder, and the contract for such reinsurance by the receiver must be approved by the commissioner of insurance of this state before it has effect. (Rev., s. 4778; 1899, c. 54, s. 58; 1903, c. 536, s. 9; C. S. 6462.)

§ 58-203. Punishment for violation of law as to reinsurance and medical examination.—If any domestic life insurance company shall reinsure its risks, except by permission of the commissioner of insurance, exceeding one-half of any individual risk, or if any life insurance company organized under the laws of, or doing business in, this state shall enter into any contract of insurance upon lives within this state without having previously made or caused to be made a prescribed medical examination of the insured by a registered medical practitioner, such insurance company, or any officer, agent, or other person soliciting or effecting or attempting to effect, a contract of insurance contrary to this section, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars for each offense. (Rev., s. 3497; 1899, c. 54, s. 58; C. S. 6463.)

§ 58-204. Insurable interest as between stockholders, partners, etc.—Where two or more persons own stock or interests in the same corporation, partnership or business association and have heretofore contracted or hereafter contract with one another for the purchase, at the death of one, by the survivor or survivors of the stock, share or interest of the deceased, the person or persons making the contract of purchase shall be deemed to have, and are hereby declared to have, an insurable interest in the life or lives of the person or persons contracting to sell. (1941, c. 201.)

Editor's Note.—For comment on this enactment, see 19 N. C. Law Rev. 490.

§ 58-205. Rights of beneficiaries.—When a policy of insurance is effected by any person on his own life, or on another life in favor of some person other than himself having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, is entitled to its proceeds against the creditors and representatives of the person effecting the insurance. The person to whom a policy of life insurance is made payable may maintain an action thereon in his own name. Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred, or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband, or by any other person, and whether the assignment or transfer is made by her husband or by any other person, inures to her separate use and benefit and to that of her children, if she dies in his lifetime. (Rev., ss. 4771, 4772; Const., Art. X, s. 7; 1899, c. 54, s. 59; C. S. 6464.)

Cross References.—As to wife insuring life of husband, see § 52-9. As to payment of sum due minor insurance beneficiary, see § 2-52.

See § 58-206 and notes thereto.

Editor's Note.—See 13 N. C. Law Rev. 95.

Change of Beneficiary by Insolvent Insured. — While formerly an insolvent insured could not change, according to a provision in his policy, the beneficiary of his policy of life insurance from his estate to his wife, without consideration, against the rights of his creditors, this is now changed by this section. Pearsall v. Bloodworth, 194 N. C. 628, 140 S. E. 303; Meadows Fert. Co. v. Godley, 204 N. C. 243, 167 S. E. 816.

A beneficiary in a policy of life insurance has only a contingent interest therein, and where the insured retains the right to change the beneficiary by the terms of the policy, he may do so, and where upon the death of the beneficiary the insured changes the beneficiary, in accordance with the terms of the policy, to a trustee for the use of certain creditors and heirs at law of the insured, the other creditors may not claim that the change in the beneficiary was void as being fraudulent as to them. Teague v. Pilot Life Ins. Co., 200 N. C. 450, 157 S. E. 421.

Rights Vest on Delivery of Policy.—"A policy of insurance is essentially like a gift by will, the only difference being that in the case of a policy of insurance the beneficiary acquires a vested interest when the policy is delivered, which becomes vested in possession or enjoyment at the death of the assured; while in the case of a gift by will the interest does not vest until the death of the testator. In other respects, and for all practical purposes, they are alike. If a bequest is made to A. for life, with remainder to his children, those in esse at the death of the testator take a vested estate, which will open, however, and let in any after-born child during the life of A; and so it is with a policy of insurance payable to children: the interests of the beneficiaries become vested at the time of the delivery of the policy or when it takes effect, as a contract between the company and the assured, as to those then in esse, but will open and let in any after-born children, and, in this case, whether of the first or second marriage. If they come within the general description, they will share under the policy." And in case

of death of one of the children his or her share will go to the personal representative of that child. Scull v. Aetna Life Ins. Co., 132 N. C. 30, 31, 43 S. E. 504.

Same—Beneficiary Dead.—When A. insured his life for the benefit of "his wife and children," and at the time the policy was issued he had no wife, but did have two children, one of whom died before A.: Held, that upon A.'s death the money due on the policy should be divided between the surviving child and the administrator of the dead child. The insertion of "his wife" as a beneficiary, when he had no wife living, was a nullity. Hooker v. Sugg, 102 N. C. 115, 8 S. E. 919.

Relation of Beneficiary to Insurer.—The terms of the policy constitute a contract of the company to pay the specified amount to the beneficiary, and create direct legal relations between them. Hooker v. Sugg, 102 N. C. 115, 8 S. E. 919; Simmons v. Biggs, 99 N. C. 236, 5 S. E. 235.

Under an ordinary policy the beneficiary has such an interest as entitled her to recover upon the death of the insured if the premiums have been paid and the policy is otherwise in force, unless the insurance company can show it had been lawfully surrendered by her consent, or that the insured had duly and legally exercised the power reserved in the clause quoted, entitled "Change of Beneficiary." Lanier v. Eastern Life Ins. Co., 142 N. C. 14, 18, 54 S. E. 786.

Applied in Russell v. Owen, 203 N. C. 262, 165 S. E. 687.

§ 58-206. Creditors deprived of benefits of life insurance policies except in cases of fraud.—If a policy of insurance, is effected by any person on his own life or on another life, in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary or assignee thereof, other than the insured or the person so effecting such insurance, or his executors or administrators, shall be entitled to its proceeds and avails against creditors and representatives of the insured and of the person effecting same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee shall predecease such person: Provided, that subject to the statute of limitations, the amount of any premiums for said insurance paid with the intent to defraud creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy; but the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms unless, before such payment, the company shall have written notice by or in behalf of the creditor, of a claim to recover for transfer made or premiums paid with intent to defraud creditors, with specifications of the amount claimed. (1931, c. 179, s. 1.)

Editor's Note.—This section, in form an independent statute, is actually an amendment of § 58-205. It makes six changes in the statutory exemption of the beneficiary of a life insurance policy from the claims of creditors of the insured. It leaves out the requirement of § 58-205 that the beneficiary to be so protected must have an insurable interest. This is undesirable in the case where the insurance is effected by one on the life of another for a third person. Vance, Insurance, (2d ed.) p. 154, n. 1. It extends the exemption to include beneficiaries made such by a change of beneficiaries (compare Pearsall v. Bloodworth, 194 N. C. 628, 140 S. E. 303, change of beneficiary from estate to wife while insolvent), and to include assignees of the policy. Compare, as to the need for an insurable interest in the assignee, Powell v. Dewey, 123 N. C. 103, 31 S. E. 381 (partnership); Hinton v. Mutual Reserve Fund Life Assn., 135 N. C. 314, 47 S. E. 474 (wife assigned insurance payable to her estate to her husband's creditors); Hardy v. Aetna Life Ins. Co., 152 N. C. 286, 67 S. E. 767; s. c., 154 N. C. 430, 70 S. E. 828 (uncle assigned insurance payable to his estate to nephew); Johnson v. Mutual Benefit & Ins. Co., 157 N. C. 106, 72 S. E. 847 (bona fide sale); McNeal v. Life & Cas. Ins. Co. of Tenn., 192 N. C. 450, 135 S. E. 300. The creditors, where there has been an attempt to defraud them, may recover the premiums with interest, out of the proceeds of the policy. As to the confused state of the decisions, clarified by this clause, see Vance, note 1, at 621. The statute does not of course deal with the case where the premiums have been paid out of stolen funds and the victim of the theft seeks to reach the entire proceeds of the policy. As to that, see Vance, note 1, 618-621. The new statute expressly applies to policies of insurance heretofore or hereafter written. The courts, however, will not permit it to prejudice the rights of existing creditors in previously issued policies. Bank of Minden v. Clement, 256 U. S. 126, 41 Sup. Ct. 408, 65 L. Ed. 857, 9 N. C. Law Rev. 377.

Statute Not Retroactive.—This section cannot affect policies written before the effective date of the statute. Com'r of Banks v. Yelverton, 204 N. C. 441, 168 S. E. 505.

§ 58-207. Notice of nonpayment of premium required before forfeiture.—No life insurance corporation doing business in this state shall, within one year after the default in payment of any premium, installment, or interest, declare forfeited or lapsed any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment, when due, of any premium, interest, or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest, or installment, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof due on such policy, the place where it shall be paid, and the person to whom the same is payable has been duly addressed and mailed, postage paid, to the person whose life is insured or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known postoffice address in this state, by the corporation or by any officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable, as regards policies which do not contain a provision for grace or are not entitled to grace in the payment of premiums and at least five and not more than forty-five days prior to the day when the same is payable as regards policies which do contain a provision for grace or are entitled to grace in the payment of premiums. The notice shall also state that unless such premium, interest, installment, or portion thereof then due shall be paid to the corporation or to the duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up policy, as in the contract provided. If the payment demanded by such notice shall be made within its time limit therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the

corporation issuing such policy, shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy unless the same is instituted within three years from the day upon which default was made in paying the premium, installment, interest, or portion thereof for which it is claimed that forfeiture ensued.

No insurance company doing business in this State and issuing health and/or accident insurance policies, other than contracts of group insurance or disability and/or accidental death benefits in connection with policies of life insurance, the premium for which is to be collected in weekly, monthly, or other periodical installments by authority of a payroll deduction order executed by the assured and delivered to such insurance company or the assured's employer authorizing the deduction of such premium installments from the assured's salary or wages, shall, during the period for which such policy is issued, declare forfeited or lapsed any such policy hereafter issued or renewed until and unless a written or printed notice of the failure of the employer to remit said premium or installment thereof stating the amount or portion thereof due on such policy and to whom it must be paid, has been duly addressed and mailed to the person who is insured under such policy at least fifteen days before said policy is cancelled or lapsed. (1909, c. 884; 1929, c. 308, s. 1; 1931, c. 317; C. S. 6465.)

Editor's Note.—The Act of 1929 added the last two sentences to the first paragraph of this section. The Act of 1931 added the second paragraph.

Construction of Provision for Forfeiture.—If there is any real ambiguity in the provisions of a policy for forfeiture for nonpayment of premiums, they will be resolved against the insurer; but, if their meaning to the ordinary reader is plain, there is no reason why they should not be enforced. Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. 339.

Forfeiture by Unpaid Check.—"An agreement that a check is received in satisfaction of a note is not implied from the surrender or cancellation of the note. Until the check was paid the note was in force, and unless it was paid at the time to which it was extended, the policy was by its terms forfeited. Forfeitures, it is true, are not favored in the law, but promptness of payment is essential in the business of life insurance." Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. 339, 343.

Notice of Forfeiture.—It is incumbent upon the insurance company to give notice that the premiums are due and the policy is not subject to forfeiture until 30 days after such notice is given. Aiken v. Atlantic Life Ins. Co., 173 N. C. 400, 92 S. E. 184.

Same—Policy Issued before Statute.—Where an old policy issued before this statute was withdrawn and a new policy issued after this statute, notice must be given in accordance with the statute in order to have a legal forfeiture. Garland v. Jefferson Standard Life Ins. Co., 179 N. C. 67, 101 S. E. 616.

Same—After Reinstatement.—Where there has been a default and forfeiture and the insured was furnished a health certificate and secured a reinstatement and an extension of time for payment, it is not necessary to again give the statutory notice of the time when the extension notes will become due. Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. 339.

Waiver of Forfeiture.—Where a policy of life insurance is forfeited for failure to pay at maturity a note given for extension of payment of premium, the mailing of notice of the next regular quarterly premium by the insurer in compliance with this section, which notice does not demand payment of the balance due on the extended premium, is not a waiver by the insurer of forfeiture. Sellers v. Life Ins. Co., 205 N. C. 355, 171 S. E. 328.

Making Sufficient Tender.—After tender and failure of insurer to accept the tender the insured does not have to keep the tender open. An application for reinstatement does not alter the insured's rights, if the policy has not been forfeited. Aiken v. Atlantic Life Ins. Co., 173 N. C. 400, 92 S. E. 184.

Three Year Limitation.—In an action for the recovery of premiums paid on forfeited policies issued on the lives of relatives, where the evidence was to the effect that these policies were canceled for the nonpayment of premiums on 19 March, 1936, and that summons was issued 17 February, 1942, the action was barred by this section and § 1-52. Bynum v. Life Ins. Co. of Virginia, 222 N. C. 742, 743, 24 S. E. (2d) 613.

Cited in Felts v. Shenandoah Life Ins. Co., 221 N. C. 148, 19 S. E. (2d) 259.

§ 58-208. Minimum premium rates for assessment life insurance companies.—No assessment life insurance corporation, organization or association of any kind issuing policies or contracts upon the life of any resident of this state shall hereafter be organized or licensed by the commissioner of insurance unless such corporation, organization or association adopt premium rates based upon the attained age of the assured at the time of issuance of the contract and such rates shall not be less than those fixed by the American Experience Table of Mortality or any other recognized table of mortality approved by the commissioner of insurance. Nothing contained in this section shall be construed to affect burial associations regulated under §§ 58-224 to 58-241, or railroad burial associations. (1939, c. 161.)

Editor's Note.—For comment on this enactment, see 17 N. C. Law Rev. 362.

§ 58-209. Distribution of surplus in mutual companies.—Every life insurance company doing business in this state upon the principle of mutual insurance, or the members of which are entitled to share in the surplus funds thereof, may distribute the surplus annually, or once in two, three, four, or five years, as its directors determine. In determining the amount of the surplus to be distributed there shall be reserved an amount not less than the aggregate net value of all the outstanding policies, this value to be computed by the American Experience Table of Mortality with interest not exceeding four and one-half per cent. (Rev., s. 4776; 1903, c. 536, s. 10; C. S. 6466.)

§ 58-210. Definition of group life insurance.—Group life insurance is hereby declared to be that form of life insurance covering not less than fifty employees with or without medical examination, written under a policy issued to the employer, the premium on which is to be paid by the employer or by the employer and employees jointly, and insuring only all of his employees, or all of any class or classes thereof determined by conditions pertaining to the employment, for amounts of insurance based upon some plan which will preclude individual selection, for the benefit of persons other than the employer: Provided, however, that when the premium is to be paid by the employer and employees jointly and the benefits of the policy are offered to all eligible employees, not less than seventy-five per centum of such employees may be so insured. Such group policy may provide that the term "employees" shall include the officers, managers and employees of subsidiary or affiliated corporations and the individual proprietors, partners and employees of affiliated individuals and firms, when the business of such subsidiary or affiliated corporations, firms or individuals is controlled by the common

employer through stock ownership, contract or otherwise.

The following form of life insurance is hereby declared to be group life insurance within the meaning of this law: Life insurance issued to a creditor or vendor, who or which shall be deemed to be the policyholder and for the purpose of this section the employer, insuring only all of the members, or only all of the members except those as to whom the evidence of insurability submitted is not satisfactory to the insurer, of a group of debtors or vendees, defined as follows: All of the borrowers, or borrowers and guarantors of borrowers, from one financial or other institution or from such institution and its subsidiary or affiliated companies, or all of the purchasers of securities, merchandise or other property from one vendor, or all of any class or classes of such debtors or purchasers determined by conditions pertaining to the type of indebtedness or purchase, under agreements by such debtors or such purchasers for the payment of the sum borrowed or the balance of the purchase price, as the case may be, in installments over a period of not more than ten years; when the premium, or any part thereof, for such insurance is to be paid, either directly or indirectly, by the insured debtors, guarantors, or debtors or vendees and the benefits of the policy are offered to all eligible debtors, guarantors of debtors or vendees, not less than seventy-five per centum of such debtors, guarantors of debtors or vendees may be so insured; no such group shall be eligible for insurance hereunder unless the new entrants to such group number at least one hundred persons annually; such policy may be issued to an assignee to whom such creditor or vendor has transferred or agreed to transfer all of its right, title, and interest to the unpaid indebtedness, or to the unpaid purchase price, under all such agreements made by it; the amount of insurance thereunder on any person insured shall not at any time exceed the amount of unpaid indebtedness due from such person or the amount of the purchase price unpaid by such person, nor the sum of ten thousand dollars, whichever is less; the premium on such insurance shall be remitted by the policyholder to the insurer; the benefits thereof shall be payable to the policyholder, and the receipt of such benefits by the policyholder shall release the insurer from all obligations under the policy to the extent of the benefits so paid; the amount of any death benefit received by the policyholder thereunder shall be applied by the policyholder to the discharge of any obligation of the person insured, or his personal representatives, to the policyholder. (1925, c. 58, s. 1; 1931, c. 328; 1943, c. 597, s. 1.)

Editor's Note.—Group life insurance is comparatively new, but seems to be increasing in favor. Its attractiveness lies largely in the fact that no medical examination is necessary. This is because the mortality rate in any given homogeneous group is only the average mortality rate as shown by the mortality tables. If the ordinary life insurance were issued without physical examination, the sickly and feeble would apply in great numbers, thus raising the death rate, as based on experience. This would not be so in a selected group and this is what group insurance does. For instance a business establishment might take out a group life insurance policy on all its employees, insuring them against death, total and partial disability and old age. The average in this group would be about the same as the general average and, therefore, no unusual losses would result to the Company, even though they had required no medical examination.

This idea embodied in the New York Law in 1918 and Massachusetts in 1921, now appears in the North Carolina Law.

This section was copied verbatim from the New York Law requiring the group to include not less than fifty employees and that 75 per cent of them shall be insured where they pay the premium jointly with the insurer. See 3 N. C. Law Rev. 145.

The Act of 1931 added the last sentence in the first paragraph.

The 1943 amendment added the second paragraph.

See 12 N. C. Law Rev., 167, for note "Recent Trends in Group Insurance."

§ 58-211. Standard provisions for policies of group life insurance.—No policy of group life insurance shall be issued or delivered in this State unless and until a copy of the form thereof has been filed with the commissioner of insurance and formally approved by him; nor shall such policy be so issued or delivered unless it contains in substance the following provisions:

(a) A provision that the policy shall be incontestable after two years from its date of issue, except for nonpayment of premium and except for violation of the conditions of the policy relating to military or naval service in time of war.

(b) A provision that the policy, the application of the employer and the individual applicants, if any, of the employees insured, shall constitute the entire contract between the parties, and that all statements made by the employer or by the individual employees shall, in the absence of fraud, be deemed representations and not warranties, and that no such statement shall be used in defense to a claim under the policy, unless it is contained in a written application.

(c) A provision for the equitable adjustment of the premiums or the amount of insurance payable in the event of a misstatement in the age of the employee.

(d) A provision that the company will issue to the employer for delivery to the employee whose life is insured under such policy, an individual certificate setting forth a statement as to the insurance protection to which he is entitled, to whom payable, together with provision to the effect that in case of the termination of the employment for any reason whatsoever the employee shall be entitled to have issued to him by the company, without evidence of insurability, and upon application made to the company within thirty-one days after such termination, and upon the payment of the premium applicable to the class of risk to which he belongs and to the form and amount of the policy at his then attained age, a policy of life insurance in any one of the forms customarily issued by the company, except term insurance, in an amount equal to the amount of his protection under such group insurance policy at the time of such termination. The provisions of this subsection shall not apply to policies described in the second paragraph of § 58-210.

(e) A provision that to the group or class thereof originally insured shall be added from time to time all new employees of the employer eligible to insurance in such group or class.

Except as provided in this chapter it shall be unlawful to make a contract of life insurance covering a group in this State. Policies of group life insurance, when issued in this State by any

company not organized under the laws of this State, may contain, when issued, any provision required by the law of the state, territory, or district of the United States under which the company is organized; and policies issued in other states or countries by companies organized in this State, may contain any provision required by the laws of the State, territory, district or county in which the same are issued, anything in this section to the contrary notwithstanding. Any such policy may be issued or delivered in this State which in the opinion of the commissioner of insurance contains provisions on any one or more of the several foregoing requirements more favorable to the employer or to the employee than hereinbefore required. (1925, c. 58, s. 2; 1943, c. 597, s. 2.)

Editor's Note.—The 1943 amendment added the second sentence of subsection (d).

§ 58-212. Voting power under policies of group life insurance.—In every group policy issued by a domestic life insurance company, the employer shall be deemed to be the policyholder for all purposes within the meaning of this chapter, and, if entitled to vote at meetings of the company, shall be entitled to one vote thereat. (1925, c. 58, s. 3.)

§ 58-213. Exemption from execution. — No policy of group insurance, nor the proceeds thereof, when paid to any employee or employees thereunder, shall be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law, to pay any debt or liability of such employee, or his beneficiary, or any other person who may have a right thereunder, either before or after payment; nor shall the proceeds thereof, when not made payable to a named beneficiary, constitute a part of the estate of the employee for the payment of his debts. (1925, c. 58, s. 4.)

Art. 23. Registered Policies.

§ 58-214. Deposits to secure registered policies.—Any life insurance company, incorporated under the laws of this state, may deposit with the commissioner of insurance securities of the kind described in article six of this chapter, for the investment of the capital of insurance companies, or farm loan bonds issued by the federal land banks, or notes secured by real estate situated in another state approved by the committee hereinafter designated, to any amount not less than ten thousand dollars, which shall be legally transferred by it to him as commissioner of insurance and his successors for the common benefit of all the holders of its "registered" policies and annuity bonds issued under the provisions of this article; and these securities shall be held by him and his successors in office in trust for the purposes and objects specified herein.

All securities offered to the commissioner of insurance for deposit under this section shall, before acceptance by him, be approved by a committee, composed of the commissioner, the state treasurer, and the attorney-general; and when the securities are of the character prescribed by law and approved by a majority of the committee, the commissioner of insurance shall list them in a book of records kept in his department for that purpose. The committee shall endorse on the record, at the end of the list of the securities, its approval of the securities named in the list. The record shall contain a separate list or account of the securities deposited by each insurance company, so kept as to show at all times the total value of all securities on deposit for each company. No security may be withdrawn or substituted except upon the approval of the committee. All the securities, after being approved and listed, shall be deposited with the state treasurer, who shall give his receipt to the commissioner of insurance for them. The committee shall, twice a year, in the months of June and December, review and assess the value of all securities on deposit under this section. (Rev., s. 4780; 1905, c. 504, s. 12; 1009, c. 920, ss. 1, 2; 1911, c. 140, s. 1; 1917, c. 191, s. 2; C. S. 6467.)

Cross References.—As to investments in bonds guaranteed by the United States, see § 53-44. As to investments in bonds and notes secured by mortgages insured by the Federal Housing Administration, see § 53-45. See also § 53-60 as to investments in Federal Farm loan bonds, and see § 142-29 as to investments in refunding bonds of North Carolina.

§ 58-215. Additional deposits may be required.—Each company which has made deposits herein provided for shall make additional deposits from time to time, as the commissioner of insurance prescribes, in amounts of not less than five thousand dollars and of such securities as are described in the preceding section, so that the market value of the securities deposited shall always equal the net value of the registered policies and annuity bonds issued by the company, less such liens not exceeding such value as the company has against it. No company organized under this chapter shall be required to make such deposit until the net value of the policies in force, as ascertained by the commissioner of insurance, exceeds the amount deposited by said company under the preceding section. As long as any licensed company maintains its deposits as herein prescribed at an amount equal to or in excess of the net value of its registered policies and annuity bonds, as aforesaid, it is the duty of the commissioner of insurance to sign and affix his seal to the certificates, as required in this article, on every policy and annuity bond presented to him for that purpose by any company so depositing. (Rev., s. 4781; 1905, c. 504, s. 15; 1909, c. 920, s. 3; 1911, c. 140, s. 2; 1917, c. 191, s. 3; C. S. 6468.)

§ 58-216. Withdrawal of deposits.—Any such company whose deposits exceed the net value of all registered policies and annuity bonds it has in force, less such liens not exceeding such value as the company holds against them, may withdraw such excess or it may withdraw any of such securities at any time by depositing in their place others of equal value and of the character authorized by law; and as long as such company remains solvent and keeps up its deposits, as herein required, it may collect the interest and coupons on the securities deposited as they accrue; and any life insurance company may withdraw such securities by and with the consent of the policyholder only; and in case of such withdrawal, the certificate of registration in each case must be surrendered for cancellation, or a receipt

from the policyholder, satisfactory to the commissioner of insurance, must be produced before such withdrawal of deposits shall be allowed. (Rev., s. 4782; 1905, c. 504, s. 18; 1911, c. 134; C. S. 6469.)

§ 58-217. Manner of keeping deposits.—The securities deposited under this article shall be deposited and kept in the manner required by law for the keeping of other deposits of insurance companies, but separate from other deposits of the company. (Rev., s. 4783; 1905, c. 504, s. 19; C. S. 6470.)

§ 58-218. Record of securities kept by commissioner; deficit made good.—The commissioner of insurance shall keep a careful record of the securities deposited by each company, and when furnishing the annual certificates of value hereafter required in this article, he may enter thereon the face and market value of the securities deposited by such company. If at any time it appears from such certificate or otherwise that the value of securities held on deposit is less than the net value of the registered policies and annuity bonds issued by such companies, it is not lawful for the commissioner of insurance to execute the certificate on any additional policies or annuity bonds of such company until it has made good the deficit. If any company fails or neglects to make such deposits for sixty days it shall be deemed to be insolvent and shall be proceeded against in the manner provided by law in such cases. (Rev., s. 4784; 1905, c. 504, s. 16; C. S. 6471.)

§ 58-219. Registered policies certified. — After making the deposits provided for in this article no company may issue a policy of insurance or endowment or an annuity bond known or designated as "registered" unless it has upon its face a certificate in the following words: "This policy or annuity bond is registered and secured by pledge of bonds, stocks, or securities deposited with this department as provided by law," which certificate shall be signed by the commissioner of insurance and sealed with the seal of his office. Such policies and bonds shall be known as "registered" policies and annuity bonds, and a sample copy of such kind, class, and issue shall be kept in the office of the commissioner of insurance. All policies and bonds of each kind and class issued, and the copies thereof, filed in the office of the commissioner of insurance must have imprinted thereon some appropriate designating letter, combination of letters or terms identifying the special forms of contract, together with the year of adoption of such form, and whenever any change or modification is made in the form of contracts, policy, or bond, the designating letters or terms and year of adoption thereon shall be changed accordingly. (Rev., s. 4785; 1905, c. 504, s. 13; C. S. 6472.)

§ 58-220. Deposit for, and registration of, unregistered policies.—Every company which has made the deposit herein provided for may, at any time after the date on which it was made, deposit with the commissioner of insurance securities of the kind herein mentioned and in accordance with the provisions hereof, in an amount, inclusive of any amount deposited under the provisions of this law, equal to the net value of any nonregistered policies and annuity bonds which it has in force at that time, less such liens not exceeding such actual cash value as the company has against them, and the commissioner of insurance shall, when requested so to do, furnish such company with a certificate of the description mentioned in § 58-219, to be attached to each of said policies and annuity bonds. The commissioner of insurance shall enter upon each of such certificates the number of the policy or annuity bond to which it belongs and make a record of the same in his department. (Rev., s. 4786; 1905, c. 504, s. 17; C. S. 6473.)

§ 58-221. Record to be kept by commissioner; valuation; mutilated policies.—The commissioner of insurance shall prepare and keep such registers of registered policies of insurance or endowment and of annuity bonds as will enable him to compute their value at any time. Upon sufficient proof, attested by the president or vice-president and secretary of the company which has issued such policies or annuity bonds, that any of them have been commuted or terminated, the commissioner of insurance shall commute or cancel them upon such register. The net present value of every policy or annuity bond according to the standard prescribed in the laws of this state for the valuation of policies of life insurance companies when the first premium shall have been paid thereon, less the amount of such liens, not exceeding such value as the company has against it, shall be entered opposite the record of said policy or annuity bond in the register aforesaid at the time the record is made. On the thirty-first day of December of each year or within sixty days thereafter the commissioner of insurance shall cause the registered policies and annuity bonds of each company to be carefully revalued, and the net present value thereof at the time fixed for such valuation, less such liens, not exceeding such value as the company has against it, shall be entered upon the register opposite the record of such policy or bond, and the commissioner of insurance shall furnish a certificate of the aggregate of such value to the company. For the purpose of making this valuation the commissioner of insurance may employ a competent actuary, who shall be paid by the company for which the services are rendered, but nothing herein shall prevent any company from having made such valuation herein contemplated, which may be received by the commissioner of insurance upon such proof as he determines. Upon application of an insurance company, subject to the provisions of this article, it is the duty of the commissioner of insurance to receive mutilated policies and annuity bonds issued by said companies and certify in lieu thereof other policies or bonds of like tenor and date. (Rev., s. 4787; 1905, c. 504, s. 14; C. S. 6474.)

§ 58-222. Power of commissioner in case of insolvency.—If at any time the affairs of a life insurance company which has deposited securities under the provisions of this article, in the opinion of the commissioner of insurance, appear in such condition as to render the issuing of additional policies and annuity bonds by such company injurious to the public interest, the commissioner of insurance may take such proceedings against the

company as are authorized by law to be taken against other insolvent companies, and said companies are in all respects subject to the provisions of law affecting other companies. (Rev., s. 4788; 1905, c. 504, s. 20; C. S. 6475.)

§ 58-223. Fees for registering policies.—Every company making deposits under the provisions of this article must pay to the commissioner of insurance for each certificate on registered policies or annuity bonds, including seal, a fee of fifty cents for those exceeding ten thousand dollars in amount and twenty-five cents for all under ten thousand dollars in amount, except policies for one hundred dollars and not exceeding five hundred dollars the fee shall be fifteen cents; for policies of one hundred dollars or less the fee shall be ten cents; for each certificate, including seal, for nonregistered policies issued in accordance with the provisions of this article, the fee shall be twenty-five cents. (Rev., s. 4789; 1905, c. 504, s. 21; C. S. 6476.)

Art. 24. Mutual Burial Associations.

§ 58-224. Mutual burial associations placed under supervision of burial association commissioner.—All mutual burial associations now organized and operating in the state of North Carolina, and all mutual burial associations hereafter organized and operating within said state, shall be under the general supervision of a burial association commissioner to be appointed by the governor of the state of North Carolina, whose term shall be for a period of four years and his salary to be fixed by the governor. (1941, c. 130, s. 2.)

Editor's Note.—This and the following sections down through § 58-241 are effective from July 1, 1941.

§ 58-225. Maintenance of separate branches, when operated for benefit of both races.—All burial associations now operating in the state of North Carolina and all burial associations hereafter organized and operated in the state of North Carolina, for the benefit of both races, shall maintain and operate two separate branches, and the provisions of article 24 shall apply to each branch as a separate association, except as hereinafter provided. (1941, c. 130, s. 3.)

§ 58-226. Requirements as to rules and by-laws.—All burial associations now operating within the state of North Carolina, and all burial associations hereafter organized and operating within the state of North Carolina shall have and maintain rules and by-laws embodying in substance the following:

Article 1. The name of this association shall be ....., which shall indicate that said association is a mutual burial association.

Article 2. The objects and purposes for which this association is formed and the purposes for which it has been organized, and the methods and plan of operation of any association already organized, shall be to provide a plan for each member of this association for the payment of one funeral benefit for each member, which benefit shall consist of a funeral in merchandise and service, with no free embalming or free ambulance service included in such benefits; and in no case shall any cash be paid. That no other free service or any other thing free shall be held out, promised or furnished in any case. Such funeral benefit shall be in the amount of one hundred dollars ($100.00) of merchandise and service, without free embalming or free ambulance service, for persons of the age of ten years and over, and in the amount of fifty dollars ($50.00) for persons under the age of ten years.

Article 3. Any person of either the white or colored race who has passed his or her first birthday, and who has not passed his or her sixty-fifth birthday, and who is in good health and not under treatment of any physician, nor confined in any institution for the treatment of mental or other disease, may become a member of such burial association by the payment of a membership fee by such person, or for such person, of twenty-five cents. Applicant's birthday must be written in the application and subject to verification by any record the burial association commissioner may deem necessary to prove or establish a true date of the birth of any applicant.

Article 4. The annual meeting of the association shall be held at ..... (here insert the place, date and hour); each member shall have one vote at said annual meeting and fifteen members of the association shall constitute a quorum. There shall be elected at the annual meeting of said association a board of directors of seven members, each of whom shall serve for a period of from one to five years as the membership may determine and until his or her successor shall have been elected and qualified. Any member of the board of directors who shall fail to maintain his or her membership, as provided in the rules and by-laws of said association, shall cease to be a member of the board of directors and a director shall be appointed by the president of said association for the unexpired term of such disqualified member. There shall be at least an annual meeting of the board of directors, and such meeting shall be held immediately following the annual meeting of the membership of the association. The directors of the association may, by a majority vote, hold other meetings of which notice shall be given to each member by mailing such notice five days before the meeting to be held. At the annual meetings of the directors of the association, the board of directors shall elect a president, a vice-president, and a secretary-treasurer. The president and vice-president shall be elected from among the directors, but the secretary-treasurer may be selected from the director membership or from the membership of the association, it being provided that it is not necessary that the secretary-treasurer shall be a member of the board of directors. The secretary-treasurer shall be the only paid officer of the association and his compensation shall be fixed by the board of directors. Among other duties that the secretary-treasurer may perform, he shall be chargeable with keeping an accurate and faithful roll of the membership of this association at all times and he shall be chargeable with the duty of faithfully preserving and faithfully applying all moneys coming into his hands by virtue of his said office. The president, vice-president and secretary-treasurer shall constitute a board of control who shall direct the affairs of the association in accordance with these articles and the by-laws of the association, and subject to such

modification as may be made or authorized by an act of the general assembly. The secretary-treasurer shall keep a record of all assessments made, dues collected and benefits paid. The books of the association, together with all records and bank accounts shall be at all times open to the inspection of the burial association commissioner or his duly constituted auditors or representatives. It shall be the duty of the secretary or secretary-treasurer of each association to keep the books of the association posted up to date so that the financial standing of the association may be readily ascertained by the burial association commissioner or any auditor or representative employed by him. Upon the failure of any secretary or secretary-treasurer to comply with this provision, it shall be the duty of the burial association commissioner to employ an auditor or bookkeeper to take charge of the books of the association and do whatever work is necessary to bring the books up to date. The burial association commissioner shall have the power and authority to set a fee sufficient to pay the said auditor or bookkeeper for the work done upon the books of said association and the secretary or secretary-treasurer of the association shall pay the fees as specified by the burial association commissioner out of the funds of the burial association. This fee must be included in the twenty-five per cent allowed by law for the operation of the burial associations.

Article 5. Upon the death of any officer, his successor shall be elected by the board of directors for the unexpired term. The president, vice-president and secretary-treasurer shall be elected for a term of from one to five years, and shall hold office until his successor is elected and qualified, subject to the power of the board of directors to remove any officer for good cause shown: Provided, that any officer removed by the board of directors shall have the right of appeal to the membership of the association, such appeal to be heard at the next ensuing annual meeting of said membership.

Article 6. Each member shall be assessed according to the following schedule (or in multiples thereof) at the age of entry of the member: Provided, those members joining at ages under ten shall be charged with the assessment for age ten when they reach their tenth birthday:

Assessment Rate for Age Groups:

First to tenth birthday .....five cents (5c)
Tenth to thirtieth birthday .....ten cents (10c)
Thirtieth to fiftieth birthday ...twenty cents (20c)
Fiftieth to sixty-fifth birthday ..thirty cents (30c)

(Ages shall be defined as having passed a certain birthday instead of nearest birthday.) Assessment shall always be made on the entire membership in good standing.

Article 7. No benefit will be paid for natural death occurring within thirty days from the date of the certificate of membership, which certificate shall express the true date such person becomes a member of this association, and the certificate issued shall be in acknowledgment of membership in this association. Benefits will be paid for death caused by accidental means occurring any time after date of membership certificate. No benefits will be paid in case of suicidal death of any member within one year from the date of the membership certificate. No agent or other person shall have authority to issue membership certificates in the field, but such membership certificates shall be issued at the home office of the association by duly authorized officers: The president, vice-president or secretary, and a record thereof duly made.

Article 8. Any member failing to pay any assessment within thirty days after notice shall be in bad standing, and unless and until restored, shall not be entitled to benefits. Notice shall be presumed duly given when mailed, postage paid, to the last known address of such members: Provided, moreover, that notice to the head of a family shall be construed as notice to the entire membership of such family in said association. Any member or head of a family changing his or her address shall give notice to the secretary-treasurer in writing of such change, giving the old address as well as the new, and the head of a family notifying the secretary-treasurer of change in address shall list with the secretary in such notice all the members of his or her family having membership in said association. Any member in bad standing may, within ninety days after the date of an assessment notice, be reinstated to good standing by the payment of all delinquent dues and assessments: Provided such person shall at the same time submit to the secretary-treasurer satisfactory evidence of good health, in writing, and no benefit will be paid for natural death occurring within thirty days after reinstatement. In case of death caused by accidental means, benefit will be in force immediately after reinstatement. Any person desiring to discontinue his membership for any reason shall communicate such desire to the secretary-treasurer immediately and surrender his or her certificate of membership. Any adult member who is the head of a family, and who, with his family, has become in bad standing, shall furnish to the secretary-treasurer satisfactory evidence of the good health of each member desired to be reinstated in writing.

Article 9. The benefits herein provided are for the purpose of furnishing a funeral and burial service for a deceased member. The service shall be in keeping with the services and casket, sold at the same price, similar to that provided and charged by reputable funeral directors of this or other like communities.

Article 10. It is understood and stipulated that the funeral and burial service provided in article nine hereof shall be rendered by (give name of funeral director and town), which funeral director is designated in these rules and by-laws as the official funeral director of this association, and such funeral director shall be, by the secretary-treasurer of this association, immediately notified upon the death of any member, and upon the death of any member it shall be the duty of his or her nearest relative to notify the secretary-treasurer of the association of the death of such member. In the event a member in good standing shall die at a place beyond the territory served by the above named funeral director, the secretary of this association, being notified of such death, shall cause the deceased to receive a funeral and burial service equal to that provided for in these

by-laws. The benefits provided for are to be payable to the funeral director rendering such funeral and burial service, which payment the secretary-treasurer is authorized to make. If the secretary-treasurer of the association shall fail, on demand, to provide the benefits as listed in article nine of these rules and by-laws by arrangement with the official funeral director serving the community in which the services are required, then the benefits shall be paid in cash to the representative of the deceased qualified under law to receive such payments.

Article 11. If the proceeds of one assessment on the entire membership produces more than enough for burial or burials, on account of which said assessment is made, the balance shall be placed in the treasury of the association to apply on future burials. Assessments shall be made in such multiples of the assessment rate as is necessary to provide a fund to take care of anticipated deaths. Whenever possible, assessments will be made at definitely stated intervals so as to reduce the cost of collection and to prevent lapse.

Article 12. In the event the proceeds of one assessment on the entire membership does not prove sufficient at any time to yield the benefit provided for in these by-laws, then the secretary-treasurer shall notify the burial association commissioner who shall be authorized, unless the membership is increased to that point where such assessment is sufficient, to cause liquidation of said association, and may transfer all members in good standing to a like organization or association.

Article 13. All legitimate operating expenses of the association shall be paid out of the assessments, but in no case shall the entire expenses exceed twenty-five per cent of the assessments collected. In the expenses of operation shall be included an amount sufficient to pay burial association commissioner and two or more auditors, with office expenses, all not to exceed an outlay of twenty-five thousand dollars ($25,000.00) per year.

Article 14. Special meetings of the association membership may be called by the secretary-treasurer when by him deemed necessary or advisible, and he shall call a meeting when petitioned to do so by sixty-six and two-thirds per cent of the members of said association who are in good standing.

Article 15. The secretary-treasurer shall, upon satisfactory evidence that membership was granted to any person not qualified at the time of entry as provided under article three of these by-laws, refund any amounts paid as assessment, and shall remove the name from the membership roll.

Article 16. Any member may pay any number of assessments in advance, in which case such member will not be further assessed until a like number of assessments shall have been levied against the remaining membership.

Article 17. No person may maintain active membership in two separate burial associations and, upon evidence that membership is maintained contrary to this article, the secretary-treasurer may call upon such member to forfeit all benefits and fees paid in either one or the other of the associations. That any person who is found to have maintained membership in two associations shall forfeit all benefits and fees paid in the second association of which he became a member, unless the membership in the original association was discontinued or such association had been placed in liquidation.

Article 18. Each year before the annual meeting of the membership of this association, the association shall cause to be mailed to each member in good standing a statement showing total income collected, expenses paid and burial benefits provided for by such association during the next preceding year (giving the names of each person buried and the amount expended by the association in such burial). A statement mailed to the head of a family shall be regarded as notice to each member of such family holding membership in such association. The secretary or secretary-treasurer shall keep a faithful list of all notices mailed each year and shall note opposite the name of each member on the list of membership the date of mailing said statement.

Article 19. These rules and by-laws shall not be modified, cancelled or abridged by any association or other authority except by act of the general assembly of North Carolina. (1941, c. 130, s. 4; 1943, c. 272, ss. 1, 2.

Cross Reference.—As to payment in cash where benefits exceed $100.00, see § 58-111.

Editor's Note.—The 1943 amendment added the last four sentences of article 4 and changed the fifth sentence from the end of the article. And the amendment struck out the words "and the frequency of the assessments will be governed by the death rate within the association," formerly appearing at the end of article 6. It also struck out the words "until the next assessment period" formerly appearing as the latter part of the second sentence of article 11. The amendment increased the amount stated in article 13 from $17,000 to $25,000.

§ 58-227. Limitation of soliciting agents; licensing and qualifications; officers exempt from license; issuance of membership certificates.—Each burial association shall have not more than five agents or representatives soliciting members other than the secretary-treasurer and president, and before any agent or representative shall or may represent any burial association in North Carolina, he or she shall first apply to the burial association commissioner of North Carolina for a license, and the burial association commissioner shall have full power and authority to issue such license upon proof satisfactory to such commissioner that such person is capable of soliciting burial association memberships, is of good moral character and recommended by the association in behalf of which such membership solicitations are to be made. The burial association commissioner may reject the application of any person who does not meet the requirements set out by him, as to capacity and moral fitness on recommendations by the association. Upon the issuing of a license to solicit membership in any burial association, such person shall be required to pay in cash, at the time of issuing license to such applicant, to the burial association commissioner, the sum of ten dollars ($10.00); moneys derived from this fee or charge to be and remain in the department or office of such burial association commissioner, for supervision of burial associations in this state, subject to withdrawal for expenses of supervision by authority of the burial association commissioner. It shall not be necessary that the president or secretary-treasurer of any burial association shall ob-

tain a license for soliciting membership in any association, of which such person is president or secretary-treasurer. Membership certificates shall not be issued by a solicitor in the field, but shall be reported to the office of the association and there issued and a record made of such issuance at the time such certificate is so issued. (1941, c. 130, s. 5.)

§ 58-228. Assessments against associations for supervision expense.—In order to meet the expense of supervision, the burial association commissioner shall prorate the amount of supervisory cost over and above any other funds in his hands for this purpose and assess each association on a pro rata basis in accordance with the number of members of each association, which assessment shall in no case exceed twenty-five thousand dollars ($25,000.00), and such association shall remit to the burial association commissioner his pro rata part of the assessment as fixed by the burial association commissioner, which expense shall be included in the twenty-five per cent expense allowance as provided in article thirteen. This assessment shall be made on the first day of July of each and every year and said assessment shall be paid within thirty days thereafter. In case any association shall fail or refuse to pay such assessment within thirty days, it shall be the duty of the burial association commissioner to transfer all memberships and assets of every kind and description to the nearest next association that is found by the burial association commissioner to be in good sound financial condition. (1941, c. 130, s. 6; 1943, c. 272, s. 3.)

Editor's Note.—The 1943 amendment added the second and third sentences, and inserted in the first sentence the words "which assessment shall in no case exceed twenty-five thousand dollars ($25,000.00)."

§ 58-229. Unlawful to operate without written authority of commissioner.—It shall be unlawful for any person, firm or corporation, association or organization to organize, operate, or in any way solicit members for a burial association, or for participation in any plan, scheme, or device similar to burial associations, without the written authority of the burial association commissioner, and any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than two hundred and fifty dollars ($250.00) or imprisoned not less than twelve months, or both, in the discretion of the court: Provided, however, the burial association commissioner shall not withhold authority for the organization or operation of a bona fide burial association, meeting the requirements of this act, unless it shall be found and established to the satisfaction of the burial association commissioner that the person or persons applying for authority to organize and operate such bona fide burial association is disqualified or does not meet the requirements of article 24. (1941, c. 130, s. 7.)

§ 58-230. Penalty for failure to operate in substantial compliance with article 24.—If any burial association or other organization or official thereof, or any person operates or allows to be operated a burial association on any plan, scheme or by-laws not in substantial compliance with the by-laws set forth in § 58-226, the burial association commissioner may revoke any authority or license granted for the operation of such burial association, and any person, firm or corporation or association convicted of the violation of this section shall be guilty of a misdemeanor and shall be fined not less than two hundred and fifty dollars ($250.00) or imprisoned not less than one year in jail, or both, in the discretion of the court. (1941, c. 130, s. 8.)

§ 58-231. Penalty for wrongfully inducing person to change membership.—Any burial association official, agent or representative thereof or any person who shall use fraud or make any promise not part of the printed by-laws, or who shall offer any rebate, gratuity or refund to cause a member of one association to change membership to another association, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred and fifty dollars ($250.00) or imprisoned not less than one year in jail, or both, in the discretion of the court. (1941, c. 130, s. 9.)

§ 58-232. Penalty for making false and fraudulent entries.—Any burial association official who makes or allows to be made any false entry on the books of the association with intent to deceive or defraud any member thereof, or with intent to conceal from the burial association commissioner or his deputy or agent, or any auditor authorized to examine the books of such association, under the supervision of the burial association commissioner, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred and fifty dollars ($250.00), or imprisoned in the common jail for not less than twelve months, or both, in the discretion of the court. (1941, c. 130, s. 10.)

§ 58-233. Accepting application without collecting fee.—Any burial association official, agent or representative, or any other person who shall accept an application for membership in any association without collecting the fee from any such person making such application for membership, shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred and fifty dollars ($250.00), or imprisoned not less than twelve months in the common jail, or both, in the discretion of the court. (1941, c. 130, s. 11.)

§ 58-234. Removal of secretary-treasurer for failure to maintain proper records.—Any burial association secretary or secretary-treasurer who fails to maintain records to the minimum standards required by the burial association commissioner shall be by such commissioner removed from office and another elected in his stead, such election to be immediate and by the board of directors of said burial association upon notice of such removal. (1941, c. 130, s. 12.)

§ 58-235. Acceptance of donations, failure to make proper assessments, etc., made misdemeanor.—Any person or persons who accept donations from any source, or who contribute money or funeral services or free embalming, free ambulance service or any other thing free of charge, acting for any burial association, directly or indirectly, or who so acting shall in any way fail to assess for the amount needed to pay death losses and allowable expenses, shall be guilty of a misdemeanor

and upon conviction shall be fined not less than two hundred and fifty dollars ($250.00) or imprisoned in the common jail for not less than twelve months, or both, in the discretion of the court. (1941, c. 130, s. 13.)

§ 58-236. Right of appeal upon revocation of license.—Upon the revocation of any license or authority by the burial association commissioner, under any of the provisions of article 24, the said association or individual whose license has been revoked, shall have right of appeal from the action of said burial association commissioner revoking such license or authority to the superior court of the county in which such burial association may be located: Provided, said association shall give notice of appeal in writing to the burial association commissioner within ten days from the date of order revoking the said license and the said association giving notice of appeal shall deposit with the burial association commissioner an amount sufficient to cover appeal fees, which the burial association commissioner shall pay to the clerk of the superior court. Upon receipt of said notice of appeal, the burial association commissioner shall file with the clerk of the superior court of the county in which the burial association is located the decision of the burial association commissioner and the clerk of the superior court shall transfer the appeal to the civil issue docket as in cases of appeal from a justice of the peace and the same shall be heard de novo. If upon the revocation of a license of a burial association by the burial association commissioner and where the burial association gives the proper notice of appeal, the burial association shall be permitted to operate until a final decision has been made by the higher court. (1941, c. 130, s. 14; 1943, c. 272, s. 4.)

Editor's Note.—The 1943 amendment struck out the words "as in other cases of appeal, and the matter shall be heard de novo," formerly ending the first sentence, and inserted in place thereof all of the section beginning with the proviso.

§ 58-237. Bond of secretary or secretary-treasurer of burial associations.—The secretary or secretary-treasurer of any burial association shall, before entering upon the duties of his office and for the faithful performance thereof, execute a bond payable to the association in some bonding company licensed to do business in this state, to be approved by the burial association commissioner, in a sum not less than twenty-five per cent of the surplus of the said association as shown by the financial statement rendered December thirty-first of each year, but in no event shall said bond be less than one thousand dollars ($1,000.00) and the said bond shall be deposited with the burial association commissioner for safekeeping: Provided, that if any association operates a branch for members of a colored race and the officers of both associations are the same, then the provisions of this section shall apply as of one association: Provided, further, however, that any burial association, with the consent and approval of the burial association commissioner, may give a bond secured by deed of trust on real estate situated in North Carolina, in lieu of procuring said bond from a bonding company; and the bond thus given is not to exceed tax value for the current year of the real estate securing the same. The said deed of trust is to be deposited with the burial association commissioner and the said deed of trust must constitute a first lien on the property secured by the deed of trust. (1941, c. 130, s. 15; 1943, c. 272, s. 5.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 58-237.1. Number of assessments; reduction and increase.—Each association shall make not less than eight single or four double assessments per annum until such association shall have on hand a surplus of three dollars ($3.00) per member as shown on the annual statement herein required to be filed by the association. When any association has accumulated such surplus, the association, with the consent of the burial association commissioner may reduce the number of assessments to be made in any one year, which number shall be fixed by the burial association commissioner: Provided, however, that the burial association commissioner shall have the power to increase the number of assessments to be made in any one year when in his opinion the same shall be necessary in order to take care of the death loss. (1943, c. 272, s. 6.)

§ 58-237.2. Minimum membership required.—Each burial association shall at all times maintain an active membership of at least eight hundred members and should any association fail to secure the same within ninety days from the date of the granting of its charter, or at any time allow its active membership to fall below eight hundred members, the burial association commissioner shall revoke its license and transfer its membership to another association. (1943, c. 272, s. 6.)

§ 58-237.3. Procedure where burial association official or employee transacts business fraudulently, etc.—When after examination the burial association commissioner is satisfied that any burial association official, employee, or representative has failed to comply with any provision of § 58-226, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently, the burial association commissioner shall call a meeting of all officers of said association and present the facts and the officers of said association shall immediately call a meeting of the said association membership. A meeting of the said association membership shall constitute a quorum when as many as fifteen of the members are present. When the membership shall meet, it shall be the duty of the burial association commissioner to submit all of the facts relative thereto to the officers and membership present in the said meeting. It shall then become the duty of the membership to proceed to the election of a new officer to fill the unexpired term of the officer whom the charges have been brought against by the burial association commissioner. If the membership of the burial association fails and refuses to elect a new officer, then it shall be the duty of the burial association commissioner to cancel the license of the said burial association and transfer its membership, together with all of its assets to another association that is found by the burial association commissioner to be in good sound financial condition. The burial association shall have the right of appeal from this decision as set up in § 58-236. (1943, c. 272, s. 6.)

§ 58-237.4. Making false or fraudulent statement a misdemeanor.—Any officer or employee of

any burial association authorized to do business under this article, who shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any application for membership or for the purpose of obtaining money from or benefit any burial association transacting business under this article, or who shall make any false financial statement to the burial association commissioner or to its membership shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1943, c. 272, s. 6.)

§ 58-238. State-wide organization of associations.—It shall be lawful for the several mutual burial associations of the state of North Carolina, in good standing, to organize and provide for a state-wide organization of mutual burial associations, which organization shall be for the mutual and general suggestive control of mutual burial associations in the state of North Carolina. Such organization shall have such name as agreed upon by the membership in meetings, and to be composed of members as are lawfully operating in the state and who pay their dues to such association. (1941, c. 130, s. 16.)

§ 58-239. Article 24 deemed exclusive authority for organization, etc., of mutual burial associations.—Article 24 shall be deemed and held exclusive authority for the organization and operation of mutual burial associations within the state of North Carolina, and such associations shall not be subject to any other laws respecting insurance companies of any class. (1941, c. 130, s. 17.)

§ 58-240. Operation of association in violation of law prohibited.—No person, firm or corporation shall operate as a burial association in this state unless incorporated under the laws of the state of North Carolina, or be composed of a membership constituting an association complying with all the rules, regulations, sections and articles of article 24; and licensed and approved by the burial association commissioner of the state of North Carolina. (1941, c. 130, s. 18.)

§ 58-241. Appointment and removal of burial association commissioner; bond.—The burial association commissioner provided for in this act shall be appointed by the governor for a term of four years, subject to removal for cause, and shall hold office until his successor is appointed and qualified. Such burial association commissioner shall give bond approved by the insurance commissioner of the state of North Carolina in the sum of ten thousand dollars ($10,000.00), conditioned for his faithful application of all funds coming into his hands by virtue of his office. (1941, c. 130, s. 19.)

§ 58-241.1. Election for benefits or return of assessments on death of member in armed forces.—If any member of a burial association who is in good standing should die while serving in the military or naval forces of the United States, the spouse, if there is one, or the next of kin in the event there is no spouse, shall be entitled to elect between the benefits prescribed in the by-laws of the burial association and the return of assessments paid into the burial association by the deceased member. Such election must be made within one year from the official notification of death. Acceptance by the spouse or the next of kin of paid-in assessments shall be a complete release to the burial association. In the event the spouse or next of kin shall not elect to receive the paid-in assessments as settlement of all claims against the burial association, then the spouse or next of kin shall be entitled to the benefits prescribed by the by-laws of the burial association at any time the body of the deceased is returned for burial to the territory served by the burial association. (1943, c. 732, s. 1.)

§ 58-241.2. Member in armed forces failing to pay assessments; reinstatement.—If a member of a burial association who is in the military or naval forces of the United States fails to pay any assessment, he shall be in bad standing, and unless and until restored, shall not be entitled to benefits. However, the said member shall be reinstated in the burial association upon application made by him at any time until twelve months after his discharge from the military or naval forces of the United States, notwithstanding his physical condition and without the payment of assessments which have become due during his service in the military or naval forces of the United States. Benefits will be in force immediately after such reinstatement. (1943, c. 732, s. 2.)

§ 58-241.3. Prior death of member in armed forces.—If a member of a burial association who was in good standing has, before March 9, 1943, died while serving in the military or naval forces of the United States, the provisions of § 58-241.1 shall be applicable: Provided, the spouse, if there is one, or the next of kin in the event there is no spouse, must elect to receive the paid-in assessments within one year after March 9, 1943, or be deemed to have elected to receive benefits provided by the by-laws of the burial association. (1943, c. 732, s. 3.)

SUBCHAPTER V. AUTOMOBILE LIABILITY INSURANCE.

Art. 25. Regulation of Automobile Liability Insurance Rates.

§ 58-242. Approval by commissioner of insurance of automobile liability insurance rates.—Every person, association or corporation authorized to transact automobile liability and/or property damage and/or collision insurance business within this state shall file with the commissioner of insurance on or before their effective date, the classification of risks, rules, rates, and rating plans, for writing such insurance, approved or made by such insurer or by any rating oganization of which it is a member, none of which shall become effective until approved by the commissioner of insurance. The commissioner of insurance shall within fifteen days after the filing of each classification of risks, rules, rates and rating plans indicate in writing his approval or disapproval thereof with his reasons therefor. Such filing may be made on behalf of an insurer by the rating organization of which it is a member. Any bureau organized in this state for making and/or administering automobile rates and rating plans shall provide for equal representation of stock and non-stock insurers upon its governing and all other committees

and shall admit to membership any insurer applying therefor. (1933, c. 283, s. 1.)

The most important feature of this legislation is the authorization of rate regulation by the commissioner of insurance. Insurance premium rate regulation has been generally upheld as an exercise of the police power, since insurance is a business affected with a public interest. See 11 N. C. Law Rev. 233.

§ 58-243. Compliance with fixed rates mandatory.—Every person, association, or corporation authorized to transact the aforesaid insurance business within this state shall comply with the rates and rules affecting such rates of the rating organization in which it has membership or whose rates it adopts as its standard, or with the rates and rules which such insurer has filed with the commissioner of insurance. (1933, c. 283, s. 2.)

§ 58-244. Adjustment of unreasonable rates.—It shall be the duty of the commissioner of insurance, after due notice and a hearing before him, to order an adjustment of rates on any such risks or classes of risks whenever it shall be found by him that such rates are excessive or unreasonable or that any insurer is discriminating unfairly between its policyholders whose risks are of essentially the same hazard. The findings, determinations and orders of the commissioner of insurance shall be subject to review on their merits by appeal to the superior court of Wake county. (1933, c. 283, s. 3.)

§ 58-245. Refunds by mutuals and exchanges unaffected.—Nothing in this article shall be construed to limit the method of determining rates or plan of operation of any mutual insurance company or inter-insurance exchange in this state, or prevent refund to all policyholders of the same class of any portion of the annual premium not required to defray the expense of such insurance. (1933, c. 283, s. 4.)

§ 58-246. North Carolina automobile rate administrative office created; objects and functions.—There is hereby created a bureau to be known as the North Carolina automobile rate administrative office which office shall be established in the compensation rating and inspection bureau of North Carolina, created under § 97-102 and shall be a branch and under the management of the general manager of the compensation rating and inspection Bureau of North Carolina, with the following objects, functions and sources of income:

(a) To maintain rules and regulations and fix maximum rates for automobile bodily injury, property damage and collision insurance and equitably adjust the same as far as practicable in accordance with the hazard of the different classes of risks as established by said bureau.

(b) To furnish upon request of any person carrying this form of insurance in the state or to any member of the North Carolina automobile rate administrative office, upon whose risk a rate has been promulgated, information as to the rating, including the method of its capitulation, and to encourage safety on the highways and streets of the state, by offering reduced premium rates under a uniform system of experience rating as may be approved by the commissioner of insurance. (1939, c. 394, s. 1.)

§ 58-247. Membership as a prerequisite for writing insurance; governing committee; rules and regulations; expenses; commissioner of insurance ex officio chairman.—Before the commissioner of insurance shall grant permission to any stock, nonstock, or reciprocal insurance company or any other insurance organization to write automobile bodily injury, property damage and collision insurance in this state, it shall be a requisite that they shall subscribe to and become members of the North Carolina automobile rate administrative office.

(a) Each member of the North Carolina automobile rate administrative office writing the above classes of insurance in North Carolina shall, as a requisite thereto, be represented in the aforesaid bureau and shall be entitled to one representative and one vote in the administration of the affairs of the bureau. They shall, upon organization, elect a governing committee which governing committee shall be composed of equal representation by stock and nonstock members.

(b) The bureau, when created, shall adopt such rules and regulations for its orderly procedure, as shall be necessary for its maintenance and operation. The expense of such bureau shall be borne by its members by quarterly contributions to be made in advance, such contributions to be made in advance by prorating such expense among the members in accordance with the amount of gross premiums derived from automobile bodily injury, property damage and collision insurance in North Carolina during the preceding year ending December 31, 1938, and members entering such bureau since that date to advance an amount to be fixed by the governing committee. After the first fiscal year of operation of the bureau the necessary expense of the bureau shall be advanced by the members in accordance with rules and regulations to be established and adopted by the governing committee.

(c) The commissioner of insurance of the state of North Carolina, or such deputy as he may appoint, shall be ex-officio chairman of the North Carolina automobile rate administrative office and shall preside over all meetings of the governing committee or other meetings of the bureau and it shall be his duty to determine any controversy that may arise by reason of a tie vote between the members of the governing committee. (1939, c. 394, s. 2.)

§ 58-248. Personnel and assistants; general manager; authority of commissioner of insurance.—In order to carry into effect the objects of §§ 58-246 to 58-248, the bureau members shall immediately elect its governing committee who shall employ and fix the salaries of such personnel and assistants as are necessary, but the general manager of the compensation rating and inspection bureau of North Carolina shall be the general manager also of the North Carolina automobile rate administrative office and the commissioner of insurance is hereby authorized to compel the production of all books, data, papers and records and any other data necessary to compile statistics for the purpose of determining the pure cost and expense loading of automobile bodily injury, property damage and collision insurance in North Carolina and this information shall be available and for the use of the North Carolina automobile rate administrative office for the capitulation and promulgation of rates on automobile bodily injury, prop-

erty damage and collision insurance. All such rates compiled and promulgated by such bureau shall be submitted to the commissioner of insurance for approval and no such rates shall be put into effect in this state until approved by the commissioner of insurance and not subsequently disapproved: Provided §§ 58-246 to 58-248 shall not apply to publicly owned vehicles. (1939, c. 394, s. 3.)

SUBCHAPTER VI. ACCIDENT AND HEALTH INSURANCE.

Art. 26. Nature of Policies.

§ 58-249. Form, classification, and rates to be approved by commissioner of insurance.—No policy of insurance against loss or damage from the sickness or the bodily injury or death of the insured by accident shall be issued or delivered to any person in this state until a copy of the form thereof and of the classification of risks and the premium rates pertaining thereto have been filed with the commissioner of insurance; nor shall it be so issued or delivered until the expiration of thirty days after it has been so filed unless the commissioner shall sooner give his written approval thereto. If the commissioner shall notify, in writing, the company, society, or other insurer which has filed such form that it does not comply with the requirements of law, specifying the reasons for his opinion, it shall be unlawful thereafter for any such insurer to issue any policy in such form. The action of the commissioner in this regard shall be subject to review by any court of competent jurisdiction; but nothing in this article shall be construed to give jurisdiction to any court not already having jurisdiction. (1911, c. 209, s. 1; 1913, c. 91, s. 1; C. S. 6477.)

§ 58-250. Specifications as to form of policy.—No such policy shall be so issued or delivered (1) unless the entire money and other considerations therefor are expressed in the policy; nor (2) unless the time at which the insurance thereunder takes effect and terminates is stated in a portion of the policy preceding its execution by the insurer; nor (3) if the policy purports to insure more than one person; nor (4) unless every printed portion thereof and of any endorsements or attached papers shall be plainly printed in type of which the face shall be not smaller than ten point; nor (5) unless a brief description thereof be printed on its first page, and on its filing back in type of which the face shall not be smaller than fourteen point; nor (6) unless the exceptions of the policy be printed with the same prominence as the benefits to which they apply: Provided, however, that any portion of such policy which purports, by reason of the circumstances under which a loss is incurred, to reduce any indemnity promised therein to an amount less than that provided for the same loss occurring under ordinary circumstances shall be printed in bold-face type and with greater prominence than any other portion of the text of the policy. (1913, c. 91, s. 2; C. S. 6478.)

§ 58-251. Standard provisions in policy.—Every such policy so issued shall contain certain standard provisions, which shall be in the words and in the order hereinafter set forth and be preceded in every policy by the caption "Standard Provisions." In each standard provision, wherever the the word "insurer" is used, there shall be substituted therefor "company" or "corporation" or "association" or "society" or such other word as will properly designate the insurer.

1. Provisions Relative to Contract.—A standard provision relative to the contract may be in either of the following two forms: Form (A) to be used in policies which do not provide for reduction of indemnity on account of change of occupation, and Form (B) to be used in policies which do so provide. If Form (B) is used and the policy provides indemnity against loss from sickness, the words "or contracts sickness" may be inserted therein immediately after the words "in the event that the insured is injured."

(A) This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. No reduction shall be made in any indemnity herein provided by reason of change in the occupation of the insured or by reason of his doing any act or thing pertaining to any other occupation.

(B) This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the insurer's classification of risks and premium rates in the event that the insured is injured after having changed his occupation to one classified by the insurer as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the insurer will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the insurer for such more hazardous occupation.

If the law of the state in which the insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the insurer in accordance with such law; but if such filing is not required by such law then they shall mean the insurer's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the insurer is liable.

2. Changes in the Contract.—A standard provision relative to changes in the contract shall be in the following form: No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the insurer and such approval be endorsed hereon.

3. Reinstatement of Policy.—A standard provision relative to reinstatement of policy after lapse may be in either of the three following

forms: Form (A) to be used in policies which insure only against loss from accident; Form (B) to be used in policies which insure only against loss from sickness; and Form (C) to be used in policies which insure against loss from both accident and sickness.

(A) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the insurer or by any of its duly authorized agents shall reinstate the policy, but only to cover loss resulting from accidental injury thereafter sustained.

(B) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the insurer or by any of its duly authorized agents shall reinstate the policy, but only to cover such sickness as may begin more than ten days after the date of such acceptance.

(C) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the insurer or by any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Time of Notice of Claim.—A standard provision relative to time of notice of claim may be in either of the three following forms: Form (A) to be used in policies which insure only against loss from accident: Form (B) to be used in policies which insure only against loss from sickness, and Form (C) to be used in policies which insure against loss from both accident and sickness. If Form (A) or Form (C) is used the insurer may at its option add thereto the following sentence: "In event of accidental death immediate notice thereof must be given to the insurer."

(A) Written notice of injury on which claim may be based must be given to the insurer within twenty days after the date of the accident causing such injury.

(B) Written notice of sickness on which claim may be based must be given to the insurer within ten days after the commencement of the disability from such sickness.

(C) Written notice of injury or of sickness on which claim may be based must be given to the insurer within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness.

5. Sufficient Notice of Claim.—A standard provision relative to sufficiency of notice of claim shall be in the following form, and the insurer shall insert in the blank space such office and its location as it may desire to designate for the purpose of notice:

Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the insurer at ..... or to any authorized agent of the insurer, with particulars sufficient to identify the insured, shall be deemed notice to the insurer. Failure to give notice within the time provided in this policy shall not invalidate any claim, if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

6. Furnishing Forms for Proof of Loss.—A standard provision relative to furnishing forms for the convenience of the insured in submitting proof of loss shall be as follows:

The insurer, upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character, and extent of the loss for which claim is made.

7. Filing Proof of Loss.—A standard provision relative to filing proof of loss shall be in such one of the following forms as may be appropriate to the indemnities provided:

(A) Affirmative proof of loss must be furnished to the insurer at its said office within ninety days after the date of the loss for which claim is made.

(B) Affirmative proof of loss must be furnished to the insurer at its said office within ninety days after the termination of the period of disability for which the company is liable.

(C) Affirmative proof of loss must be furnished to the insurer at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the insurer is liable, and in case of claim for any other loss within ninety days after the date of such loss.

8. Examination of Person and Autopsy. — A standard provision relative to examination of the person of the insured and relative to autopsy shall be in the following form: The insurer shall have the right and opportunity to examine the person of the insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

9. Time of Payments.—A standard provision relative to the time within which payments other than those for loss of time on account of disability shall be made may be in either of the following two forms, which may be omitted from any policy providing only indemnity for loss of time on account of disability. The insurer shall insert in the blank space either the word "immediately" or appropriate language to designate such period of time, not more than sixty days, as it may desire: Form (A) to be used in policies which do not provide indemnity for loss of time on account of disability, and Form (B) to be used in policies which do so provide.

(A) All indemnities provided in this policy will be paid ..... after receipt of due proof.

(B) All indemnities provided in this policy for loss other than that of time on account of disability will be paid ..... after receipt of due proof.

10. Periodical Payments.—A standard provision relative to periodical payments of indemnity for loss of time on account of disability shall be

in the following form, and may be omitted from any policy not providing for such indemnity. The insurer shall insert in the first blank space of the form appropriate language to designate the proportion of accrued indemnity it may desire to pay, which proportion may be all or any part not less than one-half, and in the second blank space shall insert any period of time not exceeding sixty days:

Upon request of the insured and subject to due proof of loss ..... accrued indemnity for loss of time on account of disability will be paid at the expiration of each ..... during the continuance of the period for which the insurer is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

11. Indemnity Payments.—A standard provision relative to indemnity payments may be in either of the two following forms: Form (A) to be used in policies which designate a beneficiary, and Form (B) to be used in policies which do not designate any beneficiary other than the insured:

(A) Indemnity for loss of life of the insured is payable to the beneficiary, if surviving the insured, and otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured.

(B) All the indemnities of this policy are payable to the insured.

12. Cancellation of Policy by Insured.—A standard provision providing for cancellation of the policy at the instance of the insured shall be in the following form: If the insured shall at any time change his occupation to one classified by the insurer as less hazardous than that stated in the policy, the insurer, upon written request of the insured, and surrender of the policy, will cancel the same and return to the insured the unearned premium.

13. Rights of Beneficiary.—A standard provision relative to the rights of the beneficiary under the policy shall be in the following form and may be omitted from any policy not designating a beneficiary: Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

14. Limiting Time of Action.—A standard provision limiting the time within which suit may be brought upon the policy shall be as follows: No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

15. Time Limitations.—A standard provision relative to time limitations of the policy shall be as follows: If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law. (1911, c. 209, s. 1; 1913, c. 91, s. 3; C. S. 6479.)

Editor's Note.—Section 11 (A) provides that if beneficiary is dead the indemnity is to be paid to the estate of the insured. This provision is different from provisions in regard to beneficiaries in straight life policies, for in the latter case the rights of the beneficiary go to his or her heirs.

Action on Policy Not Delivered.—Where a policy of accident insurance has been issued before the accident in suit, and its delivery by error or oversight of the insurer has been delayed beyond that time, and the premiums have been paid, the action thereon may be maintained. Clark v. Federal Life Ins. Co., 193 N. C. 166, 136 S. E. 291.

Amputation—Time Limit.—Where among other things in a policy of accident insurance, that to recover for the loss of a foot, it is provided that the foot must have been amputated within thirty days from the date of the accident: Held, the stipulation is a valid and enforceable one, whatever the insured's reason for a delay in amputating the foot may have been, when not consented to by the insurer. Clark v. Federal Life Ins. Co., 193 N. C. 166, 136 S. E. 291.

Same—Loss of Time.—Where an accident insurance policy creates a liability for loss of time and a foot, but restricts the right of the insured to recover loss on only one of them: Held, the provision is valid, and he may not recover for both in his action. Clark v. Federal Life Ins. Co., 193 N. C. 166, 136 S. E. 291.

Waiver of Strict Performance.—If the insured is not required to pay his premiums promptly, and is injured when the premiums are not paid he can recover for injuries received, for the act of the insurer in allowing the payments to get behind amount to a waiver. Moore v. General Accident, etc., Corp., 173 N. C. 532, 92 S. E. 362.

Waiver of Proof of Loss.—Where an insurer denies all liability under its policy of accident insurance, covering the death of the insured, and refuses to proceed with the investigation respecting it, its action is a waiver of its requirements as to the proof of death and the clause in the policy forbidding the bringing of any suit upon it until after three months from the filing of the proofs. Moore v. General Accident, etc., Corp., 173 N. C. 432, 92 S. E. 362.

Subsection 5.—In Nelson v. Jefferson Standard Life Ins. Co., 199 N. C. 443, 154 S. E. 752, it was said that the General Assembly realizing that a hard and fast rule should not always be applied, put in the provision in this section, subsec. 5, relative to reasonable notice, to meet varying contingencies that might arise. Rand v. Home Ins. Co., 206 N. C. 760, 767, 174 S. E. 749.

Notice to Be Given by Beneficiary.—Where under the provisions of a policy of accident insurance certain benefits are to be paid to the insured, with distinct provision that in case of accident resulting in death a certain sum is to be paid a beneficiary, the latter, during the lifetime of the insured, is not required to give the ten days notice of the injury which resulted in his death, but only the notice provided for from the time of the latter event; the interpretation of the policy being that the assured and the beneficiary shall each be given notice of the event upon which his claim depends. Moore v. General Accident, etc., Corp., 173 N. C. 532, 92 S. E. 362.

Double Indemnity—Fault of Insured.—Where a policy of life insurance gives double indemnity if the death of the insured has been caused by "external, violent, and accidental means," no recovery can be had of the extra indemnity when such death is caused by the killing of the insured by a third person, and the insured was in the wrong in commencing the fight, and the aggressor, under such circumstances as would render a homicide likely as a result of his own misconduct. Clay v. State Ins. Co., 174 N. C. 642, 94 S. E. 289.

What Amounts to Total Disability.—A provision in an insurance policy that the insurer will pay a certain sum when the insured has become wholly disabled by bodily injuries and permanently, continuously, and wholly prevented thereby from pursuing any and all gainful occupations, will be construed as expressed, and the liability of the insurer thereunder will not be extended so as to include a total disability of the insured to perform his trade or vocation when other gainful occupations are still open to him. Buckner v. Jefferson Standard Life Ins. Co., 172 N. C. 762, 90 S. E. 897.

Cited in Nelson v. Jefferson Standard Life Ins. Co., 199 N. C. 443, 447, 154 S. E. 752; Gorham v. Pacific Mut. Life Ins. Co., 214 N. C. 526, 200 S. E. 5.

§ 58-252. Certain provisions forbidden in policy.—No such policy shall be issued or delivered which contains any provision (1) relative to cancellation at the instance of the insurer; or (2) limiting the amount of indemnity to a sum less than the amount stated in the policy and for

which the premium has been paid; or, (3) providing for the deduction of any premium from the amount paid in settlement of claim; or, (4) relative to other insurance by the same insurer; or, (5) relative to the age limits of the policy; unless such provisions, which are hereby designated as optional standard provisions, shall be in the words and in the order in which they are set forth in the next section, but the insurer may at its option omit from the policy any such optional standard provisions. Such optional standard provisions if inserted in the policy shall immediately succeed the standard provisions named in this article. (1911, c. 209, s. 2; 1913, c. 91, s. 4; C. S. 6480.)

§ 58-253. Optional standard provisions.—The optional standard provisions which may be used in the policy are as follows:

1. Cancellation of Policy by Insurer.—The insurer may cancel this policy at any time by written notice delivered to the insured or mailed to his last address as shown by the records of the insurer, together with cash or the insurer's check for the unearned portion of the premiums actually paid by the insured, and such cancellation shall be without prejudice to any claim originating prior thereto.

2. Reduction of Indemnity.—If the insured shall carry with another company, corporation, association, or society other insurance covering the same loss without giving written notice to the insurer, then in that case the insurer shall be liable only for such portion of the indemnity promised as the said indemnity bears to the total amount of like indemnity in all policies covering such loss, and for the return of such part of the premiums paid as shall exceed the pro rata for the indemnity thus determined.

3. Deduction of Premium.—Upon the payment of claim hereunder any premium then due and unpaid or covered by any note or written order may be deducted therefrom.

4. Other Insurance.—An optional standard provision relative to other insurance by the same insurer which shall be in such one of the following forms as may be appropriate to the indemnities provided, and in the blank spaces of which the insurer shall insert such upward limits of indemnity as are specified by the insurer's classification of risks, filed as required by this article:

(A) If a like policy or policies, previously issued by the insurer to the insured be in force concurrently herewith, making the aggregate indemnity in excess of $--------, the excess insurance shall be void, and all premiums paid for such excess shall be returned to the insured.

(B) If a like policy or policies, previously issued by the insurer to the insured, be in force concurrently herewith, making the aggregate indemnity for loss of time on account of disability in excess of $-------- weekly, the excess insurance shall be void, and all premiums paid for such excess shall be returned to the insured.

(C) If a like policy or policies, previously issued by the insurer to the insured, be in force concurrently herewith, making the aggregate indemnity for loss other than that of time on account of disability in excess of $--------, or the aggregate indemnity for loss of time on account of disability in excess of $-------- weekly, the excess insurance of either kind shall be void, and all premiums paid for such excess shall be returned to the insured.

5. Age Limits.—An optional standard provision relative to the age limits of the policy, which shall be in the following form and in the blank spaces of which the insurer shall insert such number of years as it may elect: The insurance under this policy shall not cover any person under the age of .....years nor over the age of..... years. Any premium paid to the insurer for any period not covered by this policy will be returned upon request. (1911, c. 209, s. 2; 1913, c. 91, s. 4; C. S. 6481.)

§ 58-254. Conflicting provisions forbidden; terms in policy.—No such policy shall be issued or delivered if it contains any provision contradictory, in whole or part, of any provisions hereinbefore in this article designated as "Standard Provisions" or as "Optional Standard Provisions"; nor shall any endorsements or attached papers vary, alter, extend, be used as a substitute for, or in any way conflict with any of the "Standard Provisions" or the "Optional Standard Provisions"; nor shall such policy be issued or delivered if it contains any provision purporting to make any portion of the charter, constitution, or by-laws of the insurer a part of the policy unless such portion of the charter, constitution, or by-laws shall be set forth in full in the policy, but this prohibition shall not be deemed to apply to any statement of rates or classification of risks filed with the commissioner of insurance in accordance with the provisions of this article. (1911, c. 209, s. 3; 1913, c. 91, s. 5; C. S. 6482.)

Art. 27. General Regulations.

§ 58-255. False statement in application.—The falsity of any statement in the application for any policy covered by this subchapter shall not bar the right to recovery thereunder unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer. (1913, c. 91, s. 6; C. S. 6483.)

§ 58-256. Waiver by insurer.—The acknowledgment by any insurer of the receipt of notice given under any policy covered by this subchapter, or the furnishing of forms for filing proofs of loss, or the acceptance of such proofs, or the investigation of any claim thereunder, shall not operate as a waiver of any of the rights of the insurer in defense of any claim arising under such policy. (1913, c. 91, s. 7; C. S. 6484.)

§ 58-257. Alteration of application.—No alteration of any written application for insurance by erasure, insertion, or otherwise, shall be made by any person other than the applicant without his written consent, and the making of any such alteration without the consent of the applicant shall be a misdemeanor. If such alteration shall be made by any officer of the insurer, or by any employee of the insurer, with the insurer's knowledge or consent, then such act shall be deemed to have been performed by the insurer thereafter issuing the policy upon such altered application. (1913, c. 91, s. 8; C. S. 6485.)

§ 58-258. Construction of policy.—A policy issued in violation of this subchapter shall be held valid, but shall be construed as provided in this subchapter, and when any provision in such a policy is in conflict with any provision of this subchapter, the rights, duties, and obligations of the insurer, the policyholder, and the beneficiary shall be governed by the provisions of this subchapter. (1913, c. 91, s. 9; C. S. 6486.)

§ 58-259. Provisions of laws of other states.—The policies of insurance against accidental bodily injury or sickness issued by an insurer not organized under the laws of this state may contain, when issued in this state, any provision which the law of the state, territory, or district of the United States under which the insurer is organized, prescribed for insertion in such policies; and the policies of insurance against accidental bodily injury or sickness issued by an insurer organized under the laws of the state may contain, when issued or delivered in any other state, territory, district, or country, any provisions required by the laws of the state, territory, district, or country in which the same are issued, anything in this subchapter to the contrary notwithstanding. (1911, c. 209, s. 4; 1913, c. 91, s. 10; C. S. 6487.)

§ 58-260. Discrimination forbidden. — Discrimination between individuals of the same class in the amount of premiums or rates charged for any policy of insurance covered by this subchapter, or in the benefits payable thereon, or in any of the terms or conditions of such policy, or in any other manner whatsoever, is prohibited. (1913, c. 91, s. 11; C. S. 6488.)

§ 58-261. Certain policies of insurance not affected.—1. Nothing in this subchapter shall apply to or affect any policy of liability or workmen's compensation insurance or any general or blanket policy of insurance issued to any municipal corporation or department thereof, or to any corporation, copartnership, association, or individual employer, police or fire department, underwriters' corps, salvage bureau, or like associations or organizations, where the officers, members, or employees or classes or departments thereof are insured for their individual benefit against specified accidental bodily injuries or sickness while exposed to the hazards of the occupation or otherwise, in consideration of a premium intended to cover the risks of all the persons insured under such policy.

2. Nothing in this subchapter shall apply to or in any way affect contracts supplemental to contracts of life or endowment insurance where such supplemental contracts contain no provisions except such as operate to safeguard such insurance against lapse or to provide a special surrender value therefor in the event that the insured shall be totally and permanently disabled by reason of accidental bodily injury or by sickness, nor to contracts issued as supplements to life insurance contracts or contracts of endowment insurance, and intended to increase the amount insured by such life or endowment contracts in the event that the death of the insured shall result from accidental bodily injuries: Provided, that no such supplemental contracts shall be issued or delivered to any person in this state unless and until a copy of the form thereof has been submitted to and approved by the commissioner of insurance under such reasonable rules and regulations as he shall make concerning the provisions in such contracts, and their submission to an approval by him.

3. Nothing in this subchapter shall apply to or in any way affect fraternal benefit societies.

4. The provisions of this subchapter contained in clause (5) of § 58-250, and clauses two, three, eight, and twelve of § 58-251, may be omitted from railroad ticket policies sold only at railroad stations or at railroad ticket offices by railroad employees. (1911, c. 209, s. 5; 1913, c. 91, s. 12; 1921, c. 136, s. 5; C. S. 6489.)

§ 58-262. Punishment for violation.—Any company, association, society, or other insurer or any officer or agent thereof, which or who issues or delivers to any person in this state any policy in wilful violation of the provisions of this subchapter, shall be punished by a fine of not more than five hundred dollars for each offense, and the commissioner of insurance may revoke the license of any company, corporation, association, society, or other insurer of another state or country, or of the agent thereof, which or who wilfully violates any provision of this subchapter. (1911, c. 209, s. 6; 1913, c. 91, s. 13; C. S. 6490.)

SUBCHAPTER VII. FRATERNAL ORDERS AND SOCIETIES.

Art. 28. Fraternal Orders.

§ 58-263. General insurance law not applicable.—Nothing in the general insurance laws, except such as apply to fraternal orders or fraternal societies, shall be construed to extend to benevolent associations, incorporated under the laws of this state that only levy an assessment on the members to create a fund to pay the family of a deceased member and make no profit therefrom, and do not solicit business through agents. Such benevolent associations providing death benefits in excess of three hundred dollars to any one person, or disability benefits not exceeding three hundred dollars in any one year to any one person, or both, shall be known as "fraternal benefit societies"; and those providing benefits of three hundred dollars or less shall be known as "fraternal orders." (Rev., s. 4794; 1899, c. 54, s. 87; 1901, c. 706, s. 2; 1913, c. 46; C. S. 6491.)

Cross Reference.—As to other assessment insurance, see §§ 58-105 et seq.

Editor's Note.—See 12 N. C. Law Rev. 374.

Laws Governing.—Williams v. Supreme Conclave, 172 N. C. 787, 90 S. E. 888, and Wilson v. Supreme Conclave, 174 N. C. 628, 94 S. E. 443, were decided in regard to policies issued before this act. This statute makes it clear that fraternal and assessment orders shall be governed by their own rules and regulations as authorized by the state of their origin. Hollingsworth v. Supreme Council, 175 N. C. 615, 96 S. E. 81. This case gives a long discussion of the application of this law and alters the rule as applied in former cases.

Same—Fraternal Benefit Associations.—This section groups benevolent life insurance companies providing death benefits in excess of $300, in any year to any one person, as fraternal benefit associations, and those of $300 or less, as fraternal orders, and sec. 58-264, relating to fraternal orders, does not apply, and hence fraternal benefit associations fall within the provision of sec. 58-126, that statements or descriptions in the application for the policy are deemed representations and not warranties, which will not avoid a recovery, when untrue, unless material. Gay v. Woodmen of the World, 179 N. C. 210, 102 S. E. 195.

§ 58-264. Fraternal orders defined.—Every in-

corporated association, order, or society doing business in this state on the lodge system, with ritualistic form of work and representative form of government, for the purpose of making provision for the payment of benefits of three hundred dollars or less in case of death, sickness, temporary or permanent physical disability, either as the result of disease, accident, or old age, formed and organized for the sole benefit of its members and their beneficiaries, and not for profit, is hereby declared to be a "fraternal order." Societies and orders which do not make insurance contracts or collect dues or assessments therefor, but simply pay burial or other benefits out of the treasury of their orders, and use their funds for the purpose of building homes or asylums for the purpose of caring for and educating orphan children and aged and infirm people in this state, shall not be considered as "fraternal orders" or "fraternal benefit societies" under this subchapter; and such order or association paying death or disability benefits may also create, maintain, apply, or disburse among its membership a reserve or emergency fund as may be provided in its constitution or by-laws; but no profit or gain may be added to the payments made by a member. (Rev., s. 4795; 1899, c. 54, s. 88; 1901, c. 706, s. 3; 1907, c. 936; 1913, c. 46; C. S. 6492.)

Cross Reference.—See § 58-263 and note thereto.

§ 58-265. Funds derived from assessments and dues.—The fund from which the payment of benefits, as provided for in § 58-264, shall be made, and the fund from which the expenses of such association, order or society shall be defrayed, shall be derived from assessments or dues collected from its members. Such societies or associations shall be governed by the laws of the state governing fraternal orders or societies, and are exempt from the provisions of all general insurance laws of this state, and no law hereafter passed shall apply to such societies unless fraternal orders or societies are designated therein. (Rev., s. 4796; 1899, c. 54, s. 89; 1901, c. 706, s. 2; 1913, c. 46; C. S. 6493.)

Use of Funds Received.—The funds received from assessment are trust funds for orphans and widows and are not subject to use for any other purpose, therefore attachment will not lie. Brenizer v. Royal Arcanum, 141 N. C. 409, 53 S. E. 835.

Assessments Not Governed by Insurance Law.—A fraternal society or association is governed by its own charter and by-laws and an assessment in accordance with its own laws is valid. Hollingsworth v. Supreme Council, 175 N. C. 615, 96 S. E. 81.

§ 58-266. Appointment of member as receiver or collector; appointee as agent for order or society; rights of members.—Assessments and dues referred to in §§ 58-264 and 58-265 may be collected, receipted, and remitted by a member or officer of any local or subordinate lodge of any fraternal order or society when so appointed or designated by any grand, district, or subordinate lodge or officer, deputy, or representative of the same, there being no regular licensed agent or deputy of said grand lodge charged with said duties; but any person so collecting said dues or assessments shall be the agent or representative of such fraternal order or society, or any department thereof, and shall bind them by their acts in collecting and remitting said amounts so collected. Under no circumstances, regardless of any agreement, by-laws, contract, or notice, shall said officer or collector be the agent or representative of the individual member from whom any such collection is made; nor shall said member be responsible for the failure of such officer or collector to safely keep, handle, or remit said dues or assessments so collected, in accordance with the rules, regulations, or by-laws of said society; nor shall said member, regardless of any rules, regulations, or by-laws to the contrary, forfeit any rights under his certificate of membership in said fraternal benefit society by reason of any default or misconduct of any said officer or member so acting. (1921, c. 139; C. S. 6493(a).)

Where plaintiff's evidence showed that it had been the custom of defendant mutual benefit association's collecting agents, to collect dues after the due date but within thirty days thereof, that defendant's home office knew of this custom, and that insured made payment of the dues for the preceding month within thirty days of the due date and died prior to the customary time for the collection of dues for the following month, it was held that the evidence was sufficient to be submitted to the jury on the question of defendant's waiver of the provisions of its certificate and by-laws, requiring certificate of good health before reinstating a policy upon payment of premium after the due date, and upon the verdict of the jury plaintiff was entitled to judgment for the amount of the policy, less the dues for the month not paid. Shackelford v. Sovereign Camp, W. O. W., 209 N. C. 633, 184 S. E. 691.

§ 58-267. Meetings of governing body; principal office; separation of races.—Any such society or order incorporated and organized under the laws of this state may provide for the meeting of its supreme legislative or governing body in any other state, province, or territory wherein such society has subordinate lodges, and all business transacted at such meetings is as valid in all respects as if the meetings were held in this state; but the principal business office of such society shall always be kept in this state. No fraternal order or society or beneficiary association shall be authorized to do business in this state under the provisions of this article, whether incorporated under the laws of this or any other state, province, or territory, which associates with, or seeks in this state to associate with, as members of the same lodge, fraternity, society, association, the white and colored races with the objects and purposes provided in this article. (Rev., s. 4797; 1899, c. 54, s. 91; 1913, c. 46; C. S. 6494.)

§ 58-268. Conditions precedent to doing business.—Any such fraternal, beneficiary order, society, or association as defined by this chapter, chartered and organized in this state or organized and doing business under the laws of any other state, district, province, or territory, having the qualifications required of domestic societies of like character, upon satisfying the commissioner of insurance that its business is proper and legitimate and so conducted, may be admitted to transact business in this state upon the same conditions as are prescribed by this chapter for admitting and authorizing foreign insurance companies to do business in this state, except that such fraternal orders shall not be required to have the capital required of such insurance companies. (Rev., s. 4798; 1899, c. 54, s. 92; 1901, c. 706, s. 2; 1903, c. 438, s. 9; 1913, c. 46; C. S. 6495.)

Requirements for Admission to Do Business.—Fraternal insurance orders are subject to the same rules, regulations, and supervision as foreign insurance companies, when operated from beyond the State, except that they are not

required to make the deposit or have the paid up capital required of other companies. State v. Arlington, 157 N. C. 640, 73 S. E. 122.

Attachment of Funds.—Assessments received are impressed with a trust for widows and orphans and cannot be reached by attachment. Brenizer v. Royal Arcanum, 141 N. C. 409, 53 S. E. 835; Blackwell v. Mutual Reserve Fund Life Ass'n, 141 N. C. 117, 53 S. E. 833.

§ 58-269. Certain lodge systems exempt.—The following beneficial orders or societies shall be exempt from the requirements of this chapter, and shall not be required to pay any license tax or fees nor make any report to the commissioner of insurance, unless the assessment collected for death benefits by the supreme lodge amount to at least three hundred dollars in one year: Beneficial fraternal orders, or societies incorporated under the laws of this state, which are conducted under the lodge system which have the supreme lodge or governing body located in this state, and which are so organized that the membership consists of members of subordinate lodges; that the subordinate lodges accept for membership only residents of the county in which such subordinate lodge is located; that each subordinate lodge issues certificates, makes assessments, and collects a fund to pay benefits to the widows and orphans of its own deceased members and their families, each lodge independently of the others, for itself and independently of the supreme lodge; that each lodge controls the fund for this purpose; that in addition to the benefits paid by each subordinate lodge to its own members, the supreme lodge provides for an additional benefit for such of the members of the subordinate lodges as are qualified, at the option of the subordinate lodge members; that such organization is not conducted for profit, has no capital stock, and has been in operation for ten years in this state.

The commissioner of insurance may require the chief or presiding officer, or the secretary, to file annually an affidavit that such organization is entitled to this exemption. (1911, c. 199; C. S. 6496.)

§ 58-270. Fraternal benefit society defined.—Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which makes provision for the payment of benefits as hereafter prescribed in this article, is declared to be a fraternal benefit society. (1913, c. 89, s. 1; C. S. 6497.)

Applied in Equitable Trust Co. v. Widows' Fund of Oasis, etc., Temples, 207 N. C. 534, 177 S. E. 799.

§ 58-271. Lodge system defined.—A society having a supreme governing or legislative body and subordinate lodges or branches, by whatever name known, into which members are elected, initiated, and admitted in accordance with its constitution, laws, rules, regulations, and prescribed ritualistic ceremonies, which subordinate lodges or branches are required by the laws of such society to hold regular or stated meetings at least once in each month, is deemed to be operating on the lodge system. (1913, c. 89, s. 2; C. S. 6498.)

§ 58-272. Representative form of government defined.—A society is deemed to have a representative form of government when it provides in its constitution and laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws: Provided, that the elective members constitute a majority in number and have not less than two-thirds of the votes, nor less than the votes required to amend its constitution and laws; and Provided further, that the meetings of the supreme or governing body, and the election of officers, representatives, or delegates, are held as often as once in four years. The members, officers, representatives, or delegates of a fraternal benefit society shall not vote by proxy. (1913, c. 89, s. 3; C. S. 6499.)

§ 58-273. Organization.—1 Application.—Ten or more persons, citizens of the United States, and a majority of whom are citizens of this state, who desire to form a fraternal benefit society, as defined by this article, may make and sign (giving their addresses) and acknowledge before some officer competent to take acknowledgment of deeds, articles of incorporation in which shall be stated:

a. The proposed corporate name of the society, which shall not so closely resemble the name of any society or insurance company already transacting business in this state as to mislead the public or lead to confusion.

b. The purpose for which it is formed—which shall not include more liberal powers than are granted by this article: Provided, that any lawful social, intellectual, educational, charitable, benevolent, moral, or religious advantages may be set forth among the purposes of the society—and the mode in which its corporate powers are to be exercised.

c. The names, residences, and official titles of all the officers, trustees, directors, or other persons who are to have and exercise the general control and management of the affairs and funds of the society for the first year or until the ensuing election at which all such officers shall be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate.

2. Papers and Bond Filed.—Such articles of incorporation and duly certified copies of the constitution and laws, rules and regulations, and copies of all proposed forms of benefit certificates, applications therefor, and circulars to be issued by such society, and a bond in the sum of five thousand dollars, with sureties approved by the commissioner of insurance, conditioned upon the return of the advance payments, as provided in this section, to applicants, if the organization is not completed within one year, shall be filed with the commissioner of insurance, who may require such further information as he deems necessary.

3. Preliminary License.—If the purposes of the society conform to the requirements of this article, and all provisions of law have been complied with, the commissioner of insurance shall so certify to the secretary of state and upon his issuing the articles of incorporation shall furnish the incorporators a preliminary license authorizing the society to solicit members as hereinafter provided.

4. Completion of Organization.—Upon receipt of such license from the commissioner of insurance the society may solicit members for the purpose of completing its organization, and shall collect from each applicant the amount of not less than one regular monthly payment, in accordance with its table of rates as provided by its constitution and laws, and shall issue to each applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advanced payments, nor issue any benefit certificate nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death benefit certificates have been secured upon at least five hundred lives for at least one thousand dollars each, or the largest amount written on any one person, and all such applicants for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examinations have been duly filed and approved by the chief medical examiner of such society; nor until there shall be established ten subordinate lodges or branches into which said five hundred applicants have been initiated; nor until there has been submitted to the commissioner of insurance under oath of the president and secretary, or corresponding officers of such society, a list of such applicants, giving their names, addresses, date examined, date approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions, which shall be sufficient to provide for meeting the mortuary obligation contracted, when valued for death benefits upon the basis of the national fraternal congress table of mortality, as adopted by the national fraternal congress, August twenty-third, one thousand eight hundred and ninety-nine, or any higher standard, at the option of the society, and for disability benefits by tables based upon reliable experience, and for combined death and permanent total disability benefits by tables based upon reliable experience, with an interest assumption not higher than four per cent per annum; nor until it shall be shown to the commissioner of insurance by the sworn statement of the treasurer, or corresponding officer of such society, that at least five hundred applicants have each paid in cash at least one regular monthly payment as herein provided per one thousand dollars of indemnity to be effected, which payments in the aggregate shall amount to at least twenty-five hundred dollars. Such advanced payments shall be credited to the mortuary or disability fund on account of such applicants, and no part thereof may be used for expenses, but such payments shall be held in trust and returned to the applicants if the organization is not completed within one year as hereinafter provided.

5. License Issued.—The commissioner of insurance may make such examination and require such further information as he deems advisable, and, upon presentation of satisfactory evidence that the society has complied with all the provisions of law, he shall issue to such society a certificate or license to that effect. Such certificate shall be prima facie evidence of the existence of such society at the date of such certificate.

6. One-year Limit.—No preliminary certificate or license granted under the provisions of this section shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the commmissioner of insurance, upon cause shown unless the five hundred applicants herein required have been secured and the organization has been completed as herein provided; and the articles of incorporation and all proceedings thereunder shall become null and void in one year from the date of such preliminary certificate, or at the expiration of such extended period, unless the society shall have completed its organization and commenced business as herein provided.

7. Discontinuance. — When any domestic society shall have discontinued business for the period of one year, or has less than four hundred members, its charter shall become null and void. 1913, c. 89, s. 11; C. S. 6500.)

§ 58-274. Constitution and by-laws.—Each society shall have power to make a constitution and by-laws for the government of the society, the admission of its members, the management of its affairs, and the fixing and readjusting of the rates of contribution of its members from time to time; it shall have the power to change or amend such constitution and by-laws, and it shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the society. (1913, c. 89, s. 11; C. S. 6501.)

§ 58-275. Amendments to constitution and by-laws.—Every society transacting business under this article shall file with the commissioner of insurance a duly certified copy of all amendments of or additions to its constitution and laws within ninety days after the enactment of the same. Printed copies of the constitution and laws as amended, changed or added to, certified by the secretary or corresponding officer of the society, shall be prima facie evidence of the legal adoption thereof. (1913, c. 89, s. 19; C. S. 6502.)

§ 58-276. Waiver of the provisions of the laws.—The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof, and on all beneficiaries of members. (1913, c. 89, s. 17; C. S. 6503.)

Editor's Note.—See Shackelford v. Sovereign Camp, W. O. W., 209 N. C. 633, 184 S. E. 691, where a distinction is made betwen waiver by local agents, prohibited by this section, and a custom of dealing established over a period of years to the knowledge of the home office.

§ 58-277. Place of meeting; location of office.—Any domestic society may provide that the meetings of its legislative or governing body may be held in any state, district, province, or territory wherein such society has subordinate branches, and all business transacted at such meetings shall be as valid in all respects as if such meetings were held in this state; but its principal office shall be located in this state. (1913, c. 89, s. 15; C. S. 6504.)

§ 58-278. No personal liability for benefits.—Officers and members of the supreme, grand, or any subordinate body of any such incorporated

society shall not be individually liable for the payment of any disability or death benefit provided for in the laws and agreements of such society; but the same shall be payable only out of the funds of such society and in the manner provided by its laws. (1913, c. 89, s. 16; C. S. 6505.)

§ 58-279. Qualifications for membership.—Any society may admit to beneficial membership any person not less than sixteen and not more than sixty years of age, who has been examined by a legally qualified physician, and whose examination has been supervised and approved in accordance with the laws of the society: Provided, that any beneficiary member of such society who shall apply for a certificate providing for disability benefits need not be required to pass an additional medical examination therefor. Nothing herein contained shall prevent such society from accepting general or social members. (1913, c. 89, s. 6; C. S. 6506.)

§ 58-280. Benefits.—1. Every society transacting business under this article shall provide for the payment of death benefits, and may provide for the payment of benefits in case of temporary or permanent physical disability, either as the result of disease, accident, or old age, and for monuments or tombstones to the memory of its deceased members, and for the payment of funeral benefits: Provided, the period of life at which the payment of benefits for disability on account of old age shall commence shall not be under seventy years. Such society shall have the power to give a member, when permanently disabled or on attaining the age of seventy, all or such portion of the face value of his certificate as the laws of the society may provide; but nothing contained in this article shall be so construed as to prevent the issuing of benefit certificates for a term of years less than the whole of life, which are payable upon the death or disability of the member occurring within the term for which the benefit certificate may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one-half of the periodical contribution, against the certificate, with interest payable or compounded annually at a rate not lower than four per cent per annum; but this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contributions, and to contracts affected by such readjustment.

2. Any society which shall show by the annual valuation hereinafter provided for that it is accumulating and maintaining the reserve not lower than the usual reserve computed by the American experience table and four per cent interest, may grant to its members extended and paid-up protection, or such withdrawal equities as its constitution and laws may provide; but such grants shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made. (1913, c. 89, s. 4; C. S. 6507.)

§ 58-281. Beneficiaries.—The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, step-children, children by legal adoption, or to a person or persons dependent upon the member, or, with the consent of the society, any charitable institution maintained by the society; and if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and, from time to time, have the same changed in accordance with the laws, rules and regulations of the society, and no beneficiary shall have or obtain any vested interest in such benefit until the same has become due and payable upon the death of the member. Any society may, by its laws, limit the scope of beneficiaries within the above classes.

Provided, however, that any member or insured named in any contract or certificate of insurance issued by any beneficial fraternal order, lodge, society, or other insurance association, who has neither lawful spouse nor offspring, shall have the right, without regard to the amount payable thereunder, to have the death benefit provided for in any such contract or certificate of insurance made payable, or to have the named beneficiary changed, to the estate of such member or insured, or to his or her executors or administrators, and to make a testamentary disposition of the proceeds thereof, or to have such death benefit made payable, or to have the named beneficiary changed, to a trustee to be named by such member or insured, and to impress the proceeds in the hands of such trustee with a trust, the terms and provisions of the charter, rules, by-laws and regulations of any such beneficial fraternal order, lodge, society, or other insurance association, to the contrary notwithstanding: Provided further, that in case a husband or wife is designated as beneficiary and subsequently comes absolutely divorced from the member or insured, such divorce shall automatically annul the designation. (1913, c. 89, s. 5; 1931, c. 161; 1937, c. 178; C. S. 6508.)

Editor's Note.—The Act of 1931 inserted the words "or with the consent of the society, any charitable institution maintained by the society," beginning in line seven of this section.

The 1937 amendment added the provisos at the end of this section.

See 13 N. C. Law Rev. 95.

This section has heretofore confined the beneficiaries of fraternal insurance policies, with minor exceptions, to relatives and dependents of the insured. As amended, this section now permits the insured to name in addition, as beneficiaries, his estate, or a trustee, anything in the constitution or by-laws of the association to the contrary notwithstanding. A third provision adds that after absolute divorce a wife named as beneficiary loses her rights as such. The effect of the first and third of these provisions is clear. In permitting the insured to designate his estate as beneficiary, the amendment brings fraternal insurance more closely in line with old line insurance. It perhaps renders the proceeds of such a policy available to creditors of a deceased insured and permits wider use of fraternal insurance for investment purposes. In rare instances it will allow a member of an order, who has no near relatives or dependents, to take out such insurance where he heretofore has been prevented from so doing. In destroying the rights of a divorced wife as beneficiary, this section does for an insured what he might unintentionally have neglected to do. The provision permitting the naming of a trustee as beneficiary seems designed to counteract the effects of the recent case of Equitable Trust Co. v. Widows' Fund of Oasis and Omar Temples, 207 N. C. 534, 177 S. E. 799, holding invalid an attempt to name as beneficiary a corporate trustee. As amended, however, the section is

ambiguous. It does not make clear whether the trustee may be a corporation, or whether he must be a natural person. And it leaves unclear whether the beneficiaries of the trust must be relatives or dependents of the insured. If not, the amendment gives the insured carte blanche, by the device of a trust, to name any beneficiary he desires. Such is not in keeping with the usual purpose of fraternal benefit insurance. 15 N. C. Law Rev. 357-358.

Legal dependent means something more than one who is deriving support from another. It imports one who has the right to invoke the aid of the law to require support. And the status of a wife living with her husband as being his legal dependent, entitled in law to his support, is recognized by our statutes. Junior Order United American Mechanics v. Tate, 212 N. C. 305, 308, 193 S. E. 397, 113 A. L. R. 1514.

Payment of Dues Alone Is Not Sufficient to Create Lien against Certificate or Vest Interest in It.—Where insured's wife was named beneficiary, and after her death insured's brother, who became the beneficiary under the terms of the certificate as insured's nearest blood relation, kept the certificate in force until the death of the insured a short time thereafter, it was held that under the terms of the certificate the insured's brother was entitled to the proceeds thereof, to the exclusion of the wife's nephew who claimed under the will of the wife, the payment of dues or premiums alone being insufficient to create a lien against the certificate, or the proceeds thereof, and the wife at no time having any vested interest as the named beneficiary which she could bequeath by will. Sorrell v. Sovereign Camp, W. O. W., 209 N. C. 226, 183 S. E. 400.

A contract in the form of a life insurance policy with a mutual benefit society, which contract stipulates that insured agrees that the society is a Fraternal Benefit Society as defined by § 58-270, is a Fraternal Benefit Contract, not an insurance policy, and governed by this section. Equitable Trust Co. v. Widows' Fund of Oasis, etc., Temples, 207 N. C. 534, 177 S. E. 799.

Right to Change Beneficiary.—The doctrine was fully set forth by the Court of Errors and Appeals of New Jersey, where the court said: "By the terms of such contracts (those of benefit societies) the beneficiary may be changed by the mere will of the member and without the beneficiary's consent. In such case the right of the beneficiary is not property, but a mere expectancy, dependant on the will of the member to whom the certificate is issued. For this reason the beneficiary's interest in the certificate and contract evidenced thereby differs totally from the interest of a beneficiary named in an ordinary life insurance policy containing no provision for the designation of a new beneficiary. The cases, so far as I can discover, are agreed upon this doctrine. This principle is now so well settled that no further authorities need be cited." Pollock v. Hardy, 150 N. C. 211, 214, 63 S. E. 940.

Same—One Disqualified to Take.—A policy of life insurance of a fraternal order is limited to the wife, certain relations and dependents by this statute, with the right of the assured to change the beneficiary at any time, and where he has named his wife as beneficiary and afterwards substitutes the name of another, disqualified to take under the statute, such attempted change is not a revocation of the provisions of the policy first issued and leaves it in force. Andrews v. Most Worshipful Grand Lodge, 189 N. C. 697, 128 S. E. 4.

Bigamous Wife's Right to Recover.—A fraternal assessment benefit association having a representative form of government may, by its contract and constitution, confine the beneficiaries to certain blood relatives, wife, affianced wife, persons dependent upon the member, etc., in conformity with the laws of the State wherein it has its head organization; and where such beneficiary sues upon a policy, claiming as the wife of the deceased member, and it appears that in fact the marriage was bigamous, she may not recover, though the certificate states she was his wife. Applebaum v. United Commercial Travelers, 171 N. C. 435, 88 S. E. 722.

An incorporated trust company, authorized by a trust agreement to collect the proceeds of life insurance policies on the life of the trustor upon his death, may not be named beneficiary in a Fraternal Benefit Contract on the trustor's life, the trustee not being a natural person nor a charitable institution as defined by this section, and being empowered to use the funds for purposes other than for the benefit of the trustor's kindred. Equitable Trust Co. v. Widows' Fund of Oasis, etc., Temples, 207 N. C. 534, 177 S. E. 799.

§ 58-282. Benefit certificates.—Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter, or articles of incorporation or, if a voluntary association, the articles of association, the constitution and laws of the society, and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member; and copies of the same certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof. Any changes, additions, or amendments to the charter or articles of incorporation, or articles of association if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate, shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions, or amendments had been made prior to and were in force at the time of the application for membership. (1913, c. 89, s. 7; C. S. 6509.)

Recovery of Policy Holder When Policy Cancelled.—Where a fraternal benefit society has issued a policy of life insurance to a member, and has changed its plan of business so as to impair the vested rights of the insured under his contract, and refuses to accept the proper premium, and declares the policy void, the insured may maintain his action to recover of the insurer the principal sum of money he has paid on his policy, and simple interest thereon. Wilson v. Supreme Conclave, 174 N. C. 628, 94 S. E. 443.

Altering Constitution or By-Laws.—A general consent of a policy-holder in an assessment fraternal benefit society that the company may thereafter alter or amend its constitution or by-laws does not authorize the society to make such changes therein as will impair the vested right of its members and policy-holders arising under their contract of insurance with the company. Wilson v. Supreme Conclave, 174 N. C. 628, 94 S. E. 443.

Same—Suspension of Members.—Where fraternal benefit insurance societies are required to file certified copy of changes made in their constitution and by-laws with the Insurance Commission within 90 days, and fail to do so, they may not, while thus in default, suspend a member for noncompliance therewith. Wilson v. Supreme Conclave, 174 N. C. 628, 94 S. E. 443.

Proof of Forfeiture of Benefits.—A stipulation in a policy of endowment in a fraternal order requiring the member to be in good standing at the time of his death, and that "the records of the Grand Lodge shall sustain the same," must be construed in reference to provisions in the charter and by-laws of the order, that the member can only be suspended for failure to pay his dues for six months, of which notice shall be given him; and an order or suspension made in his absence will not have the effect of suspending him from benefits when there is no evidence that he had failed to pay his dues for the stated period or that notice had been given in accordance with the constitution and by-laws. Wilkie v. National Council J. O. U. A. M., 151 N. C. 527, 66 S. E. 579, cited and distinguished. Lyons v. Knights of Pythias, 172 N. C. 408, 90 S. E. 423.

False Representations of Insured.—Where an insurance policy in a fraternal order is issued in violation of certain restrictions contained in the constitution and by-laws of the company, and there is evidence tending to show that this fact was known at the time to the applicant, and the policy was issued by reason of false and material statements on the part of the applicant, the company is not estopped, as a conclusion of law, from resisting payment of the policy because of the fact that the agent of the company also knew that the applicant's statements were false. Robinson v. Brotherhood, 170 N. C. 545, 87 S. E. 537.

Nonpayment of Dues.—"It is well settled that in an action upon a life insurance policy the burden of proof is upon the insurance company to show nonpayment of dues or other matters to avoid the policy, when the certificate of insurance has been put in evidence and the death has been shown. Wilkie v. National Council, J. O. U. A. M., 147 N. C. 637, 61 S. E. 580." Harris v. National Council, J. O. U. A. M., 168 N. C. 357, 359, 84 S. E. 405.

Waiver of Defects in Policy.—A policy in the insurance department of a fraternal order cannot be recovered on when issued by a local agent contrary to its rules and regulations as contained in its constitution and by-laws, unless the de-

fect has been waived by the company or it is in some way estopped from insisting on the forfeiture. Robinson v. Brotherhood, 170 N. C. 545, 87 S. E. 537.

§ 58-283. Benefits not subject to debts.—No money or other benefit, charity or relief or aid to be paid, provided, or rendered by any such society or association for the relief of employees including railroad and other relief associations shall be liable to attachment, garnishment, or other process, or be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary or any other person who may have a right thereunder, either before or after payment. (1913, c. 89, s. 18; 1925, c. 83; C. S. 6510.)

Funds Become Trust Funds.—Where the constitution of a foreign fraternal insurance society provided for the creation of a fund to be raised from assessments upon its members for the benefit of widows and orphans of deceased members, any money paid to such fund is impressed with the qualities of a trust for the special purposes expressed, and such fund in the hands of a local collector, which he was bound to pay over to the society's treasurer, is not subject to an attachment by a creditor of the society. Brenizer v. Royal Arcanum, 141 N. C. 409, 53 S. E. 835.

In 3 N. C. Law Rev. at p. 130 in considering this section it is said: it "provides that in the case of fraternal benefit societies, no money or other relief furnished by such societies shall be liable to attachment, garnishment, or other process, to pay any debt or liability of a member or beneficiary, 'either before or after payment.'" Chapter 83 extends this exemption so as to apply to any "society or association for the relief of employees, including railroad and other relief associations."

§ 58-284. Certificates of insurance to members.—Any fraternal benefit society authorized to do business in this state which shall accumulate and maintain the reserves, on all certificates hereafter issued, required by the American Experience Table of Mortality, with Craig's or Buttolph's Extension thereof, or the Standard Industrial Table of Mortality, with an interest assumption of not more than three and one-half per centum per annum, or the American Men Ultimate Table of Mortality, with Bowerman's Extension thereof, with an interest assumption of not more than three and one-half per centum per annum, or some higher standard, may accept members in such manner and upon such showing of eligibility, and issue to its members such forms of certificates in such amounts and payable to such beneficiaries as may be authorized by the society; and such society may issue benefit certificates of insurance to any such members in an amount or amounts not exceeding five thousand ($5,000.00) dollars on the aggregate without medical examination, upon health and character information satisfactory to the society. The provisions of this section shall apply to children under sixteen years of age of members of such society.

This section shall not affect or apply to any organization or society which limit their membership to persons engaged in one or more hazardous occupations in the same or similar lines of business, or in any way affect or repeal any law that now applies to such organizations or societies. (1941, c. 74.)

Editor's Note.—For comment on this enactment, see 19 N. C. Law Rev. 491.

§ 58-285. Funds provided.—1. Any society may create, maintain, invest, disburse, and apply an emergency, surplus, or other similar fund in accordance with its laws. Unless otherwise provided in the contract, such funds shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in subsection two of § 58-280. The funds from which benefits shall be paid and the funds from which the expenses of the society shall be defrayed shall be derived from periodical or other payments by the members of the society and accretions of said funds. But no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this state which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the national fraternal congress table of mortality as adopted by the national fraternal congress, August twenty-third, one thousand eight hundred and ninety-nine, or any higher standard, with interest assumption not more than four per cent per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than four per cent per annum.

2. Deferred payments or installments of claims shall be considered as fixed liabilities on the happening of the contingency upon which such payments or installments are thereafter to be paid. Such liability shall be the present value of such future payments or installments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liability regardless of proposed future collections to meet any such liabilities. (1913, c. 89, s. 8; C. S. 6511.)

§ 58-286. Investment of funds.—Every society shall invest its funds only in securities permitted by the laws of this state for the investment of the assets of life insurance companies: Provided, that any foreign society permitted or seeking to do business in this state, which invests its funds in accordance with the laws of the state in which it is incorporated where it has such laws, shall be held to meet the requirements of this article for the investment of funds. (1913, c. 89, s. 9; C. S. 6512.)

Cross References.—As to investment in bonds guaranteed by the United States, see § 53-44. As to investment in bonds or notes secured by mortgages insured by the Federal Housing Administration, see § 53-45. See also § 53-60 as to investments in Federal Farm loan bonds, and § 142-29 as to investment in refunding bonds of North Carolina.

§ 58-287. Application of funds.—Every provision of the laws of the society for payment by its members, in whatever form made, shall distinctly state the purpose of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses. (1913, c. 89, s. 10; C. S. 6513.)

§ 58-288. Powers of existing societies retained; reincorporation.—Any society now engaged in transacting business in this state may exercise all of the rights conferred by this article, and all the rights, powers, and privileges now exercised

or possessed by it under its charter or articles of incorporation not inconsistent with this article, if incorporated; or, if it be a voluntary association, it may incorporate hereunder. But no society already organized shall be required to reincorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided by law. (1913, c. 89, s. 12; C. S. 6514.)

§ 58-289. Mergers and transfers.—No domestic society shall merge with or accept the transfer of the membership or funds of any other society unless such merger or transfer is evidenced by a contract in writing, setting out in full the terms and conditions of such merger or transfer, and is filed with the commissioner of insurance of this state, together with a sworn statement of the financial condition of each of the societies, by its president and secretary or corresponding officers, and a certificate duly verified under oath of said officers of each of the contracting societies that such merger or transfer has been approved by a vote of two-thirds of the members of the supreme legislative or governing body of each of the societies.

Upon the submission of such contract, financial statements, and certificates, the commissioner of insurance shall examine the same, and if he shall find such financial statements to be correct and the contract to be in conformity with the provisions of this section, and that such merger or transfer is just and equitable to the members of each of the societies, he shall approve the merger or transfer, issue his certificate to that effect, and thereupon the contract of merger or transfer shall be of full force and effect.

In case such contact is not approved, the fact of its submission and its contents shall not be disclosed by the commissioner of insurance. (1913, c. 89, s. 13; C. S. 6515.)

§ 58-290. Accident societies may be licensed.—Any fraternal benefit society heretofore organized and incorporated, and operating within the definition set forth in this article, providing for benefits in case of death or disability resulting solely from accidents, but which does not obligate itself to pay death or sick benefits, may be licensed under the provisions of this article, and shall have all the privileges and be subject to all the provisions and regulations of this article, except the provisions requiring medical examinations, valuations of benefit certificates, and that the certificate shall specify the amount of benefits. (1913, c. 89, s. 27; C. S. 6517.)

§ 58-291. Certain societies not included.—Nothing contained in this article shall be construed to affect or apply to societies which limit their membership to any one hazardous occupation, nor to an association of local lodges of a society now doing business in this state which provides death benefits not exceeding five hundred dollars to any one person or disability benefits not exceeding three hundred dollars in any one year to any one person, or both, nor to any contracts of reinsurance business on such plan in this state, nor to domestic societies which limit their membership to the employees of a particular city or town, designated firm, business house, or corporation, nor to domestic lodges, orders, or associations of a purely religious, charitable, and benevolent description, which do not provide for a death benefit of more than one hundred dollars, or for disability benefits of more than one hundred and fifty dollars to any one person in any one year. The commissioner of insurance may require from any society such information as will enable him to determine whether such society is exempt from the provisions of this article. (1913, c. 89, s. 26; 1925, c. 70, s. 2; C. S. 6518.)

Service on Resident Secretary Valid. — Personal service on resident secretary of fraternal insurance association allowed to do business in the State without a license under this section and §§ 58-15, 58-221, and 58-251, held valid service on the association in action on policy. Winchester v. Grand Lodge of Brotherhood of Railroad Trainmen, 203 N. C. 735, 167 S. E. 49.

§ 58-292. Reports to commissioner of insurance.

1. Annual Report. — Every society transacting business in this state shall annually, on or before the first day of March, file with the commissioner of insurance, in such form as he may require, a statement, under oath of its president and secretary or corresponding officers, of its condition and standing on the thirty-first day of December next preceding, and of its transactions for the year ending on that date, and also shall furnish such other information as the commissioner may deem necessary to a proper exhibit of its business and plan of working. The commissioner may at other times require any further statement he may deem necessary to be made relating to such society.

2. Valuation of Certificates.—In addition to the annual report herein required, each society shall annually report to the commissioner a valuation of its certificates in force on December thirty-first, last preceding, excluding those issued within the year for which the report is filed, in cases where the contributions for the first year in whole or in part are used for current mortality and expenses. Such report of valuation shall show, as contingent liabilities, the present mid-year value of the promised benefits provided in the constitution and laws of such society under certificates then subject to valuation; and as contingent assets, the present mid-year value of the future net contributions provided in the constitution and laws as the same are in practice actually collected. At the option of any society, in lieu of the above, the valuation may show the net value of the certificates subject to valuation hereinbefore provided, and the net value, when computed in case of monthly contributions, may be the mean of the terminal values for the end of the preceding and of the current insurance years.

3. Valuation Ascertained.—Such valuation shall be certified by a competent accountant or actuary, or, at the request and expense of the society, verified by the actuary of the department of insurance of the home state of the society, and shall be filed with the commissioner within ninety days after the submission of the last preceding annual report. The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the national fraternal congress table of mortality as adopted by the national fraternal congress, August twenty-third, one thousand eight hundred and ninety-nine, or, at the option of the society, any

higher table; or, at its option, it may use a table based upon the society's own experience of at least twenty years and covering not less than one hundred thousand lives with interest assumption not more than four per centum per annum. Each such valuation report shall set forth clearly and fully the mortality and interest basis and the method of valuation. Any society providing for disability benefits shall keep the net contributions for such benefits in a fund separate and apart from all other benefit and expense funds and the valuation of all other business of the society: Provided, that where a combined contribution table is used by a society for both death and permanent total disability benefits, the valuation shall be according to tables of reliable experience, and in such case a separation of the funds shall not be required.

4. Test of Solvency.—The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent so long as the funds in its possession are equal to or in excess of its matured liabilities.

5. Report Mailed to Members.—A report of such valuation and an explanation of the facts concerning the condition of the society thereby disclosed shall be printed and mailed to each beneficiary member of the society not later than June first of each year; or, in lieu thereof, such report of valuation and showing of the society's condition as thereby disclosed may be published in the society's official paper, and the issue containing the same mailed to each beneficiary member of the society. (1913, c. 89, s. 20; C. S. 6519.)

§ 58-293. Additional or increased rates.—The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full, and to provide for the creation and maintenance of the funds required by its laws, additional, increased, or extra rates of contribution shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five per cent per annum. 1913, c. 89, s. 20; C. S. 6520.)

§ 58-294. Provisions to insure future security.—If the valuation of the certificates, as hereinbefore provided, on December thirty-first, one thousand nine hundred and seventeen, shall show that the present value of future net contributions, together with the admitted assets, is less than the present value of the promised benefits and accrued liabilities, such society shall thereafter maintain said financial condition at each succeeding triennial valuation in respect of the degree of efficiency as shown in the valuation as of December thirty-first, one thousand nine hundred and seventeen. If at any succeeding triennial valuation such society does not show at least the same condition, the commissioner shall direct that it thereafter comply with the requirements herein specified. If the next succeeding triennial valuation after the receipt of such notice shall show that the society has failed to maintain the condition required herein, the commissioner may, in the absence of good cause shown for such failure, institute proceedings for the dissolution of such society, in accordance with the provisions of this article, or in the case of a foreign society, its license may be canceled in the manner provided in this article.

Any such society, shown by any triennial valuation, subsequent to December thirty-first, one thousand nine hundred and seventeen, not to have maintained the condition herein required, shall, within two years thereafter, make such improvement as to show a percentage of deficiency not greater than as of December thirty-first, one thousand nine hundred and seventeen, or thereafter, as to all new members admitted, to be subject, so far as stated rates of contributions are concerned, to the provisions of this article, applicable in the organization of new societies: Provided, that the net mortuary or beneficiary contributions and funds of such new members shall be kept separate and apart from the other funds of the society. If such required improvement is not shown by the succeeding triennial valuation, then the new members may be placed in a separate class and their certificates valued as an independent society in respect of contributions and funds. (1913, c. 89, s. 20(a); C. S. 6521.)

§ 58-295. Valuation on accumulation basis; tabular basis.—In lieu of the requirements of the two preceding sections, any society accepting in its laws the provisions of this section may value its certificates on a basis herein designated "accumulation basis," by crediting each member with the net amount contributed for each year, and with interest at approximately the net rate earned and by charging him with his shares of the losses for each year, herein designated "cost of insurance," and carrying the balance, if any, to his credit. The charge for the cost of insurance may be according to the actual experience of the society applied to a table of mortality recognized by the law of this state, and shall take into consideration the amount at risk during each year, which shall be the amount payable at death, less the credit to the member. Except as specifically provided in its articles or laws or contracts, no charge shall be carried forward from the first valuation hereunder against any member of any past share of losses exceeding the contributions and credit. If, after the first valuation, any member's share of losses for any year exceeds his credit, including the contribution for the year, the contribution shall be increased to cover his share of the losses. Any such excess share of losses chargeable to any member may be paid out of a fund or contributions especially created or required for such purpose.

Any member may transfer to any plan adopted by the society with net rates on which tabular reserves are maintained, and on such transfer shall be entitled to make such application of his credit as provided in the laws of the society.

Certificates issued, rerated, or readjusted on a basis providing for adequate rates with adequate reserves to mature such certificates upon assumptions for mortality and interest recognized by the law of this state, shall be valued on such basis, herein designated the "Tabular Basis": Provided, that if on the first valuation under this section a deficiency in reserve shall be shown for any such

certificate, the same shall be valued on the accumulation basis.

Whenever, in any society having members upon the tabular basis and upon the accumulation basis, the total of all costs of insurance provided for any year shall be insufficient to meet the actual death and disability losses for the year, the deficiency shall be met for the year from the available funds after setting aside all credits in the reserve; or from increased contributions or by an increase in the number of assessments applied to the society as a whole or to classes of members as may be specified in its laws. Savings from a lower amount of death losses may be returned in like manner as may be specified in its laws.

If the laws of the society so provide, the assets representing the reserves of any separate class of members may be carried separately for such class as if in an independent society, and the required reserve accumulation of such class so set apart shall not thereafter be mingled with the assets of other classes of the society.

A table showing the credits to individual members for each age and year of entry and showing opposite each credit the tabular reserve required on the whole life or other plan of insurance specified in the contract, according to assumptions for mortality and interest recognized by the law of this state and adopted by the society, shall be filed by the society with each annual report, and also be furnished to each member before July first of each year.

In lieu of the aforesaid statement there may be furnished to each member within the same time a statement giving the credit for such member and giving the tabular reserve and level rate required for a transfer carrying out the plan of insurance specified in the contract. No table or statement need be made or furnished where the reserves are maintained on the tabular basis.

For this purpose individual bookkeeping accounts for each member shall not be required, and all calculations may be made by actuarial methods.

Nothing herein contained shall prevent the maintenance of such surplus over and above the credits on the accumulation basis and the reserves on the tabular basis pursuant to its laws; nor be construed as giving to the individual member any right or claim to any such reserve or credit other than in manner as expressed in the contract and its laws; nor as making any such reserve or credits a liability in determining the legal solvency ot the society. (1913, c. 89, s. 20(b); C. S. 6522.)

§ 58-296. Examination of domestic societies.—The commissioner of insurance, or any person he may appoint, shall have power of visitation and examination into the affairs of any domestic society. He may employ assistants for the purpose of such examination, and he, or any person he may appoint, shall have free access to all the books, papers, and documents that relate to the business of the society, and may summon and qualify as witness under oath and examine its officers, agents, and employees or other persons in relation to the affairs, transactions, and condition of the society.

The expense of such examination shall be paid by the society examined upon statement furnished by the commissioner of insurance, and the examination shall be made at least once in three years. (1913, c. 89, s. 21; C. S. 6523.)

§ 58-297. Proceedings for dissolution.—When after examination the commissioner of insurance is satisfied that any domestic society has failed to comply with any provision of this article, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently; or whenever any domestic society, after the existence of one year or more, shall have a membership of less than four hundred (or shall determine to discontinue business), the commissioner of insurance may present the facts relating thereto to the attorney-general who shall, if he deem the circumstances warrant, commence an action in quo warranto in a court of competent jurisdiction, and such court shall thereupon notify the officers of such society of a hearing, and if it shall then appear that such society should be closed, it shall be enjoined from carrying on any further business, and a receiver shall be appointed to take possession of its books, papers, moneys, and other assets and immediately, under the direction of the court, proceed to close its affairs and distribute its funds to those entitled thereto.

No such proceedings shall be commenced by the attorney-general against any such society until after notice has been duly served on its chief executive officers and a reasonable opportunity given to it, on a date to be named in the notice, to show cause why such proceedings should not be commenced. (1913, c. 89, s. 21; C. S. 6524.)

§ 58-298. Proceedings only by attorney-general.—No application for injunction against or proceedings for the dissolution of or the appointment of a receiver for any such domestic society or branch thereof shall be entertained by any court in this state unless the same is made by the attorney-general. (1913, c. 89, s. 22; C. S. 6525.)

§ 58-299. Examination of foreign societies.—The commissioner of insurance or any person whom he may appoint may examine any foreign society transacting or applying for admission to transact business in this state. The commissioner may employ assistants, and he, or any person he may appoint, shall have free access to all the books, papers, and documents that relate to the business of the society, and may summon and qualify as witness under oath and examine its officers, agents, and employees and other persons in relation to the affairs, transactions, and condition of the society. He may, in his discretion, accept in lieu of such examination the examination of the insurance department of the state, territory, district, province, or country where such society is organized. The actual expenses of examiners making any such examination shall be paid by the society upon statement furnished by the commissioner of insurance.

If any such society or its officers refuse to submit to such examination or to comply with the provisions of the section relative thereto, its authority to write new business in this state shall be suspended or license refused until satisfactory evidence is furnished the commissioner relating to its condition and affairs, and during such suspension the society shall not write new business in this state. (1913, c. 89, s. 23; C. S. 6526.)

§ 58-300. No adverse publications. — Pending, during, or after an examination or investigation of any such society, either domestic or foreign, the commissioner of insurance shall make public no financial statement, report, or finding, nor shall he knowingly permit to become public any financial statement, report, or finding affecting the status, standing, or rights of any such society, until a copy thereof has been served upon the society, at its home office, nor until the society has been afforded a reasonable opportunity to answer any such financial statement, report, or finding, and to make such showing in connection therewith as it may desire. (1913, c. 89, s. 24; C. S. 6527.)

§ 58-301. Revocation of license.—When the commissioner of insurance on investigation is satisfied that any foreign society transacting business under this article has exceeded its powers, or has failed to comply wth any provisions of this article, or is conducting business fraudulently, or is not carrying out its contracts in good faith, he shall notify the society of his findings, and state in writing the grounds of his dissatisfaction, and after reasonable notice require the society, on a date named, to show cause why its license should not be revoked. If on the date named in the notice such objections have not been removed to the satisfaction of the commissioner, or the society does not present good and sufficient reasons why its authority to transact business in this state should not at that time be revoked, he may revoke the authority to continue business in this state. All decisions and findings of the commissioner made under the provisions of this section may be reviewed by proper proceedings in any court of competent jurisdiction, as provided in this article. (1913, c. 89, s. 25; C. S. 6528.)

§ 58-302. Criminal offenses.—Any person, officer, member, or examining physician of any society authorized to do business under this article who shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any application for membership, or for the purpose of obtaining money from or benefit in any society transacting business under this article, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the county jail for not less than thirty days nor more than one year, or both, in the discretion of the court.

Any person who shall solicit membership for, or in any manner assist in procuring membership in any fraternal benefit society not licensed to do business in this state, or who shall solicit membership for, or in any manner assist in procuring membership in any such society not authorized as herein provided, to do business as herein defined in this state, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty nor more than two hundred dollars.

Any society, or any officer, agent, or employee thereof, neglecting or refusing to comply with, or violating, any of the provisions of this article, the penalty for which neglect, refusal, or violation is not specified in this section, shall be fined not exceeding two hundred dollars upon conviction thereof. (1913, c. 89, s. 28; C. S. 6529.)

Cross Reference.—As to penalties for using funds of insurance companies for political purposes, see § 163-206.

§ 58-303. Merger, consolidation, or reinsurance of risks, with other fraternal benefit societies.—No fraternal benefit society organized under the laws of this state to do the business of life, accident, or health insurance, shall consolidate or merge with any other fraternal benefit society, or reinsure its insurance risks, or any part thereof with any other fraternal benefit society, or assume or reinsure the whole or any portion of the risks of any other fraternal benefit society, except as herein provided. No fraternal benefit society or subordinate body thereof shall merge, consolidate with, or be reinsured by any company or association not licensed to transact business as a fraternal beneficiary society. (1921, c. 60, s. 1; C. S. 6529(a).)

§ 58-304. Contract approved by governing bodies of parties to same; approval by commissioner of insurance.—When any such fraternal benefit society shall propose to consolidate or merge its business or to enter into any contract of reinsurance, or to assume or reinsure the whole or any portion of the risks of any other fraternal benefit society, the proposed contract in writing setting forth the terms and conditions of such proposed consolidation, merger, or reinsurance shall be submitted to the legislative or governing bodies of each of said parties to said contract after due notice, and if approved, such contract as so approved, shall be submitted to the commissioner of insurance of this state for his approval, and the parties to said contract shall at the same time submit a sworn statement showing the financial condition of each of such fraternal benefit societies as of the thirty-first day of December preceding the date of such contract: Provided, that such commissioner of insurance may, within his discretion, require such financial statement to be submitted as of the last day of the month preceding the date of such contract. The commissioner of insurance shall thereupon consider such contract of consolidation, merger, or reinsurance, and if satisfied that the interests of the certificate holders of such fraternal benefit societies are properly protected, and that such contract is just and equitable to the members of each of such societies, and that no reasonable objection exists thereto, shall approve said contract as submitted. In case the parties corporate to such a contract shall have been incorporated in separate states, or territories, such contract shall be submitted as herein provided to the commissioner of insurance of each of such incorporating states, or territories, to be considered and approved separately by each of such commissioners of insurance. When said contract of consolidation, merger, or reinsurance shall have been approved as hereinabove provided, such commissioner of insurance shall issue a certificate to that effect, and thereupon the said contract of consolidation, merger, or reinsurance shall be in full force and effect. In case such contract is not approved, the fact of its submission and its contents shall not be

disclosed by the commissioner of insurance. (1921, c. 60, s. 2; C. S. 6529(b).)

§ 58-305. Expenses; compensation to officers or employees of contracting parties and state employees.—All necessary and actual expenses and compensation incident to the proceedings provided in this law shall be paid as provided by such contract of consolidation, merger, or reinsurance: Provided, however, that no brokerage or commission shall be included in such expenses and compensation or shall be paid to any person by either of the parties to any such contract in connection with the negotiation therefor or execution thereof, nor shall any compensation be paid to any officer or employee of either of the parties to such contract for directly or indirectly aiding in effecting such contract of consolidation, merger, or reinsurance. An itemized statement of all such expenses shall be filed with the commissioner of insurance, subject to approval, and when approved the same shall be binding on the parties thereto. Except as fully expressed in the contract of consolidation, merger or reinsurance, or itemized statement of expenses, as approved by the commissioner of insurance, or commissioners, as the case may be, no compensation shall be paid to any person or persons, and no officer or employee of the state shall receive any compensation, directly or indirectly, for in any manner aiding, promoting, or assisting any such consolidation, merger, or reinsurance. (1921, c. 60, s. 3; C. S. 6529(c).)

§ 58-306. Violation of law a felony.—Any person violating the provisions of §§ 58-303, 58-304, and 58-305 shall be guilty of a felony, and upon conviction shall be liable to a fine of not more than five thousand dollars, or to imprisonment for not more than five years, or to both fine and imprisonment. (1921, c. 60, s. 4; C. S. 6529(d).)

§ 58-307. Appointment of commissioner of insurance as process agent.—Every foreign fraternal benefit society except labor organizations which limit their admission to membership to persons engaged in one or more hazardous occupations in the same or similar lines of business now transacting business in this state shall, within thirty days after the passage of this section, and every such society hereafter applying for admission shall, before being licensed, appoint in writing the commissioner of insurance and his successors in office to be its true and lawful attorney upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the society, and that the authority shall continue in force so long as any liability remains outstanding in this state. Copies of such appointment, certified by said commissioner of insurance, shall be deemed sufficient evidence thereof and shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service shall be made in duplicate upon the commissioner of insurance, or in his absence upon the person in charge of his office, and shall be deemed sufficient service upon said society. When legal service against any such society is served upon said commissioner of insurance he shall forthwith forward by registered mail one of the duplicate copies, prepaid and directed to its secretary or corresponding officer. No such service shall be valid or binding against any such society when it is required thereunder to file its answer, pleading or defense in less than thirty days from the date of mailing the copy of such service to such society. Legal process shall not be served upon any such society except in the manner provided therein. As a condition precedent to a valid service of process and to the duty of the commissioner in the premises, the plaintiff shall pay to the commissioner of insurance at the time of service the sum of one ($1.00) dollar, which the plaintiff shall recover as taxable costs if he prevails in his action. (1939, c. 130.)

Cross Reference.—As to other ways in which a foreign insurance company may be served with a copy of process, see §§ 1-97, 55-38.

Art. 29. Whole Family Protection.

§ 58-308. Insurance on children.—Any fraternal order or fraternal benefit society authorized to do business in this State and operating on the lodge plan may provide in its constitution and by-laws, in addition to other benefits provided for therein, for the payment of death or annuity benefits upon the lives of children between the ages of one and sixteen years at next birthday, for whose support and maintenance a member of such society is responsible. The society may at its option organize and operate branches for such children and membership in local lodges, and initiation therein shall not be required of such children, nor shall they have any voice in the management of the society. The total benefits payable as above provided shall in no case exceed the following amounts at ages at next birthday at time of death, respectively, as follows: one year, twenty dollars; two years, fifty dollars; three years, seventy-five dollars; four years, one hundred dollars; five years, one hundred twenty-five dollars; six years, one hundred fifty dollars; seven years, two hundred dollars; eight years, two hundred fifty dollars; nine years, three hundred dollars; ten years, four hundred dollars; eleven years, five hundred dollars; twelve years, six hundred dollars; thirteen years, seven hundred dollars; fourteen years, eight hundred dollars; fifteen years, nine hundred dollars; sixteen years, one thousand dollars.

Provided, any fraternal benefit society which shall accumulate and maintain the reserves required by a table of mortality not lower than the American Experience Table of Mortality, with an interest assumption of not more than four per cent, may accept members at such ages, and children under sixteen years of age, in such manner and upon such showing of eligibility, and issue to its members, and children under sixteen years of age, such forms of certificates, payable to such beneficiaries, and for such amounts, as its constitution and laws may provide. Children under sixteen years of age shall have no voice or vote. (1917, c. 239, s. 1; 1931, c. 38; 1937, c. 208; C. S. 6530.)

Editor's Note.—The Act of 1931 repealed the former section and substituted the above in lieu thereof. Formerly

the ages were set at from two to eighteen and the amounts from $34 to $600.

The 1937 amendment added the proviso and the last sentence.

§ 58-309. Medical examination; certificates and contributions.—No benefit certificate as to any child shall take effect until after medical examination or inspection by a licensed medical practitioner, in accordance with the laws of the society, nor shall any such benefit certificate be issued unless the society shall simultaneously put in force at least five hundred such certificates, on each of which at least one assessment has been paid, nor where the number of lives represented by such certificate falls below five hundred. The death benefit contributions to be made upon such certificate shall be based upon the "Standard Mortality Table" or the "English Life Table Number Six," and a rate of interest not greater than four per cent per annum, or upon a higher standard; but contributions may be waived or returns may be made from any surplus held in excess of reserve and other liabilities, as provided in the by-laws; and extra contributions shall be made if the reserves hereafter provided for become impaired. (1917, c. 239, s. 2; C. S. 6531.)

§ 58-310. Reserve fund; exchange of certificates.—Any society entering into such insurance agreements shall maintain on all such contracts the reserve required by the standard of mortality and interest adopted by the society for computing contributions as provided in § 58-309, and the funds representing the benefit contributions and all accretions thereon shall be kept as separate and distinct funds, independent of the other funds of the society, and shall not be liable for nor used for the payment of the debts and obligations of the society other than the benefits herein authorized. A society may provide that when a child reaches the minimum age for initiation into membership in such society, any benefit certificate issued hereunder may be surrendered for cancellation and exchanged for any other form of certificate issued by the society: Provided, that such surrender will not reduce the number of lives insured in the branch below five hundred; and upon the issuance of such new certificate any reserve upon the original certificate herein provided for shall be transferred to the credit of the new certificate. Neither the person who originally made application for benefits on account of such child, nor the beneficiary named in such original certificate, nor the person who paid the contributions, shall have any vested right in such new certificate, the free nomination of a beneficiary under the new certificate being left to the child so admitted to benefit membership. (1917, c. 239, s. 3; C. S. 6532.)

§ 58-311. Separation of funds.—An entirely separate financial statement of the business transactions and of assets and liabilities arising therefrom shall be made in its annual report to the commissioner of insurance by any society availing itself of the provisions hereof. The separation of assets, funds, and liabilities required hereby shall not be terminated, rescinded, or modified, nor shall the funds be diverted for any use other than as specified in the preceding section, as long as any certificates issued hereunder remain in force, and this requirement shall be recognized and enforced in any liquidation, reinsurance, merger, or other change in the condition or the status of the society. (1917, c. 239, s. 4; C. S. 6533.)

§ 58-312. Payments to expense or general fund.—Any society shall have the right to provide in its laws and the certificate issued hereunder for specified payments on account of the expense or general fund, which payments shall or shall not be mingled with the general fund of the society, as its constitution and by-laws may provide. (1917, c. 239, s. 5; C. S. 6534.)

§ 58-313. Continuation of certificates.—In the event of the termination of membership in the society by the person responsible for the support of any child on whose account a certificate may have been issued as provided herein, the certificate may be continued for the benefit of the estate of the child, provided the contributions are continued, or for the benefit of any other person responsible for the support and maintenance of such child who shall assume the payment of the required contributions. (1917, c. 239, s. 6; C. S. 6535.)

Art. 30. General Provisions for Societies.

§ 58-314. Appointment of trustees to hold property.—The lodges of Masons, Odd Fellows, Knights of Pythias, camps of Woodmen of the World, councils of the Junior Order of United American Mechanics, orders of the Elks, Young Men's Christian Associations, Young Women's Christian Associations, societies for the care of orphans and indigent children, societies for the rescue of fallen women, and any other benevolent or fraternal orders and societies, may appoint from time to time suitable persons trustees of their bodies or societies, in such manner as they deem proper, which trustees, and their successors, shall have power to receive, purchase, take, and hold property, real and personal, in trust for such society or body. The trustees shall have power, when instructed so to do by resolution adopted by the society or body which they represent, to mortgage or sell and convey in fee simple any real or personal property owned by the society or body; and the conveyances so made by the trustees shall be effective to pass the property in fee simple to the purchaser or to the mortgagee or trustee for the purposes in such conveyance or mortgage expressed. If there shall be no trustee, then any real or personal property which could be held by such trustees shall vest in and be held by such charitable, benevolent, religious, or fraternal orders and societies, respectively, according to such intent. (1907, c. 22; 1915, cc. 149, 186; 1923, c. 257; C. S. 6536.)

Suspension of Members.—Where a local fraternal and benevolent lodge has existed under the constitution and by-laws of the supreme lodge requiring written notice to be given to its members before suspension as a financial member, etc., for nonpayment of dues, etc., and such notice has not been given accordingly: Held, a resolution passed at a meeting of the local lodge authorizing a sale and conveyance of its property by trustees without complying with this requirement, is valid, and at the suit of such wrongfully suspended members, an injunction will lie. Tyler v. Howell, 192 N. C. 433, 135 S. E. 133.

§ 58-315. Unauthorized wearing of badges, etc.—Any person who fraudulently and wilfully wears the badge or button of any secret or fraternal organization or society, either in the identical form or in such near resemblance thereto as to be a colorable imitation thereof, or who fraudulently and wilfully uses the name of any such order or organization, the titles of its officers, or its insignia, ritual, or ceremonies, unless entitled to wear or use the same under the constitution and by-laws, rules and regulations of such secret or fraternal organization or society, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of fifty dollars or imprisonment for thirty days, in the discretion of the court. (1907, c. 968; 1911, c. 37; 1915, c. 252; C. S. 6537.)

Art. 31. Non-Profit Life Benefit Association.

§ 58-316. Cooperative non-profit life benefit association defined.—Any corporation or association, domestic or foreign, issuing benefit certificates or policies of life, health or accident insurance upon the lives or health of its members, having a representative form of government without capital stock and conducting its business without profit and for the sole benefit of its members and their beneficiaries and maintaining the reserves as herein provided and all contracts issued by it, which shall make acceptable written application to become such and shall comply with the provisions of this article is defined as a "Cooperative Nonprofit Life Benefit Association." (1927, c. 30, s. 1.)

§ 58-317. Form of corporate government.—Such association shall have a constitution, laws and/or by-laws providing for a representative form of government for the management of the association; providing for a legislative or governing body composed of its officers and representatives to be elected either by the adult members or by delegates elected directly or indirectly by the adult members, and providing for the manner of selecting representatives of the members for membership in its legislative body. The elected members of the governing body shall have not less than two-thirds of the votes of said body, nor less than the votes required to amend its constitution, laws and by-laws, and the governing body shall meet as often as once in four years (or any time during the fourth year after a meeting). Meetings of its governing body may be held in any state, province or country where such association is authorized to do business. The members of the governing body shall not vote by proxy.

Officers to conduct the business of the association shall be elected by such body, but not for a longer period than four years or/and until the subsequent quadrennial meeting of said body. Such officers, by whatever name known, shall constitute the Board of Directors. (1927, c. 30, s. 2.)

§ 58-318. Basis upon which insurance contracts may be issued.—Any such association maintaining reserves based upon the American Experience Table of Mortality, with an interest assumption of not more than 4% or some higher standard, or upon any minimum standard hereafter allowed by law in this State for legal reserve life insurance companies, may issue contracts of insurance, life, health, accident, annuities and endowments or all of them combined or separately, upon the health and lives of children and adults.

Any association licensed to do business under the provisions of this act, which has theretofore enacted a provision in its constitution, laws and /or by-laws in relation to the rates to be paid by its members, or lien and interest charges in lieu of such rates, or any part thereof, shall maintain the provisions of such constitution, laws and/or by-laws in full force and effect or the equivalent thereof in all particulars as to such members.

Any such association desiring to do business in this State under the provisions of this article, which has all or any portion of its membership upon a rate or premium basis not producing the reserves herein required under the American Experience Table of Mortality with an interest assumption of not more than 4% and which also possesses the power to increase the rates or call extra assessments upon said membership, may be permitted to do business in this State as such association defined in this article if it shall, as to all business hereafter acquired by it, maintain reserves on such business based upon the American Experience Table of Mortality with an interest assumption of not more than four per cent, or upon any minimum standard allowed by law for legal reserve life insurance companies in this State or the state of its domicile; and the contracts of members theretofore admitted to membership shall be forever subject to increased rates or extra assessments and the association shall maintain the reserves on all of its prior business on a basis not less than the National Fraternal Congress Table of Mortality with an interest assumption of not more than four (4) per cent, or upon a table of mortality not less than that derived from its own experience covering a period of not less than twenty years and involving not less than one hundred thousand lives, with an interest assumption of not more than four per cent.; and the officers of such association shall provide for such increased rates or extra assessments as shall be necessary to maintain such reserves. (1927, c. 30, ss. 3, 3(a); 1927, c. 252.)

Editor's Note.—The 1927 amendment, ch. 252, substituted four per cent for three and one-half per cent.

§ 58-319. Contracts in writing; fees not set out in policy forbidden.—All contracts for insurance or benefits shall be in writing. It shall be unlawful for any such association or any officer or agent to include in the sum charged a member, any fee, compensation, charge or perquisite whatsoever not specified in the policy or certificate except that a local medical examiner's fee may be charged. (1927, c. 30, s. 4.)

§ 58-320. All policies mutual and participating.—All beneficiary certificates or policies issued by such association on said American Experience Table of Mortality with said interest assumption or any higher standard, shall be mutual and participating, and the association may provide for automatic paid up or extended insurance for an amount not to exceed the amount the reserve to the credit of such member will purchase in the event of suspension after said certificate shall have

been in force for not less than two full years or more from date of issue, and shall carry such liability on its books. (1927, c. 30, c. 5.)

§ 58-321. Benefit not subject to seizure under process.—No money or other benefit, charity or relief or aid to be paid, provided or rendered by any such association, shall be liable to attachment, garnishment or other process, or be seized, taken, appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of a member, or his beneficiary, or any other person who may have a right thereunder, either before or after payment. (1927, c. 30, s. 6.)

§ 58-322. Officers and members not personally liable.—Officers and members of the supreme, grand or any subordinate body of such association, by whatever name known, shall not be individually liable for the payment of any disability or death or other benefits provided for in the laws and contracts of such association, but such benefits shall be payable out of the funds of such association and in the manner provided by its laws. (1927, c. 30, s. 7.)

§ 58-323. Authority to make laws.—Every such association shall have the power to make a constitution, laws and/or by-laws for the government of the association, the admission of its members, the management of its affairs and the fixing and readjustment of the rates of contribution of its members from time to time, and it shall have the power to change, add to or amend such constitution, laws or by-laws and shall have such other powers as are necessary to carry into effect the objects and purposes of the association; it may make refunds to its members equitably of any surplus funds of the association. (1927, c. 30, s. 8.)

§ 58-324. Constitution, laws and by-laws must be filed.—Every such association transacting business under this act shall file with the commissioner of insurance of this state, a duly certified copy of its constitution, laws or by-laws and all amendments or additions thereto. Copies of the same, certified to by the secretary or corresponding officer of the association, shall be prima facie evidence of the legal adoption and filing thereof. (1927, c. 30, s. 9.)

§ 58-325. Benefits, loan values and dividends.—Such association may provide for stipulated premiums and death, annuity, endowment and disability benefits, and for cash surrender and loan values to an amount not exceeding the reserve or the equivalent thereof, in paid up or extended term insurance, based upon the mortality standards set forth in this article. (1927, c. 30, s. 10.)

§ 58-326. May maintain hospitals and homes.—Such association may maintain homes for aged members, or children's homes, hospitals or recreational centers, or any or all of said features, or any other charitable institution, and may provide for the erection of monuments or memorials to deceased members: Provided, any such expenses may not be paid from the mortuary fund or reserves herein required. (1927, c. 30. s. 11.)

§ 58-327. Organization of coöperative non-profit life benefit association. — When ten or more citizens of the United States, a majority of whom are citizens of this State, desire to form an association under the provisions of this article, they shall adopt articles of incorporation and a constitution, laws or by-laws and file the same with the commissioner of insurance of this state who shall grant them temporary permission to solicit members and collect premiums therefrom, but without the right to issue contracts until licensed to do business; and when such incorporators have presented to the commissioner of insurance proof that they have five hundred members or more, and have collected from them assessments or premiums sufficient to pay the maximum amount of any proposed policy to be issued, and upon depositing with the commissioner of insurance ten thousand dollars ($10,000) in securities to be approved by him, then said commissioner of insurance may grant to said association a certificate of authority and permission to do business under this article. (1927, c. 30. s. 12.)

§ 58-328. Corporation now doing business in this State may qualify under this article.—Any association, domestic or foreign, now engaged in transacting business in this State, which can qualify under the provisions of this article as a "Coöperative Non-profit Life Benefit Association," may, upon making application therefor, be granted a license by the commissioner of insurance to do business as such under this article, provided, it has accumulated reserves on its policies in force in a sum of not less than one hundred thousand dollars ($100,000), properly invested. (1927, c. 30, s. 13.)

§ 58-329. License granted.—Any domestic or foreign association wishing to do business under the provisions of this article, under whatever name it may conduct its business, upon making a written application and submitting proof satisfactory to the commissioner of insurance of this state that its business, as conducted, and its reserves on hand comply with the provisions of this article, upon paying to the commissioner of insurance the sum of two hundred dollars ($200) as license fee and all other fees assessed against such company shall be licensed to do business in this State as such association until the first day of the following April. Any such association, admitted to do business under this article in this State, which shall fail to comply with the provisions of this article, may have its license revoked, and upon failing to maintain its reserves as herein required, may be liquidated by the courts or by the commissioner of insurance as may be provided by law for the liquidation of legal reserve life insurance companies. (1927, c. 30, s. 14.)

§ 58-330. Annual statement and license.—Every such association doing business in this State shall annually file with the commissioner of insurance on or before the first day of March in each year a full and complete sworn statement of its financial condition on the thirty-first day of December next preceding. Such statement shall plainly exhibit all real and contingent assets and liabilities and a complete account of its income and disbursements during the year. The commis-

sioner of insurance is hereby empowered to require such further information as may be reasonably necessary to satisfy him that the statements contained in the sworn statement are true, and he may thereupon grant a renewal of such license to such association to do business in this State which shall continue in full force and effect until a new license be issued or specifically refused unless revoked for good cause. For each such license, or annual renewal thereof, the association shall pay the commissioner of insurance two hundred dollars ($200). Such license or a duplicate thereof shall be prima facie evidence that such association is a Coöperative Non-Profit Life Benefit Association within the meaning of this article. When the commissioner of insurance refuses to license any such association or revokes its authority to do business in this State, he shall reduce his ruling, order or decision to writing and file the same in his office and furnish a copy thereof, together with a statement of his reasons for his ruling to the officers of the association upon request, and the action of the commissioner of insurance shall be reviewable by proper proceedings in any court of competent jurisdiction within the State. Except as herein provided, such association shall be governed by the laws of this State relative to or affecting life insurance companies. (1927, c. 30, s. 15.)

§ 58-331. Examination of association. — The commissioner of insurance or any person he may appoint shall have the power of visitation and examination into the affairs of any such association. He may employ assistants for such purpose and they shall have free access to all the books, papers and documents that relate to the business of the association, and may summon and qualify as witnesses under oath and examine its officers, agents and employees or other persons in relation to the condition of its business. The expenses of such examination shall be paid by the association examined upon a statement furnished by the commissioner of insurance. As to all such foreign associations doing business in this State, the commissioner of insurance, in his discretion, may accept in lieu of such examination the report of the examination of the commissioner of insurance of the state, territory, district, province or country where such association is organized or a report of an examination made of such association by the commissioner of insurance of any state. (1927, c. 30, s. 16.)

§ 58-332. Investments.—The funds of such association shall be invested in the same securities as provided by law for other domestic companies, and if a foreign association, in such securities as may be provided by the laws of its domicile. (1927, c. 30, s. 17.)

§ 58-333. Premium tax; reports.—The officers of such association shall file the reports required by § 58-67 and shall pay the same premium tax as is now or shall hereafter be provided for other life insurance companies. (1927, c. 30, s. 18.)

§ 58-334. Foreign associations may incorporate under this article.—Any foreign association, now or hereafter doing business in this state or conducting a business enabling it to qualify to do business under this article in this state, may become incorporated in this state as such association under whatever name it shall select, upon filing with the commissioner of insurance a resolution of its board of directors or of a similar body by whatever name known, or of its legislative body, requesting to be incorporated as such association of this state, and submitting proof of its financial qualifications under this article: Provided, the name chosen shall not conflict with the name of some other organization doing business in this state so as to cause confusion. The officers of such associations shall thereupon retain their respective offices for the terms for which they were elected. Such association so reincorporated in this state shall maintain a general office within this state. (1927, c. 30, s. 19.)

§ 58-335. To become a legal reserve life company.—Any such association filing with the commissioner of insurance a resolution of its board of directors or similar body, by whatever name known, or of its legislative body, making a request to become a legal reserve life insurance company, upon submitting proof satisfactory to the commissioner of insurance that the condition of its business qualifies it under the laws of this State, to be classed as a legal reserve life insurance company, shall thereupon become a legal reserve life insurance company under such name and such plan as may be approved by the commissioner of insurance. (1927, c. 30, s. 20.)

§ 58-336. Election of corporation to accept article.—This article shall not apply to any corporation, domestic or foreign, now or hereafter doing business in this State, unless said corporation, by action of its board of directors or other properly constituted body, elects to have said corporation come under the provisions hereof. (1927, c. 30, s. 21.)

§ 58-337. Suit against association; where instituted.—Suit may be instituted against said association in any county in this State in any court having jurisdiction. (1927, c. 30, s. 22.)

§ 58-338. Service of process on commissioner of insurance.—Every coöperative non-profit life benefit association, whether domestic or foreign, before it shall be permitted to transact business in this State, shall appoint in writing the commissioner of insurance and his successor in office to be its true and lawful attorney on whom all legal process and legal notices in any action or proceeding against it in this State shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon said association, and that the authority of such commissioner of insurance shall continue in force so long as any liability remains outstanding in this State. (1927, c. 30, s. 23.)

§ 58-339. Mode of service; time to file answer.—Copies of such appointment, certified by said commissioner of insurance, shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original. Service of process in all suits and proceedings against such association shall be made only upon such attorney and must be made in

duplicate upon him, or in his absence upon the person in charge of his office, and shall be deemed sufficient service upon such association: Provided, however, that no such service shall be deemed valid or binding against such association when it is required thereunder to file its answer, pleading or defense in less than thirty days from the date of service upon such attorney. When legal process against such association is served upon said commissioner of insurance, he shall forthwith forward by mail one of the duplicate copies, directed to its secretary or corresponding officer at the home office of the association. Legal process shall not be served upon any such association except in the manner herein provided. (1927, c. 30, s. 24.)

§ 58-340. Commissioner of insurance defined.—The term "Commissioner of insurance," as used in this article, shall include the person, board or department of this State, under whatever name known, supervising the granting of licenses to insurance organizations to do business in this State. (1927, c. 30, s. 25.)

Chapter 59. Partnership.

Art. 1. Uniform Limited Partnership Act.

Art. 2. Uniform Partnership Act.

Part 1. Preliminary Provisions.

Part 2. Nature of a Partnership.

Part 3. Relations of Partners to Persons Dealing with the Partnership.

Part 4. Relations of Partners to One Another.

Part 5. Property Rights of a Partner.

Part 6. Dissolution and Winding Up.

Art. 1. Uniform Limited Partnership Act.

§ 59-1. Limited partnership defined.—A limited partnership is a partnership formed by two or more persons under the provisions of § 59-2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership. (1941, c. 251, s. 1.)

Editor's Note.—For comment on this enactment, see 19 N. C. Law Rev. 503.

§ 59-2. Formation.—(1) Two or more persons desiring to form a limited partnership shall

(a) Sign and swear to a certificate, which shall state

I. The name of the partnership,

II. The character of the business,

III. The location of the principal place of business,

IV. The name and place of residence of each member; general and limited partners being respectively designated,

V. The term for which the partnership is to exist,

VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,

VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,

VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned,

IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,

X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,

XI. The right, if given, of the partners to admit additional limited partners,

XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority,

XIII. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and

XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

(b) File for record the certificate in the office of the clerk of the superior court.

(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph (1). (1941, c. 251, s. 2.)

§ 59-3. Business which may be carried on.—A limited partnership may carry on any business which a partnership without limited partners may carry on. (1941, c. 251, s. 3.)

§ 59-4. Character of limited partner's contribution.—The contributions of a limited partner may be cash or other property, but not services. (1941, c. 251, s. 4.)

§ 59-5. A name not to contain surname of limited partner; exceptions.—(1) The surname of a limited partner shall not appear in the partnership name, unless

(a) It is also the surname of a general partner, or

(b) Prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.

(2) A limited partner whose name appears in a partnership name contrary to the provisions of paragraph (1) is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner. (1941, c. 251, s. 5.)

§ 59-6. Liability for false statements in certificate.—If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false

(a) At the time he signed the certificate, or

(b) Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its cancellation or amendment as provided in § 59-25, subsection (3). (1941, c. 251, s. 6.)

§ 59-7. Limited partner not liable to creditors.—A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. (1941, c. 251, s. 7.)

Cross Reference.—As to nature of liability of a general partner, see § 59-45.

§ 59-8. Admission of additional limited partners.—After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of § 59-25. (1941, c. 251, s. 8.)

§ 59-9. Rights, powers and liabilities of a general partner.—A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

(a) Do any act in contravention of the certificate,

(b) Do any act which would make it impossible to carry on the ordinary business of the partnership,

(c) Confess a judgment against the partnership,

(d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,

(e) Admit a person as a general partner,

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate,

(g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate. (1941, c. 251, s. 9.)

§ 59-10. Rights of a limited partner.—(1) A limited partner shall have the same rights as a general partner to

(a) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them,

(b) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and

(c) Have dissolution and winding up by decree of court.

(2) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in §§ 59-15 and 59-16. (1941, c. 251, s. 10.)

§ 59-11. Status of person erroneously believing himself a limited partner.—A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income. (1941, c. 251, s. 11.)

§ 59-12. One person both general and limited partner.—(1) A person may be a general partner and a limited partner in the same partnership at the same time.

(2) A person who is a general, and also at the same time a limited partner, shall have all the rights and powers and be subject to all restrictions of a general partner; except that, in respect to his contribution, he shall have the rights against the other members which he would have had if he were not also a general partner. (1941, c. 251, s. 12.)

§ 59-13. Loans and other business transactions with limited partner.—(1) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No limited partner shall in respect to any such claim

(a) Receive or hold as collateral security any partnership property, or

(b) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(2) The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of paragraph (1) is a fraud on the creditors of the partnership. (1941, c. 251, s. 13.)

§ 59-14. Relation of limited partners inter se.—Where there are several limited partners the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners shall stand upon equal footing. (1941, c. 251, s. 14.)

§ 59-15. Compensation of limited partner.—A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners. (1941, c. 251, s. 15.)

§ 59-16. Withdrawal or reduction of limited partner's contribution.—(1) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until

(a) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them,

(b) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of paragraph (2), and

(c) The certificate is cancelled or so amended as to set forth the withdrawal or reduction.

(2) Subject to the provisions of paragraph (1)

a limited partner may rightfully demand the return of his contribution

(a) On the dissolution of a partnership, or

(b) When the date specified in the certificate for its return has arrived, or

(c) After he has given six months' notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership.

(3) In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution.

(4) A limited partner may have the partnership dissolved and its affairs wound up when

(a) He rightfully but unsuccessfully demands the return of his contribution, or

(b) The other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required by paragraph (1) (a) and the limited partner would otherwise be entitled to the return of his contribution. (1941, c. 251, s. 16.)

§ 59-17. Liability of limited partner to partnership.—(1) A limited partner is liable to the partnership

(a) For the difference between his contribution as actually made and that stated in the certificate as having been made, and

(b) For any unpaid contribution which he agreed in the certificate to make in the future at the time and on the condition stated in the certificate.

(2) A limited partner holds as trustee for the partnership

(a) Specific property stated in the certificate as contributed by him, but which was not contributed or which has been wrongfully returned, and

(b) Money or other property wrongfully paid or conveyed to him on account of his contribution.

(3) The liabilities of a limited partner as set forth in this section can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.

(4) When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return. (1941, c. 251, s. 17.)

§ 59-18. Nature of limited partner's interest in the partnership.—A limited partner's interest in the partnership is personal property. (1941, c. 251, s. 18.)

§ 59-19. Assignment of limited partner's interest.—(1) A limited partner's interest is assignable.

(2) A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership.

(3) An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.

(4) An assignee shall have the right to become a substituted limited partner if all the members (except the assignor) consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.

(5) An assignee becomes a substituted limited partner when the certificate is approximately amended in accordance with § 59-25.

(6) The substituted limited partner has all the rights and powers, and is subject to all the restrictions and liabilities of his assignor, except those liabilities of which he was ignorant at the time he became a limited partner and which could not be ascertained from the certificate.

(7) The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under §§ 59-6 and 59-17. (1941, c. 251, s. 19.)

Cross Reference.—As to assignment of a partner's interest, see § 59-57.

§ 59-20. Effect of retirement, death or insanity of a general partner.—The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners

(a) Under a right so to do stated in the certificate, or

(b) With the consent of all members. (1941, c. 251, s. 20.)

§ 59-21. Death of limited partner.—(1) On the death of a limited partner his executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate, and such power as the deceased had to constitute his assignee a substituted limited partner.

(2) The estate of a deceased limited partner shall be liable for all his liabilities as a limited partner. (1941, c. 251, s. 21.)

§ 59-22. Rights of creditors of limited partner.—(1) On due application to a court of competent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require.

(2) The interest may be redeemed with the separate property of any general partner, but may not be redeemed with partnership property.

(3) The remedies conferred by paragraph (1) shall not be deemed exclusive of others which may exist.

(4) Nothing in this article shall be held to deprive a limited partner of his statutory exemption. (1941, c. 251, s. 22.)

§ 59-23. Distribution of assets.—(1) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

(a) Those to creditors, in the order of priority as provided by law, except those to limited part-

ners on account of their contributions, and to general partners,

(b) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions,

(c) Those to limited partners in respect to the capital of their contributions,

(d) Those to general partners other than for capital and profits,

(e) Those to general partners in respect to profits,

(f) Those to general partners in respect to capital.

(2) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims. (1941, c. 251, s. 23.)

§ 59-24. When certificate shall be cancelled or amended.—(1) The certificate shall be cancelled when the partnership is dissolved or all limited partners cease to be such.

(2) A certificate shall be amended when

(a) There is a change in the name of the partnership or in the amount or character of the contribution of any limited partner,

(b) A person is substituted as a limited partner,

(c) An additional limited partner is admitted,

(d) A person is admitted as a general partner,

(e) A general partner retires, dies or becomes insane, and the business is continued under § 59-20,

(f) There is a change in the character of the business of the partnership,

(g) There is a false or erroneous statement in the certificate,

(h) There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution,

(i) A time is fixed for the dissolution of the partnership, or the return of a contribution, no time having been specified in the certificate, or

(j) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them. (1941, c. 251, s. 24.)

§ 59-25. Requirements for amendment and for cancellation of certificate.—(1) The writing to amend a certificate shall

(a) Conform to the requirements of § 59-2, subsection (1) (a) as far as necessary to set forth clearly the change in the certificate which it is desired to make, and

(b) Be signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

(2) The writing to cancel a certificate shall be signed by all members.

(3) A person desiring the cancellation or amendment of a certificate, if any person designated in paragraphs (1) and (2) as a person who must execute the writing refuses to do so, may petition the superior court to direct a cancellation or amendment thereof.

(4) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the clerk of the superior court in the office where the certificate is recorded to record the cancellation or amendment of the certificate; and where the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment.

(5) A certificate is amended or cancelled when there is filed for record in the office of the clerk of the superior court where the certificate is recorded

(a) A writing in accordance with the provisions of paragraph (1), or (2) or

(b) A certified copy of the order of court in accordance with the provisions of paragraph (4).

(6) After the certificate is duly amended in accordance with this section, the amended certificate shall thereafter be for all purposes the certificate provided for by this article. (1941, c. 251, s. 25.)

§ 59-26. Parties to actions.—A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership. (1941, c. 251, s. 26.)

§ 59-27. Name of article.—This article may be cited as the Uniform Limited Partnership Act. (1941, c. 251, s. 27.)

§ 59-28. Rules of construction.—(1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this article.

(2) This article shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(3) This article shall not be so construed as to impair the obligations of any contract existing when the article goes into effect, nor to affect any action on proceedings begun or right accrued before this article takes effect. (1941, c. 251, s. 28.)

§ 59-29. Rules for cases not provided for in this article.—In any case not provided for in this article the rules of law and equity, including the law merchant, shall govern. (1941, c. 251, s. 29.)

§ 59-30. Provisions for existing limited partnerships.—(1) A limited partnership formed under any statute of this state prior to March 15, 1941, may become a limited partnership under this article by complying with the provisions of § 59-2; provided the certificate sets forth

(a) The amount of the original contribution of each limited partner, and the time when the contribution was made, and

(b) That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.

(2) A limited partnership formed under any statute of this state prior to the adoption of this article, until or unless it becomes a limited partnership under this article, shall continue to be governed by the provisions of existing law, except that such partnership shall not be renewed unless so provided in the original agreement. (1941, c. 251, s. 30.)

Editor's Note.—Section 31 of the Uniform Limited Part-

nership Act (1941, c. 251, s. 31) repealed §§ 3258-3276 of the Consolidated Statutes, as amended, except in so far as said sections affect limited partnerships existing on March 15, 1941, when the act became effective.

Art. 2. Uniform Partnership Act.

Part 1. Preliminary Provisions.

§ 59-31. Name of article.—This article may be cited as Uniform Partnership Act. (1941, c. 374, s. 1.)

Editor's Note.—The Uniform Partnership Act became effective March 15, 1941.

For comment on this enactment, see 19 N. C. Law Rev. 499.

§ 59-32. Definition of terms.—In this article, "court" includes every court and judge having jurisdiction in the case.

"Business" includes every trade, occupation, or profession.

"Person" includes individuals, partnerships, corporations, and other associations.

"Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any state insolvent act.

"Conveyance" includes every assignment, lease, mortgage, or encumbrance.

"Real property" includes land and any interest or estate in land. (1941, c. 374, s. 2.)

§ 59-33. Interpretation of knowledge and notice.—(1) A person has "knowledge" of a fact within the meaning of this article not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances show bad faith.

(2) A person has "notice" of a fact within the meaning of this article when the person who claims the benefit of the notice:

(A) states the fact to such person, or

(B) delivers through the mail, or by other means of communication a written statement of the fact to such person or to a proper person at his place of business or residence. (1941, c. 374, s. 3.)

§ 59-34. Rules of construction.—(1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this article.

(2) The law of estoppel shall apply under this article.

(3) The law of agency shall apply under this article.

(4) This article shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(5) This article shall not be construed so as to impair the obligations of any contract existing when the article goes into effect, nor to affect any action or proceedings begun or right accrued before this article takes effect. (1941, c. 374, s. 4.)

§ 59-35. Rules for cases not provided for in this article.—In any case not provided for in this article the rules of law and equity, including the law merchant, shall govern. (1941, c. 374, s. 5.)

Part 2. Nature of a Partnership.

§ 59-36. Partnership defined.—(1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this article, unless such association would have been a partnership in this state prior to the adoption of this article; but this article shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith. (1941, c. 374, s. 6.)

Cross Reference.—As to limited partnerships, see §§ 59-1 to 59-30.

§ 59-37. Rules for determining the existence of a partnership.—In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by § 59-46 persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(a) as a debt by installments or otherwise,

(b) as wages of an employee or rent to a landlord,

(c) as an annuity to a widow or representative of a deceased partner,

(d) as interest on a loan, though the amount of payment vary with the profits of the business,

(e) as the consideration for the sale of a goodwill of a business or other property by installments or otherwise. (1941, c. 374, s. 7.)

Cross Reference.—That a lessor and lessee are not partners, see §§ 74-1 and 42-1.

§ 59-38. Partnership property.—(1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears. (1941, c. 374, s. 8.)

Part 3. Relations of Partners to Persons Dealing with the Partnership.

§ 59-39. Partner agent of partnership as to partnership business.—(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the part-

ner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(a) Assign the partnership property in trust for creditors, or on the assignee's promise to pay the debts of the partnership,

(b) Dispose of the goodwill of the business,

(c) Do any other act which would make it impossible to carry on the ordinary business of a partnership,

(d) Confess a judgment,

(e) Submit a partnership claim or liability to arbitration or reference.

(4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction. (1941, c. 374, s. 9.)

§ 59-40. Conveyance of real property of the partnership.—(1) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of § 59-39, or unless such property has been conveyed by the grantee of a person claiming through such grantee to holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(2) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of § 59-39.

(3) Where title to real property is in the name of one or more, but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership under the provisions of paragraph (1) of § 59-39, unless the purchaser or his assignee, is a holder for value, without knowledge.

(4) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of § 59-39.

(5) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property. (1941, c. 374, s. 10.)

§ 59-41. Partnership bound by admission of partner.—An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this article is evidence against the partnership. (1941, c. 374, s. 11.)

Cross Reference.—As to admission after the statute of limitations has run, see § 1-27.

§ 59-42. Partnership charged with knowledge of or notice to partner.—Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner. (1941, c. 374, s. 12.)

§ 59-43. Partnership bound by partner's wrongful act.—Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act. (1941, c. 374, s. 13.)

§ 59-44. Partnership bound by partner's breach of trust.—The partnership is bound to make good the loss:

(a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(b) where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership. (1941, c. 374, s. 14.)

§ 59-45. Nature of partner's liability.—All partners are liable

(a) Jointly and severally for everything chargeable to the partnership under §§ 59-43 and 59-44.

(b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract. (1941, c. 374, s. 15.)

Cross References.—As to liability of a limited partner, see §§ 59-6 and 59-7. As to personal liability of corporate manager of a partnership, see § 55-60. As to procedure in an action against a partnership, see §§ 1-113 and 1-72.

§ 59-46. Partner by estoppel.—(1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(a) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(b) When no partnership liability results, he is liable jointly with the other persons, if any, so

consenting to the contract or representation as to incur liability, otherwise separately.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation. (1941, c. 374, s. 16.)

§ 59-47. Liability of incoming partner.—A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property. (1941, c. 374, s. 17.)

Part 4. Relations of Partners to One Another.

§ 59-48. Rules determining rights and duties of partners.—The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(b) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

(c) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

(d) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

(e) All partners have equal rights in the management and conduct of the partnership business.

(f) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

(g) No person can become a member of a partnership without the consent of all the partners.

(h) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners. (1941, c. 374, s. 18.)

Cross Reference.—As to rights and liabilities of limited partners, see §§ 59-10 to 59-17.

§ 59-49. Partnership books.—The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them. (1941, c. 374, s. 19.)

§ 59-50. Duty of partners to render information.—Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability. (1941, c. 374, s. 20.)

§ 59-51. Partner accountable as a fiduciary.—(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner. (1941, c. 374, s. 21.)

Cross Reference.—As to criminal liability for appropriation of partnership funds by a partner, see §§ 14-97 and 14-98.

§ 59-52. Right to an account.—Any partner shall have the right to a formal account as to partnership affairs:

(a) if he is wrongfully excluded from the partnership business or possession of its property by his copartners,

(b) if the right exists under the terms of any agreement,

(c) as provided by § 59-51,

(d) whenever other circumstances render it just and reasonable. (1941, c. 374, s. 22.)

§ 59-53. Continuation of partnership beyond fixed term.—(1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership. (1941, c. 374, s. 23.)

Part 5. Property Rights of a Partner.

§ 59-54. Extent of property rights of a partner.—The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management. (1941, c. 374, s. 24.)

§ 59-55. Nature of a partner's right in specific partnership property.—(1) A partner is coowner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this article and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin. (1941, c. 374, s. 25.)

Cross Reference.—As to survivor in joint tenancy for partnership purposes, see § 41-2.

§ 59-56. Nature of partner's interest in the partnership.—A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property. (1941, c. 374, s. 26.)

§ 59-57. Assignment of partner's interest.—(1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners. (1941, c. 374, s. 27.)

Cross Reference.—As to assignment of a limited partner's interest, see § 59-19.

§ 59-58. Partner's interest subject to charging order.—(1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(a) With separate property, by any one or more of the partners, or

(b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this article shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership. (1941, c. 374, s. 28.)

Cross Reference.—As to right of creditors of a limited partner, see § 59-22.

Part 6. Dissolution and Winding Up.

§ 59-59. Dissolution defined.—The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business. (1941, c. 374, s. 29.)

§ 59-60. Partnership not terminated by dissolution.—On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed. (1941, c. 374, s. 30.)

§ 59-61. Causes of dissolution.—Dissolution is caused: (1) Without violation of the agreement between the partners,

(a) by the termination of the definite term or particular undertaking specified in the agreement,

(b) by the express will of any partner when no definite term or particular undertaking is specified,

(c) by the express will of all partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specific term or particular undertaking,

(d) by the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) in contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) by any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) by the death of any partner, unless the partnership agreement provides otherwise;

(5) by the bankruptcy of any partner or the partnership;

(6) by decree of court under § 59-62. (1941, c. 374, s. 31; 1943, c. 384.)

Editor's Note.—The 1943 amendment added to subsection (4) the words "unless the partnership agreement provides otherwise."

§ 59-62. Dissolution by decree of court.—(1) On application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(b) a partner becomes in any other way incapable of performing his part of the partnership contract,

(c) a partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) a partner wilfully or persistently commits a breach of the partnership agreement, or otherwise

so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(e) the business of the partnership can only be carried on at a loss,

(f) other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under §§ 59-57 and 59-58:

(a) After the termination of the specified term or particular undertaking,

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued. (1941, c. 374, s. 32.)

§ 59-63. General effect of dissolution on authority of partner.—Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

(1) with respect to the partners,

(a) when the dissolution is not by the act, bankruptcy or death of a partner; or

(b) when the dissolution is by such act, bankruptcy or death of a partner, in cases where § 59-64 so requires,

(2) with respect to persons not partners, as declared in § 59-65. (1941, c. 374, s. 33.)

§ 59-64. Right of partner to contribution from copartners after dissolution.—Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his copartners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

(a) the dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

(b) the dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy. (1941, c. 374, s. 34.)

§ 59-65. Power of partner to bind partnership to third persons after dissolution.—(1) After dissolution a partner can bind the partnership except as provided in paragraph (3)

(a) by any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(b) by any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

(I) had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under paragraph (1) (b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

(a) unknown as a partner to the person with whom the contract is made; and

(b) so far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution

(a) where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(b) where the partner has become bankrupt; or

(c) where the partner has no authority to wind up partnership affairs; except by a transaction with one who

(I) had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(II) had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in paragraph (1) (b) (II).

(4) Nothing in this section shall affect the liability under § 59-46 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business. (1941, c. 374, s. 35.)

§ 59-66. Effect of dissolution on partner's existing liability.—(1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts. (1941, c. 374, s. 36.)

§ 59-67. Right to wind up.—Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court. (1941, c. 374, s. 37.)

§ 59-68. Rights of partners to application of partnership property.—(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interest in the partnership, unless otherwise agreed, may have the partnership

property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under § 59-66, subsection (2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have

(I) all the rights specified in paragraph (1) of this section, and

(II) the right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2) (a) (II) of this section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

(I) If the business is not continued under the provisions of paragraph (2) (b) all the rights of a partner under paragraph (1), subject to clause (2) (a) (II), of this section,

(II) if the business is continued under paragraph (2) (b) of this section, the right as against his copartners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the goodwill of the business shall not be considered. (1941, c. 374, s. 38.)

§ 59-69. Rights where partnership is dissolved for fraud or misrepresentation.—Where partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled,

(a) to a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(b) to stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(c) to be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership. (1941, c. 374, s. 39.)

§ 59-70. Rules for distribution.—In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are

(I) the partnership property,

(II) the contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this section.

(b) The liabilities of the partnership shall rank in order of payment, as follows:

(I) Those owing to creditors other than partners,

(II) those owing to partners other than for capital and profits,

(III) those owing to partners in respect of capital,

(IV) those owing to partners in respect of profits.

(c) The assets shall be applied in the order of their declaration in clause (a) of this section to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by § 59-48, subsection (a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this section.

(f) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this section, to the extent of the amount which he has paid in excess of his share of the liability.

(g) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this section.

(h) When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(i) Where a partner has become bankrupt or his estate is insolvent the claims against the separate property shall rank in the following order:

(I) Those owing to separate creditors,

(II) Those owing to partnership creditors,

(III) Those owing to partners by way of contribution. (1941, c. 374, s. 40.)

Cross Reference.—As to distribution of assets of a limited partnership, see § 59-23.

§ 59-71. Liability of persons continuing the business in certain cases.—(1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partner-

ship are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of § 59-68, subsection (2) (b), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person becoming a partner in the partnership continuing the business, under this section, to the creditors of the dissolved partnership shall be satisfied out of the partnership property only.

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership. (1941, c. 374, s. 41.)

§ 59-72. Rights of retiring or estate of deceased partner when the business is continued.—When any partner retires or dies, and the business is continued under any of the conditions set forth in § 59-71, subsections (1, 2, 3, 5, 6), or § 59-68, subsection (2) (b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by § 59-71, subsection (8). (1941, c. 374, s. 42.)

§ 59-73. Accrual of actions.—The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary. (1941, c. 374, s. 43.)

Art. 3. Surviving Partners.

§ 59-74. Surviving partner to give bond.—Upon the death of any member of a partnership, the surviving partner shall, within thirty days, execute before the clerk of the superior court of the county where the partnership business was conducted, a bond payable to the state of North Carolina, with sufficient surety conditioned upon the faithful performance of his duties in the settlement of the partnership affairs. The amount of such bond shall be fixed by the clerk of the court; and the settlement of the estate and the liability of the bond shall be the same as under the law governing administrators and their bonds. (1915, c. 227, ss. 1, 2, 3; C. S. 3277.)

Death of Partner Dissolves.—The death of a partner works, by operation of law, a dissolution of the firm. George on Partnership, 257; Bates on Partnership, sec. 610; Bank v. Hollingsworth, 135 N. C. 556, 568, 47 S. E. 618.

Applied in Reel v. Boyd, 198 N. C. 214, 151 S. E. 192.

§ 59-75. Effect of failure to give bond.—Upon the failure of the surviving partner to execute the bond provided for in § 59-74, the clerk of the superior court shall, upon application of any person interested in the estate of the deceased partner, appoint a collector of the partnership, who shall be governed by the same law governing an administrator of a deceased person. (1915, c. 227, s. 4; C. S. 3278.)

Cross Reference.—As to the law governing an administrator of a deceased person, see chapter 28.

§ 59-76. Surviving partner and personal representative make inventory.—When a member of any partnership dies the surviving partner, within sixty days after the death of the deceased partner, together with the personal representative of the deceased partner, shall make out a full and complete inventory of the assets of the partnership, including real estate, if there be any, together with a schedule of the debts and liabilities

thereof, a copy of which inventory and schedule shall be retained by the surviving partner, and a copy thereof shall be furnished to the personal representative of the deceased partner. (Rev., s. 2540; 1901, c. 640; C. S. 3279.)

Not Retroactive.—This section does not apply to actions then pending and is not retroactive. Bank v. Hodgin, 129 N. C. 247, 39 S. E. 959.

Property Vests in Surviving Partner.—The surviving copartner has the closing up of partnership affairs, the reduction of personal property to cash and the settlement of partnership affairs, and, under Revisal 1905, sec. 1579, now section 41-2, the title to this class of personal property vests at once in the surviving partner and not in the personal representative of the deceased partner. Sherrod v. Mayo, 156 N. C. 144, 72 S. E. 216.

Same—Duty.—After the dissolution of a firm by the death of one of the partners, it is the duty of the surviving partner to settle up the joint estate in the manner most conducive to the interest of all persons interested. Calvert v. Miller, 94 N. C. 600.

"Although as to future dealings," remarks Story, "the partnership is terminated by the death of one partner, yet for some purposes, it may be said to subsist, and the rights, duties, powers and authorities of the survivors remain, so far as is necessary to enable them to wind up and settle the affairs of the partnership." Story Part., Sec. 344. Quoted with approval in Calvert v. Miller, 94 N. C. 600, 603.

Same—Rights.—It is the right as well as the duty of a surviving partner to close up the affairs of the firm. He has the right, therefore, to receive and to collect the debts and assets of the partnership, and apply the same toward the payment of the debts and liabilities of the firm. Story on Partnership, sec. 344; Weisel v. Cobb, 114 N. C. 22, 18 S. E. 943; Hodgin v. Peoples' Nat. Bank, 124 N. C. 540, 32 S. E. 887; Hodgin v. Bank, 128 N. C. 110, 111, 38 S. E. 294.

Same—Same—To Create New Debts.—A surviving partner has no right to create or contract new debts binding upon the partnership, except to the extent of purchasing new material and making new debts so far as may be necessary to work up unfinished material and sell the same. Howell v. Boyd Mfg. Co., 116 N. C. 806, 22 S. E. 5.

Same—Power to Endorse Note.—A surviving partner has no power after dissolution to renew or endorse a firm note in the name of the firm. Bank v. Hollingsworth, 135 N. C. 556, 47 S. E. 618.

A surviving partner who, more than two years after dissolution of the firm, indorsed a note in the firm name for the renewal of notes outstanding similarly indorsed, was individually liable on such indorsement, though it did not bind the firm. Bank v. Hollingsworth, 135 N. C. 556, 47 S. E. 618.

Same—Impressed with a Trust.—The death of a partner, in the absence of any stipulation in the articles of copartnership to the contrary, works an immediate dissolution, and the title to the assets vests in the surviving partner, impressed with a trust to close up the partnership business, pay the debts and turn over to his personal representative the share of the deceased partner. Walker v. Miller, 139 N. C. 448, 52 S. E. 125.

When Danger of Misapplication of Funds.—In case of danger of misapplication by the surviving partner of partnership funds, the court would certainly, in behalf of the representatives of a deceased partner, interfere and restrain by injunction the surviving partner from such acts, or grant other proper relief; and there is no reason why they should not interfere in behalf of a creditor in such a case. Hodgin v. Bank, 128 N. C. 110, 111, 38 S. E. 294.

When Surviving Partner Is Agent of Executor.—Where one of the members of a firm was constituted its general managing agent by the articles of partnership, and upon the death of one partner his executor consented to a continuance of the business, it was held that the manager became the agent of the executor as well as of the other surviving member, and a demand and refusal to account are necessary to terminate the agency and put the statute of limitations in operation. Patterson v. Lilly, 90 N. C. 82.

When Property Held in Common.—An arrangement between distributees and legatees to permit their property with the consent and co-operation of the representatives of the deceased partners to remain in common and to be used for their joint benefit, adopting the name of the old firm, constitutes a partnership. Walker v. Miller, 139 N. C. 448, 52 S. E. 125.

Personal Property Exemptions.—A surviving partner of an insolvent firm is not entitled to have his personal property exemptions paid out of the partnership assets. Southern Commission Co. v. Porter, 122 N. C. 692, 30 S. E. 119.

Competency of Witness.—In an action for goods sold to a firm, the testimony of one partner, who admitted his liability by failing to answer, that the goods were furnished by the plaintiff on the order of the firm, is not competent as against the executor of the deceased partner or against the firm. Fertilizer Co. v. Rippy, 124 N. C. 643, 32 S. E. 980; Moore v. Palmer, 132 N. C. 969, 44 S. E. 673.

A surviving partner, who assigns partnership property of an insolvent firm to pay his own debts pro rata with those of the firm, cannot be allowed to testify that he did not thereby intend to defraud the firm creditors. Southern Commission Co. v. Porter, 122 N. C. 692, 30 S. E. 119.

When Representative Not Subject to Suit.—The representative of a deceased partner cannot be sued while there is a surviving partner. Burgwin v. Hostler, 1 N. C. 167.

§ 59-77. When personal representative may take inventory; receiver.—If the surviving partner neglect or refuse to have such inventory made, the personal representative of the deceased partner may have the same made in accordance with the provisions of § 59-76. Should any surviving partner fail to take such an inventory or refuse to allow the personal representative of the deceased partner's estate to do so, such personal representative of the deceased partner's estate may forthwith apply to a court of competent jurisdiction for the appointment of a receiver for such partnership, who shall thereupon proceed to wind up the same and dispose of the assets thereof in accordance with law. (Rev., s. 2541; 1901, c. 640, s. 2; C. S. 3280.)

Receiver Appointed When Assignee Holds for Indefinite Time.—Where an assignment was made by a surviving partner of an insolvent firm, and the assignee was empowered to continue the business for an indefinite term, a receiver might be appointed to administer the partnership fund among the creditors though the deed was not set aside. Southern Commission Co. v. Porter, 122 N. C. 692, 30 S. E. 119.

When Surviving Partner Appointed Receiver.—Where the surviving partner of a firm is appointed receiver of the firm, he cannot maintain an action against one who, as surety for the accommodation of the deceased partner indorsed the latter's note, which was discounted by the firm, if it appears that the assets of the partnership are sufficient to pay its debts and leave a surplus against the deceased partner's share of which the note can be charged. Patton v. Carr, 117 N. C. 176, 23 S. E. 182.

Duty of Assignee to Charge Interest.—Where the surviving partner of a firm conveyed the assets to an assignee to settle the estate, it was the duty of the assignee, notwithstanding a contrary custom existing in the town where the business has been conducted, to charge and collect interest on all good overdue accounts from the end of a year after dissolution of the copartnership, and he is liable to the surviving partner for his failure to do so. Weisel v. Cobb, 118 N. C. 11, 24 S. E. 782.

Same—Assignee Liable for Interest.—The assignee of a surviving partner is chargeable with interest on the partnership moneys kept by him after twelve months from the time he assumed the trust until he disbursed it. Weisel v. Cobb, 118 N. C. 11, 24 S. E. 782.

§ 59-78. Notice to creditors.—Every surviving partner, within thirty days after the death of the deceased partner, shall notify all persons having claims against the partnership which were in existence at the time of the death of the deceased partner, to exhibit the same to the surviving partner within twelve months from the date of first publication of such notice. The notice shall be published once a week for four weeks in a newspaper (if there be any) published in the county where the partnership existed. If there should be no newspaper published in the county, then the notice shall be posted at the courthouse and four other public places in the county. (Rev., s. 2542; 1901, c. 640, s. 3; C. S. 3281.)

Where a dissolution of a firm occurs by operation of law, by the death of one of the partners, the giving of notice of such dissolution is not necessary to prevent liability from

attaching to the estate of the deceased partner or of the surviving partners for any future contracts made in the name of the firm. Bank v. Hollingsworth, 135 N. C. 556, 47 S. E. 618.

§ 59-79. Debts paid pro rata; liens.—All debts and demands against a copartnership, where one partner has died, shall be paid pro rata, except debts which are a specific lien on property belonging to the partnership. (Rev., s. 2543; 1901, c. 640, s. 4; C. S. 3282.)

When Interest of Firm Demands Creation of Debt.—While a surviving partner cannot enter into contracts, or create liabilities which will bind the estate of his deceased partner, yet he is not bound to sacrifice the interests of the firm, and if he contracts debts, bona fide, for the interest of the common property, he may pay them out of the common fund. Calvert v. Miller, 94 N. C. 600.

Same—Creditors Advancing Funds to Market Product.—Where a surviving partner has purchased materials and contracted new debts to complete unfinished products and placed the finished article on the market, the creditors advancing the necessary funds are entitled to pay out of assets of the partnership. Howell v. Boyd Manufacturing Co., 116 N. C. 806, 22 S. E. 5.

Personal Debt as Set-Off.—In an action brought by a surviving partner for a debt, a debt due from him may be pleaded as a set-off. Hogg v. Ashe, 2 N. C. 471.

But a defendant cannot avail herself of a debt due to her by a deceased member of the firm, though the contract between the latter and the defendant was that the debt, being for the board of his partner, should be paid out of the assets of the store in which the plaintiff and the defendant were copartners. Norment v. Johnston, 32 N. C. 89.

Division Not Permitted before Settlement.—"There can be no division of partnership property," in the language of Ruffin, C. J., in Baird v. Baird, 21 N. C. 524, "until all the accounts of the partnership have been taken and the clear interest of each partner ascertained." Mendenhall v. Benbow, 84 N. C. 646, 650.

Prior Encumbrance.—The claims of a surviving partner upon the proceeds of sale of the deceased partner's half of the real estate (here mill property), to reimburse him to the amount of half the expenditures incurred in the conduct of the joint business and improvements put upon the property, constitute a prior encumbrance and must be paid, to the postponement of creditors of the deceased partner. Mendenhall v. Benbow, 84 N. C. 646.

When Assignment for Indefinite Term Fraudulent.—An assignment by a surviving partner of an insolvent firm for an indefinite term, the assignee to have the right to employ servants and to replenish the stock, and out of the proceeds to pay firm debts, and also the individual debts of the survivor pro rata, is fraudulent as against creditors. Southern Commission Co. v. Porter, 122 N. C. 692, 30 S. E. 119.

When Bank May Not Apply Deposits to Debts.—When a bank knew that the plaintiff was the only surviving partner of a firm, and that he was making deposits as such, it had no right to apply them to the payment of a debt created by the partnership before its dissolution, without the consent of the depositor. Hodgin v. National Bank, 125 N. C. 503, 34 S. E. 709, 712.

Accommodation Indorser of Note for Member of Firm.—A note executed by a member of a partnership to a third party who, as surety for the accommodation of the maker, indorses it and receives no benefit from it, cannot be subject to an action at law against the indorser by the firm, nor in case of the death of the maker of the note can the surviving partner maintain an action on the note against the accommodation indorsers unless the firm is insolvent. Patton v. Carr, 117 N. C. 176, 23 S. E. 182.

§ 59-80. Effect of failure to present claim in twelve months.—In an action brought on a claim which was not presented within twelve months from the first publication of the general notice to creditors, the surviving partner shall not be chargeable for any assets that he may have paid in satisfaction of any debts before such action was commenced, nor shall any costs be recovered in such action against the surviving partner. (Rev., s. 2544; 1901, c. 640, s. 5; C. S. 3283.)

§ 59-81. Procedure for purchase by surviving partner.—1. Appraisal of Property.—The surviving partner may, if he so desire, make application to the clerk of the superior court of the county in which the partnership existed, after first giving notice to the executor or administrator of the time of the hearing of such application, for the appointment of three judicious, disinterested appraisers, one of whom may be named by the surviving partner, one by the representative of the deceased partner's estate, and the third named by the two appraisers selected, whose duty it shall be to make out under oath a full and complete inventory and appraisement of the entire assets of the partnership, including real estate if there be any, together with a schedule of the debts and liabilities thereof, and to deliver the same to the surviving partner; they shall also deliver a copy to the executor or administrator, and file a copy with the clerk of the court.

2. Surviving Partner May Purchase.—The surviving partner may, with the consent of the executor or administrator of the deceased partner and the approval of the clerk of the superior court by whom such executor or administrator was appointed, purchase the interest of such deceased partner in the partnership assets at the appraised value thereof, including the good will of the business, first deducting therefrom the debts and liabilities of the partnership, for cash or upon giving to the executor or administrator his promissory note or notes, with good approved security, and satisfactory to the executor or administrator, for the payment of the interest of such deceased partner in the partnership assets.

3. Surviving Partner to Give Bond.—In case the surviving partner shall avail himself of the privilege of purchasing such interest as provided for in this section, he shall give bond to the executor or administrator with surety for the payment of the debts and liabilities of the partnership, and for the performance of all contracts for which the partnership is liable.

4. Sale of Real Estate.—In case of such sale of the real estate belonging to the partnership, the title to the real estate so purchased shall not pass until the sale thereof has been reported to and confirmed by the clerk of the superior court of the county in which the partnership was located, in a special proceeding to which the widow and heirs at law or devisees of the deceased partner are duly made parties. (Rev., s. 2545; 1901, c. 640, s. 6; 1911, c. 12; C. S. 3284.)

§ 59-82. Surviving partner to account and settle.—In case the surviving partner shall not avail himself of the privilege of purchasing the interest of the deceased partner, he shall, within twelve months from the death of the deceased partner, file with the clerk of the superior court of the county where the partnership was located, an account, under oath, stating his action as surviving partner, and shall come to a settlement with the executor or administrator of the deceased partner: Provided, that the clerk of the superior court shall have power, upon good cause shown, to extend the time within which said final settlement shall be made. The surviving partner for his services in settling the partnership estate shall receive commissions to be allowed by the court, and in no case to exceed five per cent out of the share of the deceased

partner. (Rev., s. 2546; 1901, c. 640, s. 7; C. S. 3285.)

Editor's Note.—The English doctrine is that surviving partners, trustees, etc., are not entitled to commissions or compensation for their services. However, the doctrine has met with little favor in the American courts. The rule in America has been to allow commissions. The rule was laid down in this State, by Mr. Chief Justice Ruffin in Boyd v. Hawkins, 17 N. C. 195. It seems that the great Chief Justice correctly pointed out the reason for the difference between the English and the American rule in that case. In England persons acting in a fiduciary capacity are not practically at any trouble or expense about their trusts, because the whole business is managed through attorneys. In this country the custom is different. The surviving partner himself looks after the closing out of the business, often involving much time and expense.

The holding of the courts and the tendency of legislation in this State has been to provide compensation for persons acting in a fiduciary character. Yet, it was 1901 before the Legislature finally confirmed the rule laid down by the court by statutory enactment.

Presumption of Equal Interest. — In the absence of evidence to the contrary, each partner is presumed to be equally interested in the joint business. State v. Brower, 93 N. C. 344.

If an agreement for a common or special partnership appears to have existed between parties for the purchase of property, with intent to sell the same for the profit of the parties, and no express agreement be proved adjusting the division or share of the profits, the law extends the concern to all the goods purchased by either of the parties; and the parties are entitled to share the profits, without regard to the payments or advances made by either for the purpose of effecting the purchase, if there be no contract as to the amount of the advances to be made by them respectively. Taylor v. Taylor, 6 N. C. 70.

Note Arising Out of Business.—In stating an account between an executor and the surviving partner of the testator, it is not error to charge the surviving partner with the value of a note due the testator of the plaintiff individually, if such note arose from or grew out of the business of the co-partnership business. Royster v. Johnson, 73 N. C. 474.

Compensation.—Under the law of this State, a surviving partner is entitled to reasonable compensation for his services in settling up the partnership business. Royster v. Johnson, 73 N. C. 474. See Editor's Note above.

In Weisel v. Cobb, 118 N. C. 11, 24 S. E. 782, it was held that two and one-half per cent commissions on receipt and disbursement was enough to be allowed the assignee for his services, under the circumstances in that case.

Loss.—Where the surviving partner has acted in good faith in a fiduciary character he is not chargeable with loss. Thompson v. Rogers, 69 N. C. 361.

§ 59-83. Accounting compelled.—In case any surviving partner fails to come to a settlement with the executor or administrator of the deceased partner within the time prescribed by law, the clerk of the superior court may, at the instance of such executor, administrator or other person interested in such deceased partnership estate, cite the surviving partners to a final settlement as provided for by law in the case of executors and administrators. (Rev., s. 2547; 1901, c. 640, s. 8; C. S. 3286.)

Cross Reference.—As to compelling account by executors and administrators, see §§ 28-118 and 28-122.

§ 59-84. Settlement otherwise provided for.—When the original articles of partnership in force at the death of any partner or the will of a deceased partner make provision for the settlement of the deceased partner's interest in the partnership, and for a disposition thereof different from that provided for in this chapter, the interest of such deceased partner in the partnership shall be settled and disposed of in accordance with the provisions of such articles of partnership or of such will. (Rev., s. 2545; 1901, c. 640, s. 6; C. S. 3287.)

Art. 4. Business Under Assumed Name Regulated.

§ 59-85. Certificate filed; contents.—No person shall hereafter carry on, conduct or transact business in this state under assumed name, or under any designation, name or style other than the real name of the individual owning, conducting or transacting such business, unless such person shall file in the office of the clerk of the superior court of the county in which such person owns, conducts or transacts, or intends to own, conduct or transact such business, or maintain an office or place of business, a certificate setting forth the name under which such business owned is or is to be conducted or transacted, and the true or real full name of the person owning, conducting or transacting the same, with the home and post-office address of such person. The certificate shall be executed and duly acknowledged by the person so owning, conducting or intending to conduct such business: Provided, that the selling of goods by sample or through traveling agents or traveling salesman, or by means of orders forwarded by the purchaser through the mails, shall not be construed for the purpose of this section as conducting or transacting business so as to require the filing of such certificates. (1913, c. 77, s. 1; C. S. 3288.)

Cross Reference.—As to use of title of certified public accountant by a partnership, see § 93-4.

Highly Penal.—The section is of a highly penal character, and its meaning will not be extended by interpretation to include cases that do not come clearly within its provision. Jennette v. Coppersmith, 176 N. C. 82, 97 S. E. 54.

Purpose and Operation.—This statute manifestly is for the protection of creditors of persons who fail to comply with its provisions, or of others who do business with them. The consequences of a violation of the statute are prescribed by sec. 59-88. They seem to be limited to punishment as a misdemeanor, for it is expressly provided that failure to comply with this section, shall not prevent a recovery in a civil action by the person who shall violate the statute. Farmers' Bank, etc., Co. v. Murphy, 189 N. C. 479, 127 S. E. 527, 529.

The section was enacted as a police regulation to protect the general public from fraud and imposition, and a person violating the same may not enforce a contract in our courts made in the course of such business, though the statute does not expressly invalidate such transactions. Courtney v. Parker, 173 N. C. 479, 92 S. E. 324. The rule laid down in this case is now changed by legislative enactment.

The intent of chapter 77, Public Laws 1913, now this and the following sections of this article, requiring that a partnership under an assumed name shall file a certificate in the office of the clerk of the superior court setting forth the name under which the business is conducted, with the full names and addresses of the persons owning and conducting it, etc., was to prevent fraud or imposition upon those dealing therewith, and to afford them means for knowing the statute and responsibility of the concern with which they deal. Price v. Edwards, 178 N. C. 493, 101 S. E. 33.

When Not Applicable.—It does not apply between partners who are presumed to know these conditions; and a surviving partner may maintain his action against the heirs of the dead one to recover his share in the assets of a partnership in a legitimate business, notwithstanding the business had been conducted in the name solely of the dead partner, and the requirements of the statute had not been complied with. Price v. Edwards, 178 N. C. 493, 101 S. E. 33.

Same—Surname of Proprietors. — Where a partnership business is being conducted under the surname of the proprietors in such manner as to afford a reasonable and sufficient guide to a correct knowledge of the individuals composing the firm, chapter 77, Laws 1913, forbidding the carrying on or transacting business under an "assumed name," etc., does not apply. Befarah v. Spell, 176 N. C. 193, 96 S. E. 949.

Same—A Silent Partner.—Where a partnership in a legitimate business has been conducted in the name of one of the partners alone, as between themselves, chapter 77, Public Laws 1913, now this article does not apply, and an action of

the silent partner to recover his share of the assets from the other is not founded upon any wrong, and the principles relating to such transactions do not apply, or avoid his recovery. Price v. Edwards, 178 N. C. 493, 101 S. E. 33.

Cited in Patterson v. Southern Ry. Co., 214 N. C. 38, 198 S. E. 364.

§ 59-86. Index of certificates kept by clerk.—The several clerks of the superior court of this state shall keep an alphabetical index of all persons filing certificates provided for herein, and for the indexing and filing of such certificates they shall receive a fee of twenty-five cents. A copy of such certificates duly certified to by the clerk in whose office the same shall be filed shall be presumptive evidence in all courts of law in this state of the facts therein contained. (1913, c. 77, s. 2; C. S. 3289.)

§ 59-87. Corporations and limited partnerships not affected.—This article shall in no way affect or apply to any corporation created and organized under the laws of this state, or to any corporation organized under the laws of any other state and lawfully doing business in this state, nor shall it in any manner affect the right of any persons to form limited partnerships as provided by the laws of this state. (1913, c. 77, s. 3; C. S. 3290.)

§ 59-88. Violation of article misdemeanor.—Any person owning, carrying on or conducting or transacting business as aforesaid, who shall fail to comply with the provisions of this article, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty dollars or imprisonment in the county jail for a term of not exceeding thirty days: Provided, however, that the failure of any person or persons owning, carrying on, or conducting or transacting business as aforesaid, to comply with the provisions of this article shall not prevent a recovery by said person or persons in any civil action brought in any of the courts of this state. (1913, c. 77, s. 4; 1919, c. 2; C. S. 3291.)

Nature of Section.—As stated in Courtney v. Parker, infra, and reaffirmed in Price v. Edwards, infra, this statute is "a police regulation to protect the general public, as heretofore stated, from fraud and imposition." Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

Application.—In Courtney v. Parker, 173 N. C. 479, 92 S. E. 324, it was held that the statute was enacted as a police regulation to protect the general public from fraud and imposition, and a person violating the same may not enforce a contract made in the course of such business, though the statute does not expressly invalidate such transactions. See note infra.

This statute was further considered by the court in Jennette v. Coppersmith, 176 N. C. 82, 97 S. E. 54. In that case, Courtney v. Parker, supra, was distinguished, and the plaintiffs allowed to recover without filing the certificate required by sec. 59-85, because the title of the plaintiffs' firm, Jennette Bros., afforded a reasonable and sufficient guide to correct knowledge of the individuals composing the firm, and therefore did not come clearly within the doctrine of "assumed" names. Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 630. See note following immediately hereafter.

When Courts Will Not Lend Aid.—The courts will not lend their aid to extend a highly penal statute, although it is within the police power, unless the case comes within the letter of the law, and also within its meaning and palpable design. It is just as clearly the policy of the law that it will not lend its aid in enforcing a claim founded on its own violation. Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

In Jennette v. Coppersmith, supra, the court, reviewing Courtney v. Parker, after referring to the highly penal character of this statute, says: "It should not be extended or held to include cases that do not come clearly within its provision." Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

Same—Act Not Forbidden by Statute.—In Hines v. Norcott, 176 N. C. 123, 130, 96 S. E. 899, the court held that this statute did not apply, because the action did not arise out of the doing of an act forbidden by the statute. Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 630.

Same—When Transaction Illegal.—In Fineman v. Faulkner, 174 N. C. 13, 16, 93 S. E. 384, L. R. A. 1918F 337, the plaintiff had not violated any statute, but was suing the administrator of Mamie Faulkner who was engaged in an illegal business, and the court says: "In all the cases in which recovery has been denied, it will be found that either the consideration or the transaction was illegal or the vendor participated in the illegal purposes of the purchaser." Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 630. See notes supra.

Same—Courtney v. Parker Overruled by 1919 Amendment.—The foregoing were decided by the court prior to the enactment of chapter 2, Public Laws 1919. This enactment added the proviso now appearing in this section, and this proviso had the effect to change the decision in Courtney v. Parker, supra, as to violations of section 59-85. The legislative intent is clear, not only in the act itself, but the title: "An act to amend chapter 77 of the Public Laws of 1913, regulating the use of assumed names in partnerships, so as to permit recovery in actions brought by a partnership which has failed to register." Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

In Real Estate Co. v. Sasser, 179 N. C. 497, 498, 103 S. E. 73, the court considers this statute (Public Laws 1913, ch. 77) together with chapter 2, Public Laws 1919, now contained in sections 59-85 to 59-88, inclusive, and allows the plaintiff to recover, although he was carrying on a real estate business, and he admitted direct violation of this statute. The court says that this amendment (chapter 2, Public Laws 1919) applied to pending actions and to transactions prior to its enactment, in the absence of a saving clause (36 Cyc. 1164). And, since it is a mere police regulation, it may be abolished at any time and no vested rights are acquired under it. Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

Same—Contracts Not Void.—It is clear by express enactment, that the Legislature intended by adding the proviso that the punishment should be confined to the fine or imprisonment, set out in this section, but that contracts made by persons carrying on or conducting or transacting business in violation of this statute, should not be void. Security Finance Co. v. Hendry, 189 N. C. 549, 127 S. E. 629, 631.

§ 59-89. Person trading as "company" or "agent" to disclose real parties.—If any person shall transact business as trader or merchant, with the addition of the words "factor," "agent," "& Company" or "& Co.," or shall conduct such business under any name or style other than his own, except in case of a corporation, and fail to disclose the name of his principal or partner by a sign placed conspicuously at the place wherein such business is conducted, then all the property, stock of goods and merchandise, and choses in action purchased, used and contracted in the course of such business shall, as to creditors, be liable for the debts contracted in the course of such business by the person in charge of same. Provided, this section shall not apply to any person transacting business under license as an auctioneer, broker, or commission merchant; in all actions under this section it is incumbent on such trader or merchant to prove compliance with the same. (Rev., s. 2118; 1905, c. 443; C. S. 3292.)

Cross Reference.—As to running of the statute of limitations against an undisclosed party, see § 1-28.

Chapter 60. Railroads and Other Carriers.

Art. 1. General Provisions.

§ 60-1. Application to existing railroads; special charters.—All existing railroad corporations within this state shall respectively have and possess all the powers and privileges contained in this chapter; and they shall be subject to all the duties, liabilities and provisions of this chapter not inconsistent with their charters. This chapter shall govern and control, anything in any special act of assembly creating a railroad corporation to the contrary notwithstanding, unless in the act of the general assembly creating the corporation the section or sections of this chapter intended to be repealed shall be specially referred to by number and, as such, specially repealed. (Rev., s. 2566; Code, ss. 701, 1982; 1871-2, c. 138, s. 45; C. S. 3412.)

Editor's Note.—Railroad companies are common carriers, receiving from the state a delegation of a portion of its sovereign powers for the public good; and being agents and, in the place and stead of the government, exercising public duties, they are therefore, subject to legislative as well as judicial control. The sections comprising this chapter are the result of the exercise of this power by the legislature of North Carolina.

To What Charters Applicable.—This section governs and controls all charters granted after its enactment. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 27, 10 S. E. 1041

Does Not Affect Subsequent Legislation.—The section is like any other act of the legislature and is subject to any subsequent legislation, and is only useful in construing the meaning of subsequent legislation when it is doubtful. It cannot have the effect to prevent antagonistic legislation at a subsequent date. Watauga, etc., R. Co. v. Ferguson, 169 N. C. 70, 71, 85 S. E. 156.

Repeal by Implication Not Favored. — "This provision very plainly shows that it was the intention of the legislature that the general railroad act should apply, and that its important provisions should not be repealed, either by implication or by hasty legislation. It is but an affirmance of the principle that the repeal by implication of a general law by a private statute is not favored. But the statute goes a step further, and prescribes a rule of construction under which the private act, even if it be inconsistent with the provisions of the general law, shall not repeal them 'unless they are specially referred to by number, and, as such, specially repealed'." Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 27, 10 S. E. 1041.

Consequently a provision of a charter that the railroad shall have the power to condemn land under the "same rules and regulations as are prescribed for the North Carolina Railroad Company," is invalid. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 10 S. E. 1041, cited as conclusive in Livermon v. Roanoke, etc., R. R. Co., 109 N. C. 52, 55, 13 S. E. 734.

Cited in Land v. Wilmington & Weldon R. Co., 107 N. C. 72, 12 S. E. 125; Rumbough v. Southern Improvement Co., 106 N. C. 461, 11 S. E. 528.

§ 60-2. Roads not to be established unless authorized by law.—If any person or corporation, not being expressly authorized thereto, shall make or establish any canal, turnpike, tramroad, railroad or plankroad, with the intent that the same shall be used to transport passengers other than such persons, or the members of such corporation, or to transport any productions, fabrics or manufactures other than their own, the person or corporation so offending, and using the same for any such purpose, shall forfeit and pay fifty dollars for every person and article of produce so transported.

This section shall not apply to any narrow-gauge railroad, tramroad or toll road made and established and maintained solely by the owner of the lands upon which said road may be, the principal business of which is the transportation of logs, lumber and articles for the owners of such railroad or tramroad: Provided, that the utilities commission shall have power to authorize lumber companies, having logging roads, to transport all kinds of commodities other than their own and passengers and to charge therefor reasonable rates to be approved by said commission. (Rev., s. 2598; Code, s. 1717; R. C., c. 61, s. 37; 1874-5, c. 83; 1901, c. 282; 1907, c. 531; 1911, c. 160; 1915, c. 6; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3413.)

Violation by Company Can Not Be Set Up as Defense.—A lumber company cannot avail itself of the defense, in an action for damages, that it was prohibited by this section, from building a standard-gauge railroad, in consideration of which it had obtained the plaintiff's timber at a less price than its actual value; for if the stipulation to construct the road is invalid, the plaintiffs, though they should be particeps criminis, are not in pari delicto. Herring v. Cumberland Lumber Co., 159 N. C. 382, 383, 74 S. E. 1011.

§ 60-3. Conductor and certain other employees to wear badges.—Every conductor, baggage-master, engineer, brakeman or other servant of any railroad corporation employed on a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office and the initial letters of the title of the corporation by which he is employed. No conductor or collector without such badge shall be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office; and no officer or servant without such badge shall have authority to meddle or interfere with any passenger, his baggage or property. (Rev., s. 2604; Code, s. 1958; 1871-2, c. 138, s. 30; C. S. 3414.)

Cross Reference.—As to badge of railroad police, see § 60-85.

§ 60-4. Actions for penalties to be in name of state.—All penalties imposed by this chapter may, unless otherwise provided, be sued for in the name of the state. (Rev., s. 2647; Code, s. 1976; 1885, c. 221; C. S. 3415.)

Cross Reference.—As to venue of actions against railroads, see § 1-81.

The penalty prescribed by section 60-112 for failure to transport within a reasonable time is given directly to the party aggrieved, and an action therefor is not required to be brought in the name of the state. Robertson v. Atlantic, etc., R. Co., 148 N. C. 323, 62 S. E. 413.

§ 60-5. Discrimination in charges misdemeanor.—If any common carrier shall directly or indirectly by special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of law than it charges,

demands or collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions; or shall make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever; or shall subject any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such person or corporation shall be upon conviction thereof fined not less than one thousand nor more than five thousand dollars for each and every offense. (Rev., s. 3749; 1899, c. 164, s. 13; C. S. 3416.)

Cross References.—As to failure to receive and forward freight, see §§ 60-111 and 60-112. As to rules of the utilities commission to prevent discrimination, see § 62-56. As to discrimination between connecting lines, see § 62-143.

Editor's Note.—At common law it was an indictable offense for a common carrier to unjustly discriminate between members of the public; and by constitutional and statutory provisions in a number of states, including North Carolina by this section, unlawful discrimination makes the carriers subject to prosecution.

The sine qua non for a prosecution under this section is that the variance in charge constituting the discrimination must be for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." This language seems to be patterned after the Act of Congress of 1887, c. 104, section 2, U. S. Comp. Stat., 1901, p. 3155, which regulates the same subject in interstate commerce, and is found in substantially the same form in all of the state laws. For example the Kentucky statute is held not to apply to a discrimination in charges for the transportation of freight unless the shipments are of the same class from and to the same point and upon the same condition. See Louisville, etc., R. Co. v. Com., 105 Ky. 179, 20 Ky. L. Rep. 1099, 48 S. W. 416, 43 L. R. A. 550.

Section Is Remedial.—"The statutes enacted for the enforcement of the duties of common carriers, imposing penalties, are not intended to simply penalize railroads, but to secure prompt, efficient service to all and not a favored few." Garrison v. Southern R. Co., 150 N. C. 575, 585, 64 S. E. 578.

It will be observed, as said by Clark, C. J., in Lumber Co. v. Atlantic, etc., R. Co., 136 N. C. 479, 487, 48 S. E. 813, that this section is substantially like that portion of the English "Traffic Act" known as the "Equality Clause" and the "Interstate Commerce Act." The fundamental purpose underlying all of this legislation, both in England and this country, is, as said by Mr. Justice White, in New York, etc., R. Co. v. Interstate Commerce Comm., 200 U. S. 361, 26 S. Ct. 272, 50 L. Ed. 515, that "Whilst seeking to prevent unjust and unreasonable rates, to secure equality of rates as to all, and destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of unjust discrimination, to this extent and for these purposes, the statute is remedial, and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. . . . What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all."

Declaratory of Common Law.—This section is declaratory of the common law and secures to every person the right to participate in the use of the facilities furnished, or which it is its duty to furnish, by a common carrier upon terms of equality, in regard to price, and otherwise, and free from unlawful discrimination. Lumber Co. v. Atlantic Coast Line R. Co., 141 N. C. 171, 53 S. E. 823.

Recovery of Excess.—Where a higher freight charge was paid than that charged other shippers, the payment is not to be considered voluntary, and the excess may be recovered back upon account for money had and received, and it is not necessary that at the time of payment there should have been any protest. Lumber Co. v. Atlantic Coast Line R. Co., 141 N. C. 171, 53 S. E. 823.

What Constitutes Unlawful Discrimination.—A common carrier is guilty of unlawful discrimination by the principles of the common law, and the terms of this section when it charges one person for service rendered a larger sum than is charged another person for like service under substantially similar conditions. Lumber Co. v. Atlantic Coast Line R. Co., 141 N. C. 171, 53 S. E. 823.

A carrier cannot rightfully charge one shipper $2.50 per 1,000 feet for hauling his logs if it, at the same time, for the same service, under substantially similar circumstances, carried logs for other persons at $2.10 per 1,000 feet in consideration of the shipment of the manufactured products over its railroad. Lumber Co. v. Atlantic Coast Line R. Co., 141 N. C. 171, 53 S. E. 823.

Embargoes Prohibited.—A common carrier cannot place an embargo on its customer or patron so as to discriminate against him or those dealing with him, and for such unjust discrimination the carrier is indictable under this section. Garrison v. Southern R. Co., 150 N. C. 575, 64 S. E. 578.

Allegations.—There are discriminations which require more explicit allegations, as for instance, illegal rebates upon freight charges, and the like, U. S. v. Hanley, 71 Fed. 672, but as the common carrier carries for hire, the allegation that it gave a person named undue preference by transporting him free ex vi termini alleges discrimination. State v. Southern Ry. Co., 125 N. C. 666, 671, 34 S. E. 527.

§ 60-6. Discrimination by rebate or reduced charges, misdemeanor. — Any railroad company doing business in the state, or officer or agent thereof, who shall give to any person or shipper any advantage over another person or shipper under like circumstances, by way of any rebate or reduced rate not authorized by law or by the North Carolina utilities commission, or which shall make charges for shipments of freight in violation of the law as to railroad freight rates, contained in article 8 of the chapter Utilities Commission, or shall willfully discriminate in the matter of service in favor of one person or corporation against another in like circumstances, shall be guilty of a misdemeanor, and such corporation shall, upon conviction, be fined not less than one hundred dollars and such officer or agent shall be fined or imprisoned or both, in the discretion of the court; and any shipper or consignee of any freight in the state of North Carolina who shall knowingly accept any rebate or other consideration or services from any railroad company which is not allowed or given other shippers or consignees under like or similar circumstances, and which is not allowed by law, shall be guilty of a misdemeanor, and fined or imprisoned in the discretion of the court. (1907, c. 217, s. 2; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3417.)

Cross Reference.—As to person allowing or accepting rebate, see § 60-116.

§ 60-7. Discrimination against connecting lines and violation of certain rules of the utilities commission misdemeanor.—If any common carrier shall not afford all reasonable, proper and equal facilities for the interchange of traffic between its respective lines and for the forwarding and delivering of passengers and freights to and from its several lines and those connecting therewith, or shall discriminate in its rates and charges against such connecting lines, or if any connecting line shall not make as close connection as practicable for the convenience of the traveling public, or shall not obey all rules and regulations made by the utilities commission relating to trackage, it shall be punished by a fine of not less than five hundred dollars nor exceeding five thousand dollars for each and every offense. (Rev., s. 3751;

1899, c. 164, s. 21; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3418.)

Cross Reference.—See § 62-143.

§ 60-8. Discrimination against the Atlantic and North Carolina railroad misdemeanor; venue.—If any railroad in North Carolina shall discriminate against the freights received from the Atlantic and North Carolina railroad, or shall make rates by which, either directly or indirectly, by rebates or otherwise, freights may be delivered at less rates when received from other points than from points along the Atlantic and North Carolina railroad in proportion to distance hauled, it shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars for each and every violation thereof. An indictment for the misdemeanor may be found and tried in the courts where the goods were either shipped or delivered, but the court in which the indictment for the offense is first found shall have exclusive jurisdiction. (Rev., s. 3750; 1889, c. 358; C. S. 3419.)

Art. 2. Incorporation, Officers, and Stock of Railroad.

§ 60-9. Articles of association; contents; signature; filing.—Any number of persons, not less than six, at least one of whom shall be a citizen and resident of this state, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, or for the purpose of maintaining and operating any unincorporated railroad already constructed for the like public use; and for that purpose may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the places from and to which the road is to be constructed or maintained and operated, the length of such road as near as may be, and the name of each county in this state through or into which it is made or intended to be made, the amount of the capital stock of the company, which shall not be less than five thousand dollars for every mile of road constructed or proposed to be constructed, and the number of shares of which the capital stock shall consist, and the names and places of residence of six directors of the company, at least one of whom shall be a citizen and resident of this state, upon whom legal process may be served, who shall manage its affairs for the first year, or until others are chosen in their places. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in the company. On compliance with the provisions of § 60-10, such articles of association may be filed in the office of the secretary of state, who shall indorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose; and thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, shall be a corporation by the name specified in such articles of association, and shall possess the powers and privileges granted to railroad corporations by this chapter. The articles of association of any company formed under the provisions of this chapter, or the charter of any railroad company formed under a special act, may be amended as provided in §§ 55-30 and 55-31 and said §§ 55-30 and 55-31 are hereby made to apply to railroad companies: Provided, no amendment may be made changing the nature of the company's business, extending its corporate existence or authorizing any powers other than those authorized by this chapter. Provided further, that the capital stock provision or provisions of this section shall not apply to any railroad corporation chartered for the purpose of leasing a railroad already in existence and in operation, and such railroad company so chartered shall have a paid-in capital stock of not less than five thousand dollars ($5,000.00). (Rev., s. 2548; Code, s. 1932; 1871-2, c. 138; 1905, c. 187; 1907, c. 472, ss. 1, 2; 1921, c. 117; 1939, c. 60; C. S. 3420.)

Cross References.—As to requirement of certificate of convenience and necessity for construction and operation of utilities, see § 62-101. As to amendments of charter of railroad, see also § 60-11.

Editor's Note.—The last sentence of this section with the proviso thereto relative to amendments of articles of associations and carriers, was added by the Public Laws of 1921.

The 1939 amendment added the second proviso.

Section Provides Exclusive Method of Creating.—The legislature has in this and the two following sections manifested a clear and positive intention that railroad corporations shall not be created by the action of associated persons otherwise than as provided in such sections. Bradley v. Ohio River & C. Ry. Co., 119 N. C. Appx. 918, 926.

Not Applicable to Continuing Existence.—This section refers only to the mode and manner of creating railroad corporations, and not as to the methods of continuing the existence and operation of railroad franchises in the hands of purchasers at judicial sales. Bradley v. Ohio River & C. Ry. Co., 119 N. C. Appx., 918, 927.

Effect of Noncompliance.—The filing and recording by the secretary of state of articles of association of a proposed railroad company, if not such as required by law, is a nullity. Kinston, etc., R. Co. v. Stroud, 132 N. C. 413, 43 S. E. 913.

May Be Declared Void by Court.—Where the articles of incorporation of a railroad company are upon their face void, though not subject to collateral attack, the trial court will so declare in a proceeding to condemn land by right of eminent domain claimed thereunder. Kinston, etc., R. Co. v. Stroud, 132 N. C. 413, 43 S. E. 913.

§ 60-10. Prerequisites of filing; stock subscription; affidavit of directors; payment of fees.—Such articles of association shall not be filed and recorded in the office in the secretary of the state until at least one thousand dollars of stock for every mile of railroad proposed to be made is subscribed thereto, and five per cent paid thereon in good faith, and in cash, to the directors named in the articles of association; nor until there is indorsed thereon or annexed thereto an affidavit made by at least three of the directors named in such articles, that the amount of stock required by this section has been in good faith subscribed and five per cent paid in cash thereon as aforesaid, and that it is intended in good faith to construct or to maintain and operate the road mentioned in such articles of association, which affidavit shall be recorded with the articles of association, as aforesaid; nor until said directors shall pay the taxes and fees provided for under the chapter Corporations, Article 14, entitled Taxes and Fees. (Rev., s. 2549; Code, s. 1933; 1871-2, c. 138, s. 2; 1905, c. 168; C. S. 3421.)

§ 60-11. Amendment of charter by railroad; changing value of and issuing stock without par value.—Any railroad company heretofore or here-

after organized under the laws of this State, whether under a special act, or otherwise, may, in the manner provided by § 55-31, as heretofore amended, amend its certificate of incorporation, articles of association or charter, for the purpose of increasing or decreasing its capital stock, changing its name, changing the par value of the shares of its capital stock, creating one or more classes of common or preferred stock, creating shares of stock with or without nominal or par value, or for any purpose authorized by statutes now in force relating to the amendment of certificates of incorporation, articles of association or charters of corporations: Provided, however, that in case of a consolidated railroad company, heretofore or hereafter organized under a special act or general laws of this State and of any other state or states, a new class or classes of stock may be created upon authorization by vote of such amount of the outstanding capital stock, in no case less than a majority thereof, as may be prescribed by the provisions of the agreement of consolidation in pursuance of which such consolidated company was formed. (1929, c. 261.)

Cross Reference.—As to exchange by a corporation of par value shares of stock for no par value shares, see § 55-80.

§ 60-12. Copy of articles evidence of incorporation.—A copy of any articles of association filed and recorded in pursuance of this article and of the record thereof, with a copy of the affidavit aforesaid indorsed thereon or annexed thereto, and certified to be a copy by the secretary of state, shall be presumptive evidence of the incorporation of such company, and of the facts therein stated. (Rev., s. 2550; Code, s. 1934; 1871-2, c. 138, s. 3; C. S. 3422.)

§ 60-13. Opening of subscription books.—When such articles of association and affidavit are filed and recorded in the office of the secretary of state, the directors named in such articles of association may, in case the whole of the capital stock is not before subscribed, open books of subscription to fill up the capital stock of the company in such places and after giving such notice as they may deem expedient, and may continue to receive subscriptions until the whole of the capital stock is subscribed. (Rev., s. 2551; Code, s. 1935; 1871-2, c. 138, s. 4; C. S. 3423.)

§ 60-14. How stock paid for; forfeiture for nonpayment. — The directors may require the subscribers to the capital stock of the company to pay the amounts by them respectively subscribed in such manner and in such installments as they may deem proper. If any stockholder shall neglect to pay any installment as required by a resolution of the board of directors, the said board shall be authorized to declare his stock and all previous payments thereon forfeited for the use of the company, but they shall not declare it so forfeited until they shall have caused a notice in writing to be served on him personally, or the same to be deposited in the postoffice, properly directed to him at the post office nearest his usual place of residence, stating that he is required to make such payment at the time and place specified in such notice, and that if he fails to make the same, his stock and all previous payments thereon will be forfeited for the use of the company, which notice shall be served as aforesaid at least sixty days previous to the day on which payment is required to be made. (Rev., s. 2554; Code, s. 1938; 1871-2, c. 138, s. 7; C. S. 3424.)

Cross Reference.—As to construction companies taking stock in railroad as payment, see § 55-64.

§ 60-15: Repealed by Session Laws 1943, c. 543.

§ 60-16. Stockholders' liability for unpaid stock and to laborers; notice.—Each stockholder of any such company shall be individually liable to the creditors of such company to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such company until the whole amount of the capital stock so held by him shall have been paid to the company, and all the stockholders of any such company shall be jointly and severally liable for the debts due or owing to any of its laborers and servants, other than contractors, for personal services for thirty days service performed for such company, but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation, and the amount due on such execution shall be the amount recoverable with costs against such stockholder. Before such laborer or servant shall charge such stockholders for such thirty days service he shall give them notice in writing within twenty days after the performance of such service that he intends to hold them liable, and shall commence such action therefor within thirty days after the return of such execution unsatisfied as above mentioned; and every such stockholder, against whom any such recovery by such laborer or servant shall have been had, shall have a right to recover the same of the other stockholders in such corporation in ratable proportion to the amount of the stock they shall respectively hold with himself. (Rev., s. 2556; Code, s. 1940; 1871-2, c. 138, s. 10; C. S. 3426.)

§ 60-17. Liability of trustees and other fiduciaries holding stock.—No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company. The estates in the hands of such executor, administrator, guardian or trustee shall be liable in like manner and to the same extent as the testator or intestate or the ward or person interested in such trust fund would have been if he had been living and competent to act and hold the same stock in his own name, and a person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly. (Rev., s. 2557; Code, s. 1941; 1871-2, c. 138, s. 11; C. S. 3427.)

§ 60-18. Directors and presidents.—There shall be a board of six directors, one of whom shall be elected president, of every corporation formed under this article, to manage its affairs. The directors shall be chosen annually by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue in office until others are elected in their places. In the election of directors each stockholder shall be entitled to one vote person-

ally or by proxy on every share held by him thirty days previous to any such election, and vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation. The inspectors of the first election of directors shall be appointed by the board of directors named in the articles of association. No person shall be a director or president unless he shall be a stockholder owning stock absolutely in his own right and qualified to vote for directors at the election at which he shall be chosen; and at every election of directors the books and papers of such company shall be exhibited to the meeting, if a majority of the stockholders present shall require it. (Rev., s. 2552; Code, s. 1936; 1871-2, c. 138, s. 5; C. S. 3428.)

§ 60-19. Appointment of officers and agents.—The president and directors shall appoint a treasurer and secretary and such other officers and agents as shall be prescribed by the by-laws. (Rev., s. 2553; Code, s. 1937; 1871-2, c. 138, s. 6; C. S. 3429.)

§ 60-20. Officials to account to successors.—The president and directors of the several railroads, and all persons acting under them, are hereby required upon demand to account with the president and directors elected or appointed to succeed them, and shall transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company. (Rev., s. 2648; Code, s. 2001; 1870-1, c. 72, ss. 1, 3; C. S. 3430.)

Cross References.—As to criminal liability for failure to account to successors, see § 14-253. As to embezzlement by officers of a railroad, see §§ 14-94 and 14-95.

Art. 3. County Subscriptions in Aid of Railroads.

§ 60-21. Counties may subscribe stock.—The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company when necessary to aid in the construction of any railroad in which the citizens of the county may have an interest. (Rev., s. 2558; Code, s. 1996; 1868-9, c. 171, s. 1; C. S. 3431.)

Cross Reference.—As to an incorporated town encouraging the building of railroads, see § 158-1.

Editor's Note.—As this section appeared in the Code of 1883 it permitted subscription when necessary to aid in the completion of any railroad. This phraseology was the cause of some litigation as it was doubtful whether the section was applicable only to those railroads which were partially completed or whether it extended to all such companies. The Supreme Court of North Carolina adhered consistently to the former view, while the Federal Courts adopted the latter. The decisions of the Federal Courts were made statutory by the substitution in the Revisal of 1905, of the word "construction" for the word "completion." For the North Carolina cases prior to this substitution see Com'rs v. Snuggs, 121 N. C. 394, 28 S. E. 539; Com'rs v. Payne, 123 N. C. 432, 31 S. E. 711; Graves v. Commissioners, 135 N. C. 49, 47 S. E. 134. For the controlling federal cases see Com'rs v. Coler, 113 Fed. 705; Wilkes County v. Coler, 190 U. S. 107, 47 L. Ed. 971, 23 S. Ct. 738; Stanly County v. Coler, 190 U. S. 437, 47 L. Ed. 1126, 23 S. Ct. 811.

Interest of Citizens of County.—The same state and federal cases which were in conflict upon the question of whether this section referred to all railroads or only those partially completed (see Editor's Note above) were also at variance upon the sufficiency of interest requisite to authorize the subscription. The state cases maintained the position that the interest must be direct and in and of the county subscribing, while the federal cases were decided on the theory that a public interest would suffice. The best statement of this rule is found in Coler v. Commissioners, 89 Fed. 257 where it is said: "The section does not require the citizens to have a direct pecuniary interest in the road, but a public interest, such as is created by the building of a railroad into the county, and the fixing of one of the termini therein, is sufficient to fulfill the condition and authorize a subscription to its stock by the county, and the issuance of bonds and levying of taxes to carry out the same."

Burden of Proving Validity.—Where the recitals in railroad bonds are that they were issued under a particular act of the Legislature, the burden of validating them, as made under this section, is on the party alleging their validity. Graves v. Commissioners, 135 N. C. 49, 47 S. E. 134.

§ 60-22. Election on question of county aid.—The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and if a majority of the board shall vote for the proposition, this shall be entered of record, which record shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. If a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company: Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper. (Rev., s. 2559; Code, s. 1997; 1868-9, c. 171, s. 2; C. S. 3432.)

Editor's Note.—Section 160-62 and Article VII, section 7 of the Constitution require a popular vote for the contraction of debts by cities and towns except in the case of necessary expenses.

Vote on Two Subscriptions.—Where the question of subscription to two different railway corporations is to be submitted to a vote, it is improper and irregular to submit them as a single proposition, at the same election and on the same ballot. Goforth v. Rutherford Ry. Constr. Co., 96 N. C. 535, 2 S. E. 361.

§ 60-23. Conduct of election.—All elections ordered under § 60-22 shall be held by the sheriff under the laws and regulations provided for the election of members of the general assembly. The votes shall be compared by the boards of county commissioners, who shall make a record of the same. (Rev., s. 2560; Code, s. 1998; 1868-9, c. 171, s. 3; C. S. 3433.)

§ 60-24. Interest on bonds.—In case the county shall subscribe the amount proposed in bonds, the board of commissioners shall have power to fix the rate of interest, not to exceed the rate of six per cent, when the principal on said bonds shall be payable and at what place, and shall also fix the time and places of paying the interest, and shall also determine the mode and manner of paying the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on such bonds. (Rev., s. 2561; Code, s. 1999; 1868-9, c. 171, s. 4; C. S. 3434.)

No Estoppel by Payment of Interest.—The payment of interest from year to year on the bonds is not an estoppel, does not validate them. Commissioners v. Payne, 123 N. C. 432, 31 S. E. 711.

§ 60-25. Collection and disposition of taxes authorized.—The taxes authorized by this article to

be raised for the payment of interest or principal shall be collected by the sheriff or tax collector in like manner as ad valorem taxes, and be paid into the hands of the county treasurer, to be used by the chairman of the board of county commissioners as directed by this article. (Rev., s. 2562; Code, s. 2000; 1868-9, c. 171, s. 5; 1943, c. 543; C. S. 3435.)

Cross Reference.—As to the collection of taxes generally, see § 105-372 et seq.

Editor's Note.—The 1943 amendment inserted the words "or tax collector" and substituted the words "ad valorem" for the words "other state."

Art. 4. Township Subscriptions in Aid of Railroads.

§ 60-26. Townships may subscribe stock.—The board of commissioners of the several counties of the state shall have power to subscribe stock for the use and benefit of any township in their several counties, when necessary to aid in the construction of any railroad, which is now or may be hereafter incorporated under the laws of this state, in which the citizens of such county may have an interest. (1917, c. 64, s. 1; C. S. 3436.)

Editor's Note. — In Graves v. Com'rs, 135 N. C. 49, 47 S. E. 134, it was held that section 60-21 did not apply to townships and that there existed no provision authorizing the aid from townships similar to that which might be afforded by counties under section 60-21. The Supreme Court, however, has held in several cases, that, despite the absence of express statutory provisions townships may by observing the constitutional requirements, issue bonds to aid in the construction of railroads. Wood v. Oxford, 97 N. C. 227, 2 S. E. 653; Brown v. Commissioners, 100 N. C. 92, 5 S. E. 178; Jones v. Commissioners, 107 N. C. 248, 12 S. E. 69; Wittkowsky v. Com'rs, 150 N. C. 90, 94, 63 S. E. 275. See also, McCracken v. Greensboro, etc., R. Co., 168 N. C. 62, 84 S. E. 30. It would seem that these latter cases are made statutory by the enactment of this article in 1917.

§ 60-27. Election on question of township aid.—The board of commissioners of any county proposing to take stock, for the use and benefit of any township, as mentioned in § 60-26, shall meet and agree upon the amount to be subscribed for such township, and if a majority of the board shall vote for the proposition, this shall be entered of record, which record shall show the amount proposed to be subscribed, and for what township, to what company, and whether in bonds, money or other property; and thereupon the board shall order an election, to be held upon a notice of not less than thirty days, in each and every township for whose use and benefit such subscription is proposed to be made for the purpose of voting for or against the proposition to subscribe the amount agreed on by the board of commissioners. If a majority of the qualified voters of the township for whose use and benefit such subscription is proposed to be made shall vote in favor of the proposition, the board of county commissioners through their chairman shall have power to subscribe the amount of stock proposed by them, and submitted to the voters, for the use and benefit of such township, subject to all the rules, regulations, and restrictions of other stockholders in such railroad company: Provided, that the township, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as it may think proper. (1917, c. 64, s. 2; C. S. 3437.)

§ 60-28. Conduct of election; canvass of votes.—All elections ordered under § 60-27 shall be held by the sheriff of the county in which such township is located, under such laws and regulations as are now or may hereafter be provided for the election of members of the general assembly. The votes of each township for whose use and benefit subscription under this article is proposed to be made shall be compared and the results of such election determined by the board of commissioners of the county in which such township is located, who shall make a record of the same. (1917, c. 64, s. 3; C. S. 3438.)

§ 60-29. Bond issue; special tax.—In case the township shall authorize, at the election herein provided for, a subscription of the amount proposed in bonds, the board of commissioners shall have power to fix the rate of interest, not to exceed the rate of six per cent, when the principal of such bonds shall be payable, and at what place, and shall also fix the time and place for paying interest, and shall also determine the mode and manner of paying the same. The board of commissioners shall, in order to provide for the payment of the bonds and interest thereon authorized to be issued by this article, compute and levy each year at the time of levying the county taxes a sufficient tax upon the property in any township authorizing the issuing of bonds under this article to pay the interest on the bonds issued on account of and for the use and benefit of such township, and shall also levy a sufficient tax to create a sinking fund to provide for the payment of such bonds at maturity. Such taxes shall be levied and collected annually and under the same laws and regulations as shall be in force for levying and collecting other county taxes. (1917, c. 64, s. 4; 1943, c. 543; C. S. 3439.)

Editor's Note. — The 1943 amendment struck out the words "and state" formerly appearing after the word "county" in the fourteenth line.

§ 60-30. Levy, collection, and disposition of tax.—The tax authorized by this article to be raised for the payment of interest and principal shall be levied by the board of commissioners of the county in which such township is located, at such times as is now or hereafter may be fixed for levying ad valorem county taxes, against the taxable property located in such township, in addition to the regular ad valorem county taxes assessable against such property. The tax shall be collected by the sheriff or tax collector or other collecting officer of the county in which such township is located in like manner as ad valorem taxes are collected, and shall be paid into the hands of the county treasurer, to be used by the chairman of the board of commissioners as directed by this article. (1917, c. 64, s. 5; 1943, c. 543; C. S. 3440.)

Cross Reference.—As to the collection of taxes generally, see §§ 105-372 et seq.

Editor's Note. — The 1943 amendment substituted the words "ad valorem" for former references to state and other taxes.

§ 60-31. Tax to be kept separate.—The taxes levied and collected under the provisions of this article shall be kept separate and apart from all other ad valorem taxes levied and collected in the county in which such township shall be located. (1917, c. 64, s. 6; 1943, c. 543; C. S. 3441.)

Editor's Note.—The 1943 amendment substituted in the fourth line the words "ad valorem" for the words "state and county."

§ 60-32. Townships may subscribe to purchase of railroad corporations. — The board of commissioners of the several counties of the state shall have power to make subscriptions, for the use and benefit of any township in their several counties, for the purpose of purchasing or aiding in the purchase of any railroad corporation now or hereafter incorporated under the laws of this state which shall be dissolved or whose property and franchises are proposed to be sold privately or under execution, judicial decree, deed in trust, mortgage, or other conveyance, and all the provisions of this article shall apply as fully and as well to such subscriptions as they do to subscriptions to stock to aid in the construction of railroads. (1917, c. 64, s. 1; 1919, c. 130, s. 1; C. S. 3442.)

§ 60-33. Election on question of purchase; proxies to represent stock.—The county commissioners shall, upon the petition of one-fourth of the qualified voters of any township mentioned in § 60-32, order an election and submit the question of such subscription according to the terms of the petition. At such election five persons shall be chosen as proxies to represent such stock, if the vote shall be in favor of the subscription, in all respects as fully as if private promoters, corporators or holders of such stock. They shall be eligible to the position of director or other office in the corporation. They shall hold office until the first Monday in December following the next general election and until their successors chosen at such general election shall qualify. Such proxies shall be chosen at the general election every two years as township officers are. They shall have authority, alone, if sole purchasers, and with the proxies from other townships and others participating in the purchase, if not acting alone, to purchase such railroad property and franchise, and shall constitute a new corporation upon compliance with law as in other cases of a dissolution and sale of railroad property and franchise. (1917, c. 64, s. 2; 1919, c. 130, s. 2; C. S. 3443.)

§ 60-34. Increase of interest; procedure.—Whenever the board of county commissioners of any county has subscribed for the use and benefit of any township to any interest in any railroad or railroad corporation, as provided in this article, and the majority of the proxies chosen to represent the stock or interest of the township in such railroad shall certify to the board of commissioners that in their opinion the interest of the township in said railroad or railroad corporation should be increased, the board of county commissioners shall order an election to be held in such township, upon the petition of one-fourth of the qualified voters of such township, in the same manner as provided in this article, and if the majority of the qualified voters of such township shall vote in favor of the proposition contained in the petition the county commissioners shall execute and deliver the bonds authorized, levy and collect in the township and dispose of the tax, as authorized in this article. (Ex. Sess. 1924, c. 117, s. 1.)

§ 60-35. Execution and sale of bonds for increase of interest.—Said bonds shall be executed by the chairman of the board of county commissioners of such county, attested by the clerk of said board, who shall affix the seal of the board, and deliver the same to the board of proxies representing said township.

The board of proxies shall advertise said bonds as provided by law, and faithfully apply the same to the purposes set forth in the petition for the election. (Ex. Sess. 1924, c. 117, ss. 2, 3.)

§ 60-36. Organization of proxies; report; vacancies.—The proxies chosen at each general election shall qualify and organize on the first Monday in December, elect a chairman, vice-chairman and secretary, and they shall annually in each year file with the board of county commissioners a copy of the report required by law to be made to the Interstate Commerce Commission.

Any vacancy occurring in the board of proxies shall be filled by the board of proxies until the next general election. (Ex. Sess. 1924, c. 117, ss. 4, 5.)

Art. 5. Powers and Liabilities.

§ 60-37. Powers of railroad corporations enumerated.—Every railroad corporation shall have power:

1. To Survey and Enter on Land.—To cause such examination and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto.

Cross Reference.—As to right of entry on land, see § 40-3.

Conflicting Locations.—As between two railroad companies the first location belongs to that company which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action. Fayetteville Street Ry. v. Aberdeen & R. R. Co., 142 N. C. 423, 55 S. E. 345.

2. To Condemn Land under Eminent Domain.—To appropriate land and rights therein by condemnation, as provided in the chapter Eminent Domain.

Cross Reference.—As to condemnation by right of eminent domain, see § 40-2 et seq. As to amount of land which may be condemned, see § 40-29.

Editor's Note.—Since railroads are quasi-public corporations they are given by the state the power to take, by proper proceedings the necessary lands upon which to build their roads. Nor will the courts enjoin a railroad corporation from condemning land for a public purpose on the ground that the corporation was irregularly organized. In Powers v. Hazelton, etc., R. Co., 33 Ohio St. 429, it was held that a land-owner could not be permitted to prove, as a defense to condemnation proceedings instituted by a regularly organized railroad corporation, that the company was incorporated not for a public use, but for the private purposes of the corporators only, and that there was no public necessity for the road. See, also, Wellington, etc., R. Co. v. Cashie, etc., R. Co., 114 N. C. 690, 19 S. E. 646.

Land May Be Taken from Another Railroad.—Land acquired by one railroad company under a legislative grant of the right of eminent domain, and not necessary for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of another railroad company. North Carolina, etc., R. Co. v. Carolina, etc., R. Co., 83 N. C. 489.

3. To Take Property by Grant.—To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by volun-

tary grant shall be held and used for the purposes of such grant only.

Editor's Note.—Railroads can acquire real estate only by statutory authority. After the authority is granted, either by general legislation, charter or implied power, property may be acquired by purchase, grant, dedication, adverse possession, license or by condemnation under the power of eminent domain.

In 1 Elliott on Rys., sec. 390, the general principle is stated as follows:

"The rule is well established that a railroad corporation cannot acquire and hold lands for any purposes except such as are authorized by statute. The authority must be conferred by legislation or it does not exist. It is, however, not necessary that the authority should be expressly conferred. It may be implied." See Wallace v. Moore, 178 N. C. 114, 115, 100 S. E. 237.

Extending User of Right of Way.—While a railroad can use only the part of its right of way actually occupied, whenever the necessities of the company require it, it can extend its user of the right of way to the extent of the statutory right for additional tracks or other railroad purposes. Tighe v. Seaboard Air Line R. Co., 176 N. C. 239, 244, 97 S. E. 164; Atlantic, etc., R. Co. v. Bunting, 168 N. C. 579, 84 S. E. 1009; R. R. v. Olive, 142 N. C. 257, 264, 55 S. E. 263.

4. To Purchase and Hold Property.—To purchase and hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad and the stations and other accommodations necessary to accomplish the object of its incorporation.

Cross Reference.—As to adverse possession of property owned by a railroad, see § 1-44.

5. To Grade and Construct Road.—To lay out its road, not exceeding one hundred feet in width, and to construct the same; to take, for the purpose of cuttings and embankments, as much more land as may be necessary for the proper construction and security of the road; and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in the chapter Eminent Domain.

Cross Reference.—See also § 40-29.

Change of Grade.—A railroad company has a right to change the grade of its road-bed or to remove it to any point on its right of way. Brinkley v. Sou. R. Co., 135 N. C. 654, 47 S. E. 791.

6. To Intersect with Highways and Waterways.—To construct its road across, along or upon any stream of water, water-course, street, highway, plankroad, turnpike, railroad or canal which the route of its road shall intersect or touch; but the company shall restore the stream or water-course, street, highway, plankroad or turnpike road, thus intersected or touched, to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this chapter contained shall be construed to authorize the erection of any bridge or any other obstruction across, in or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstructions may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any streets in any city without the assent of the corporation of such city.

Cross References.—As to the power of the utilities commission to regulate crossings, see § 62-50. As to the duty of railroads to construct and maintain bridges which it has necessitated building, see §§ 136-75 and 136-78; as to their duty to provide cattle guards, see § 60-48.

Editor's Note.—The right of railroad companies to cross highways is limited to the necessities of the crossing and no greater rights can be claimed than those reasonably necessary to accomplish the purpose of the crossing. It is the duty of a railway company constructing its line across a public highway to do so in such a manner as to interfere with the right of the public to the use of the highway as little as possible and to restore the highway to as safe a condition for travel as before the crossing was made so far as it can reasonably and practicably be done. A railroad company that has constructed its line across a highway may lay such additional parallel tracks as are reasonably necessary for it in the transaction of its business.

Duty to Public.—While railroad corporations are given the right and power to construct their roads across streets, highways, etc., they must maintain a safe and convenient crossing there, making it, as far as they can, as safe and convenient to the public as it would have been had the railroad not been built. Raper v. Wilmington, etc., R. Co., 126 N. C. 563, 36 S. E. 115.

Whole Street Cannot Be Appropriated.—In Seaboard Air Line R. Co. v. Raleigh, 219 Fed. 573, 581, in construing this section it is said: "It is doubtful whether the language of the section can be construed to authorize the exclusive appropriation of the street. The sidewalk is a portion of the street appropriated to the use of pedestrians. To construe the grant of the right to construct its road 'across, along, or upon' a street, always of much greater width than a railroad track and the cross-ties, as a grant of the right to occupy the entire street or sidewalk, is not permissible in the light of the recognized rule of construction of such grants of power. How is it possible to restore the street to 'its former state' if the track occupies its entire width? Statutes must be given a reasonable construction."

Assent of City an Essential Power.—The assent to the use of the street by a railroad company is often a most essential power, necessary to be used for the benefit of the people of the city. Griffin v. Southern R. Co., 150 N. C. 312, 314, 64 S. E. 16.

Court Cannot Review Grant.—The action of the board of aldermen in authorizing a railroad company to use a certain street for legitimate railroad purposes, the laying and use of tracks, etc., when the statutory power is given, is not reviewable by the courts at the instance of an owner of land on the street, claiming that some other street should have been so used. Griffin v. Southern R. Co., 150 N. C. 312, 64 S. E. 16.

Cited in Raper v. Wilmington, etc., R. Co., 126 N. C. 563, 567, 36 S. E. 115.

7. To Intersect with Other Railroads.—To cross, intersect, join and unite its railroad with any other railroad before constructed, at any point on its route, and upon the grounds of such other company, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the object of its connections. Every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections and grant the facilities aforesaid, and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners to be appointed by the court as is provided in the chapter Eminent Domain.

Cross Reference.—As to appointment of the commissioners, see § 40-11 et seq.

Editor's Note.—In Elliott on Railroads, p. 1687, the author says, "This provision (that the companies shall unite in agreement) has the effect of a condition precedent to the right to invoke the aid of the statute, and a complaint or instrument to condemn a crossing hereunder must show that the companies were unable to agree. If there is a waiver of an agreement or of an effort to agree, that fact should be alleged. Negotiations had with officers of the road sought to be crossed, who assume to act in its behalf, although they have no authority to so act, will be sufficient to constitute an effort to agree, unless the person with whom such officers act has knowledge of their lack of authority. The burden of proof is upon the petitioner to show that there was a failure to agree. It must be made to appear before a crossing will be granted when so required by the statute authorizing the condemnation, that the crossing is necessary."

Railroad Decides Necessity of Intersection. — Where a railroad company has a right to condemn a way across the track of another company to manufacturing plants for a

spur track to which the other company also has its siding, in competition for freight, the question whether it is necessary for the plaintiff company to build its spur is one in its discretion; and controversies as to whether the defendant could and would shift the plaintiff's cars on its own track advantageously to the plaintiff, and for a reasonable charge, are immaterial. Virginia, etc., R. Co. v. Seaboard Air Line R. Co., 161 N. C. 531, 78 S. E. 68.

No Restriction of Right Except Voluntary.—A railroad company having the power of condemnation across the road of another company should exercise this right with regard to the convenience of both parties and with as little interference with the use of the other party of its own track as can be obtained without a great increase in its cost and inconvenience. But the courts cannot restrict this right to be exercised by a railroad to cases in which the courts may approve its reasonableness or expediency. Virginia, etc., R. Co. v. Seaboard Air Line R. Co., 165 N. C. 425, 81 S. E. 617.

Agreement or Condemnation Necessary for Entry. — Under this section one road cannot enter on the right-of-way of another for the purpose of connecting therewith without previous agreement, or condemnation proceedings. Richmond, etc., R. Co. v. Durham, etc., Ry. Co., 104 N. C. 658, 10 S. E. 659.

Parol Agreement Ineffectual.—A parol agreement to allow one railroad company to extend its track on the right-of-way of another, for the purpose of connecting therewith, is a mere license, revocable at the will of the licensor, and will not operate as an estoppel although the licensee has entered and made valuable improvements. Richmond, etc., R. Co. v. Durham, etc., Ry. Co., 104 N. C. 658, 10 S. E. 659.

8. To Transport Persons and Property.—To take and convey persons and property on its railroad by the power or force of steam, electricity or animals, or by any mechanical power, and to receive compensation therefor.

Cross References.—As to the railroad's duty to transport, see § 60-75. As to power of utilities commission to prevent discrimination in service, see § 62-56. As to discrimination in charges, see §§ 60-5, 60-6, and 62-56.

Charter May Confer Right to Lease.—The charter of a railroad company conferring the right to transport passengers and freight, and giving the power to "farm out" the right of transportation, authorizes the company to execute a valid lease of its property and franchises to another railroad company. Hill v. Atlantic, etc., R. Co., 143 N. C. 539, 55 S. E. 854.

9. To Erect Stations and Other Buildings.—To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of its passengers, freight and business.

Cross References.—As to power of utilities commission to regulate the establishment of stations, see § 62-41 et seq. As to power of railroad companies to condemn land for union depots, see § 40-4. As to abandonment or relocation of a station by a railroad, see § 62-53.

10. To Borrow Money, Issue Bonds and Execute Mortgages.—From time to time to borrow such sums of money as may be necessary for completing and finishing or operating its railroad, and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporate property and franchises and to secure the payment of any debt contracted by the company for the purposes aforesaid, and the directors of the company may confer on any holder of any bond issued for money borrowed, as aforesaid, the right to convert the principal due or owing thereon into stock of such company at any time under such regulations as the directors may see fit to adopt.

Cross Reference.—As to control of the utilities commission over pledge of assets, issuing securities, etc., see § 62-81 et seq.

Corporation Has Power to Issue Bonds.—A railroad corporation has power to contract debts, and every corporation possessing such power must also have power to acknowledge its indebtedness under its corporate seal, i. e., to make and issue its bonds. Commissioners v. Atlantic, etc., R. Co., 77 N. C. 289.

11. To Lease Rails.—To lease iron rails to any person or corporation for such time and upon such terms as may be agreed on by the contracting parties, and upon the termination of the lease by expiration, forfeiture or surrender, to take possession of and remove the rails so leased as if they had never been laid.

12. To Establish Hotels and Eating Houses. —To purchase, lease, hold, operate or maintain eating-houses, hotels and restaurants for the accommodation of the traveling public along the line of its road. (Rev., ss. 2567, 2575; Code, s. 1957; 1887, c. 341; 1889, c. 518; 1871-2, c. 138, s. 29; C. S. 3444.)

§ 60-38. Engaging in unauthorized business.—It shall be unlawful for any railroad company incorporated under the laws of this State, or any railroad company incorporated under the laws of any other state and operating one or more railroads in this State, to engage in any business other than the business authorized by its or their charter.

Any railroad company violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined in the discretion of the court. (Ex. Sess. 1924, c. 80.)

§ 60-39. Power to aid in construction of connecting and branch lines.—Any railroad or other transportation company shall have the right to aid in the construction of any railroad or branch railroad in this or an adjoining state connected with it directly or indirectly, if the construction of such railroad or branch railroad is authorized by law. (Rev., s. 2567, subsec. 12; 1885, c. 108, s. 1; C. S. 3445.)

§ 60-40. Power to seize fuel.—If any railroad or other transportation company finds it necessary, in order to prevent delays in the transportation of freight or passengers, to take possession of coal, wood, or other fuel not its own property and convert it to its own use without an agreement with the owner thereof, it shall notify such owner within three days of such taking that his property has been appropriated, giving the date thereof, and shall, within a period of thirty days, pay for such coal, wood or other fuel at the invoice price at place of shipment, plus twenty-five per cent. Should the transportation company fail to notify the consignee or owner within such three days or pay for the coal, wood or other fuel at the invoice price at place of shipment, plus twenty-five per cent as above provided, within thirty days after converting the same to its own use, it shall in addition forfeit to the party aggrieved the sum of twenty-five dollars for the first day of failure to notify such consignee of the appropriation of the fuel, or its failure to pay for the same, and five dollars for each day thereafter in which it shall fail to notify such consignee or pay for the same. (Rev., s. 2617; 1903, c. 590, s. 4; 1907, c. 467; C. S. 3446.)

§ 60-41. Agreements for through freight and travel.—The directors representing the stock held in the various railroad corporations are hereby authorized and empowered to enter into such agreements and terms with each other as to secure

through freight and travel without the expense of transfer of freight, or breaking the bulk thereof, at different points along the lines, and for this purpose may use the road or roads and the rolling stock of such corporations or companies on such terms as may be agreed upon by them. (Rev., s. 2640; Code, s. 1995; 1866-7, c. 105; C. S. 3447.)

§ 60-42. Intersection with highways. — Whenever the track of a railroad shall cross a highway, turnpike or plankroad, such highway, turnpike or plankroad may be carried under or over the track, as may be found most expedient; and in cases where an embankment or cutting shall make a change in the line of such highway, turnpike or plankroad desirable, then such corporation may take such additional lands for the construction of the road, highway, turnpike or plankroad on such new line as may be deemed requisite by the directors. Unless the land so taken shall be purchased for the purposes aforesaid, compensation therefor shall be ascertained in the manner prescribed in the chapter Eminent Domain, and duly made by such corporation to the owners and persons interested in such land. The same when so taken shall become a part of such intersecting highway, turnpike or plankroad in such manner and by such tenure as the adjacent parts of the same highway, turnpike or plankroad may be held for highway purposes. (Rev., s. 2568; Code, s. 1954; 1871-2, c. 138, s. 26; C. S. 3448.)

Cross References.—See also § 60-37, paragraph 6, and § 60-43. As to the power of the utilities commission to regulate crossings, see § 62-50. As to ascertaining the compensation for land taken, see § 40-11 et seq.

Cited in Raper v. Wilmington, etc., R. Co., 126 N. C. 563, 567, 36 S. E. 115; Herndon v. Southern R. Co., 161 N. C. 650, 77 S. E. 683.

§ 60-43. Obstructing highways; defective crossings; failure to repair after notice misdemeanor. —Whenever, in their construction, the works of any railroad corporation shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same. If any railroad corporation shall so construct its crossings with public streets, thoroughfares or highways, or keep, allow or permit the same at any time to remain in such condition as to impede, obstruct or endanger the passage or transportation of persons or property along, over or across the same, the governing body of the county, city or town, or other public road authority having charge, control or oversight of such roads, streets or thoroughfares may give to such railroad notice, in writing, directing it to place any such crossing in good condition, so that persons may cross and property be safely transported across the same. If the railroad corporation shall fail to put such crossing in a safe condition for the passage of persons and property within thirty days from and after the service of the notice, it shall be guilty of a misdemeanor and shall be punished in the discretion of the court. Each calendar month which shall elapse after the giving of the notice and before the placing of such crossing in repair shall be a separate offense. This section shall in no wise be construed to abrogate, repeal or otherwise affect any existing law now applicable to railroad corporations with respect to highway and street crossings; but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law. (Rev., s. 2569; Code, s. 1710; R. C., c. 61, s. 30; 1874-5, c. 83; 1915, c. 250, ss. 1, 2; C. S. 3449.)

Cross References.—As to the power of the utilities commission to regulate crossings, see § 62-50. As to duty of railroad to maintain bridges it makes necessary, see § 136-75. As to duty of railroad to provide drawbridge, see § 136-78. As to venue in an action against a railroad, see § 1-81.

Editor's Note.—Section 62-50 confers authority upon the utilities commissioner to abolish grade crossings by a railroad company when by the operation of the railroads they become dangerous or inconvenient to the public traveling along their highways or private ways.

Duty Required.—While railroad corporations are given the right and power to construct their roads across streets, highways, etc., they must maintain a safe and convenient crossing there, making it, as far as they can, as safe and convenient to the public as it would have been had the railroad not been built. Raper v. Wilmington, etc., R. Co., 126 N. C. 563, 36 S. E. 115.

Not Restricted to Public Highway.—This section does not restrict the defendant's duty to crossings of "public highways," but uses the broader and generic term "highways," which might include any road used by the public as a mill and church road and in going to town, as was this road. Goforth v. Southern R. Co., 144 N. C. 569, 570, 57 S. E. 209.

Same—Applies to Private Crossings. — An "established road or way" which a railroad company may not obstruct in crossing it with its tracks extends to those whose use is of a private nature, and not necessarily those dedicated to a public use, and in such instances, where the rights of a railroad and the rights of the public to the use of their roads or ways conflict, the former must give place to the latter. Tate v. Seaboard Air Line R. Co., 168 N. C. 523, 84 S. E. 808.

"Negligent Construction" Defined.—By "negligent construction" is meant such an improper construction of the crossing, whether arising from negligence, indifference, or motives of economy, as unnecessarily increases the danger of using the public highway. Raper v. Wilmington, etc., R. Co., 126 N. C. 563, 36 S. E. 115. But the mere fact that a crossing is dangerous does not necessarily impute negligence to the railroad company. Edwards v. Atlantic Coast Line R. Co., 129 N. C. 78, 39 S. E. 730, 731.

Presumption That Crossing Is Safe. — One has the right to assume that a railroad company has discharged its duty to the public by keeping the crossing in safe condition. Tankard v. Roanoke R., etc., Co., 117 N. C. 558, 23 S. E. 46.

Indictment.—An indictment charging a railroad company with obstructing a public road by the use of plank at a crossing, is fatally defective if it does not charge the manner of the misuse of the plank. State v. Roanoke R., etc., Co., 109 N. C. 860, 13 S. E. 719.

It is a fatal variance in an indictment for obstructing a highway at a railroad crossing, to prove that the defendant permitted for some time a dangerous hole to remain in the crossing. State v. Roanoke R., Co., 109 N. C. 860, 13 S. E. 719.

When Injury Might Have Been Caused by Defective Crossing.—Under this section it is error for the trial court to sustain a motion of nonsuit on competent evidence from which the jury could have found that, if defendant's crossing over a neighborhood road had not been negligently left in a dangerous condition, plaintiff would not have been injured by the slipping and falling thereon of the mule upon which he was riding. Goforth v. Southern R. Co., 144 N. C. 569, 57 S. E. 209.

Cited in Bass v. Navigation Co., 111 N. C. 439, 455, 16 S. E. 402; Stone v. Seaboard Air Line R. Co., 197 N. C. 429, 149 S. E. 399; Cashatt v. Brown, 211 N. C. 367, 190 S. E. 480.

§ 60-44. Service of notice of defective crossings.—The notice required by § 60-43 may be served upon the agent of the offending railroad located nearest to the defective or dangerous crossing about which the notice is given, or it may be served upon the section master whose section includes such crossing. Such notice may be served by delivering a copy to such agent or section master, or by letter properly stamped,

registered and addressed to either of such persons. (1915, c. 250, s. 1; C. S. 3450.)

§ 60-45. Change in location of highways.—In order to prevent the frequent crossing of such road or ways, or in cases where it may be necessary to occupy the same, the corporation may change the roads and ways so as to avoid such crossing and occupation, and to such points as may be deemed expedient. (Rev., s. 2570; Code, s. 1711; R. C., c. 61, s. 31; 1874-5, c. 83; C. S. 3451.)

May Change County Road.—A railroad company may make a change in a county road that does not necessarily impair its usefulness. Brinkley v. Sou. R. Co., 135 N. C. 654, 47 S. E. 791.

§ 60-46. Damages due to change in location.—For any injury done to the lands of persons by taking them under § 60-45, the value thereof shall be assessed in like manner as is provided for assessing damages to real estate for taking lands under the chapter Eminent Domain. (Rev., s. 2571; Code, s. 1712; R. C., c. 61, s. 32; 1874-5, c. 83; C. S. 3452.)

Cross Reference.—As to manner of assessing damages when the parties cannot agree, see § 40-11 et seq.

§ 60-47. Old road not to be impeded until new road is made.—Before any part of an established road or way shall be impeded by any railroad corporation, the new road or way shall be prepared and made equally good with the portion proposed to be discontinued; and then the same shall be deemed a part of the original road or way, and shall be kept up and repaired as before the change. (Rev., s. 2572; Code, s. 1713; R. C., c. 61, s. 33; 1874-5, c. 83; C. S. 3453.)

§ 60-48. Cattle-guards and private crossings; failure to erect and maintain misdemeanor.—Every incorporated company owning, operating or constructing, or which shall hereafter own, operate or construct, or any company which shall hereafter be incorporated and shall own, operate or construct any railroad passing through and over the land of any person now enclosed, or which may hereafter become enclosed, shall, at its own expense, construct and constantly maintain, in good and safe condition, good and sufficient cattle-guards at the points of entrance upon and exit from such enclosed land, and shall also make and keep in constant repair crossings to any plantation road thereupon. Every railroad corporation which shall fail to erect and constantly maintain the cattle-guards and crossings provided for by this section shall be liable to an action for damages to any party aggrieved, and shall be guilty of a misdemeanor and fined in the discretion of the court.

So far as this section relates to cattle-guards, the utilities commission is hereby authorized, directed and empowered to adopt such good and sufficient make of cattle-guard now upon the market as is best suited for turning stock. When such guard is selected, approved and authorized by the commission any company operating in this state which shall procure, install and maintain and keep in good and safe condition on its line of road such guard so selected by the commission shall be deemed and held in all suits, actions or proceedings in all the courts of this state to have complied with the conditions of this section in installing a good and sufficient cattle-guard: Provided, that any railroad company operating in this state may make application to the commission to adopt for its road any particular brand or make of cattle-guard, and if the commission shall approve and authorized the use of such guard, it shall, if kept and maintained in good and sufficient condition at all times by such railroad company, be deemed and held in all actions, suits or proceedings in any court of this state a good and sufficient cattle-guard. (Rev., ss. 2601, 3753; Code, s. 1975; 1883, c. 394, ss. 1, 2, 3; 1915, c. 127; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3454.)

Applies to Town Lot.—This section which requires railroads to construct cattle guards at the point of entrance upon and exit from enclosed lands, applies to a town lot as well as in the county. Shepard v. Suffolk & C. R. Co., 140 N. C. 391, 53 S. E. 137.

Adoption of Stock Law.—The adoption of the stock law does not abrogate this section in a locality. Shepard v. Suffolk & C. R. Co., 140 N. C. 391, 53 S. E. 137.

Joinder of Actions.—Where plaintiff's complaint contained two causes of action, one to recover damages alleged to have been caused by defendant's ponding water back on plaintiff's land; the other to recover damages for a breach of duty on the part of defendant in not putting up sufficient cattle-guards as required by this section, this was an improper joinder of causes of action, the first being for injury to property, a tort, while the second arose "upon contract" for the breach of an implied contract to perform a statutory duty. Hodges v. Wilmington, etc., R. Co., 105 N. C. 170, 10 S. E. 917.

Cited in Allen v. Wilmington, etc., R. Co., 102 N. C. 381, 389, 9 S. E. 4. Concurring opinion of Avery, J., in Allen v. Wilmington, etc., R. Co., 106 N. C. 515, 526, 11 S. E. 576, 826; Hinkle v. Richmond, etc., R. Co., 109 N. C. 472, 481, 13 S. E. 884; Carter v. Wilmington, etc., R. Co., 126 N. C. 437, 443, 36 S. E. 14.

§ 60-49. Change of route of railroad.—The directors of any railroad corporation may by a vote of two-thirds of their whole number at any time alter or change the route, or any part of the route, of their road, if it shall appear to them that the line can be improved thereby, and they shall have the same right and power to acquire title to any lands required for the purposes of the company in such altered or changed route, as if the road had been located there in the first instance; but no such alteration shall be made in any city or town after the road shall have been constructed, unless the same is sanctioned by a vote of two-thirds of the corporate authorities of such city or town. In case of any alteration made in the route of any railroad after the company has commenced grading, compensation shall be made to all persons for injury so done to any lands that may have been donated to the company. When any route or line is abandoned in the exercise of the power herein granted, full compensation shall be made by the company for all money, labor, bonds or material contributed to the construction of the road-bed or its superstructure by those so interested by their contributions in the abandoned route or line. All the provisions of this chapter relative to the first location and to acquiring title to land shall apply to every such new or altered portion of the route. (Rev., s. 2573; Code, s. 1953; 1871-2, c. 138, s. 25; 1889, c. 391; 1893, c. 396, s. 3; C. S. 3455.)

Cross Reference.—As to the duty of the utilities commission to require railroads to enter towns, see § 62-52.

Authority Necessary to Change Route.—While a railroad company has no power to change its route without legislative authority, it is not necessary that this power should

be given in the charter or a direct amendment thereto, but it may be given by charter or by special enactment or by the general railroad laws of the State. Dewey v. Atlantic Coast Line R. Co., 142 N. C. 392, 55 S. E. 292.

Original Rights May Be Retained.—Variations in a route over which a railroad may run do not affect the identity of a corporate body that builds it, where subsequent acts are amendatory of the original charter and give permission for a deflection from the line first projected; and the right to exemption of property from tax granted in the original charter, is retained unimpaired. Cheraw, etc., R. Co. v. Commissioners, 88 N. C. 519.

When Corporation Commission Orders Change.—This section requiring that a contemplated change in the route of a railroad in a city can only be made when sanctioned by a two-thirds vote of the aldermen, only applies where the railroad of its own volition, and for its own convenience, contemplates a change of route, and not to a case where the Corporation Commission, acting under express legislative authority and direction, require the railroad to make the change for the convenience of the general public. Dewey v. Atlantic Coast Line R. Co., 142 N. C. 392, 55 S. E. 292.

Right to Change Grade.—A railroad company has a right to change the grade of its roadbed or to remove it to any point on its right of way. Brinkley v. Sou. R. Co., 135 N. C. 654, 47 S. E. 791.

Cited in North Carolina, etc., R. Co. v. Central. etc., R. Co., 83 N. C. 489, 494.

§ 60-50. Forfeiture for failure to begin or complete railroad.—If any railroad corporation shall not within three years after its articles of association are filed and recorded in the office of the secretary of state, or the passage of its charter, begin the construction of its road and expend thereon ten per cent of the amount of its capital, or shall not finish the road and put it in operation in ten years from the time of filing its articles of association or passage of its charter as aforesaid, its corporate existence and powers shall cease. (Rev., s. 2564; Code, s. 1980; 1871-2, c. 138, s. 43; Ex. Sess. 1908, c. 142; C. S. 3456.)

State Must Institute Forfeiture Proceedings.—The failure of a railroad company to organize under an act of incorporation within the two years prescribed, does not prevent a valid organization thereafter, unless forfeiture has been declared in proceedings instituted by the state. Railroad v. Olive, 142 N. C. 257, 55 S. E. 263.

The State alone, acting through the Attorney-General, may institute a proceeding against a railroad company to forfeit its charter under the provisions of this section for failure to begin construction of the railroad and complete the same within the two separate periods therein prescribed. Brummitt v. Snow Hill Ry. Co., 197 N. C. 381, 148 S. E. 444.

Same—Waiver of Forfeiture.—If the legislature knowing the ground of forfeiture deals with the corporation as if it were lawfully existing it thereby waives its right of forfeiture. Attorney-General v. Petersburg, etc., R. Co., 28 N. C. 456.

Where a railroad company has not commenced the construction of its road within three years after its charter has been granted as required by this section, and thereafter by statute the Legislature declares that certain bonds issued by a township to aid in the construction of the railroad shall be valid, and the county has acted in recognition of the existence of the corporation, the State by its acquiescence in the delay and by its recognizing the railroad company as an existing corporation has waived its right to insist on a forfeiture. Brummitt v. Snow Hill Ry. Co., 197 N. C. 381, 148 S. E. 444.

Same—Attorney-General Cannot Bring Action.—The attorney-general cannot of his own motion bring an action to vacate the charter of a corporation. Attorney-General v. Railroad, 134 N. C. 481, 46 S. E. 959.

Same—Cannot Be Attacked in Condemnation Proceedings.—The existence of a railroad corporation can not be attacked or questioned in an action brought by it to condemn land for its purposes. Wellington, etc., R. Co. v. Cashie, etc., R. Co., 114 N. C. 690, 19 S. E. 646.

Forfeiture for Failure to Comply with Either of Time Limits.—Construing this section as to the forfeiture of the charter of a railroad company when construction of the proposed road is not commenced within three years or completed and put into operation within ten years after its charter has been granted, to make the two provisions consistent it is held that they are not alternative, and upon the failure of a railroad to comply with either one of the provisions, the suit of the Attorney-General will be maintained in the absence of acts or conduct upon the part of the sovereign that amount to a waiver of the default. Brummitt v. Snow Hill Ry. Co., 197 N. C. 381, 148 S. E. 444.

§ 60-51. Secretary of state may extend time to begin railroad in certain cases.—In all cases where railroad companies have been chartered by the act of the general assembly or the charter of any railroad company has been amended by act of the general assembly, during or subsequent to the session of one thousand nine hundred and eleven, but where construction work has not begun in accordance with the provisions of § 60-50 or having been begun such construction work has not been completed, the secretary of state may in the exercise of his sound discretion, upon application of any such railroad company and the payment to the state of the same fees as provided in § 55-158, extend from time to time for periods of two years the time within which to begin or renew construction work as required by § 60-50; and the fact of extending the time by the secretary of state, as herein provided, shall, for the period of such extension, fully and to all intents and purposes, renew corporate existence and corporate powers as fully as the same are conferred in the original charter. (1919, c. 19; 1921, c. 184; 1923, c. 245; C. S. 3457.)

Editor's Note.—In 1921, by Public Laws 1921, ch. 184, this section was amended so as to include railroads whose charters had been amended since 1911. At the same time the provision regarding construction work begun but not completed was added. By Public Laws 1923, ch. 245, the legislature made the granting of any extension of time for beginning, renewing or completing, work on railroads within the state discretionary with the secretary of state, instead of obligatory as heretofore.

§ 60-52. Forfeiture for preferences to shippers.—In the event of any contract having been entered into by any railroad company in this state with any person or company, whereby preferences or exclusive rights of transportation, either in priority or in arrangements, are given to such person or company, the attorney-general is hereby instructed to institute proceedings against such railroad company for a forfeiture of its charter. (Rev., s. 2563; Code, s. 1969; 1865-6, resolution ratified December 14, 1865; C. S. 3458.)

§ 60-53. Obtaining temporary track across railroad.—Wherever any railroad line track and right of way shall lie between any body of merchantable timber or quarry or other kind or class of heavy property requiring machinery for transportation and any body of navigable water over which such property could be floated or shipped, and the owner of such timber or property shall desire to transport such property to water for purpose of floating or shipping, such property owner shall have the right to file petition before the utilities commission for a right to cross such railroad with any other railroad track or tramway. The procedure for the hearing of the petition shall be same as other proceedings of the commission. The commission shall hear the facts and if it be found reasonably necessary that the railroad track and right of way shall be crossed by a temporary railroad track the commission shall so order and

prescribe the payment of the expense and the cost. (1931, c. 448; 1933, c. 134, s. 8; 1941, c. 97.)

Cited in Waldroup v. Ferguson, 213 N. C. 198, 195 S. E. 615.

§ 60-54. Shelter at railroad division points required; failure to provide, a misdemeanor.—It shall be the duty of every person, firm, or corporation that may now or hereafter own, control, or operate any line of railroad in the state of North Carolina, to erect and maintain at every division point where cars are regularly taken out of trains for repairs or construction work, or where other railroad equipment is regularly made, repaired, or constructed, a building or shed with a suitable and sufficient roof over the repair and construction track or tracks so as to provide that all men or employees permanently employed in the construction and repair of cars, trucks, or other railroad equipment of whatever description shall be under shelter and protected during snows, rains, sleets, hot sunshine, and other inclement weather: Provided, the utilities commission shall have the power to direct the points at which sheds shall be erected, and the character of the sheds: Provided further, that such order shall only be made after a hearing of which public notice shall have been given.

Any person, firm, or corporation failing to comply with the requirements of this section shall be guilty of a misdemeanor, and for each offense shall be fined not less than one hundred dollars nor more than five hundred dollars. Each day of such failure shall constitute a separate offense. (1913, c. 65; 1913, c. 117; 1933, c. 134; 1941, c. 97; C. S. 6557.)

§ 60-55. Railroad employees to be paid twice a month.—All persons, firms, companies, corporations, or associations owning, leasing, or operating any railroad or railroads, wholly or partially within this state, shall pay and settle with their employees engaged or employed in shops, round-houses, or repair shops within this state at least twice in each month, which settlements shall not be less than two weeks nor more than three weeks apart, and shall, in such settlements, pay such employees the full amounts due them for their work and services up to the date of the preceding settlement, and such payment shall be made in lawful money of the United States, or by check or cash order redeemable by the maker thereof for its face value in lawful money of the United States upon demand of or presentation by the lawful holder thereof: Provided, this section shall not apply to repair shops where less than ten employees are engaged. (1915, c. 92; C. S. 6558.)

Editor's Note.—This section seems to be the only North Carolina enactment of its kind. 15 N. C. L. Rev. 266.

Art. 6. Hours of Service for Employees of Carriers.

§ 60-56. Maximum continuous service.—It shall be unlawful for any common carrier, its officers or agents, subject to this article, to require or permit any employee, subject to this article, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, that no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a period longer than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: Provided further, the utilities commission may, after a full hearing in a particular case and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case. (1911, c. 112, s. 2; 1933, c. 134; 1941, c. 97; C. S. 6565.)

§ 60-57. Penalty for violation.—Any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be or remain on duty in violation of § 65-56 shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in suit or suits to be brought in the name of the state of North Carolina on relation of the utilities commission in the superior court of Wake county or of the county in which the violation of this article occurred; and it shall be the duty of the said utilities commission to bring such suits upon satisfactory information lodged with it; but no such suit shall be brought after the expiration of one year from date of such violation; and it shall be the duty of said utilities commission to lodge with the proper solicitors information of any such violations as may come to its knowledge. In all prosecutions under this article the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: Provided, that the provisions of this article shall not apply to any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the said employee left a terminal, and which could not have been foreseen: Provided further, that the provisions of this article shall not apply to the crews of wrecking or relief trains: Provided further, this article shall not be construed to impose a penalty upon any common carrier for any act done in violation of the act of congress, ratified March the fourth, one thousand nine hundred and seven, and entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," or any acts amendatory thereof. (1911, c. 112, s. 3; C. S. 6566.)

§ 60-58. Utilities commission to enforce article.—It shall be the duty of the utilities commission to execute and enforce the provisions of this article, and all powers granted to the utilities commission are extended to it in the execution thereof. (1911, c. 112, s. 4; 1933, c. 134, ss. 7, 8; 1941, c. 97; C. S. 6567.)

Art. 7. Lease, Sale, and Reorganization.

§ 60-59. Lessee of noncompeting railroad may acquire its stock; merger of lessor.—Any railroad corporation or its successors, being the lessee of the road of any other noncompeting railroad corporation, may take a surrender or transfer of the capital stock of the stockholders, or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporation taking such surrender or transfer shall thereafter, on a resolution electing so to do, to be entered on their minutes, become ex officio the directors of the corporation whose road is so held under lease, and shall manage and conduct the affairs thereof as provided by law; and whenever the whole of such capital stock shall have been so surrendered or transferred, and a certificate thereof filed in the office of the secretary of state under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges and franchises of the corporation whose stock shall have been so surrendered or transferred shall thereupon vest in and be held and enjoyed by the corporation to whom such surrender or transfer shall have been made, and as fully and entirely, without charge or diminution, as the same were before held and enjoyed, and be managed and controlled by the board of directors of the corporation to whom the surrender or transfer of such stock shall have been made in the corporate name of such corporation. But the property, rights, franchises and profits of every corporation so surrendered, transferred or leased shall hereafter always be liable to taxation, and shall never be exempt therefrom. The rights of any stockholder not so surrendering or transferring his stock shall not be in any way affected thereby, nor shall existing liabilities or the rights of creditors of the corporation where stock shall have been so surrendered or transferred be in any way affected or impaired by this section. (Rev., s. 2574; Code, s. 1994; 1871-2, c. 138, s. 57; Ex. Sess. 1908, c. 119, s. 2; C. S. 3459.)

Cross References.—As to conditional sales or leases of railroad property, see § 47-24. As to taxation of leased railroad, see § 105-367.

Editor's Note.—The stockholders of the old corporation cannot be compelled to become stockholders of the new corporation without their consent and do not become such until they have actively participated in the transfer by exchanging their old stock for the new.

A railroad corporation has no power to consolidate with another railroad company so as to form a single corporation unless this authority is granted by legislative act. Under this section no consolidation can take place until one corporation holds all of the capital stock of another.

The sentence reserving the right of taxation is a saving clause to prevent the operation of Tennessee v. Whitworth, 117 U. S. 139, 6 S. Ct. 649, 29 L. Ed. 833, which held that all special privileges, including exemption from taxation, of the old corporation were inherited by the new.

When New Corporation Formed.—Where a new corporation is formed out of two existing corporations, these latter ceasing thereafter to exist, the law forming the new corporation governs and controls its corporate functions and rights. Cheraw & Salisbury R. Co. v. Commissioners, 88 N. C. 519.

Legislative Act Authorizing Consolidation.—An act authorizing the consolidation of certain railroad corporations upon a vote of a majority of the stockholders and allowing a stockholder actual value for his stock in lieu of taking stock in the consolidated company, is valid. Spencer v. Seaboard Air Line R. Co., 137 N. C. 107, 49 S. E. 96.

§ 60-60. Lease or merger of competing carrier declared a misdemeanor.—No railroad or other transportation company or its officers, now or hereafter doing business in this state, shall purchase, lease, absorb, take over, buy stock in, merge with or in any way secure an interest in a competing line of railroad or other transportation company, nor shall any railroad or other transportation company or its officers enter into any contract, agreement or understanding with a competing line of railroad or other transportation company calculated to defeat or which may defeat or lessen competition in this state. All such contracts, purchases or sales shall be void. Any violation of this section shall make the corporation or person so offending guilty of a misdemeanor, and on conviction the offender shall be fined in the discretion of the court. This section shall not prevent railroads independently owned and operated in this state, and not exceeding one hundred miles in length, from selling their roads and property. (Ex. Sess. 1908, c. 119, ss. 2, 3; C. S. 3460.)

§ 60-61. Acquisition of interest in or lease of noncompeting branch or connecting lines.—Any railroad or other transportation company may acquire and hold or guarantee, or endorse the bonds or stocks of, or may lease any railroad or branch railroad, or other transportation line in this or adjoining state connecting with it directly or indirectly. But no railroad or other transportation company or its officers shall acquire, hold or guarantee the bonds or stock of, or lease or be leased to, or purchase or buy or consolidate with or be merged into, any parallel or competing railroad or other transportation company, nor shall any railroad or other transportation company or its officers sell any of its stock or bonds to any holding or voting company or its officers, whereby such consolidation or merger may be effected, and any such purchase, contract, merger or sale shall be void. This provision shall not prevent railroads independently owned and operated in this state, and not exceeding one hundred miles in length, from selling their roads and property. (Rev., s. 2567, subsec. 13; 1885, c. 108, s. 2; 1908, c. 119, ss. 1, 3; C. S. 3461.)

Lease Beyond Time Granted for Corporate Existence. — Where the term of a lease of property of a railroad company extends beyond the time fixed by its charter for the corporate existence of the lessor, such a lease is valid for the period of the corporate life of the lessor, and will extend beyond that period if the charter is renewed, and the lessor's corporate existence is thereby extended, and by this process it may endure for the full term. Hill v. Atlantic, etc., R. Co., 143 N. C. 539, 55 S. E. 854.

Lessor Responsible for Torts. — The lessor of a railroad is responsible for the torts committed by the lessee in the operation of the leased road, and in the exercise of its franchise. Mitchell v. Sou. R. Co., 176 N. C. 645, 97 S. E. 628; Hill v. Director-General, 178 N. C. 607, 610, 101 S. E. 376.

Same—Granting New Trial to Lessee Railroad.—When the lessor railroad company is sued jointly with its lessee company for damages caused by the alleged negligence of the lessee, and after verdict the lessor moves for judgment upon the verdict, but makes no motion for a new trial, while the lessee company moves for a new trial, and both motions are refused and both defendants appeal from the judgment rendered against them, the granting a new trial to the lessee vacates the judgment as to both defendants. Tillett v. Lynchburg, etc., R. Co., 115 N. C. 662, 663, 20 S. E. 480.

§ 60-62. Purchaser at mortgage or execution sale of railroads may incorporate.—Whenever the purchaser of the real estate, track and fixtures of any railroad corporation which has heretofore been sold, or may hereafter be sold, by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any court, shall acquire title to the same in the manner prescribed by law, such purchaser may associate with him any number of persons, and make and acknowledge and file articles of association as prescribed in this chapter. Such purchaser and his associates shall thereupon be a new corporation, with all the powers, privileges and franchises and subject to all of the provisions of this chapter. (Rev., s. 2552; Code, s. 1936; 1871-2, c. 138, s. 5; C. S. 3462.)

Cross Reference.—As to contents of articles of assiciation, prerequisites for fiiling, etc., see § 60-9 et seq.

Railroad May Be Sold.—A railroad is the subject of private property, and in that character is liable to be sold, unless the sale be forbidden by the Legislature; not the franchise, but the land itself constituting the road. State v. Rives, 27 N. C. 297.

Corporation Not Dissolved by Sale.—A railroad corporation is not dissolved by the sale of its road. State v. Rives, 27 N. C. 297.

Purchaser Takes Rights of Old Company.—On the foreclosure of a mortgage given by a railroad company, the purchaser takes the rights that the company had acquired in relation to its right of way under its charter. Barker v. Sou. R. Co., 137 N. C. 214, 49 S. E. 115.

Cited in Saluda v. Polk County, 207 N. C. 180, 184, 176 S. E. 298.

§ 60-63. On dissolution or sale of railroads purchaser becomes a corporation.—When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation upon compliance with law. (Rev., s. 2565; Code, s. 2005; C. S. 3463.)

Corporate Existence Not Extinguished by Sale. — The sale of a railroad under a second mortgage and a conveyance thereunder, subject to the first mortgage upon its franchise and corporate property, did not extinguish the corporate existence of the company nor release it from liability to the public for the manner in which it is operated. James v. Western North Carolina R. Co., 121 N. C. 523, 28 S. E. 537.

Same—When Sale Effects Dissolution.—In order that the sale of the franchise and property of a railroad corporation under mortgage shall have the effect of a dissolution of such corporation another corporation must be provided, to take its place, and assume and discharge the obligations to the public growing out of the grant of the franchise, and until that is done the old corporation continues to exist and when it is done the new corporation will be a domestic corporation. James v. Western North Carolina R. Co., 121 N. C. 523, 28 S. E. 537.

Property Must Be Associated with Franchises.—The property of railroads must be kept in association with their franchises to preserve value; to give credit to such corporations; to secure creditors and keep railroads in operation for the benefit of the public. Bradley v. O. R. & C. Ry. Co., Appx. 119 N. C. 918, 927.

Same—Object.—The legislative purpose, as clearly manifested in this section, is that the property of railroads must be kept in association with their franchises, to preserve value, to give credit to such corporations, to secure creditors, and keep railroads in operation for the benefit of the public, which was the primary object of the legislature in bestowing such corporate franchises. Bradley v. Ohio, etc., Ry. Co., 78 Fed. 387, 393.

Sale under Second Mortgage.—The effect of the sale of a railroad company's franchises and property under a second mortgage, subject to a first mortgage which was assumed by the purchaser, is to place the purchaser in the place of the mortgagor in its relation to the trustee of the first mortgage, with the right to run and operate the road as agent of the mortgagor, but the old corporation was not extinguished, but is still in existence and liable for damages caused by the mal-administration of its agent which liability can be enforced against the property which it allows the purchaser to use. James v. Western North Carolina R. Co., 121 N. C. 523, 28 S. E. 537.

Art. 8. Liability of Railroads for Injuries to Employees.

§ 60-64. Common carrier defined.—The term "common carrier," as used in this article, shall include the receiver or receivers, or other persons or corporations charged with the duty of the management of the business of a common carrier. (1913, c. 6, s. 5; C. S. 3464.)

Editor's Note.—This article, regulating the liability of railroads for injuries to employees, was enacted prior to the adoption of the Workmen's Compensation Act, §§ 97-1 to 97-122. Section 97-13 expressly provides that the Workmen's Compensation Act is not applicable to railroads or railroad employees and that this article is not repealed. According to that section, however, the exemption as to railroads does not apply to electric street railroads and their employees.

§ 60-65. Fellow-servant rule abrogated; defective machinery.—Any servant or employee of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death in the course of his services or employment with such company, by the negligence, carelessness or incompetence of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void. (Rev., s. 2646; 1897 (Pr.), c. 56; 1915, c. 256; C. S. 3465.)

I. Editor's Note.
II. Fellow-Servant Rule.
III. Assumption of Risk.

Cross References.

As to venue of an action against a railroad, see § 1-81. As to action for death by wrongful act generally, see § 28-173.

I. EDITOR'S NOTE.

In Hobbs v. Atlantic, etc., R. Co., 107 N. C. 1, 12 S. E. 124, it was held that a railroad company was not liable for injury to its servants, resulting from the negligence of a fellow servant. In that case the attention of the legislature was called to the fact that many of the states had by legislative enactment abrogated the fellow servant rule in so far as it applied to railroad employees. Thereupon there ensued a strenuous discussion for and against the passage of a similar statute in North Carolina. In 1897 such a statute was passed and its constitutionality sustained in Hancock v. Norfolk, etc., Railway, 124 N. C. 222, 32 S. E. 679. By several decisions of the United States Court similar statutes in other states have been held not to be in violation of the Fourteenth Amendment to the Federal Constitution.

In Mott v. Southern R. Co., 131 N. C. 234, 237, 42 S. E. 601, it was sought to curtail and restrict this section so that it should apply only to employees engaged in operating trains, but the court held the contrary and said: "The language of the statute is both comprehensive and explicit. It embraces injuries sustained by 'any servant or employee of any railway company . . . in the course of his services or employment with said company.' The plaintiff

was an employee and was injured in the course of his employment."

However, to come within the provisions of this section a railroad must be "operating" and not "under construction."

The succeeding section was passed after congress had passed a similar statute applicable to employees engaged in interstate commerce. It is not as broad as this section for it applies only to common carriers by railroad. See Editor's Note under that section.

The act applies only to employees who are engaged in duties connected with or incidental to the operation of railroads, logging roads or tramroads. Gurganous v. Camp Mfg. Co., 204 N. C. 525, 168 S. E. 833.

II. FELLOW-SERVANT RULE.

Abrogation of Fellow-Servant Rule.—This section is an unconditional abrogation of the kindred doctrines of Fellow Servant and Assumption of Risk as applied to railroad companies. Coley v. North Carolina R. Co., 129 N. C. 407, 409, 40 S. E. 195.

Rule Abrogated Only as to Railroads.—The law relating to the doctrine of fellow-servants has been only modified in regard to its application to those employed by railroad companies operating in this state. Robinson v. Ivey & Co., 193 N. C. 805, 138 S. E. 173.

Applies to Any Department of Railroad.—The provisions of this section apply to an injury negligently inflicted by a fellow-servant in any department of a railroad being operated. Buckner v. Madison County R. Co., 164 N. C. 201, 80 S. E. 225.

Applies to Street Railways.—This section applies to street railways. Brookshire v. Asheville Elect. Co., 152 N. C. 669, 68 S. E. 215; Hemphill v. Buck Creek Lumber Co., 141 N. C. 487, 54 S. E. 420. But see § 97-13 and Editor's Note to § 60-64.

Applicable to Logging Roads.—This section has been held to apply to logging roads. Moore v. Rawls, 196 N. C. 125, 144 S. E. 552.

Applies to Manufacturing Company Operating Spur Track.—This section applies to a manufacturing corporation which owns and operates a spur track on its grounds as incidental to its main business, with respect to servants employed in such service. United States Leather Co. v. Howell, 151 Fed. 444; Hairston v. United States Leather Co., 143 N. C. 512, 55 S. E. 847.

Does Not Apply to Railroad under Construction. — This section does not apply to an employee engaged in building a trestle for the extension of a railroad, at a point some miles from the track on which trains are being operated. Nicholson v. Railroad, 138 N. C. 516, 51 S. E. 40; Bailey v. Meadows Co., 152 N. C. 603, 68 S. E. 11.

Kind of Employment. — The provisions of this section applying to railroads do not require that the servant, at the time of the injury, should be engaged in the running or operation of a train, but applies to any other kind of service, whether more or less dangerous. Mincey v. Atlantic Coast Line R. Co., 161 N. C. 467, 77 S. E. 673.

Applies to All Employees.—This section operates on all employees of the company, whether in superior, equal, or subordinate positions. Fitzgerald v. Southern R. Co., 141 N. C. 530, 54 S. E. 391; Bloxham v. Stave etc. Corp., 172 N. C. 37, 89 S. E. 1013.

Section Read into Contract.—Where a contract of service with the defendant railroad was made in this State, the provisions of this section must be read into the contract, and there being no evidence that the service was to be performed altogether in another State, it would seem that the relative rights and liabilities of the parties are fixed by the terms of the contract. Miller v. Railroad, 141 N. C. 45, 53 S. E. 726.

Injury When Duty Delegated to Another.—Where a railroad company delegated its duty of loading a car to a lumber company making a shipment, it is liable for any injury to its own employee caused by negligence of the employees of the lumber company in loading the car. Britt v. Carolina, etc., R. Co., 144 N. C. 242, 56 S. E. 910.

Injury in Loading Logs—Where a tram railroad is engaged in loading logs and a fellow-servant of the plaintiff engaged in the scope of his employment in loading the logs, negligently caused one of the logs to drop upon the plaintiff and injure him the defendant is liable in damages for the negligent injury proximately caused. Lilley v. Interstate Cooperage Co., 194 N. C. 250, 139 S. E. 369.

Injury by Falling Tree.—This section applies where an employee was injured by a tree falling upon him as he was riding on the car of defendant's logging road in the performance of his duties, a change of wind having deflected the tree from its expected course, so that it struck the tops of smaller trees and thence fell upon the plaintiff, the engineer should reasonably have seen the danger in time for him to have stopped the train and avoided the injury, after the course of the falling tree had been unexpectedly deflected. Bloxham v. Stave, etc., Corp., 172 N. C. 37, 89 S. E. 1013.

Defective Ladder.—Where two employees of a railroad company are instructed to do certain work, requiring the use of a ladder, and a discarded ladder, which proves defective, is selected from several supplied by the company, the others being sound, and one of the employees sustains a fall because of the defect and sues for damages therefor, this section applies. Mincey v. Atlantic Coast Line R. Co., 161 N. C. 467, 77 S. E. 673.

Flagman at Crossing.—Where the plaintiff was employed by a railroad to warn pedestrians of approaching trains at a public crossing and to signal the engineer, and the plaintiff was injured by the defendant's negligence when he had crossed the platform on a train and was on the lowest step of the car for the performance of his duty on the other side, the evidence is sufficient upon the question of employment to sustain a verdict in plaintiff's favor. West v. Atlantic Coast Line R. Co., 174 N. C. 125, 93 S. E. 479.

Engineer Injured by Assistant's Negligence.—It was the duty of a railroad company to furnish its engineer, a competent person to assist him in fixing his locomotive, when such assistance is necessary from the character of the work being done; and the defendant is liable in damages when the assistant fails to exercise ordinary care to prevent an injury, such failure being the proximate cause of the injury. Horton v. Seaboard Air Line Railway, 145 N. C. 132, 58 S. E. 993.

Death by Fellow-Servant's Pistol. — Where a baggage agent of a railroad company, in the course of his employment in getting some baggage checks from a drawer to a desk in the baggage room, removes a pistol which he knew to be loaded, takes it in his hand, and in a careless manner opens another drawer to the desk, and in doing so causes the pistol to fire, and kills his assistant, his negligent acts are attributable to the company employing him. Moore v. Southern R. Co., 165 N. C. 439, 81 S. E. 603.

Catching Hand between Cross-Tie and Rail.—The plaintiff was employed by a railroad to replace the crossties under the rails of the road. While a tie was being depressed into position by his fellow servant his hand was caught between the end of the tie and the rail and injured. The plaintiff had no explanation to make of the occurrence, except "he had his hand on the tie to bear it down, and it went over and the end flew up and caught his hand." It was held that the injury was the result of an accident in doing work of a simple nature, and a recovery should have been denied as a matter of law. Lloyd v. Southern R. Co., 168 N. C. 646, 85 S. E. 10.

III. ASSUMPTION OF RISK.

Editor's Note.—After the passage of a similar Federal Statute applying to employees engaged in interstate commerce this legislature enacted section 60-68. It is not as broad as this section for it applies only to common carriers.

General Considerations. — The doctrine of assumption of risk is that an employee assumes the risk of accidents and injuries incident to the business properly operated. He does not assume the risk caused by the negligence of the company, in not furnishing proper appliances or in any other respect. Horton v. Seaboard Air Line R. Co., 175 N. C. 472, 474, 95 S. E. 883.

The employee assumes no risk in the proper use of defective appliance after notifying the employer thereof, who promises to remedy the defect; but he must use them with proper regard to their known condition, and, failing in this, he would be guilty of contributory negligence, which would bar his recovery. Britt v. Carolina, etc., R. Co., 144 N. C. 242, 56 S. E. 910.

It is not the mere working in the presence of an obvious defect in an appliance furnished by the master that will constitute contributory negligence on the part of the servant; and assurances on the part of the former that needed repairs will be made will frequently relieve the latter of this charge, which might otherwise bar his recovery of damages for an injury thereby sustained by him. Bissell v. Greenleaf-Johnson Lumber Co., 152 N. C. 123, 67 S. E. 259.

Defense of Assumption of Risk Eliminated.—In an action for negligence against a railroad company operating in this state, the defense of working on in the presence of a defective appliance or machine, usually dealt with under the head of assumption of risk, has been eliminated by this section; but if, apart from the element of assumption of risk, the plaintiff in his own conduct has been careless in a manner which amounts to contributory negligence, his

action fails, except in extraordinary cases. Biles v. Seaboard Air Line R. Co., 143 N. C. 78, 55 S. E. 512.

Under the construction of this section assumption of risk is not available. Moore v. Rawls, 195 N. C. 125, 128, 144 S. E. 552.

Duty to Furnish Safe Tools.—It is the master's duty to furnish the servant such tools as are reasonably safe and suitable for the work in which he is engaged, and in general use. Eplee v. Southern R. Co., 155 N. C. 293, 71 S. E. 325; Bissell v. Greenleaf Johnson Lumber Co., 152 N. C. 123, 67 S. E. 259. If he fails to do so he exposes the servant to extraordinary risks. Moore v. Railroad, 141 N. C. 111, 53 S. E. 745.

Same—Acquiescence in Use.—The master's acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose. Wallace v. Railroad, 141 N. C. 646, 54 S. E. 399.

Obviously Defective Machinery. — The use of machinery obviously defective will not prevent a person from a recovery for an injury resulting therefrom, unless the apparent danger is so great that its assumption would amount to a reckless indifference of probable consequences. Coley v. North Carolina R. Co., 129 N. C. 407, 40 S. E. 195.

When Plaintiff Causes Own Injury. — When under instructions from his superior officer the plaintiff, in repairing a piece of machinery, with knowledge of its defects, negligently caused an injury to himself in such manner as it was his duty in repairing to prevent, he cannot recover, and this section has no application. Mathis v. Atlantic Coast Line R. Co., 144 N. C. 162, 56 S. E. 864.

Liability Not Affected by Act of Shipper.—The duty of the railroad company to have a crosspiece used to keep steady lumber on flat cars secured in a reasonably safe manner for the use to which its servants customarily put it is not affected by the fact that the shipper puts it on in loading the car. Wallace v. Railroad, 141 N. C. 646, 54 S. E. 399.

Question for Jury. — Where the employee of a railroad company, in intrastate commerce, was ruptured while handling heavy baggage at the station by the unaided use of his personal strength, when the company had promised to furnish him a truck proper for the service, the use of which would have avoided the injury, it is for the jury to determine whether the defendant was negligent in failing to supply the truck, or whether the plaintiff assumed the risk in attempting to lift the trunk. Hines v. Atlantic, etc., R. Co., 185 N. C. 72, 116 S. E. 175; see also, Horton v. Seaboard Air Line R. Co., 175 N. C. 472, 95 S. E. 883; Wallace v. Tallahassee Power Co., 176 N. C. 558, 97 S. E. 611.

Failure to Equip Car with Automatic Couplers. — Where the jury found that the plaintiff was injured by the negligence of the defendant in failing to have its cars equipped with automatic couplers, the only defense open to the defendant, in the absence of any evidence of recklessness, was whether plaintiff was injured in the course of his service and employment. Hairston v. United States Leather Co., 143 N. C. 512, 55 S. E. 847.

Defective Coupler.—In an action for an injury alleged to have been sustained from a defective coupler, the use of a defective coupler was a violation of a positive duty, and, in connection with an express order of the superintendent to make the coupling, was continuing negligence, and the causa causans of the injury. Liles v. Fosburg Lumber Co., 142 N. C. 39, 54 S. E. 795; Sears v. Atlantic, etc., R. Co., 169 N. C. 446, 86 S. E. 176.

Engine without Handhold Along Pilot Beam.—Where the plaintiff's evidence shows that he was at the time of the injury at the usual position provided for the purpose on the pilot of the engine by order of his superiors and in the necessary performance of his duties, and that he was thrown and injured because the engine did not have the usual handhold along the pilot beam and that he did not know it was lacking when he got on, and was guilty of no carelessness, his right of action is established. Biles v. Seaboard Air Line R. Co., 143 N. C. 78, 55 S. E. 512.

Exposed Screw or Power Drill.—A power drill furnished by the master to the servant for boring holes in iron plates, leaving an exposed set-screw thereon dangerous in operating the drill and which are usually covered or countersunk, is not a proper tool for the purpose, and the master is liable in damages proximately caused by the defect. Eplee v. Southern R. Co., 155 N. C. 293, 71 S. E. 325.

Improper Ladder—Where it is the custom of a railroad company to furnish ladders to its painters and one of them so employed had not been furnished with a proper ladder, but with an ordinary ladder that extended beyond the steep roof of the building upon which he was at work and the ladder fell over and struck the plaintiff, causing him to fall and the injury would not have occured if a proper ladder or appliance had been furnished, the evidence was sufficient to take the case to the jury upon the issue of the defendant's actionable negligence. Jones v. Atlantic Coast Line R. Co., 194 N. C. 227, 139 S. E. 242.

Defective Handcar.—Where plaintiff was injured in consequence of using a defective hand car which he had theretofore repeatedly reported to his employer as defective, and had been promised another, the railroad is liable. Boney v. Atlantic, etc., R. Co., 145 N. C. 248, 58 S. E. 1082.

Evidence.—Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. Fitzgerald v. Southern R. Co., 141 N. C. 530, 54 S. E. 391.

Cited in Stewart v. Black Wood Lumber Co., 193 N. C. 138, 140, 136 S. E. 385; Stamey v. Suncrest Lumber Co., 197 N. C. 391, 393, 148 S. E. 436; Hawkins v. Rowland Lumber Co., 198 N. C. 475, 476, 152 S. E. 169.

§ 60-66. Injuries through fellow-servants or defective appliances.—Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, or in the case of the death of such employee, to his or her personal representative, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engine, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment. (1913, c. 6, s. 1; C. S. 3466.)

Cross References.—As to action for death by wrongful act generally, see § 28-173. As to venue of an action against a railroad, see § 1-81.

Editor's Note.—This section applies only to employees engaged exclusively in intrastate commerce. There is a federal statute similar in its provisions which applies to employees engaged in interstate commerce. See 45 U. S. C. § 51. Rights accruing under the latter statute may be enforced in the state courts as well as the federal courts.

There is a distinction between the state and federal statute as to the basis of the damage assessed. Under the State statute the damages are based upon the present worth of the net pecuniary value of the life of the deceased. Ward v. North Carolina R. Co., 161 N. C. 179, 186, 176 S. E. 717. Under the United States statute the damages are based upon the pecuniary loss sustained by the beneficiary. North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591.

There is also a distinction as to the beneficiary. Under the State statute the jury assesses the value of the life of the decedent in solido, which is disbursed under the statute of distributions. Under the United States statute, the jury must find as to each plaintiff what pecuniary benefit each plaintiff had reasons to expect from the continued life of the deceased, and the recovery must be limited to compensation of those relatives in the proper class who are shown to have sustained such pecuniary loss. The personal representatives sue for the benefit of the next of kin. See Horton v. Sea Board Air Line R. Co., 175 N. C. 472, 477, 95 S. E. 883.

The difference between section 60-65 and this section is very marked. The former applies to all railroads, while this section applies only to a common carrier by railroad. See Williams v. Kinston Mfg. Co., 175 N. C. 226, 227, 95 S. E. 366.

Under section 28-173 none of the amount recovered in action for death by wrongful act belongs to the estate of the deceased and none of it is liable for the payment of his debts.

"Common Carrier" Defined.—A common carrier is one who, by virtue of his calling, undertakes for compensation to transfer personal property from one place to another for all persons as choose to employ him. Williams v. Kinston Mfg. Co., 175 N. C. 226, 227, 95 S. E. 366.

Statute Applicable.—The federal and state courts have concurrent jurisdiction and the question of which statute will apply depends upon whether or not the employee was engaged in interstate commerce. West v. Atlantic, etc., R. Co., 174 N. C. 125, 93 S. E. 479; Renn v. Seaboard Air

Line R. Co., 170 N. C. 128, 86 S. E. 964. See also Capps v. Atlantic, etc., R. Co., 178 N. C. 558, 101 S. E. 216.

When Interstate Question Immaterial. — In an action brought by a switchman of the defendant's train crew to recover damages for alleged negligence of the defendant in providing an improper coupler on a train made up and ready to start for a destination beyond the State, the question whether the train was an interstate one, or the plaintiff was at the time engaged in interstate commerce, is not material, since the enactment of this section which, in this respect, is substantially identical with the Federal statute. Sears v. Atlantic, etc., R. Co., 169 N. C. 446, 86 S. E. 176.

As to the time within which the action must be brought, under the federal act, see Belch v. Seaboard Air Line R. Co., 176 N. C. 22, 96 S. E. 640; King v. Norfolk-Southern R. Co., 176 N. C. 301, 97 S. E. 29.

Effect of Nonsuit in Action under Federal Act.—A judgment as of nonsuit upon the merits of an action brought by the administratrix of an injured employee of a railroad company under the Federal Employers' Liability Act will not operate as a bar to the same cause brought under the laws of this State, §§ 60-66, 60-67, the law and facts applicable to the first not being identical with those applicable to the second. Fuquay v. A. & W. Ry. Co., 199 N. C. 499, 155 S. E. 167.

Cited in Stamey v. Suncrest Lumber Co., 197 N. C. 391, 393, 148 S. E. 436.

§ 60-67. Contributory negligence no bar, but mitigates damages. — In all actions hereafter brought against any common carrier by railroad to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, however, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. (1913, c. 6, s. 2; C. S. 3467.)

Editor's Note.—The provisions of this section apply only to employees engaged exclusively in intrastate commerce. There is a similar federal statute which applies to employees engaged in interstate commerce. See 45 U. S. C. § 53.

In an action brought in a court of common law there could be no recovery for negligence by a plaintiff whose default contributed to the injury. The common law rule was that there could be no recovery for injuries where it appeared that the person injured was guilty of contributory negligence, or, in other words, where the injury was the result of the united, mutual, concurring and contemporaneous negligence of the parties to the tranaction. This section abolishes the common law rule and substitutes the doctrine of comparative negligence, reducing the damage but not barring the action.

There is a vital difference between contributory negligence and assumption of risk, which is thus stated, 1 Labatt on Master and Servant, secs. 305 and 306, as follows: "Assumed risk is founded upon the knowledge of the employee, either actual or constructive, of the risks to be encountered, and his consent to take the chance of injury therefrom. Contributory negligence implies misconduct, the doing of an imprudent act by the injured party, or his dereliction in failing to take proper precaution for his personal safety. The doctrine of assumed risk is founded upon contract, while contributory negligence is solely matter of conduct." This distinction has often been approved by the United States Supreme Court in cases under the Employers' Liability Act. Seaboard Air Line Railway v. Horton, 233 U. S. 492. 58 L. Ed. 1062, 34 S. Ct. 635; Yazoo, etc., R. Co. v. Wright, 235 U. S. 376, 59 L. Ed. 277, 35 S. Ct. 130.

See 13 N. C. Law Rev. 256.

In General.—The doctrine of comparative negligence is only recognized by our courts in instances coming within the meaning of the Federal Employers' Liability Act, and this section, and then only for the purpose of mitigating the damages or as a partial defense. Moore v. Chicago Bridge, etc., Works, 183 N. C. 438, 111 S. E. 776.

Contributory Negligence Question for Jury.—Under this section, the plaintiff is entitled to have his cause submitted to the jury, for, as herein provided, contributory negligence is no longer a bar to an action by an employee against the railroad for injuries sustained during his employment, and the question of assumption of risk was for the jury, the burden of proof being upon the defendant. Hines v. Atlantic, etc., R. Co., 185 N. C. 72, 75, 116 S. E. 175.

In Hines v. Atlantic Coast Line R. Co., 185 N. C. 72, at p. 75, 116 S. E. 175, it is said: "Assumption of risk is also a matter of defense analogous to contributory negligence to be passed upon by the jury who are to say whether the employee voluntarily assumed the risk; it is not enough to show merely that he worked on, knowing the danger. Lloyd v. Hines, 126 N. C. 359, 35 S. E. 611; the numerous cases cited thereto in the Anno. Ed.; C. S., 3468 [§ 60-68.]" West v. Fontana Mining Corporation, 198 N. C. 150, 155, 150 S. E. 884.

When Jury Fails to Allow for Contributory Negligence.—Where the plaintiff's complaint demands damages in a certain amount in his action involving the issues of negligence and contributory negligence, and the application of the rule of comparative negligence under the provisions of this section the fact that the jury has rendered a verdict for damages to the full amount demanded in the complaint under a proper instruction does not alone show that the jury had failed to follow the rule of damages prescribed in such instances, and the verdict will not on that ground be disturbed on appeal. Brooks v. Suncrest Lumber Co., 194 N. C. 141, 138 S. E. 532.

Evidence Raising Issue for Jury.—In an action for a deceased employee's negligent death, the fact that it was caused by a head-on collision on defendant railroad company's trestle, in broad daylight, with another of its cars, is some evidence that the defendant's negligence proximately caused the employee's death, and raises the issue for the determination of the jury though the intestate might have been guilty of contributory negligence. Hinnant v. Tidewater Power Co., 187 N. C. 288, 121 S. E. 540.

The section applies only to employees who are engaged in duties connected with or incidental to the operation of railroads, logging roads or tramroads. Gurganous v. Camp Mfg. Co., 204 N. C. 525, 168 S. E. 833.

Negligence in Obtaining Improper Ladder.—The failure of a railroad company to furnish an employee engaged in the scope of his employment in painting a station house, a proper ladder or appliance which caused the injury in suit comes within the provisions of this section, and the contributory negligence of the plaintiff is not a complete bar to his recovery, but only to be considered by the jury in diminution of the damages. Jones v. Atlantic Coast Line R. Co., 194 N. C. 227, 139 S. E. 242.

Motion to Nonsuit.—Where plaintiff, while performing his duty coupled a car attached to defendant's locomotive, while not in motion, and the injury was caused by the sudden movement of the locomotive by the engineer, without a signal from the plaintiff, contrary to practice, though there was evidence of contributory negligence, its establishment would not be a complete defense, under this section, and upon a motion to nonsuit, evidence that the engineer properly acted on the signal of another employee will not be considered. Lamm v. Atlantic, etc., R. Co., 183 N. C. 74, 110 S. E. 659.

Federal Statute.—The rule under the federal statute is substantially the same as that prescribed by this section. Contributory negligence is not a complete bar to the recovery of damages by an employee of a railroad company caused by the latter in interstate commerce, in an action brought under the Federal Employers' Liability Act, the admeasurement being that of comparative negligence by which the jury, under conflicting evidence, reduces the recovery in accordance with the relative negligence of the employee. Cobia v. Atlantic, etc., R. Co., 188 N. C. 487, 125 S. E. 18; Hinnant v. Tidewater Power Co., 187 N. C. 288, 121 S. E. 540; Ballew v. Asheville, etc., R. Co., 186 N. C. 704, 120 S. E. 334; Moore v. Atlantic Coast Line R. Co., 185 N. C. 189, 116 S. E. 409.

Applied in Byers v. Boice Hardwood Co., 201 N. C. 75, 159 S. E. 3; Bateman v. Brooks, 204 N. C. 176 167 S. E. 627.

Cited in Ingle v. Southern R. Co., 167 N. C. 636, 83 S. E. 744; Ballew v. Asheville, etc., R. Co., 186 N. C. 704. 120 S. E. 334; Stamey v. Suncrest Lumber Co., 197 N. C. 391, 393, 148 S. E. 436; Hawkins v. Rowland Lumber Co., 198 N. C. 475, 476, 152 S. E. 169.

§ 60-68. Assumption of risk as defense.—In any action brought against any common carrier under or by virtue of any of the provisions of this article to recover damages for injuries to, or the

death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee, or the death or injury was caused by negligence. (1913, c. 6, s. 3; C. S. 3468.)

Editor's Note.—Section 60-65 is an earlier section similar in its import. It applies to all railroads in North Carolina while this section applies only to common carriers.

Applied in Bateman v. Brooks, 204 N. C. 176, 167 S. E. 627.

Cited in Ingle v. Southern R. Co., 167 N. C. 636, 83 S. E. 744; Stamey v. Suncrest Lumber Co., 197 N. C. 391, 393, 148 S. E. 436.

§ 60-69. Contracts and rules exempting from liability void; set-off.—Any contract, rule, regulation or device whatsoever, the purpose and intent of which shall be to enable any common carrier by railroad to exempt itself from any liability created by this article, shall to that extent be void: Provided, that in any action brought against such common carrier, under and by virtue of any of the provisions of this article, such common carrier may set off therein any sum it has contributed or paid to any insurance or relief benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which such action was brought. (1913, c. 6, s. 4; C. S. 3469.)

Accepting Benefit from Relief Department.—A relief department of a railroad for providing hospitals for employees contributed to by the employees and the company under the control and management of the company, is but an agency of the company; and a stipulation in the contract with its employee that in the case of accident he must accept the benefit of the contract and release the company from liability, is prohibited by the provisions of this section. Barden v. Atlantic Coast Line R. Co., 152 N. C. 318, 67 S. E. 971; Herring v. Atlantic, etc., R. Co., 168 N. C. 555, 84 S. E. 863.

Cited in dissenting opinion of Walker, J., in Tilghman v. Seaboard Air Line R. Co., 167 N. C. 163, 169, 83 S. E. 315, 1090; Ingle v. Southern R. Co., 167 N. C. 636, 83 S. E. 744. Dissenting opinion of Clark, C. J., in Lloyd v. Southern R. Co., 168 N. C. 646, 85 S. E. 10.

§ 60-70. Provisions of this article applicable to logging roads and tramroads.—The provisions in this article relating to liability for damages shall also apply to logging roads and tramroads. (1919, c. 275; C. S. 3470.)

Editor's Note.—Before the enactment of this section provisions of section 60-65 were held, by judicial construction, to apply to logging roads and tramroads. See Roberson v. Greenleaf-Johnson Lumber Co., 154 N. C. 328, 70 S. E. 630; Buckner v. Madison County R. Co., 164 N. C. 201, 80 S. E. 225.

However, in Williams v. Kinston Mfg. Co., 175 N. C. 226, 95 S. E. 366. (decided in 1918) it was held that a logging road was not a common carrier within the meaning of section 60-67 and that the doctrine of comparative negligence was not applicable to actions for injuries sustained by employees of such roads. This decision seems to have engendered the legislative enactment enunciated by this section which was passed in 1919.

In a recent decision, Lilley v. Interstate Cooperage Co., 194 N. C. 250, 139 S. E. 369, the rule of the section, as to tram railroads, applied, and it is held that section 60-67 is operative as to such railroads.

The provisions of §§ 60-67, 60-65, are applicable to tram or logging roads under the provisions of this section. Sampson v. Jackson Bros. Co., 203 N. C. 413, 166 S. E. 181.

The employee must be engaged in duties connected with or incidental to the operation of such roads. Gurganous v. Camp Mfg. Co., 204 N. C. 525, 168 S. E. 833.

Comparative Negligence Rule Applies.—Under this section contributory negligence is no longer a bar to injuries received in the operation of a logging road, but such negligence mitigates damages. In other words, comparative negligence is now, under the law, applicable to logging roads. Moore v. Rawls, 196 N. C. 125, 129, 144 S. E. 552, citing McKinish v. Lumber Co., 191 N. C. 836, 133 S. E. 163.

Narrow-Gauge Logging Road. — A small narrow-gauge road running through the woods and used for the purpose only of transporting logs to the defendant's sawmill, with the cars loaded with logs pulled up a grade by means of a steam skidder, the wire cables operating around a drum upon the skidder, is a logging road within the intent and meaning of this section and an employee negligently injured by such company is not barred of his right to recover damages when caused by a fellow-servant; and contributory negligence is only considered in determination of the amount of damages the injured employee has sustained. Stewart v. Blackwood Lumber Co., 193 N. C. 138, 136 S. E. 385; Brooks v. Suncrest Lumber Co., 194 N. C. 141, 138 S. E. 532.

Applied in Bateman v. Brooks, 204 N. C. 176, 167 S. E. 627.

Cited in Hawkins v. Rowland Lumber Co., 198 N. C. 475, 476, 152 S. E. 169; Stamey v. Suncrest Lumber Co., 197 N. C. 391, 393, 148 S. E. 436.

Art. 9. Construction and Operation of Railroads.

§ 60-71. Map of route to be served with summons for condemnation.—Whenever it shall become necessary to condemn any land for the purposes of a railroad, at the time that the summons for such condemnation is served there shall also be served by the railroad company a map showing how the line of the road is located on the land sought to be condemned, and a profile showing the depth of the cuts and the height of the embankments on the land so sought to be condemned, and at what points on such land such cuts and embankments are located. This section shall not apply to street railways. (Rev., s. 2599; Code, s. 1952; 1893, c. 396, s. 2; 1901, c. 6, s. 3; 1871-2, c. 138, s. 24; C. S. 3471.)

Section Mandatory. — These conditions must be complied with before any company can construct any part of its road. Durham, etc., R. Co. v. Richmond, etc., R. Co., 106 N. C. 16, 23, 10 S. E. 1041.

Same—Defect May Be Cured by Amendment.—The failure to serve a map and profile with the summons in condemnation proceedings as required by this section may be cured by amendment. State v. Wells, 142 N. C. 590, 55 S. E. 210.

Cited in Gastonia v. Glenn, 218 N. C. 510, 11 S. E. (2d) 459.

§ 60-72. Map of railroad to be made and filed.—Every railroad corporation shall, within a reasonable time after its road shall be constructed, cause to be made a map and profile thereof, and of the land taken or obtained for the use thereof, and shall file the same in the office of the utilities commission. Every such map shall be drawn on a scale and on paper to be designated by the utilities commission, and shall be certified and signed by the president or engineer of such corporation. (Rev., s. 2600; Code, s. 1977; 1871-2, c. 138, s. 41; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3472.)

Purpose of Section.—By this section railroad corporations are required, within a reasonable time after their road is constructed, to file a map and profile of their route and of land condemned for its use with the Corporation Commission. But this is for the information of that body and is not required as a part of a correct and completed location. Fayetteville Street Railway v. Railroad, 142 N. C. 423, 55 S. E. 345.

Survey Unnecessary When Old Road-Bed Adopted. — Where the line of a railroad is clearly defined by the existence of an old road-bed which is entered on and staked out by the agents of the company, and the route so marked is approved and adopted by the directors as its permanent location, in such case a survey by engineers is not essential. Fayetteville Street Railway v. Railroad, 142 N. C. 423, 55 S. E. 345.

Profile Must Show Fills and Cuts.—The profile required

to be filed must show whether there will be any "fills" or "cuts" on the land sought to be condemned. Kinston, etc., R. Co. v. Stroud, 132 N. C. 413, 43 S. E. 913.

Railroad Completed before Section Passed. — Where the railroad was completed through the locus in quo prior to the passage of this section, it was not necessary to the validity of the location that a map of the route should be filed. Purifoy v. Richmond, etc., R. Co., 108 N. C. 100, 12 S. E. 741.

§ 60-73. Joint construction by railroads having same location.—Whenever two railroad companies shall, for a portion of their respective lines, embrace the same location of line; they may by agreement provide for the construction of so much of said line as is common to both of them, by one of the companies, and for the manner and terms upon which the business thereon shall be performed. Upon the making of such an agreement, the company that is not to construct the part of the line which is common to both may terminate its line at the point of intersection, and may reduce its capital to a sum of not less than five thousand dollars for each mile of the road proposed to be constructed. (Rev., s. 2602; Code, s. 1983; 1871-2, c. 138, s. 46; C. S. 3473.)

§ 60-74. Construction of part of line in another state.—Whenever after due examination it shall be ascertained by the directors of any railroad company that a part of the line of railroad proposed to be made between any two points in this state ought to be located and constructed in an adjoining state, it may be so located and constructed by a vote of two-thirds of all the directors. The sections of such railroad within this state shall be considered a connected line, and the directors may reduce the capital specified to such amount as may be deemed proper, but not less than the amount required by law for the number of miles of railroad to be actually constructed in this state. (Rev., s. 2603; Code, s. 1984; 1871-2, c. 138, s. 47; C. S. 3474.)

Cross Reference.—As to amount of capital required by law, see § 60-9.

§ 60-75. Carriage must be according to public schedule.—Every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junction of other railroads and at usual stopping places established for receiving and discharging way passengers and freights for that train, and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises. (Rev., s. 2611; Code, s. 1963; 1871-2, c. 138, s. 35; C. S. 3475.)

Cross References.—As to the powers of the utilities commission to prevent discrimination in transportation facilities, see § 62-56. As to rate regulation, see § 62-122 et seq.

Editor's Note.—Railroads are great public service corporations and are public agents in the sense that they are created for the purpose of transporting goods and passengers. In accepting the grant of rights and franchises from the state the railroad corporation impliedly assumes the duties of a common carrier. Because their functions are public they have no right to choose their passengers and customers but must under substantially similar conditions treat all those who seek transportation alike. This is a common law duty and is only reaffirmed in this section. It applies alike to individuals, receivers and trustees.

The carrier is not bound to accept every person as a passenger. It may make reasonable rules and regulations and require those who would become passengers to conform to such rules. Prima facie every person is entitled to be carried as a passenger but a railroad company may refuse to accept a person by showing that because of his condition or conduct, or even because of his character he is not a fit person to enter the train with other persons. See Elliott on Railroads, sections 1577 et seq.

Similarly, a railroad company is not bound to accept all freight that is offered it for transportation. It is only a common carrier as to those goods which are of the kind usually or professedly carried. Goods may properly be refused which are dangerous or which are in an unfit condition for transportation. See Elliott on Railroads, sec. 1466.

Reaffirmance of Common Law Rule.—The requirement to furnish accommodations within a reasonable time is but a reaffirmance of the common law (leaving the courts to say what time was reasonable). Alsop v. Southern Exp. Co., 104 N. C. 278, 285, 10 S. E. 297.

Duty to Provide Transportation.—It is the duty of a common carrier to provide sufficient means of transportation for all freight and passengers which its business naturally brings to it, and an unusual occasion by which a greater demand upon it is temporarily made will not relieve it of the obligation if, by the use of reasonable foresight, it could have been provided for. Purcell v. Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 956.

When Contract of Carriage Begins. — The contract of carriage by a common carrier begins when a passenger comes upon the carrier's premises or conveyance with the purpose of buying a ticket, within a reasonable time or after having purchased a ticket; and the relation, once constituted, continues until the journey contracted for is concluded and the passenger has left or has had reasonable time to leave such premises. Hansley v. Jamesville, etc., R. Co., 115 N. C. 602, 20 S. E. 528.

Trains Need Not Stop at All Stations.—It is a reasonable regulation of the defendant that certain trains shall not stop at all stations, provided there are enough to serve the purposes of local travel. Hutchinson v. Railroad, 140 N. C. 123, 52 S. E. 263.

Schedule Is Offer.—Under this section, the printed schedule of trains is an offer, which is accepted by a person when he asks for a ticket, and he has the right to be transported by the first train stopping at his destination. Coleman v. Southern R. Co., 138 N. C. 351, 50 S. E. 690.

Passenger on Baggage Car. — A person who gets on a blind baggage car, though having a ticket, but not having told the conductor that he had it, and the conductor not having seen it, is not entitled to recover as a passenger for injuries received by being pulled off the train by the conductor. McGraw v. Southern R. Co., 135 N. C. 264, 47 S. E. 758.

Ticket Not Good on Particular Train. — It is the duty of the defendant to have an agent at the gate to examine the tickets and allow no one to get upon a train which does not stop at his destination. Not having done this, but having received the plaintiff into the train, without objection, with a ticket calling for a regular station, as her destination, and nothing on its face to show it was not good on that train, and she not knowing that that train did not stop there, it was the duty of the defendant to stop the train at that point for her. Hutchinson v. Railroad, 140 N. C. 123, 52 S. E. 263.

Where Conductor Fails to Return Ticket.—Where plaintiff purchased through transportation to a destination to reach which it was necessary to change, and the conductor on the first train neglected to return passenger's ticket, he having no money, and, when the conductor of the second train asked for his fare, vainly attempted to borrow from men who had been on the first train with him, it was negligence on the conductor's part not to have satisfied himself by inquiring of such men whether plaintiff had been on the train with them prior to reaching the changing point, before ejecting plaintiff. Sawyer v. Norfolk, etc., R. Co., 171 N. C. 13, 86 S. E. 166.

Injury Caused by Misdirection of Agent. — The plaintiff, who missed his train by misdirection of the defendant's agent and his refusal to sell him a ticket, can recover for any injury proximately caused by being put out of the station into the cold weather while waiting for the next train. Coleman v. Southern R. Co., 138 N. C. 351, 50 S. E. 690.

Ejected Passenger Has Right of Action.—Under this sec-

tion a passenger, ejected from train of defendant road for failure to pay again fare which he had paid once upon purchasing ticket, has a right of action. Sawyer v. Norfolk, etc., R. Co., 171 N. C. 13, 86 S. E. 166.

Same—Passenger Need Not Pay Additional Fare to Prevent Ejection. — Under this section where a passenger is about to be wrongfully ejected from a train, having paid his fare thereon, but being unable to produce his ticket, it is not incumbent on him, by paying money which the conductor has no right to exact, to avoid ejection from the train, as he is not required to buy again his right to remain on the train to his destination. Sawyer v. Norfolk, etc., R. Co., 171 N. C. 13, 86 S. E. 166.

Duty to Stop Train at Passenger's Station.—A passenger on a railway train is entitled, as a matter of right, to have the train stop at a station to which he has purchased his ticket; and where his destination is a flag station at which the train fails to stop, attributable to the neglect of the conductor in failing to take up the passenger's ticket in time, the railroad company is answerable for the consequent damages. Elliott v. Norfolk Southern R. Co., 166 N. C. 481, 82 S. E. 853.

Carrier under No Duty to Delay Trains.—A common carrier of passengers is under no obligation to delay the departure of its trains, or to look after the safety of persons who attempt to enter them, when they have been stopped long enough to allow passengers to embark and disembark; but it may be liable for injuries incurred by one who, by the invitation or command of persons in charge of the trains, attempt to get on or off while the cars are in motion. Browne v. Raleigh, etc., R. Co., 108 N. C. 34, 12 S. E. 958.

Failure to Transport Passenger. — Where the plaintiff purchased a ticket from defendant's agent at a regular station before the time advertised for the arrival and departure of its trains at that place, and was in readiness to get aboard, but the train ran by, making no effort to stop, although it had room in its cars for plaintiff; the plaintiff was entitled to punitive damages, in the absence of sufficient excuse shown by the defendant. Purcell v. Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 956.

Action May Be Brought in Tort or Contract.—A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transportation or operate its trains as required by this section may bring an action on contract, or in tort, independent of the statute. Purcell v. Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 956.

Same—Damages.—If the tort is the result of simple negligence, damages will be restricted to such as are compensatory; but if it was willful, or committed with such circumstances as show gross negligence, punitive damages may be given. Purcell v. Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, 956.

Where a railroad company, negligently and by reason of defective and inadequate equipment, failed to carry a passenger to whom it had sold an excursion ticket back to its starting point, but no personal injury or indignity was inflicted upon him, the passenger's right of action is ex contractu and not in tort, and hence exemplary or punitive damages cannot be recovered. Purcell v. Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954, which was overruled in Hansley v. Jamesville, etc., R. Co., 115 N. C. 602, 20 S. E. 528, is reinstated, but the ground of the judgment is changed. Hansley v. Jamesville, etc., R. Co., 117 N. C. 565, 23 S. E. 443, 32 L. R. A. 551, 53 A. S. R. 600.

If a train arrives after its schedule time, or misses connection, or delays a passenger at his destination after the schedule time, unless the delay is caused by no fault of the carrier, the passenger has a right to recover compensation for the loss of time and actual expenses. Coleman v. Southern R. Co., 138 N. C. 351, 50 S. E. 690.

Failure to Stop at Flag Station.—Where plaintiff went to a flag station on a railroad a reasonable time before the arrival of a train on which he intended to take passage and, by reason of absence of the agent and the failure of the engineer to see his signal, the train did not stop for him, the railroad is liable for the actual damages sustained by the plaintiff. Thomas v. Southern R. Co., 122 N. C. 1005, 30 S. E. 343.

Same—Stepping Off Moving Train at Conductor's Suggestion.—Where a train on which plaintiff was a passenger, did not stop at the station to which he had paid his fare, and the conductor agreed that he would slow up the train at a safe place for plaintiff to alight the plaintiff consented to jump off and went upon the platform as the train slowed up, but seeing a "go ahead" signal from the rear, did not step for that reason; and then, feeling the increased motion of the train, he stepped off believing he was at a safe place and relying upon the conductor's promise to put him off at a safe place, and was injured, the evidence of the defendant's negligence was sufficient to be submitted to the jury. Cable v. Southern R. Co., 122 N. C. 892, 29 S. E. 377.

Same—When Punitive Damages Allowed. — It is only when the railway engineer actually sees the signal of an intended passenger at a flag station and wilfully passes him by that punitive damages will be allowed in an action for damages, and the burden of showing the reckless disregard of plaintiff's rights is upon the latter. Thomas v. Southern R. Co., 122 N. C. 1005, 30 S. E. 343.

Passenger Carried by Station.—Under this section when a passenger is carried by his station, he is entitled to damages, and this, though there is no bodily harm, or actual damages. If it is done recklessly or wilfully he is entitled to punitive damages. Hutchison v. Railroad, 140 N. C. 123, 52 S. E. 263, overruling Smith v. Wilmington, etc., R. Co., 130 N. C. 304, 41 S. E. 481.

Under the well settled rules of law, and plainly under this section a railroad company is liable for nominal damages for its negligence in failing to stop its train and conveying a passenger beyond the destination to which he had paid his fare, it being a regular station on the line. Cable v. Southern R. Co., 122 N. C. 892, 29 S. E. 377.

Basis of Exemplary Damages.—The true ground for allowing exemplary damages in an action against a railroad company for damages on account of its negligence is personal injury, or (in the absence of personal injury) insult, indignity, contempt, etc., to which the law imputes bad motive towards the plaintiff. Hansley v. Jamesville, etc., R. Co., 117 N. C. 565, 23 S. E. 443.

Carrier May Demand Prepayment of Freight.—A common carrier has a right to demand the prepayment of charges for transportation before receiving freight for shipment to one individual, although it may have an established custom to accept shipments to its other patrons without such prepayment. Allen v. Cape Fear, etc., R. Co., 100 N. C. 397, 6 S. E. 105.

Same—May Demand It of Particular Shipper.—A common carrier may demand prepayment of freight charges before shipment to any station, and from one shipper, though not required of others. It should appear, however, that a plaintiff had notice of such regulation. Randall v. Richmond, etc., R. Co., 108 N. C. 612, 13 S. E. 137.

§ 60-76. Arrangement of cars in passenger trains.—In forming a passenger train, baggage, freight, merchandise or lumber cars shall not be placed in rear of the passenger cars, except in case of accident, or when the cars are provided with automatic couplers or brakes. If any officer or agent of a railroad company, in forming a passenger train, shall direct or knowingly suffer an arrangement of the cars different from the one herein provided for, he shall be guilty of a misdemeanor: Provided, the criminal liability hereby imposed shall not apply to officers and agents of the Wilmington sea-coast railroad company. (Rev., ss. 2612, 3747; Code, s. 1971; 1871-2, c. 138; 1893, c. 331; 1895, c. 212; C. S. 3476.)

§ 60-77. Unauthorized manufacture or sale of switch-lock keys misdemeanor.—It shall be unlawful for any person to make, manufacture, sell or give away to any other person any duplicate key to any lock used by any railroad company in this state on its switches or switch tracks, except upon the written order of that officer of such railroad company whose duty it is to distribute and issue switch-lock keys to the employees of such railroad company. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court. (1909, c. 795; C. S. 3477.)

§ 60-78. Willful injury to railroad property misdemeanor.—If any person shall willfully do or cause to be done any act or acts whatever whereby any building, construction or work of any railroad corporation, or any engine, machine or structure or any matter or thing appertain-

ing to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, he shall be guilty of a misdemeanor. (Rev., s. 3756; Code, s. 1974; 1871-2, c. 138, s. 39; C. S. 3478.)

Cross Reference.—As to injury to property of railroad, see also §§ 14-278 and 14-279.

§ 60-79. Headlights on locomotives on main lines.—Every company, corporation, lessee, manager or receiver owning or operating a railroad in this state is hereby required to equip and maintain and use upon every locomotive in operation in railroad service on main lines in this state an electric or power headlight of at least one thousand five hundred candlepower, measured without the aid of a reflector. This section shall not apply to locomotive engines regularly used in switching cars or trains, to locomotive engines used exclusively between sunup and sundown, and to locomotive engines going to and returning from repair shops when ordered in for repairs; neither shall this section apply to independently owned and operated railroad companies in this state whose mileage of road in this state is one hundred and twenty-five miles or less, nor to railroad companies having only lines extending into this state, no one of which is one hundred miles in length in this state. The utilities commission may relieve from the operation of this section such locomotives and roads, or parts or sections or branches of roads, upon which the said utilities commission may deem electric or power headlights not advisable. Should an engine start on a trip with the headlight in good working condition, and from some unavoidable cause such headlight becomes disabled and cannot be repaired on the line of the road on which such run is being made, there shall be nothing in this section to prevent such engine from continuing on its trip, and the railroad company shall not be liable for prosecution on account of such failure to repair. Any company, corporation, lessee, manager or receiver violating the provisions of this section shall be guilty of a misdemeanor. (1909, c. 446; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3479.)

Proximate Cause of Death.—Evidence failing to show how deceased was killed, whether walking along railroad tracks or at platform, and showing that he was intoxicated at the time, does not show that the violation of this section was the proximate cause of death. Owens v. Southern Ry. Co., 33 F. (2d) 870.

Burden of Proof.—It is negligence for a railroad company not to equip its locomotives with electric headlights, with the burden on the company to plead and prove that it had one in use at the time complained of or that its use was excepted by the statute, when relevant to the inquiry, Barnes v. Atlantic, etc., R. Co., 168 N. C. 512, 84 S. E. 805, citing Powers v. Norfolk Southern R. Co., 166 N. C. 599, 82 S. E. 972. But see McNeill v. Atlantic, etc., R. Co., 167 N. C. 390, 83 S. E. 704.

§ 60-80: Repealed by Session Laws 1943, c. 543.

§ 60-81. Negligence presumed from killing livestock.—When any cattle or other livestock shall be killed or injured by the engine or cars running upon any railroad, it shall be prima facie evidence of negligence on the part of the railroad company in any action for damages against such company: Provided, that no person shall be allowed the benefit of this section unless he shall bring his action within six months after his cause of action shall have accrued. (Rev., s. 2645; Code, s. 2326; 1856-7, c. 7; C. S. 3482.)

Cross Reference.—As to venue of an action against a railroad, see § 1-81.

Editor's Note.—Several of the earlier cases notably Doggett v. Richmond, etc., R. Co., 81 N. C. 459, and Durham v. Wilmington, etc., R. Co., 82 N. C. 352, stated that, where the facts are known and show there was no negligence on the part of the railroad, the presumption created by this section does not apply. But the language used by the Court in these cases is calculated to produce an erroneous impression and it would have been much more accurate to have said that the prima facie case here created is rebutted where the undisputed facts show there was no negligence on the part of the defendant, than to say the statute did not apply to such a case. There is no exception in the statute. It is in terms general and applies alike to all cases of killing stock by a railroad. The rule is thus stated in the later cases. See Hardison v. Atlantic, etc., R. Co., 120 N. C. 492, 494, 26 S. E. 630.

In some of the early decisions it was said that when livestock were injured by the engine or cars of a railroad company and an action thereon was brought within six months, this section raised a presumption of negligence and cast upon the defendant the burden of rebutting such presumption. Bethea v. Raleigh, etc., R. Co., 106 N. C. 279, 10 S. E. 1045; Carlton v. Wilmington, etc., R. Co., 104 N. C. 365, 10 S. E. 516. But it is now the established rule, as settled by the later and prevailing cases, that "prima facie evidence of negligence" means no more than evidence sufficient to carry the case to the jury, and to justify, but not compel, a verdict as for a negligent wrong.

Plaintiff Must Prove Case.—Where a railroad train runs into, kills or injures livestock and turkeys of the owner along its tracks, and he brings his action for damages within the statutory six months, the prima facie case of negligence raised by the statute is sufficient to take the case to the jury, but does not change the burden of proving the issue of negligence from the plaintiff. Ferrell v. Norfolk Southern R. Co., 190 N. C. 126, 129 S. E. 155.

Section Applies When Facts Known. — The presumption of negligence in killing live stock, when the action is brought within six months, applies where the facts were known. Hanford v. Southern R. Co., 167 N. C. 277, 279, 83 S. E. 470.

Applies When Stock under Control of Person. — The statutory presumption of negligence for killing live stock, when the action is brought within six months, is not rebutted by showing that the live stock were under the control of a person at the time. Randall v. Richmond, etc., R. Co., 104 N. C. 410, 10 S. E. 691.

Same—When Horse Hitched to Buggy. — The statutory presumption of negligence of a railroad company in killing live stock, when the action is brought within six months, applies whether a horse, the subject of the action, was hitched to a buggy at the time or running at large. Hanford v. Southern R. Co., 167 N. C. 277, 83 S. E. 470.

Where it is proven or admitted that cattle had been killed by the train of a railroad company within six months before the action was brought, there is a presumption that the killing was caused by the negligence of such company, and this presumption arises from the fact of killing, where the animal is hitched to a wagon or cart, as well as where it is straying at large when killed. Randall v. Richmond, etc., R. Co., 107 N. C. 748, 12 S. E. 605.

Does Not Apply to Fowls.—No presumption of negligence against a railroad company is raised by the mere fact of killing fowls, etc., upon its track in the operation of its trains. This section makes it prima facie evidence of negligence in respect only to "cattle and other live stock," which does not include "geese" or other fowl within its terms. James v. Atlantic, etc., R. Co., 166 N. C. 572, 82 S. E. 1026.

Same—Nor to Dogs.—The killing of a dog by a street railway is not prima facie evidence of negligence. Moore v. Charlotte Elect. R., etc., Co., 136 N. C. 554, 48 S. E. 822.

Same—Nor When Horses Run into Trestle.—In an action against a railroad company for damages for injuries to horses, where the evidence showed that the horses were injured by running into a trestle, and that the train was 100 yards from the trestle when they were injured, and stopped 100 feet from the trestle this section does not apply. Ramsbottom v. Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448.

How Presumption Rebutted.—In an action against a railroad company for killing certain mules of the plaintiff, where negligence is established by force of this section, it can only be rebutted by showing that by the exercise of due diligence the stock could not have been seen in time to save them. Pippen v. Wilmington, etc., R. Co., 75 N. C. 54.

This rule can only be rebutted by showing that the

agents of such railroad company used all proper precautions to guard against damage. It is not sufficient to prove that there was probably no negligence. Battle v. W. & W. Railroad, 66 N. C. 343.

Same—Presumption Not Repelled. — Where plaintiff's horse had been injured on a railroad by the running of a train against it, and it was doubtful from defendant's testimony whether the brakes had been applied to the wheels of the train after the animal was discovered to be on track, the prima facie case of negligence made by this section was not repelled. Clark v. Western North Carolina Railroad, 60 N. C. 109.

Same—Instructions. — Where the killing of stock by a railroad is admitted or proven, the trial judge may instruct the jury that a certain state of facts, if believed by them, would rebut the presumption of negligence, but not that certain evidence, though uncontradicted, would do so. Baker v. Roanoke, etc., R. Co., 133 N. C. 31, 45 S. E. 347.

When Owner Permits Cattle to Stray on Railroad Track. —If the owner of cattle permit them to stray off and get upon the track of a railroad and they are killed or hurt, the railroad company is not liable unless the train was being carelessly run, or by the exercise of proper care after the animals were discovered the injury could have been avoided or prevented. Doggett v. Richmond, etc., R. Co., 81 N. C. 459.

Effect of Local Stock Law.—The prima facie evidence of negligence on the part of a railroad company in a suit for damages for killing stock is not impaired by a local act requiring stock to be fenced in, but the defendant must repel the presumption by satisfactory proof to the jury. Roberts v Richmond, etc., R. Co., 88 N. C. 560.

No Duty to Cut Down Weeds.—A railroad company is not negligent in failing to cut down bushes or weeds on the right-of-way beyond the portion over which it is exercising actual control for corporate purposes, though a horse is killed as a result of the engineer's inability to see him on account of the weeds. Ward v. Wilmington, etc., R. Co., 109 N. C. 358, 13 S. E. 926.

Measure of Damages.—The measure of damages when a cow is killed by a train is the difference in the value of the cow and that of the beef. Roberts v. Richmond, etc., R. Co., 88 N. C. 560.

When Judge May Direct Verdict.—This section applies to all cases of killing stock by a railroad and while the presumption of negligence arising from the killing may be rebutted, it is only where the undisputed facts show there was no negligence that the trial judge should direct a verdict for the defendant. Hardison v. Atlantic, etc., R. Co., 120 N. C. 492, 26 S. E. 630.

Defendant Not Entitled to Nonsuit. — Where a plaintiff makes a prima facie case by suing for the killing of a cow within six months, the defendant is not entitled to nonsuit on the ground that such prima facie case is rebutted by the evidence of the defendant. Davis v. Railroad Co., 134 N. C. 300, 46 S. E. 515.

Applied in Aycock v. W. & W. R. Road Co., 51 N. C. 231; Wilson v. Norfolk, etc., R. Co., 90 N. C. 69; Snowden v. Norfolk, etc., Railroad, 95 N. C. 93; Carlton v. Wilmington, etc., R. Co., 104 N. C. 365, 10 S. E. 516.

Cited in State v. Divine, 98 N. C. 778, 4 S. E. 477; Cable v. Southern R. Co., 122 N. C. 892, 897, 29 S. E. 377.

Art. 10. Railroad and Other Company Police.

§ 60-82. Railway conductors and station agents declared special police.—All passenger conductors of railroad trains and station or depot agents are hereby declared to be special police of the state of North Carolina, with full power and authority to make arrests for offenses committed in their presence or view, or for felony, or on sworn complaint for misdemeanor, except that the conductors shall have such power only on board of their respective trains or their railroad right of way, and the agents at their respective stations; and such conductors and agents may cause any person so arrested by them to be detained and delivered to the proper authority for trial as soon as possible. Nothing contained in the provisions of this section shall have the effect to relieve any such railroad company from any civil liability now existing by statute or under the common law for the act or acts of such conductors, station or depot agents, in unlawfully exercising or attempting to exercise the powers herein conferred. (1907, c. 470, ss. 3, 4; C. S. 3483.)

Editor's Note.—For article discussing arrest without a warrant, see 15 N. C. Law Rev. 101.

Conductor Has Power of Peace Officer.—A conductor on a railroad passenger train is held to a high degree of care in looking after and protecting passengers on his train, and he is clothed, to some extent, with the powers of a peace officer. Brown v. Atlantic Coast Line R. Co., 161 N. C. 573, 77 S. E. 777.

§ 60-83. Governor may appoint and commission police for railroad, etc., companies; civil liability of companies.—Any corporation operating a railroad on which steam or electricity is used as the motive power or any electric or water-power company or construction company or manufacturing company or motor vehicle carrier may apply to the governor to commission such persons as the corporation or company may designate to act as policemen for it. The governor upon such application may appoint such persons or so many of them as he may deem proper to be such policemen, and shall issue to the persons so appointed a commission to act as such policemen. Nothing contained in the provisions of this section shall have the effect to relieve any such company from any civil liability now existing by statute or under the common law for the act or acts of such policemen, in exercising or attempting to exercise the powers conferred by this section. (Rev., ss. 2605, 2606; Code, ss. 1988, 1989; 1871-2, c. 138, ss. 51, 52; 1907, c. 128, s. 1; 1923, c. 23; 1933, c. 61; 1943, c. 676, ss. 1, 4; C. S. 3484.)

Cross Reference.—As to venue of an action against a railroad, see § 1-81.

Editor's Note.—This section was amended by Public Laws 1923, ch. 23, so as to include manufacturing companies.

Public Laws 1933, c. 61, added the last sentence of the section. The act further provided that causes of action existing February 16, 1933, should not be affected thereby.

The 1943 amendment made this section applicable to motor vehicle carriers. It also struck out the word "railroad" before the word "company" in the third sentence.

A railroad policeman appointed pursuant to this section, is prima facie a public officer, but the question of whether a particular act is done as an employee of the railroad company or as a public officer is a question to be determined from the nature of the act, whether it relates to vindication and enforcement of public justice or whether it is in the scope of duties owed to the company by reason of employment. Tate v. Southern Ry. Co., 205 N. C. 51, 169 S. E. 816.

Cited in Stanley v. Southern R. Co., 160 N. C. 323, 76 S. E. 221.

§ 60-84. Oath, bond, and powers of company police.—Every policeman so appointed shall, before entering upon the duties of his office, take and subscribe the usual oath. Such oath, with a copy of the commission, shall be filed with the utilities commission, and such policemen shall severally possess within the limits of each county in which the railroad or motor vehicle carrier for which such policemen are appointed may run or in which the company may be engaged in work or business all the powers of policemen in the several towns, cities and villages in any such county: Provided, that every policeman appointed under this and § 60-83 shall, before entering upon the duties of his office, enter into bond in the sum of five hundred dollars, payable to the state of North Carolina, conditioned for the faithful performance of the duties of his office, with good and sufficient surety, to be passed upon and accepted by and filed with the utilities commission. (Rev., s. 2607;

Code, s. 1990; 1871-2, c. 138, s. 53; 1907, c. 128, s. 2; 1907, c. 462; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1943, c. 676, s. 2; C. S. 3485.)

Cross Reference.—As to the oath required, see § 11-11.

Editor's Note.—The 1943 amendment rewrote portions of this section appearing before the proviso.

§ 60-85. Company police to wear badges.—Such railroad police shall, when on duty, severally wear a metallic shield with the words "Railway Police" and the name of the corporation for which appointed inscribed thereon, and this shield shall always be worn in plain view except when such police are employed as detectives. (Rev., s. 2608; Code, s. 1991; 1871-2, c. 138, s. 54; C. S. 3486.)

Cross Reference.—As to badges of conductor and certain other railroad employees, see § 60-3.

§ 60-86. Compensation of company police.—The compensation of such police shall be paid by the companies for which the policemen are respectively appointed, as may be agreed on between them. (Rev., s. 2609; Code, s. 1992; 1871-2, c. 138, s. 55; C. S. 3487.)

§ 60-87. Police powers cease on company's filing notice.—Whenever any company shall no longer require the services of any policeman so appointed as aforesaid, it may file a notice to that effect in the office of the governor and the office of the utilities commission and thereupon the power of such officer shall cease and determine. (Rev., s. 2610; Code, s. 1993; 1871-2, c. 138, s. 56; 1943, c. 676, s. 3; C. S. 3488.)

Editor's Note. — The 1943 amendment substituted the words "office of the governor and the office of the utilities commission" for the words "several offices in which notice of such appointment was originally filed."

Art. 11. Joint Rates.

§ 60-88. Carriers permitted to establish joint rates. — Any operating railroad company is authorized and directed to enter into arrangements for the establishment of joint rates and through routes with common carriers by water and with other such railroad companies for the transportation of persons and/or property transported wholly within the State of North Carolina by such carrier by water and such railroad company. (1931, c. 195.)

Art. 12. Carriage of Passengers.

§ 60-89. Railroad passenger rates established.—No railroad company doing business as a common carrier of passengers in the state of North Carolina shall, except as herein provided, charge, demand or receive for transporting any passenger and his or her baggage, not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina to any other station on its road in North Carolina, a rate in excess of three cents per mile: Provided, however, that independently owned and operated railroad companies in North Carolina whose mileage of road in this state is one hundred miles or less may charge a rate twenty per cent higher than the rate above specified; but this proviso shall not extend to branch lines of railroad companies controlling over one hundred miles of road, whether chartered in or out of the state: Provided further, this section shall not apply to railroads hereafter built less than fifty miles in length. For transporting children under twelve years and over five years old, one-half of the rate above prescribed may be charged. For transporting children under five years old, accompanied by any person paying fare, no charge whatever shall be made. Where the amount of the ticket at the prescribed rate would amount to any figure between two multiples of five, the price of the ticket shall be the multiple of five which is nearest the price of the ticket at the rate above mentioned; or, in the event that the amount is equidistant between the multiples of five, the price charged for the ticket shall be on the basis of the higher of those two multiples of five. No charge less than ten cents shall be required. A charge of fifteen cents may be added to the fare of any passenger when the same is paid on the train, if the ticket might have been procured within a reasonable time before the departure of the train. (Ex. Sess. 1908, c. 144, s. 1; Ex. Sess. 1920, c. 51, s. 1; C. S. 3489.)

Cross References.—As to free carriage, see § 62-134. As to rate regulation in general, see § 62-122 et seq. As to passenger's baggage, see § 60-119. As to duty of the railroad to file rates with the utilities commission, see § 62-68.

Editor's Note.—Formerly the maximum charge allowed by this section was two and one-half cents per mile. This section was amended by Public Laws 1920, Ex. Sess., ch. 51, sec. 1, and the maximum rate allowed raised to three cents per mile. At the same time the proviso allowing a twenty per cent higher rate for railroads less than one hundred miles in length was added.

Federal Control of Rates.—The provisions of this section apply only to fixing rates for intrastate carriers, and cannot be applied to interstate carriers, as control of the rates charged by the latter is vested in the Interstate Commerce Commission. The Interstate Commerce Commission in fixing rates cannot by their order fix rates between points that are remotely internal and from which no prejudice to interstate commerce can arise. But it can fix rates on intrastate carriers where such rate as fixed by the State is a discrimination against interstate or foreign commerce. See R. R. Comm. v. C. B. & Q. R. R. Co., 257 U. S. 563, 66 L. Ed. 236, 42 S. Ct. 232.

Right to Put Off Child on Train with Parent.—Where a conductor has taken up the ticket of a person traveling with his child for whom a half ticket is required, but has not been purchased, and who is unable to pay the fare of the child with the extra fare allowed when a ticket has not been regularly purchased, his right to put the child off the train is dependent upon the return of the ticket he has collected from the father, or its equivalent. Landford v. Southern R. Co., 165 N. C. 653, 81 S. E. 998.

§ 60-90. Rates on leased or controlled lines.—In the case that any railroad company operating as a common carrier of passengers in the state of North Carolina is owned, controlled or operated by lease or other agreement by any other railroad company doing business in the state, the rate for carrying passengers thereon shall be determined for such railroad company by the rate prescribed by § 60-89 for the railroad company which owns, controls or operates the same. (Ex. Sess. 1908, c. 144, s. 2; C. S. 3490.)

§ 60-91. Violations of passenger rates misdemeanor.—Any railroad company violating any of the provisions of §§ 60-89 and 60-90, or counseling, ordering or directing any employee, agent or servant to violate any of such provisions, by charging, demanding or receiving any rate greater than that fixed by such sections, shall be guilty of a misdemeanor, and on conviction shall be fined not less than five hundred dollars nor more than five thousand dollars; and any agent, servant or employee of any railroad company who shall violate either § 60-89 or § 60-90 shall be

guilty of a misdemeanor, and on conviction shall be fined or imprisoned, or both, in the discretion of the court. (Ex. Sess. 1908, c. 144, s. 3; C. S. 3491.)

Cross References.—As to charging unreasonable freight rates, see § 60-115. As to free carriage, see § 62-134.

§ 60-92. Accepting or giving free transportation illegally misdemeanor.—Any persons, except those permitted by law, who accept free transportation shall be guilty of a misdemeanor, and on conviction shall be fined or imprisoned, or both, in the discretion of the court; and any railroad, or its employees or agents, giving free transportation of any kind whatsoever, except that permitted by law, shall be guilty of a misdemeanor, and on conviction shall be fined not less than five hundred dollars nor more than two thousand dollars for each offense. (Ex. Sess. 1908, c. 144, s. 4; C. S. 3492.)

Cross Reference.—As to persons entitled to free carriage, see §§ 62-133 and 62-134.

Editor's Note.—For cases arising previous to the enactment of this section see State v. Southern R. Co., 122 N. C. 1052, 30 S. E. 133; McNeill v. Railroad Co., 135 N. C. 682, 47 S. E. 765.

§ 60-93. Powers of utilities commission over rates limited.—The utilities commission shall have no power to change, alter, modify or in any way affect the enforcement or operation of any of the provisions of the preceding sections of this article, except as the same shall be therein specifically authorized, or the enforcement of any penalties for violating the provisions thereof. (Ex. Sess. 1908, c. 144, s. 7; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3493.)

Cross Reference.—As to regulation of rates by the utilities commission, see § 62-122 et seq.

§ 60-94. Separate accommodations for different races.—All railroad and steamboat companies engaged as common carriers in the transportation of passengers for hire, other than street railways, shall provide separate but equal accommodations for the white and colored races at passenger stations or waiting-rooms, and also on all trains and steamboats carrying passengers. Such accommodations may be furnished by railroad companies either by separate passenger cars or by compartments in passenger cars, which shall be provided by the railroads under the supervision and direction of the utilities commission: Provided, that this shall not apply to relief trains in cases of accident, to Pullman or sleeping cars, or through express trains that do not stop at all stations and are not used ordinarily for traveling from station to station, to negro servants in attendance on their employers, to officers or guards transporting prisoners, nor to prisoners so transported. (Rev., s. 2619; 1899, c. 384; 1901, c. 213; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3494.)

Cross References.—As to duty of utilities commission to require separate waiting rooms, see § 62-44. As to separation of races by motor carriers, see § 62-109; by street interurban and suburban railways, see § 60-135.

Conductor Directing White Passengers to Colored Coach.—When a railroad company has furnished equal and separate accommodations on its train for the white and colored races, no penalties may be recovered by reason of the conductor merely directing a few white passengers to take the coach set apart for the colored people. Merritt v. Atlantic Coast Line R., 152 N. C. 281, 67 S. E. 579.

Sheriff with Colored Prisoner.—Where the conductor of a train requires a white sheriff to go into the coach provided for colored people with a colored prisoner in his custody, traveling with him on the train, without any evidence that he did so in a harsh or abusive manner, or that the accommodations furnished were unequal to those of the other coach, damages sought by the sheriff will be denied as a matter of law. Huff v. Norfolk Southern R. Co., 171 N. C. 203, 88 S. E. 344.

Power of Corporation Commission to Require Bus Lines to Provide Equal Separate Accommodations for Races.—The Corporation Commission is given plenary power by statute to require bus lines operating between points within the State in carrying passengers for hire, which are public-service corporations, to provide indiscriminatory separate accommodations for the carriage of white and negro passengers, and for their separate accommodations at the bus stations, the working out of the plans or details for the purpose being vested largely within the discretion of the Commission, and where this is done without racial discrimination it is not objectionable as being in contravention of Thirteenth and Fourteenth Amendments to the Federal Constitution. Hotels, theatres, etc., distinguished from public-service corporations, and the policy of our State with regard to the equal treatment of the negro race discussed by Mr. Justice Clarkson. Corporation Commission v. Transportation Committee, 198 N. C. 317, 151 S. E. 648.

§ 60-95. Certain carriers may be exempted from requirement.—The utilities commission is hereby authorized to exempt from the provisions of § 60-94 steamboats, branch lines and narrow-gauge railroads and mixed trains carrying both freight and passengers, if in its judgment the enforcement of the same be unnecessary to secure the comfort of passengers by reason of the light volume of passenger traffic, or the small number of colored passenger travelers on such steamboats, narrow-guage railroads, branch lines or mixed trains. (Rev., s. 2620; 1899, c. 384, s. 2; 1901, c. 213; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3495.)

§ 60-96. Use of same coach in emergencies.—When any coach or compartment car for either race shall be completely filled at a station where no extra coach or car can be had, and the increased number of passengers could not be foreseen, the conductor in charge of such train may assign and set apart a portion of a car or compartment assigned for passengers of one race to passengers of the other race. (Rev., s. 2621; 1899, c. 384, s. 3; C. S. 3496.)

§ 60-97. Penalty for failing to provide separate coaches.—Any railroad or steamboat company failing to comply in good faith with the provisions of §§ 60-94 to 60-96 shall be liable to a penalty of one hundred dollars per day, to be recovered in an action brought against such company by any passenger on any train or boat of any railroad or steamboat company which is required by this chapter to furnish separate accommodations to the races, who has been furnished accommodations on such railroad train or steamboat only in a car or compartment with a person of a different race in violation of law. (Rev., s. 2622; 1899, c. 384, s. 5; C. S. 3497.)

§ 60-98. Exceptions to requirement of separate coaches and toilets.—As to trains consisting of not more than one passenger car unit, operated principally for the accommodation of local travel, although operated both intrastate and interstate and irrespective of the motive power used, the utilities commission is authorized to make such rules and regulations for the separation of the races and with regard to toilet facilities as in its best judgment may be feasible and reasonable in the circumstances, and the rules and regulations established pursuant to this authority shall be ex-

ceptions to the provisions of §§ 60-94 and 60-107. (1935, c. 270; 1941, c. 97, s. 5.)

§ 60-99. Unused tickets to be redeemed.—When any round-trip ticket is sold by a railroad or other transportation company, it shall be the duty of such company to redeem the unused portion of said ticket by allowing to the holder thereof the difference between the cost thereof and the price of a one-way ticket between the stations for which such round-trip ticket was sold. Whenever any one-way or regular ticket is sold by a railroad or other transportation company, and not used by the purchaser, it shall be the duty of the company selling the ticket to redeem it at the price paid for it. All railroad and other transportation companies shall redeem in money all mileage tickets known as five-hundred, thousand and two-thousand mile tickets, sold by them, if presented within a year from the date of the sale, when as much as fifty per centum of such ticket has been used by the purchaser, by paying the same price per mile paid for it, or shall allow the original holder to ride it out. (Rev., s. 2627; 1891, c. 290; 1893, c. 249; 1895, c. 83, ss. 2, 3; 1897, c. 418; C. S. 3503.)

Cited in State v. Ray, 109 N. C. 736, 738, 14 S. E. 83; Kindley v. Seaboard Air Line R. Co., 151 N. C. 207, 208, 65 S. E. 897.

§ 60-100. Ticket may be refused intoxicated person; prohibited entry misdemeanor. — The ticket agent of any railroad, steamboat or other transportation company shall at all times have power to refuse to sell a ticket to any person applying for the same who may at the time be intoxicated. The conductor, captain or other person in charge of any railroad car, steamboat or other conveyance for the use of the traveling public shall at all times have power to prevent any intoxicated person from entering such car, boat or other conveyance. If any intoxicated person, after being forbidden by the conductor, captain or other person having charge of any such railroad train, steamboat or other conveyance for the use of the traveling public, shall enter such train, boat or other conveyance, he shall be guilty of a misdemeanor. (Rev., ss. 2625, 2626, 3757; 1885, c. 358, ss. 1, 2, 3; C. S. 3504.)

Cross References.—As to public drinking on railway passenger cars, see § 14-333. As to sale of whiskey on railroad cars, see § 18-70.

When Exemplary Damages Allowed.—In an action for damages for refusal to allow a person with a ticket to board a train because he was intoxicated, exemplary damages will be allowed if such refusal was made with malice, undue force, or insult. Story v. Norfolk, etc., R. Co., 133 N. C. 59, 45 S. E. 349.

Cited in Stanley v. Southern R. Co., 160 N. C. 323, 76 S. E. 221.

§ 60-101. Entering cars after being forbidden misdemeanor.—No person shall enter any railroad passenger car, baggage car, mail car or caboose car, or go upon the platform of such cars, after being forbidden so to do by the conductor, his assistants, the baggage-master or other person in charge of such cars, unless the person enter such cars or go upon such platforms as a passenger or in some official capacity authorized by law, or on business with a passenger or some official or employee of the railroad, or for some other like purpose. Any person violating this section shall be guilty of a misdemeanor and shall be fined not exceeding ten dollars. (Rev., s. 3752; Code, s. 1979; 1883, c. 351; C. S. 3505.)

Cross References.—As to breaking into or entering railroad cars with felonious intent, see § 14-56. As to train robbery, see §§ 14-88 and 14-89.

§ 60-102. Riding in first-class cabin with second-class ticket misdemeanor.—If any passenger purchasing or holding a second-class ticket, after being requested or directed by any captain or other officer in charge of any steamboat in this state, riding in any first-class cabin, refuses to pay the difference between a first-class and a second-class fare or rate, or refuses to go into the second-class cabin, when there shall be a comfortable second-class cabin on such steamboat, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Any justice of the peace in the county where such offense is committed shall have jurisdiction of the offense, upon sworn complaint of any officer of such steamboat company. (Rev., s. 3761; 1903, c. 795; C. S. 3506.)

§ 60-103. Passenger refusing to pay fare and violating rules may be ejected.—If any passenger shall refuse to pay his fare, or violate the rules of a railroad corporation, it shall be lawful for the conductor of the train and servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place or near any dwelling house, as the conductor shall elect, on stopping the train. (Rev., s. 2629; Code, s. 1962; 1871-2, c. 138, s. 34; C. S. 3507.)

Permission to Ride in Express Car. — Where a party shipped horses by express with an agreement that he should ride in the same car he cannot ride in the passenger coach without paying his fare. Teeter v. Southern Exp. Co., 172 N. C. 616, 90 S. E. 761.

Ejecting Person on Baggage Car.—A person who gets on a blind baggage car, though having a ticket, but not having told the conductor that he had it, and the conductor not having seen it, is not entitled to recover as a passenger for injuries received by being pulled off the train by the conductor. McGraw v. Southern R. Co., 135 N. C. 264, 47 S. E. 758.

Mileage Book Holder Must Comply with Terms. — The holder of a mileage book must comply with its terms if reasonable opportunity is given, as he may be ejected. McNairy v. Norfolk, etc., R. Co., 172 N. C. 505, 90 S. E. 497; Mason v. Seaboard Air Line R. Co., 159 N. C. 183, 75 S. E. 25.

Ejection of Party Refusing to Show Mileage Book.—When a purchaser of a mileage book from a railroad company is riding on an exchange ticket, and refuses, without excuse, to show his mileage book, in connection with the ticket, to the conductor on the train, he is not regarded as a passenger, and the conductor has the right to eject him from the train. Mason v. Seaboard Air Line R. Co., 159 N. C. 183, 75 S. E. 25.

Evidence of Drunkenness Inadmissible.—In an action for wrongful ejection from a train, evidence of drunkenness of plaintiff is not admissible, where the answer simply denies the wrongful ejection alleged in the complaint. Raynor v. Wilmington Seacoast R. Co., 129 N. C. 195, 39 S. E. 821.

Ejection by Failure of Conductor to Return Ticket. — Where the conductor failed to return ticket to passenger to be used on another train, and the passenger was ejected therefrom for lack of the ticket, the railroad is liable for all damages attending the ejection. Sawyer v. Norfolk, etc., R. Co., 171 N. C. 13, 86 S. E. 166.

How Conductor May Eject Passenger.—The conductor of a railroad train is authorized to expel without using unnecessary force one who refuses to pay regular fare, at any point where he may safely get off provided it be "at any usual stopping place or near any dwelling house, as the conductor shall elect, on stopping the train"; and provided further that the ejected person is not willfully and wan-

tonly exposed to danger of life or limb. Roseman v. Carolina Cent. R. Co., 112 N. C. 709, 16 S. E. 766.

Person Must Be Ejected Near Station or House. — The railroad company owed a duty to plaintiff ejected from its train to put her off the train at a suitable and proper place, either at a station or near a house, even though she had not been rightfully a passenger. Bullock v. Atlantic Coast Line R. Co., 152 N. C. 66, 67 S. E. 60.

Flag Station Not a Usual Stopping Place.—A place along a railroad company's track is not a usual stopping place within the meaning of this section when it is merely a flag station without shelter, and the nearest dwelling three-quarters of a mile away; and where one traveling on the train has been put off at such place at 9 o'clock in the night for failure to exchange his mileage for a ticket, and was informed by the conductor that it was "a rather poor place to spend the night," it does not preclude his recovery, for the company's violation of the statute, that he again boarded the train and complied with the conductor's demand in paying the additional charge required of those who have no ticket. McNairy v. Norfolk, etc., R. Co., 172 N. C. 505, 90 S. E. 497.

Carrier Not Liable for Unusual Results. — A conductor requiring an intoxicated man to leave the train for nonpayment of fare does not render the carrier liable for the death of the man from exposure, where the conductor did not have reasonable ground to believe that the man was unable to find his way or walk to the nearest house or to the railroad station, or even to his own father's house, which was not far away. Roseman v. Carolina Cent. R. Co., 112 N. C. 709, 16 S. E. 766.

Reliance on Agent's Statements.—The purchaser of a ticket may rely upon the statements of the railroad agent as to trains, connection, validity of ticket, etc., and if the passenger is ejected as a result of the agent's mistake the railroad is liable. Creech v. Atlantic, etc., R. Co., 174 N. C. 61, 93 S. E. 453; Hallman v. Southern R. Co., 169 N. C. 127, 130, 85 S. E. 298.

§ 60-104. Beating way on trains misdemeanor; venue.—If any person, other than a railroad employee in the discharge of his duty, without authority from the conductor of the train or by permission of the engineer, and with the intention of being transported free and without paying the usual fare for such transportation, rides or attempts to ride on top of any car, coach, engine or tender, on any railroad in this state, or on the draw-heads between cars, or under cars, on truss rods, or trucks, or in any freight car, or on a platform of any baggage car, express car or mail car on any train, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding fifty dollars or imprisoned not more than thirty days. Any person charged with a violation of this section may be tried in any county in this state through which such train may pass carrying such person, or in any county in which such violation may have occurred or may be discovered. (Rev., s. 3748; 1899, c. 625; 1905, c. 32; C. S. 3508.)

Effect on Liability of Insurance Co.—A policy of accident insurance that excepts from the company's full liability diseases contracted before the date of the policy, "nor for sickness due to immorality or the violation of law," does not of itself exclude such liability for an injury caused by the plaintiff stealing a ride on a railway train, made a misdemeanor by this section, unless the plaintiff's act was so reckless as to withdraw it from the class of accidents covered by the policy. Poole v. Imperial Mut. Life, etc., Co., 188 N. C. 468, 125 S. E. 8.

§ 60-105. Injury while on platform or in other prohibited places.—In case any passenger on any railroad shall be injured while on the platform of a car or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside its passengers cars then in the train, such company shall not be liable for the injury: Provided, such company at the time furnish room inside its passenger cars sufficient for the proper accommodation of its passengers. (Rev., s. 2628; Code, s. 1978; 1871-2, c. 138, s. 42; C. S. 3509.)

Cross Reference.—As to injury while riding on platform of street car, see § 60-140.

Effect of Posting Notice.—When this section has been complied with, a rule of a railroad company prohibiting passengers from going on the platform while the train is in motion is given the force and effect of a state law, barring a recovery for injuries sustained under such circumstances. Shaw v. Seaboard Air Line R. Co., 143 N. C. 312, 55 S. E. 713.

Notice Need Be Only in English.—This section requires only that the notice to be placed by a railroad company in its coach, relieving the company from liability to a passenger injured while riding on the platform, etc., shall be in English, and the fact that such passenger cannot read that language is immaterial. Bane v. Norfolk Southern R. Co., 176 N. C. 247, 97 S. E. 11.

Riding on Platform Prima Facie Negligence. — It is prima facie negligence for a passenger to voluntarily ride on the platform of a rapidly moving train. Wagner v. Atlantic Coast Line R. Co., 147 N. C. 315, 61 S. E. 171.

Same—Not Applicable When Passenger Alighting.—This section is for the protection of passengers and should be reasonably construed, and has no application when the injury complained of has been received as the passenger was alighting at a regular station after the train had stopped for that purpose, though he may have ridden in violation of the statute before the train had stopped. Kearney v. Seaboard Air Line R. Co., 158 N. C. 521, 74 S. E. 593.

Same—When Getting on. — One who is on the passenger platform of a railroad company at its station with the purpose of becoming a passenger on its expected train is entitled to the protection due a passenger from dangerous conditions and usages there. Thomas v. Southern R. Co., 173 N. C. 494, 92 S. E. 321.

Cited in Roberson v. Carolina Taxi Service, 214 N. C. 624, 200 S. E. 363.

§ 60-106. Checking baggage; liability for loss.—A check shall be affixed to every parcel of baggage when taken for transportation by the agent or servant of any railroad corporation, if there is a handle, loop or fixture so that the same can be attached upon the parcel or baggage so offered for transportation, and a duplicate thereof given to the passenger or person delivering the same on his behalf; and if such check be refused on demand, the corporation shall pay to such passenger the sum of ten dollars, to be recovered in a civil action; and further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare the same shall be refunded by the conductor in charge of the train, and on producing the check, if his baggage shall not be delivered to him, he may, by an action, recover the value of such trunk or baggage. (Rev., s. 2623; Code, s. 1970; 1871-2, c. 138, s. 36; C. S. 3510.)

§ 60-107. Cars and toilets to be kept clean.—Every person or railroad company, whether incorporated or not, engaged in the regular business of carrying passengers on his or its railroad cars in this state, shall have such cars cleaned, brushed, dusted and the windows washed, if needed, at least once each day, and shall in each car, in which male and female passengers are carried, have therein a toilet-room for each sex, and have the same kept clean and decent. Any person or corporation engaged in the business aforesaid who shall willfully or negligently fail or refuse to give orders to his or its agent in charge of such cars to comply with the requirements of this section, shall forfeit twenty dollars for each day of such failure or refusal, to

be recovered by any person suing therefor. (1907, c. 474, ss. 1, 2; C. S. 3511.)

Cross Reference.—As to exception to this section, see § 60-98.

§ 60-108. Evidence of failure to order cleaning of cars; violation of orders misdemeanor.—The willful or negligent refusal or the failure on the part of the conductor or manager of any passenger car named in § 60-107 to comply with such section shall be received as evidence of failure or refusal of such person or railroad company to give the orders therein provided for. Moreover, such conductor or manager shall be guilty of a misdemeanor if he fail or refuse to carry out such orders of the persons or company mentioned in the said section. (1907, c. 474, s. 3; C. S. 3512.)

§ 60-109. Surcharge on Pullman car transportation.—It shall be unlawful for any railroad or Pullman car company doing business in North Carolina to collect from any person within the boundaries of North Carolina any surtax or surcharge for Pullman car transportation from one point to any other point within the bounds of the state of North Carolina; but nothing in this section shall be construed to affect in any way the charge which any railroad or Pullman car company may require for transportation on interstate travel. (1923, c. 147; C. S. 3512(a).)

Editor's Note.—It was said in 1 N. C. Law Rev. 305, that the power exercised in this section is clearly within the power of the state, and has been observed by carriers since its passage.

Art. 13. Carriage of Freight.

§ 60-110. No charge in excess of printed tariffs; refunding overcharge; penalty.—No railroad, steamboat, express or other transportation company engaged in the carriage of freight and no telegraph company or telephone company shall demand, collect or receive for any service rendered or to be rendered in the transportation of property or transmission of messages more than the rates appearing in the printed tariff of such company in force at the time such service is rendered, or more than is allowed by law. In case of any overcharge, contrary to the provisions of this section, the person aggrieved may file with any agent of the company collecting or receiving greater compensation than the amount allowed a written demand, supported by a paid freight bill and an original bill of lading or duplicate thereof for refund of overcharge, and a maximum period of sixty days shall be allowed such company to pay claims filed under this section. Any company failing to refund such overcharge within the time allowed shall forfeit to the party aggrieved the sum of twenty-five dollars for the first day and five dollars per day for each day's delay thereafter until said over charge is paid, together with all costs incurred by the party aggrieved: Provided, the total forfeiture shall not exceed one hundred dollars. (Rev., ss. 2642, 2643, 2644; 1903, c. 590, ss. 1, 2; C. S. 3514.)

Cross References.—As to power of the utilities commission to fix rates generally, see § 62-122. As to railroad freight rates, see § 62-135 et seq. As to action for double of overcharge in railroad freight rates, see § 62-138. As to venue of an action against a railroad, see § 1-81. As to schedule of rates as evidence, see § 62-132. As to long and short hauls, see § 62-128. As to contracts as to rates, see § 62-129. As to duty to file schedule of rates with the utilities commission, see § 62-68.

Constitutionality of Section.—This section is not unconstitutional as in violation of the Fourteenth Amendment to the Federal Constitution, or the Commerce Clause of said Constitution, and the acts passed in pursuance thereof. Efland v. Southern R. Co., 146 N. C. 135, 59 S. E. 355; Iron Works v. Southern R. Co., 148 N. C. 469, 62 S. E. 595; Hardware Co. v. Seaboard Air Line R. Co., 170 N. C. 395, 86 S. E. 1025.

Not Applicable to Interstate Shipment.—Under the Interstate Commerce Act, as amended, Congress, in the exercise of the constitutional powers conferred on it, has taken entire control of rates upon interstate shipments of goods, and this section is inoperative, as to such shipments. Hdw. Co. v. Seaboard Air Line R. Co., 170 N. C. 395, 86 S. E. 1025.

For earlier cases holding contra, see Macon County Supply Co. v. Tallulah Falls R. Co., 166 N. C. 82, 82 S. E. 13; Thurston v. Southern R. Co., 165 N. C. 598, 81 S. E. 785.

Burden of Proof.—The burden is upon the plaintiff to show that a freight rate charged and collected by the carrier on an interstate shipment was in excess of its tariff required of the carrier to be published, when he seeks to recover this excess and the State statutory penalty; and where the shipment has been routed over one line of connecting carriers and the tariff filed by the carrier over another route is shown, it affords no evidence as to the rate of the actual route of the shipment, and, in the absence of further evidence, a judgment as of nonsuit should be granted. Hdw. Co. v. Seaboard Air Line R. Co., 170 N. C. 395, 86 S. E. 1025.

Penalty Enforceable though Charges Small.—The penalty fixed by this section to enforce the duty of the carrier in regard to proper charges for transporting freight and refund of overcharges, and which cannot in any event exceed $100, is enforceable for a default established against defendant, though the particular transportation charges may appear disproportionately small. It is on failure to return small amounts wrongfully overcharged that penalties are especially required. In large matters the claimant can better afford the cost of litigation. Efland v. Southern R. Co., 146 N. C. 129, 59 S. E. 359.

Rates Need Not Be Same for Both Directions.—In shipments to a great distance, special circumstances, such as flow of traffic, may justify a higher rate between two points in one direction than in the opposite; and in an action for the recovery of the penalty under this section, it is error for the judge below in effect to charge the jury that such tariff rate published between the two points for freight moving in an opposite direction to that of the shipment in question was conclusive, and that they should be governed in their verdict as to the overcharge accordingly. Scull & Co. v. Atlantic Coast Line R. Co., 144 N. C. 180, 56 S. E. 876.

Agent as Party Aggrieved.—Where under agreement with his principal the agent of a manufacturer is obligated to pay the freight charges on shipments made to him, and upon demand of the carrier he has paid its unlawful charges on a shipment, he is the party aggrieved, and may maintain his action to recover the excess, and also the penalty when settlement has not been made within sixty days, when he has filed written demand supported by the original freight bill and the original or duplicate bill of lading, etc. Tilley v. Southern R. Co., 172 N. C. 363, 90 S. E. 309.

Freight Charge on Undelivered Shipment.—Where the defendant collected freight charges for an entire shipment, as invoiced and originally billed, and the sum of 96 cents was paid as freight on that part of the shipment which was "short" and not delivered, this was an overcharge, and failure to refund such overcharge after the 60 days allowed for investigation rendered the defendant liable for the penalty denounced by this section. Cottrell v. Carolina, etc., R. Co., 141 N. C. 383, 54 S. E. 288.

What Demand Must Specify.—Where the carrier has demanded and received an unlawful freight charge for a shipment, and the party aggrieved has made written demand of the carrier for payment of the overcharge, required by the statute, it is not necessary, in order to maintain an action for the penalty imposed upon the carrier failing to settle in sixty days, that the written demand specify the penalty, or that demand therefor was made in the justice's court or alleged in the complaint filed on appeal therefrom. Tilley v. Southern R. Co., 172 N. C. 363, 90 S. E. 309.

Same—Separate Demand in Same Envelope.—The mere fact that the plaintiff, inclosed separate written demands in the same envelope and gave an aggregate amount thereof in a letter accompanying them, does not affect the demands being specific, when the overcharges were separate and distinct, the demand made specifically as to each, accompanied

separately with the paid freight bill and duplicate bill of lading, and each demand was complete in itself; and such is a compliance with the provisions of this section. Efland v. Southern R. Co., 146 N. C. 129, 59 S. E. 359.

§ 60-111. Penalty for failure to receive and forward freight tendered.—Agents or other officers of railroad and other transportation companies whose duty it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a sidetrack, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day such company refuses to receive such shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment. (Rev., s. 2631; Code, s. 1964; 1903, cc. 444, 693; C. S. 3515.)

Cross References.—As to power of utilities commission to prevent discrimination, see § 62-56. As to venue of an action against a railroad, see § 1-81. As to the regulation of the shipment of inflammable substances and explosives, see § 62-58.

This section is constitutional as applied to intrastate shipments. Corbett v. Atlantic Coast Line R. Co., 205 N. C. 85, 170 S. E. 129.

Section Strictly Construed.—This is a penal statute and must be strictly construed. Cox v. Atlantic Coast Line R. Co., 148 N. C. 459, 62 S. E. 556.

Intrastate Shipments.—The penalty imposed by this section is not a burden upon interstate commerce when shipments are intrastate. Wampum Cotton Mills v. Carolina, etc., R. Co., 150 N. C. 612, 64 S. E. 588.

Interstate Shipments.—In Reid v. Southern R. Co., 150 N. C. 753, 64 S. E. 874, it was held that the penalty provided for by the provisions of this section would apply to interstate shipments, the same not being a burden on interstate commerce. In reviewing the same case the United States court reversed this decision and held that the section could not apply to interstate shipments. Southern Ry. Co. v. Reid, 222 U. S. 424, 32 S. Ct. 140, 56 L. Ed. 257.

Requisites of Valid Tender.—This section provides that the tender be made at a regular station and that the articles tendered be of the nature and kind received by the carrier for transportation, and it is necessary in an action for the penalty to show that the character of the shipment and place of tender are such as fall within its provisions. Olive v. Atlantic Coast Line R. Co., 152 N. C. 279, 67 S. E. 583.

Same—Sufficiency of Complaint.—A complaint alleging that plaintiff tendered to a carrier at a certain station a certain quantity of loose lumber for shipment, etc., which the defendant wrongfully and unlawfully refused to receive, states a good cause of action, since it would be inferred, to be thereafter shown by proof, that this station referred to was a regular station, and that loose lumber was an article usually received by the carrier. Olive v. Atlantic Coast Line R. Co., 152 N. C. 279, 67 S. E. 583.

Meaning of "Whenever Tendered."—The words "whenever tendered" can only be qualified by supplying the ellipsis "within the usual hours adopted by the public for the transaction of such business at the place where the tender is made." Alsop v. Southern Express Co., 104 N. C. 278, 10 S. E. 297.

Requisites for Daily Penalty.—In order for the daily penalty to attach to the carrier for continually refusing to accept freight for shipment under the provisions of this section, it is necessary for actual or constructive tender thereof to be made to the carrier each day; and where cattle are the subject of shipment, evidence that the shipment had been refused and that the shipper kept the cattle near the depot and told the defendant's agent thereof, and that he would deliver them when notified that the company would receive them, is insufficient except as to the first penalty. Bane v. Atlantic Coast Line R. Co., 171 N. C. 328, 88 S. E. 477.

When the common carrier permits a shipper to load a car with his goods and refuses to receive it for shipment or to issue a bill of lading, it is a refusal to receive the goods for shipment, under this section; and when the shipper leaves the goods in the car, with request for shipment, and by his conduct, understood by the railroad, makes his tender continuous, each day's delay is a separate refusal, within the meaning of the statute, to which the penalty will apply. Garrison v. Southern R. Co., 150 N. C. 575, 64 S. E. 578.

Same—Placing Goods in Depot.—Placing a shipment of goods in the depot of the carrier, prepared for and with request for shipment, and thus leaving them there, makes each day's delay by the carrier "a refusal to ship," under this section, and the carrier, thus refusing, is responsible for the penalty. Burlington Lumber Co. v. Southern R. Co., 152 N. C. 70, 67 S. E. 167.

Money Tendered After Regulation Hours.—Where money was tendered to the agent of an express company at a regular station for shipment at 2 o'clock P. M., and the trains carrying express freight in the direction of the place to which it was to be consigned passed only at 12:55 o'clock each day, a regulation of the company that money would be received for shipment only on the morning before the train on which it was to be transported passed, would not protect the company in an action brought to recover a penalty incurred by violation of this section. Alsop v. Southern Express Co., 104 N. C. 278, 10 S. E. 297.

Meaning of "Under Existing Laws."—The words "under existing laws," in this section, qualify the word "forward," and are used in reference to the rules governing the legal relations of consignor, consignee and the connecting lines. Alsop v. Southern Express Co., 104 N. C. 278, 10 S. E. 297.

Who Is the "Party Aggrieved."—The shipper of the goods is the "party aggrieved," and is the one entitled to sue for the penalty prescribed in this section which arises from the wrongful refusal of the carrier's agent to accept them for transportation. Reid v. Southern R. Co., 149 N. C. 423, 63 S. E. 112.

Same—Consignee of Goods Shipped on Approval.—A consignee to whom goods are shipped on approval owes a duty to the consignor to return them if they are unsatisfactory, and he must do so to relieve himself of liability to the consignor; and he is the party aggrieved, under this section, and may maintain his action thereunder for the penalty prescribed upon the refusal of the carrier to accept them for shipment. Burlington Lumber Co. v. Southern R. Co., 152 N. C. 70, 67 S. E. 167.

Same—Agent of Attaching Creditor.—The penalty prescribed by this section is for the person who is interested in having the goods shipped, and whose legal right in respect thereto is denied; and a person may not maintain an action for the penalty, as the party aggrieved, who has no right or interest in the goods tendered by him for shipment, except as agent or attorney for an attaching creditor and surety on his attachment bond, after the debt has been paid and the goods released. McRackan v. Atlantic Coast Line R. Co., 150 N. C. 331, 63 S. E. 1042.

Goods Not Delivered to Carrier.—When the plaintiff did not deliver the goods to the carrier because they could not be transported by a train then getting ready to leave the station, but carried it back and shipped it the next day, a nonsuit should be allowed. Cox v. Atlantic Coast Line R. Co., 148 N. C. 459, 62 S. E. 556.

No Penalty for Refusal to Accept Loose Hay.—Where the Corporation Commission has authorized and fixed and approved the charges for the transportation of baled hay, without expressly requiring its acceptance by the carrier when unbaled or loose, and by express provision it does not require the carrier to receive "cotton or other merchandise and warehouse the same unless the articles offered are in good shipping condition, etc., the carrier is not liable, for the penalty prescribed by this section, for refusing to receive for shipment a car-load of loose hay, such shipments evidently being of such a character as to endanger the property, not only of the carrier, but that of others received by the carrier for shipment. Tilley v. Norfolk & Western R. Co., 162 N. C. 37, 77 S. E. 994.

Embargo on Consignee's Freight. — A railroad company may show, in defense to an action for refusal to receive goods for shipment when tendered, such matters as would excuse its failure to do so at common law, unavoidable conditions then existing, over which it had no control; when a carrier has refused a shipment of the nature and kind it was its business to receive, and which it could have received at the point tendered without working a hardship or oppression, it is no defense for it to show that, for the reason of the consignee's blocking the freight yards at destination, an embargo had been placed by the railroad for shipments ten-

dered to be forwarded to him there. Garrison v. Southern R. Co., 150 N. C. 575, 64 S. E. 578.

Embargo by Connecting Carrier.—The penalty imposed by this section is enforcible against a railroad company refusing to receive freight when tendered, though to reach destination it was necessary for another road to receive and transport it beyond the junctional point; and it is no valid excuse that the connecting line had laid an embargo on the consignee, for it was the duty of the initial carrier to transport the goods and make a tender to the connecting line to be relieved of the penalty. Wampum Cotton Mills v. Carolina & Northwestern R. Co., 150 N. C. 612, 64 S. E. 588.

When Rate Unknown.—Where the defendant carrier refused to receive for shipment goods tendered to it, basing its right to refuse upon the ground that it was necessary for the shipment to go over lines of connecting carriers in order to reach its destination and that no joint rate had been made, and the plaintiff offered to prepay the freight, and asked for a bill of lading, it was the duty of the defendant to accept the shipment, forward it to its connecting line; and to use reasonable means of ascertaining the rate of freight, by wire if necessary, for the issuance of a through bill of lading. Reid v. Southern R. Co., 153 N. C. 490, 69 S. E. 618.

In an action to recover the penalties alleged to have been incurred under this section, for refusing to receive freight for transportation, where the plaintiff delivered freight for shipment at the defendant's station and tendered the charges, and an agent received the freight for storage, but refused to give a bill of lading because he did not know the freight rates, and kept the freight twelve days there was a refusal "to receive for transportation," and the action is brought under the proper statute. Twitty v. Southern R. Co., 141 N. C. 355, 53 S. E. 957.

Mismarking of Part of Shipment.—In an action to recover a penalty against a carrier for failing to ship one of four packages consigned for shipment under a single bill of lading, the defendant is estopped to claim as a defense that the mismarking of three of the packages was a sufficient excuse for failing to ship the fourth. Grocery Co. v. Sou. R. Co., 136 N. C. 396, 48 S. E. 801.

Freight Not Consigned to Regular Station.—A refusal of the carrier's agent to receive, at its depot, freight, and transportation charges therefor, destined for a point on the carrier's road which was only a siding, and was not a regular station, is wrongful, and subjects the carrier to the penalty prescribed by this section when the refusal is on the ground that the agent did not know where the given destination was, and it appears that he could have ascertained that freight was ordinarily shipped there on way bills made out to a regular station on the carrier's road some two miles distant therefrom. Reid v. Southern R. Co., 149 N. C. 423, 63 S. E. 112.

Tender of Freight Eight Minutes before Train. — Where the plaintiff tendered to the defendant thirty crates of strawberries at a small station requiring only one agent to attend to the various duties of express, telegraph, and railroad agent, and the train from which the shipment was intended was seen approaching the depot about eight minutes before its arrival, a charge of the court that it was for the jury to determine whether, under the circumstances, the tender of the shipment for that train was in time was not open to plaintiff's objection. Shaw v. Southern Express Co., 171 N. C. 216, 88 S. E. 222.

Need Not Accept Express for All Trains.—An express company is not liable for damages and the statutory penalties of this section for refusing to receive a shipment of thirty crates of strawberries for a certain train not carrying accommodations for shipments of this character, though it had taken, on occasion, a few berries thereon for the plaintiff, when it so advertised, the shipper knew of it, and accommodations on other daily trains were specially provided. Shaw v. Southern Express Co., 171 N. C. 216, 88 S. E. 222.

Conclusiveness of Referee's Findings.—Where in an action to recover the prescribed penalties under this section the referee finds upon ample evidence in a hearing in which no error of law is committed, that the shipment came within a certain classification, and that the shipper tendered the correct amount for such classification, and the finding is approved by the trial court, such finding is conclusive on appeal, and the carrier may not successfully contend that the shipment came within another classification for which higher freight charges were prescribed, and where a higher tariff has been charged on one shipment the shipper is entitled to recover the excess paid. Corbett v. Atlantic Coast Line R. Co., 205 N. C. 85, 170 S. E. 129.

Sufficiency of Evidence.—Evidence that shipper's contract to deliver certain merchandise was canceled because of carrier's wrongful refusal to accept the merchandise for shipment is sufficient to support the referee's finding of actual damages, profits which would have been certainly realized but for carrier's wrongful refusal of the shipment being recoverable under this section. Corbett v. Atlantic Coast Line R. Co., 205 N. C. 85, 170 S. E. 129.

Cited in Burlington Lbr. Co. v. Southern R. Co., 152 N. C. 70, 67 S. E. 167; Kemp v. Norfolk, etc., R. Co., 169 N. C. 731, 86 S. E. 621.

§ 60-112. Penalty for failure to transport within reasonable time.—It shall be unlawful for any railroad company, steamboat company, express company or other transportation company doing business in this state to omit or neglect to transport within a reasonable time any goods, merchandise or other articles of value received by it for shipment and billed to or from any place in the state of North Carolina, unless otherwise agreed upon between the company and the shipper, or unless the same be burned, stolen or otherwise destroyed, or unless otherwise provided by the North Carolina utilities commission.

Any company violating any of the provisions of this section shall forfeit to the party aggrieved the sum of fifteen dollars for the first day and two dollars for each succeeding day of such unlawful detention or neglect where such shipment is made in carload lots, and in less quantities there shall be a forfeiture in like manner of ten dollars for the first day and one dollar for each succeeding day, but the forfeiture shall not be collected for a period exceeding thirty days.

In reckoning what is a reasonable time for such transportation, it shall be considered that such transportation company has transported freight within a reasonable time if it has done so in the ordinary time required for transporting such articles of freight between the receiving and shipping stations. A delay of two days at the initial point and forty-eight hours at one intermediate point for each hundred miles of distance or fraction thereof over which such freight is to be transported shall not be charged against the transportation company as unreasonable and shall be held to be prima facie reasonable, and a failure to transport within such time shall be held prima facie unreasonable. This section shall be construed to refer not only to delay in starting the freight from the station where it is received, but to require the delivery at its destination within the time specified: Provided, that if such delay shall be due to causes which could not in the exercise of ordinary care have been foreseen, and which were unavoidable, then upon the establishment of these facts to the satisfaction of the justice of the peace or jury trying the cause, the defendant transportation company shall be relieved from any penalty for delay in the transportation of freight, but it shall not be relieved from the costs of such action. In all actions to recover penalties against a transportation company under this section, the burden of proof shall be upon the transportation company to show where the delay, if any, occurred. (Rev., s. 2632; 1903, c. 590, s. 3; 1905, c. 545; 1907, cc. 217, 461; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3516.)

Cross Reference.—As to venue of actions against a railroad, see § 1-81.

Editor's Note.—Under this section as it formerly prevailed, a penalty was imposed for unreasonable delay in the transportation of goods. Construing the statute in Alexander v. Atlantic Coast Line R. Co., 144 N. C. 93, 56 S. E. 697 the Court held that the term "transportation" did not include a delivery to consignee at the point of destination, and if goods shipped by a carrier had been properly placed at the

point of destination, no penalty was incurred under this section for a negligent delay in delivery from the car or warehouse of the company. Subsequently the Legislature amended the statute so as to include delays in delivery after transportation had ceased.

For a review of the history of legislative penalties for the refusal of railroads to transport freight, see Grocery Co. v. Sou. R. Co., 136 N. C. 396, 48 S. E. 801.

Constitutionality of Section.—This section is in the nature of a police regulation and is constitutional and valid. Owens v. Hines, 178 N. C. 325, 100 S. E. 617; Davis v. Southern R. Co., 147 N. C. 68, 60 S. E. 722.

It does not deny to the carrier the equal protection of the laws. Rollins v. Seaboard Air Line Railway, 146 N. C. 153, 59 S. E. 671; Grocery Co. v. Sou. R. Co., 136 N. C. 396, 48 S. E. 801.

Common Law Duty.—This section does not supersede or alter the duty of a carrier at common law, but merely enforces an admitted duty and superadds a penalty. Meredith v. Seaboard Air Line Ry. Co., 137 N. C. 478, 50 S. E. 1.

Section Strictly Construed.—This is a penal statute and must be strictly construed. Alexander v. Atlantic Coast Line R. Co., 144 N. C. 93, 56 S. E. 697.

Does Not Apply to Interstate Shipments.—A penalty may not be recovered of the carrier of an interstate shipment for negligent delay in transportation, under this section. Bivens Bros. v. Atlantic Coast Line R. Co., 176 N. C. 414, 97 S. E. 215. See, also, Hickory Marble Co. v. Southern R. Co., 147 N. C. 53, 60 S. E. 719.

Same—Although Both Terminal Points in State.—A penalty under this section cannot be recovered for the failure of a railroad company to transport freight within a reasonable time, when the initial and terminal points are within the State, but the shipment necessarily passes into another State in transitu. Such is interstate commerce and cannot be interferred with by the State. Shelby Ice, etc., Co. v. Southern R. Co., 147 N. C. 66, 60 S. E. 721.

Two Days Allowed at Initial Point.—Under this section, the carrier is allowed two days at the initial point for the transportation of freight instead of the one day allowed by section 1-593. Wall-Huske Co. v. Southern R. Co., 147 N. C. 407, 61 S. E. 277.

Same—No Deduction for Receipt and Delivery.—Under this section the two days at the initial point are allowed for the purpose of giving a reasonable time to begin the transportation; the forty-eight hours at each intermediate point are allowed for the necessary change of cars or unloading and loading; and it is not a reasonable construction of the statute to deduct the day of the receipt and the day of delivery from the time thus fixed. Watson v. Atlantic Coast Line R. Co., 145 N. C. 236, 59 S. E. 55.

Deductible Time Allowed Applies to Actions for Penalty as Well as Damages.—The deductible time allowed by this section in computing "reasonable time," to wit, "two days at the initial point and forty-eight hours at one intermediate point for each hundred miles distance or fraction thereof," applies to actions brought to recover the penalty given by said section and fixing the amount thereof, and not to actions for damages only. Talley v. Atlantic Coast Line R. Co., 198 N. C. 492, 493, 152 S. E. 390.

"Intermediate Point" Defined.—An "intermediate point" for which time is allowed under this section, in transporting freight is only where the freight is transferred to another road. Davis v. Atlantic Coast Line R. Co., 145 N. C. 207, 59 S. E. 53.

In shipment of less than car-load lots a point where they are ordinarily transferred from one car to another in transit, at a junctional point on the same road, is an intermediate point, within the meaning of this section. Blue Ridge Collection Agency v. Southern R. Co., 147 N. C. 593, 61 S. E. 462.

Same—Transfer at Carrier's Distributing Point.—When a car-load intrastate shipment necessarily is transferred without breaking bulk from one road of the carrier's system to another thereof at a general distributing point in the carrier's system in order to reach destination, the carrier is allowed thereat the statutory time for transportation at such point as an intermediate point. Wall-Huske Co. v. Southern R. Co., 147 N. C. 407, 61 S. E. 277.

"Ordinary Time" a Question for Jury.—The question of "ordinary time" for the transportation of freight by the carrier, in a suit for a penalty for failure to transport, under this section, is a question of fact for the jury. Wall-Huske Co. v. Southern R. Co., 147 N. C. 407, 61 S. E. 277; Shelby Ice, etc., Co. v. Southern R. Co., 147 N. C. 66, 60 S. E. 721.

In an action for the recovery of a penalty under this section, it was for the jury to find what was "ordinary" time, under the surrounding circumstances, and whether the defendant transported freight within such time; also, the amount of recovery after allowing for the "lay days," etc., provided by this section. It is error for the trial court to instruct the jury, if they believed the evidence, to answer the issue in a certain way or in a sum certain. Davis v. Southern R. Co., 147 N. C. 68, 60 S. E. 722.

Same—No Fixed Rule.—This section does not fix a "hard and fast" rule in defining reasonable time. From the "ordinary time" within which the jury find the goods should have been transported and delivered, the court must deduct two days at the "initial point" and forty-eight hours at each "intermediate point," and for all time in excess thereof the statutory penalty may be recovered. Jenkins v. Southern R. Co., 146 N. C. 178, 59 S. E. 663.

Same—Burden of Proof.—When the evidence discloses that the time taken by the railroad company for transporting goods, etc., was prima facie reasonable as fixed by the statute, the question of reasonable time is one for the jury to measure by the statutory standard, the burden of proof being upon the plaintiff. Alexander v. Atlantic Coast Line R. Co., 144 N. C. 93, 56 S. E. 697.

Same—Evidence.—In an action to recover the penalty given by this section, the burden of proof is on the plaintiff to show that the carrier failed to transport and deliver the goods within a reasonable time, which is defined to be the "ordinary time" required to transport and deliver. This may be shown by proving the distance over which the goods are to be transported and the time consumed therein. From this evidence the jury may, as a matter of common knowledge and observation, draw the conclusion whether, in view of the usual speed of freight trains, the time consumed, the distance, and other conditions the carrier has failed to transport and deliver within a reasonable time. Jenkins v. Southern R. Co., 146 N. C. 178, 59 S. E. 663.

Same—Illustrations.—When there is evidence that the time in transporting a certain shipment from one station to another on the same railroad, leading directly to the point of destination, and only 25 miles apart, was twelve days, the jury will be permitted, from their common observation and experience, to consider and determine the question of ordinary time between the two points, and in the absence of explanation by defendant, fix the amount of wrongful delay. Rollins v. Seaboard Air Line Railway, 146 N. C. 153, 59 S. E. 671.

When it is admitted that certain articles were received by defendant, to be transported and delivered to plaintiff, the party aggrieved, both points being in the State, the distance separating them 58 miles, with but one intermediate point between the place of shipment and destination, and that they were not delivered to plaintiff within twenty-one days, the delay was unreasonable. Watson v. Atlantic Coast Line R. Co., 145 N. C. 236, 59 S. E. 55. The official headnote to this case is misleading.—Ed. Note.

Computation of Time.—The time in which railroads shall transport freight shall be computed by excluding the first day and including the last, except when the last day falls on Sunday. Davis v. Atlantic Coast Line R. Co., 145 N. C. 207, 59 S. E. 53.

When the carrier was allowed two days time for a shipment at an intermediate point, and therefore could not deliver it before Sunday, delivery on the next succeeding day was a compliance with the law. Blue Ridge Collection Agency v. Southern R. Co., 147 N. C. 593, 61 S. E. 462.

In a suit for penalty against the carrier for failure to transport freight, under this section, the defense that the last day, being Sunday, should not be counted, under section 60-80, is unavailable when it is made to appear that the delay chargeable began to run and to be counted from the Saturday preceding; for the charge for delay having once begun to run, it continues to run without deduction for Sundays or holidays. Wall-Huske Co. v. Southern R. Co., 147 N. C. 407, 61 S. E. 277; Watson v. Atlantic Coast Line R. Co., 145 N. C. 236, 59 S. E. 55.

Issues.—An issue which presupposes a failure on defendant's part in its duty to transport freight, in an action for penalty, under this section, is objectionable. Davis v. Southern R. Co., 147 N. C. 68, 60 S. E. 722.

Who Entitled to Recover.—The real "party aggrieved" is entitled to recover the penalty, under this section, irrespective of the question of knowledge of or notice to the defendant. Cardwell v. Southern R. Co., 146 N. C. 218, 59 S. E. 673.

Who Is "Party Aggrieved."—The plaintiff may maintain his action against the defendant railroad company, under this section, for wrongful failure to transport certain goods received by the latter, and bill of lading issued by it to plaintiff, when it appears that plaintiff shipped the goods to be for his benefit sold by the consignee, and that he (the plaintiff) was the one who alone acquired the right to demand the service to be rendered by the defendant, and was the party aggrieved. Rollins v. Seaboard Air Line Railway, 146 N. C. 153, 59 S. E. 671.

When the consignor ships goods to be sold for his own benefit, he is the "party aggrieved," under this section, and the proper party plaintiff. Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 62 S. E. 413.

Same—Party Whose Legal Right Denied.—The plaintiff is entitled to recover the penalty as the "party aggrieved," under this section, for the defendant's wrongfully failing to transport freight within a reasonable time, where the facts show that, from the attendant circumstances or terms of the agreement, he is the one whose legal right is denied and who is alone interested in having the transportation properly made. Cardwell v. Southern R. Co., 146 N. C. 218, 59 S. E. 673.

Same—Goods Not to Be Paid for until Delivery.—When the consignor had agreed with the consignee that the latter was only required to pay for the intrastate shipment when it reached its destination, the consignor may maintain his action for delay in transitu, as the party aggrieved. Davis v. Southern R. Co., 147 N. C. 68, 60 S. E. 722.

When, by the contract or agreement between a vendor and vendee of goods, the goods are to be "received, inspected and weighed" by the vendee before any part of the purchase price is payable, the title does not vest in the vendee, and the vendor is the "party aggrieved" under the meaning of this section. Elliott v. Southern R. Co., 155 N. C. 235, 71 S. E. 339.

Same—Notice Immaterial.—When it is shown that the plaintiff is the "party aggrieved," under this section, it is of no importance and bears in no way on the justice of plaintiff's demand or of defendant's obligation, whether defendant knew who was the party aggrieved, either at the inception of the matter or at any other time. Rollins v. Seaboard Air Line Railway, 146 N. C. 153, 59 S. E. 671.

Action Not Brought "on Relation of State."—Under this section, the action for penalty is given directly to the party aggrieved, and is not required to be brought "on relation of the State." If it were, that would be a mere informality, which could be remedied by amendment. Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 62 S. E. 413.

No Right to Hold Freight Full Time Limit.—This section providing that a carrier shall not allow any freight to remain at any "intermediate point" for more than forty-eight hours, does not authorize the carrier to hold it at each of such points the extreme limit, without any necessity for detaining it at all. Meredith v. Seaboard Air Line Ry. Co., 137 N. C. 478, 50 S. E. 1.

When Transportation Ceases.—Transportation ceases when the duty of the carrier as a warehouseman commences, and in respect to freight transported in carload lots, when the car reaches destination and is placed for unloading. What particular parts of the carrier's tracks and freight yards may be used for such purposes must of necessity be left to its discretion, but the car must be reasonably accessible and placed for delivery before transportation is fully ended. Brooks Mfg. Co. v. Southern R. Co., 152 N. C. 665, 669, 68 S. E. 243.

Transportation does not cease when a car-load is placed by the carrier within the yard limits of the point of destination. Wall-Huske Co. v. Southern R. Co., 147 N. C. 407, 61 S. E. 277.

Delivery Does Not Have to Be on Private Tracks.—This section does not apply to a delivery on the private tracks of a consignee; but to avoid the penalty it is required of the carrier to place for delivery a carload shipment on its track at destination at a place reasonably accessible. Brooks Mfg. Co. v. Southern R. Co., 152 N. C. 665, 68 S. E. 243.

When Goods Travel over Several Lines.—When the initial carrier delivers goods to its connecting carrier, necessary for them to be by it further transported to their destination, and an unreasonable delay occurs, without evidence as to which carrier was responsible for the delay, the defendant, the initial carrier is liable for the entire delay, the burden of proof being upon it as the party having the evidence peculiarly within its own knowledge or possession. Watson v. Atlantic Coast Line R. Co., 145 N. C. 236, 59 S. E. 55.

Same—Parties to Action.—Where an intrastate shipment of goods is transported over connecting lines to its destination, it is proper for the trial court to make both roads parties to an action to recover the penalty for the failure to transport safely and within a reasonable time, the burden being upon each defendant to show that it had not failed in its duty. Sellars Hosiery Mills v. Southern R. Co., 174 N. C. 449, 93 S. E. 952.

When Bill of Lading Not Presumptive Evidence.—When it was the consignor's duty to load a car for shipment, which had been placed at its mill by the carrier, and the carrier's agent gave a bill of lading upon the statement of the consignor that the car had been loaded, without being required to verify the statement, the bill of lading is not presumptive evidence of the receipt of the contents of the car, and the question is an open one for the jury in a suit by the consignee for the penalty, for failure to deliver under this section. Peele v. Atlantic, etc., R. Co., 149 N. C. 390, 63 S. E. 66.

Negligent Default in Delivery.—This section extends the penalty to cases of negligent default in the carrier's making delivery of the freight to the consignee. Mitchell v. Atlantic Coast Line R. Co., 183 N. C. 162, 110 S. E. 859.

Duty to Notify Consignee.—Where a shipment of goods is delivered to a railroad company for transportation, the title vests in the consignee, with the duty resting upon the carrier on the arrival of the goods at destination to notify the consignee and make delivery. This principle applies to a side-station when notification of arrival should have been given from a nearby station, and the inquiring consignee was there misinformed as to the arrival, and the car in the meanwhile was broken into and the shipment stolen. Acme Mfg. Co. v. Tucker, 183 N. C. 303, 111 S. E. 525.

Burden of Proof as to Destruction of Goods.—The burden of proof is on the carrier to show that it is relieved of the penalty prescribed by this section, under the provision thereof, because the goods were "burned, stolen or destroyed." That the goods were placed in defendant's car by the initial carrier, that search had been made therefor, without stating how thorough, and the absence of evidence that the goods had since been seen, is no evidence that they were "burnt, stolen or destroyed." Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 62 S. E. 413.

Verdict Incomplete.—Where it is established by the jury that a consignment of goods was carried to the delivering point by the carrier, which failed to deliver to the consignee, or to notify him, and the goods are lost while in its possession, the verdict is incomplete when there was no issue submitted as to whether the carrier, who is a party to the action, was in default in not delivering it to the consignee. Acme Mfg. Co. v. Tucker, 183 N. C. 303, 111 S. E. 525.

Sufficiency of Evidence on Motion for Nonsuit.—Where a shipment of various articles was transported by the carrier to destination, and all were received by the consignee, except one of them, which was missing, and remained in the carrier's warehouse beyond the statutory reasonable time the motion for nonsuit was properly denied. Mitchell v. Atlantic Coast Line R. Co., 183 N. C. 162, 110 S. E. 859.

Joinder of Actions.—An action for damages against a carrier for a lost shipment, and one for the penalty for unreasonable delay given by this section, do not merge into each other. They arise on contract and may be joined in the same action. Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 62 S. E. 413.

Regulation of Dangerous Article.—The Corporation Commission is given the power to make orders and regulations for the safety, etc., of shippers or patrons of any public-service corporation, and particularly to regulate the shipment of articles rendering transportation dangerous, such as inflammable articles of freight. Tilley v. Norfolk & Western R. Co., 162 N. C. 37, 77 S. E. 994.

Applied in Alexander v. Atlantic Coast Line R. Co., 144 N. C. 93, 56 S. E. 697.

Cited in Corbett v. Atlantic Coast Line R. Co., 205 N. C. 85, 88, 170 S. E. 129.

§ 60-113. Flume companies exercising right of eminent domain become common carriers.—All flume companies availing themselves of the right of eminent domain under the provisions of the chapter Eminent Domain shall become public carriers of freight, for the purposes for which they are adapted, and shall be under the direction, control and supervision of the utilities commission in the same manner and for the same purposes as is by law provided for other public carriers of freight. (1907, c. 39, s. 4; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3517.)

Local Modification.—Duplin: 1911, c. 214.

§ 60-114. Freight charges to be at legal rates; penalty for failure to deliver to consignee on tender of same.—All common carriers doing business in this state shall settle their freight charges according to the rate stipulated in the bill of lading, provided the rate therein stipulated be in conformity with the classifications and rates made and filed with the interstate commerce commission in case of shipments from without

the state and with those of the utilities commission of this state in case of shipments wholly within this state, by which classifications and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carriers to inform any consignee of the correct amount due for freight according to such classification and rates. Upon payment or tender of the amount due on any shipment which has arrived at its destination according to such classification and rates, such common carrier shall deliver the freight in question to the consignee. Any failure or refusal to comply with the provisions hereof shall subject such carrier so failing or refusing to a penalty of fifty dollars for each such failure or refusal, to be recovered by any consignee aggrieved by any suit in any court of competent jurisdiction. (Rev., s. 2633; 1905, c. 330, s. 1; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3518.)

Cross References.—As to obligations and rights of carriers upon bills of lading, see § 21-9 et seq. As to the power of the utilities commission to regulate delivery, see § 62-55. As to railroad freight rates, see § 62-135 et seq. As to venue of an action against a railroad, see § 1-81.

Constitutionality of Section.—The penalty for failure of a common carrier to deliver freight, as prescribed by this section, shipped from beyond the State, after it has been unloaded from its cars and while in the depot, is constitutional and not a burden upon interstate commerce. Hockfield v. Southern R. Co., 150 N. C. 419, 64 S. E. 181; Jeans v. Seaboard Air Line R. Co., 164 N. C. 224, 80 S. E. 242.

A railroad company owes it as a common-law duty to deliver freight upon tender of lawful charges by the consignee, and, in the absence of a conflicting regulation by Congress, this section, imposing a penalty upon default of the railroad company therein, is constitutional and valid, and is an aid to, rather than a burden upon, interstate commerce. Harrill Bros. v. Southern R. Co., 144 N. C. 532, 57 S. E. 383.

Foreign Corporation Bound to Obey Laws.—Where a railroad corporation chartered by another state, leases a railroad chartered by this state, it is bound to observe and obey all laws of this state regulating the business of transportation. Hines v. Wilmington, etc., R., 95 N. C. 434.

Intrastate Rebilling of Interstate Shipment.—An interstate shipment of goods which was missent, bill of lading lost, and rebilled from one point in the State to another therein, is an intrastate shipment, and upon the carrier's violating the provisions of this section, the penalty therein accrues. Hockfield v. Southern R. Co., 150 N. C. 419, 64 S. E. 181.

Section Not Cumulative.—This section imposes only one penalty for the refusal of the railroad company to deliver freight upon demand and tender of charges, and it is not cumulative upon more than one demand for the same offense. Harrill Bros. v. Southern R. Co., 144 N. C. 532, 57 S. E. 383.

Consignee Must Produce Bill of Lading.—A consignee must produce, upon the carrier's demand, a bill of lading for a prepaid shipment of goods in the carrier's possession. Jeans v. Seaboard Air Line R. Co., 164 N. C. 224, 80 S. E. 242.

Insufficient Notice to Consignee.—Notice given by a carrier of the arrival of goods to a transfer company in the habit of hauling consignor's goods from the depot is not of itself sufficient notice to the consignee. Hockfield v. Southern R. Co., 150 N. C. 419, 64 S. E. 181.

Burden of Proof.—Where the consignee brings his action to recover the value of a shipment of goods from the carrier, shows that the shipment was addressed to him, was prepaid, in the carrier's possession at destination, and a demand for delivery, the burden is on the carrier to show a valid reason for its refusal to deliver the shipment. Jeans v. Seaboard Air Line R. Co., 164 N. C. 224, 80 S. E. 242.

No Liability for Unlawful Shipment.—A druggist who has not received a valid license to sell intoxicating liquors for the purposes and in the manner indicated, may not recover of the carrier the penalty provided by this section, for the failure to deliver such liquors to him for the purpose of sale, for such are unlawful and prohibited. Smith v. Southern Express Co., 166 N. C. 155, 82 S. E. 15.

Carrier Cannot Collect Storage for Illegal Detainment.—A carrier cannot enforce collection of storage charges arising from its wrongful refusal to deliver goods to consignee. Hockfield v. Southern R. Co., 150 N. C. 419, 64 S. E. 181.

Agent Ignorant of Amount of Charges.—It is no defense to an action to recover a penalty for refusing to deliver shipment upon tender of freight charges by the consignee, for the defendant company to show its agents did not know the correct amount of the charges because of the defendant's failure to file its schedule of rates. Harrill Bros. v. Southern R. Co., 144 N. C. 532, 57 S. E. 383.

Rate When Smaller Cars Furnished.—Where a consignor requested two cars of a certain standard size and the carrier furnished four cars of a smaller size the rate for the shipment must be the same. Yorke Furniture Co. v. Railroad, 162 N. C. 138, 78 S. E. 67.

§ 60-115. Charging unreasonable freight rates misdemeanor.—If any railroad company doing business in this state shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of freight of any description, or for the use and transportation of any railroad car upon its track or any of the branches thereof or upon any railroad in this state which has the right, license or permission to use, operate or control the same, it shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five hundred nor more than five thousand dollars. (Rev., s. 3768; 1899, c. 164, s. 12; C. S. 3519.)

Cross References.—See also § 62-135. As to action for double of overcharge, see § 62-138. As to penalty for wilful overcharge, see § 62-139. As to violation of passenger rates, see § 60-91.

§ 60-116. Allowing or accepting rebates or pooling freights misdemeanor. — If any person shall be concerned in pooling freights or shall directly or indirectly allow or accept rebates on freights he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than one thousand dollars or imprisoned not less than twelve months. (Rev., s. 3762; Code, s. 1968; 1879, c. 237, s. 2; C. S. 3520.)

Cross Reference.—As to a railroad or officer thereof allowing a rebate, see § 60-6.

Cited in McGwigan v. Wilmington & W. R. R., 95 N. C. 428, 445.

§ 60-117. Partial charges for partial deliveries.—Whenever any freight of any kind shall be received by any common carrier in this state to be delivered to any consignee in this state, and a portion of the same shall not have been received at the place of destination, it shall not be lawful for the carrier to demand any part of the charges for freight or transportation due for such portion of the shipment as shall not have reached the place of destination. The carrier shall be required to deliver to the consignee such portion of the consignment as shall have been received upon the payment or tender of the freight charges due upon such portion. But nothing in this section shall be construed as interferring with, or depriving a consignor, or other person having authority, of his rights of stoppage in transitu. (Rev., s. 2641; 1893, c. 495; C. S. 3521.)

§ 60-118. Placing cars for loading.—Whenever any person, firm or corporation intending to ship freight makes a written application to any railroad company for cars to be loaded in carload lots with any kind of freight embraced in the tariffs of the company, stating in the application the character of the freight, the number of cars wanted, the station, depot, siding, wharf or boat-landing on the line of the company whence the shipment is to be moved, and its final destination, the railroad company shall furnish the cars

within four days from seven o'clock a. m., the day following such application. The application must be delivered to the agent of the railroad company at the station at or nearest the point of shipment. Any railroad company failing to furnish the cars named in such written application shall be subject to a penalty of five dollars per car per day for each car not furnished, to be recovered by the person, firm or corporation making application: Provided, that the railroad company, before furnishing the cars upon such application, may require the person, firm or corporation applying for the same to deposit five dollars for each car so demanded at the time the application is made, which deposit of five dollars for each car may be retained by the said railroad company as a forfeit for trackage in case the car or cars are not loaded within forty-eight hours after notice of the placement of car or cars in accordance with demand: Provided, that the utilities commission may excuse from the penalties imposed by this section independent lines not owned, operated, or controlled by any other line or system when trackage is less than one hundred miles. (1907, c. 217, s. 3; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3522.)

Cross Reference.—As to the power of the utilities commission to make rules for loading cars, see § 62-59.

Carrier Entitled to Notice.—The carrier is entitled to reasonable notice from the shipper for placing a car to be loaded, and when written notice is required by its rules, the rule may be waived or abandoned by a verbal agreement. Futch v. Atlantic Coast Line R. Co., 178 N. C. 282, 100 S. E. 436.

Same—No Liability for Penalty unless Four Days Notice Given.—A railway company is not liable for the penalty for failure to furnish cars to those who apply in writing when the company is not allowed the four days therein specified within which to furnish them, notwithstanding the railway company did not furnish them for twenty-three days. McDuffie v. Seaboard Air Line Ry., 145 N. C. 397, 59 S. E. 122.

When Action Not Brought for Penalty.—Where the recovery of the penalty is not sought, but the action is to recover damages for the carrier's failure to receive and ship the goods, a written demand for the cars is not required, and a verbal one is sufficient. Bell v. Norfolk Southern R. Co., 163 N. C. 180, 79 S. E. 421.

Failure to Furnish Ventilated Cars.—When a railroad company fails in its duty to furnish the shipper a ventilated car for transporting his fruit, and furnishes a box car instead, the company is not relieved from liability solely by the fact that the shipper knew his fruit was forwarded in a box car. Forrester & Co. v. Southern R. Co., 147 N. C. 553, 61 S. E. 524.

Interstate Shipment.—An action may be brought in the state courts to recover damages for failure to furnish cars to be used in interstate commerce. Smart v. Tallulah Falls R. Co., 173 N. C. 650, 92 S. E. 929.

Cited in Pinehurst Peach Co. v. Norfolk Southern R. Co., 201 N. C. 176, 159 S. E. 359.

§ 60-119. Baggage and freight to be carefully handled.—All railroad and steamboat companies shall handle with care all baggage and freights placed with them for transportation, and they shall be liable in damages for any and all injuries to the baggage or freight of persons from whom they have collected fare or charged freight, while the same is under their control. Upon proof of injury to baggage or freight in the possession or under the control of any such company it shall be presumed that the injury was caused by the negligence of the company. (Rev., s. 2624; 1897, c. 46; C. S. 3523.)

Cross References.—As to power of the utiliities commission to regulate the delivery of baggage, see § 62-55. As to conveying livestock in a cruel manner, see § 14-363. As to sanitation of cars, see § 130-279. As to carrier's liability for misdelivery, see § 21-11.

Delivery Necessary.—To fix the responsibility for lost baggage upon a railroad company, either as a common carrier or warehouseman, a delivery, actual or constructive, including an acceptance by the company, is necessary; and in order to a valid delivery the general rule is that when baggage is taken by others to the station, and to places where baggage is usually received, some kind of notice must be given to the agent authorized to receive it. Williams v. Southern R. Co., 155 N. C. 260, 71 S. E. 346.

Same—Estoppel.—The requisites of the general rule to affect delivery of baggage of a passenger to a railroad company in order to hold the company liable may become modified by a custom of the latter to consider and treat baggage as received when left at a given place, without further notice. Williams v. Southern R. Co., 155 N. C. 260, 71 S. E. 346.

Stipulations Limiting Liability.—Stipulations upon a railroad ticket, limiting the liability of the carrier in a specified sum "unless a greater value has been declared by the owner and excess charges paid thereon at the time of taking passage," and similar provisions in a bill of lading for the transportation of freight, are void as an attempt on the part of the carrier to contract against its own negligence. Cooper v. Norfolk Southern R. Co., 161 N. C. 400, 77 S. E. 339.

A common carrier cannot contract with a passenger against the loss of baggage by its negligence. Thomas v. Southern R. Co., 131 N. C. 590, 42 S. E. 964.

Liability for Non-Personal Baggage.—While the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either with or without payment of an extra charge, to take articles as baggage which are not properly such, it will be liable for their loss or for damage to them, though it may have been without any fault. Trouser Co. v. Seaboard Air Line R. Co., 139 N. C. 382, 51 S. E. 973.

When Liability as Carrier Ceases.—When the baggage has arrived at its destination and has been deposited at the usual or customary place of delivery and kept there a sufficient time for the passenger to claim and remove the same, the company's liability as a common carrier ceases, and it is thereafter liable only as a warehouseman, and bound to the use of ordinary care. Trouser Co. v. Seaboard Air Line R. Co., 139 N. C. 382, 51 S. E. 973.

Liability When Passenger Not Carried.—When there is no partnership arrangements between connecting lines of railroads, and a passenger buys a through ticket from a carrier to his destination on a connecting line, checks his trunk through to his destination and voluntarily returns to the starting point without going upon the road of the connecting lines, the latter carrier is not liable as insurer of the contents of the trunk from larceny by reason of taking the trunk to its destination, storing it there in its baggage room until its return was requested and then forwarding it to the junctional point, without compensation. Kindley v. Seaboard Air Line Ry. Co., 151 N. C. 207, 65 S. E. 897.

Baggage Not on Same Train.—The passenger's right to a limited amount of baggage as a part of the consideration for the price of his ticket is upon the condition that the baggage accompany the passenger on the same train; and where without any default on the part of the carrier, its agent, without further charge, has the baggage forwarded on a later train, the carrier's liability is not that of an insurer, but of a gratuitous bailee, under the rule of the prudent man, and attaches only in instances of gross negligence. Perry v. Seaboard Air Line R. Co., 171 N. C. 158, 88 S. E. 156.

§ 60-120. Claims for loss of or damage to goods; filing and adjustment.—Every claim for loss of or damage to property while in possession of a common carrier, including every express company, firm or corporation doing an express business within the state, shall be adjusted and paid within ninety days in case of shipments wholly within the state and within four months in case of shipments from without the state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment, or point of delivery to another common carrier, by the consignee, or at the point of origin by the consignor, when it shall appear that the consignor was the owner of the shipment: Provided, that no such claim shall be filed until after the arrival of the shipment, or some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof.

In every case such common carrier shall be

liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee aggrieved (or consignor, when it shall appear that the consignor was the owner of the property at the time of shipment and at the time of suit, and is, therefore, the party aggrieved), in any court of competent jurisdiction: Provided, that unless such consignee or consignor recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid; and that no penalty shall be recoverable under the provisions of this section where claims have been filed by both the consignor and consignee, unless the time herein provided has elapsed after the withdrawal of one of the claims.

Causes of action for the recovery of the possession of the property shipped, for loss or damage thereto, and for the penalties herein provided for, may be united in the same complaint. (Rev., s. 2634; 1905, c. 330, ss. 2, 4, 5; 1907, c. 983; 1911, c. 139; C. S. 3524.)

Cross Reference.—As to venue of an action against a railroad, see § 1-81.

Section Strictly Construed.—This is a penal statute, and in order to recover, the plaintiff must bring his case strictly within its terms. Watkins v. American Ry. Express Co., 190 N. C. 605, 130 S. E. 305.

Section Must Be Followed.—The penalty imposed by this section is to enforce obedience to the mandate of the law by punishment of the carrier, and the statute must be strictly construed, requiring the consignee to bring his case clearly within its language and meaning; and in order to recover the penalty, the consignee must file his claim with the agent as the statute directs, and the filing thereof with another of the carrier's agents is insufficient. Eagles Co. v. East Carolina Ry., 184 N. C. 66, 113 S. E. 512.

Who May Bring Action.—Ordinarily the title to a shipment of goods by common carrier passes to the consignee upon their acceptance by the carrier, and he may sue for damages thereto in transit; but when it is shown that the consignee refused to accept the damaged goods, and that the sale has been canceled by consent, the consignor may maintain his action against the carrier for damages. Aydlett v. Norfolk Southern R. Co., 172 N. C. 47, 89 S. E. 1000.

Joinder of Causes of Action.—A recovery of the value of a shipment of goods and the penalties for the refusal of the carrier to deliver and for the failure to settle the claim within the statutory period, may be united in the same action. Jeans v. Seaboard Air Line R. Co., 164 N. C. 224, 80 S. E. 242.

Same—Issues Separate and Distinct.—In an action against a railroad company to recover damages to a shipment of goods and the penalty for the failure of defendant to pay the same within 90 days, as allowed by this section, the issues raised are entirely separate and distinct from each other, and the trial judge may set aside the verdict on the second issue, and retain that on the first one, for a retrial. Hussey v. Atlantic Coast Line R. Co., 183 N. C. 7, 110 S. E. 599.

Carrier Cannot Contract against Own Negligence.—A common carrier may relieve itself from liability as an insurer upon a contract reasonable in its terms and founded upon a valuable consideration, but it cannot so limit its responsibility for loss or damage resulting from its negligence. Everett v. Norfolk, etc., R. Co., 138 N. C. 68, 50 S. E. 557; Mitchell v. Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671.

Owner Cannot Refuse Damaged Goods.—Damages to a shipment of goods by a railroad company, caused by the carrier's negligence, does not justify the owner in refusing to accept them on that account, unless the damages are sufficient to render the goods practically worthless. He must accept the goods and sue for the damages upon the refusal of the carrier to pay them. Whittington v. Southern R. Co., 172 N. C. 501, 90 S. E. 505.

Prima Facie Case.—In an action against the carrier for damages for the destruction of a shipment of freight by fire, a prima facie case is made out when the plaintiff shows the receipt of the freight for transportation and its nondelivery. Osborne v. Southern Ry. Co., 175 N. C. 594, 96 S. E. 34; Everett v. Norfolk, etc., R. Co., 138 N. C. 68, 50 S. E. 557.

Same—Limited Liability.—In cases of limited liability, proof of shipment and loss or injury makes a prima facie case for the shipper, and then the burden is upon the carrier to show that the circumstances of the loss bring it within the excepted causes, and when this is shown, the burden still rests upon the carrier of showing that the loss or injury was not due to its own negligence. Mitchell v. Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671.

Connecting Carriers—Duty Assumed by Carrier.—Where a carrier accepts goods for transportation, in the absence of a special contract, it assumes the duty of safely carrying, within a reasonable time, the goods to the end of its line, and delivering them in like condition to the connecting carrier. Meredith v. Seaboard Air Line Ry. Co., 137 N. C. 478, 50 S. E. 1.

Same—When Duty of Safe Carriage Attaches.—The duty of safe carriage attaches as the goods pass into the custody of each company, and ceases only when they are safely delivered to its successor. Lindley v. Richmond, etc., R. Co., 88 N. C. 547.

Same—Burden of Proof as to Safe Delivery.—On proof that a carrier received goods in good condition, the burden of proof rests upon such carrier to show delivery in the same condition to the next carrier or to the consignee, such proof being peculiarly within its power. Meredith v. Seaboard Air Line Ry. Co., 137 N. C. 478, 50 S. E. 1.

Same—Evidence.—To show that the freight was in good condition when it was delivered by the defendant to a connecting line, evidence that it is the custom of agents of such lines to examine freights before receiving them, and if found in good condition to forward them, and that such examination was made and forwarding was done, is admissible. Knott v. Raleigh, etc., R. Co., 98 N. C. 73, 3 S. E. 735.

Same—Prima Facie Case.—Where a shipment of goods is received by the consignee from the final carrier in bad condition, and there is evidence that this carrier received the goods from its connecting carrier in good condition, a prima facie case of negligence is made out against the delivering carrier, and presents sufficient evidence thereof to be submitted to the jury, with the burden of proof on it. Lyon v. Atlantic Coast Line R. Co., 165 N. C. 143, 81 S. E. 1.

Same—Presumption of Damage.—Among connecting lines of railway, that one in whose hands goods are found damaged is presumed to have caused the damage and the burden is upon it to rebut the presumption. Gwyn Harper Mfg. Co. v. Carolina Central R., 128 N. C. 280, 38 S. E. 894; Mitchell v. Carolina Central R. Co., 124 N. C. 236, 32 S. E. 671; Morganton Mfg. Co. v. Ohio, etc., R. Co., 121 N. C. 514, 28 S. E. 474.

Same—Goods Found Damaged at Destination. — When goods are shipped over several connecting lines of carriers and are found in a damaged condition at destination, there is a rebuttable presumption that the injury was negligently inflicted by the last carrier. Boss v. Atlantic Coast Line R. Co., 156 N. C. 70, 72 S. E. 93. This is on the principle that as the carrier is peculiarly in a position to know the facts, the burden of proof should rest on it. Beville v. Atlantic Coast Line R. Co., 159 N. C. 227, 74 S. E. 349.

Same—Liability for Negligence of Connecting Carrier.—A railroad company whose line is one of several connecting roads between places from and to which freight is shipped, in the absence of a special contract, or proof of copartnership by which each of the connecting lines will become liable for the contracts of the others, is not responsible for damages for negligence occurring beyond its terminus. Knott v. Raleigh, etc., R. Co., 98 N. C. 73, 3 S. E. 735.

But where two or more common carriers unite in forming an association creating a through line for the transportation of freight, payment of tariff charges to be made at the beginning or end of the transportation, with through bills of lading, the freight charges to be divided according to the respective mileage of the companies, they become a copartnership and each line is liable for any damage resulting from delay or otherwise on any part of the through line, notwithstanding a provision in the bill of lading that each company shall be liable only for loss or damage occurring on its own line. Rocky Mount Mills v. Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854.

Same — Interstate Shipments. — The Interstate Commerce Act and Carmack Amendment placed the entire regulation of interstate commerce under Federal control, and the penalty provided for by this section for failure of a carrier to pay a claim in the time prescribed does not apply to interstate shipments. See Morphis v. Express Co., 167 N. C. 139, 83 S. E. 1. These acts made the initial carrier liable for dam-

ages to a shipment made over connecting lines. However this does not relieve the intermediate or delivering carrier of responsibility for its own negligence, or prevent the state court from requiring the carriers to show which is responsible for the damage. See Aydlett v. Norfolk Sou. R. Co., 172 N. C. 47, 89 S. E. 100. And notice of damages to the initial carrier of an interstate shipment of goods is sufficient notice to the connecting carrier. Gilikin v. Norfolk Southern R. Co., 174 N. C. 137, 93 S. E. 469.

While the initial carrier may also be held liable for damages to a shipment made over connecting lines, a direction of the court relieving it from liability does not necessarily relieve the carrier whose negligence caused the damages. Gilikin v. Railroad, 174 N. C. 137, 93 S. E. 469.

Parol Agreement to Ship Sufficient.—When a carrier has received goods for transportation over its own and a connecting line which were not delivered, and upon consignor's parol request it has them reshipped to the initial or starting point, the latter agreement for reshipment, though resting in parol, is sufficient in an action for damages to the goods occurring while in the carrier's possession. Lyon v. Atlantic Coast Line R. Co., 165 N. C. 143, 81 S. E. 1.

Filing of Claim Prerequisite to Penalty.—A consignor of a shipment of goods is required by this section to file his claim with the agent of the common carrier at the point of its origin, and this he must have done to maintain his action against the carrier for the penalty prescribed for its failure to settle for its loss, or damage thereto, within ninety days, etc. Hamlet Grocery Co. v. Southern R. Co., 170 N. C. 241, 87 S. E. 57.

Same—Carrier May Regulate.—A stipulation in a bill of lading denying the carrier's liability for damages unless written notice of such claim be filed within a specified period is in derogation of the common law, and while it will be upheld if reasonable, the burden of proof is on the carrier to show that it is. Phillips v. Seaboard Air Line R. Co., 172 N. C. 86, 89 S. E. 1057.

A stipulation that they must be filed in four months is reasonable. Culbreth v. Atlantic Coast Line R. Co., 169 N. C. 723, 86 S. E. 624. An allowance of sixty days is reasonable. Gwyn-Harper Mfg. Co. v. Carolina Central R., 128 N. C. 280, 38 S. E. 894. But an allowance of thirty days is unreasonable. Gwyn-Harper Mfg. Co. v. Carolina Central R., 128 N. C. 280, 38 S. E. 894.

Same—Notice to Agent.—Where the second carrier in the connected line of shipment causes damages to the shipment by improperly loading it, it may not defeat an action to recover such damages, when the required notice within four months has been filed with and accepted without comment by it, on the ground that such notice had not been filed with the initial or final carrier under the terms of the contract of carriage. The doctrine of notice to the agent is applicable here. Aydlett v. Norfolk Southern R. Co., 172 N. C. 47, 89 S. E. 1000.

Same—Omission of Amount of Loss. — It is not required that a claimant state the amount of his loss, in his claim for damages against a carrier. McRary v. Southern Ry. Co., 174 N. C. 563, 94 S. E. 107.

Same—Interstate Shipments.—The Federal statutes, while recognizing the right of the carrier to stipulate for the filing of claims within a reasonable period, provide that if the loss or damage is due to a delay in transit by negligence no notice shall be required as a condition precedent to recovery. Mann v. Transportation Co., 176 N. C. 104, 96 S. E. 731.

Same — By Mail.—The essential things for the proper filing of the claim against the common carrier for damages, and for the penalty under the provisions of this section, being its delivery to and acceptance by the carrier's designated agent, such filing is not restricted to its manual delivery, but the same may be done through the agency of the United States mail. The delivery of the mail will be presumed. Eagles Co. v. East Carolina Railway, 184 N. C. 66, 113 S. E. 512.

Same—Necessity of Written Demand.—A penal statute is to be strictly construed, and the provisions of this section are not complied with when oral demand is made, as such cannot be filed under the ordinary acceptance of the word and does not afford the carrier the protection that a written demand would give. Thompson v. Southern Express Co., 147 N. C. 343, 61 S. E. 182. But failure to file a formal written demand is no bar to a recovery from the carrier of actual damages sustained. Hinkle v. Southern Ry. Co., 126 N. C. 932, 36 S. E. 348; Kime v. Sou. R. Co., 153 N. C. 398, 69 S. E. 264.

Stipulations May Be Waived.—The stipulation in a live-stock bill of lading requiring that notice in writing be given the carrier's agent at destination, of claim for damages to the animals shipped, before they are removed or mingled with other animals, may be waived by the carrier's agent at the delivering point. Newborn v. Louisville, etc., R. Co., 170 N. C. 205, 87 S. E. 37.

Recovery Must Equal Claim.—In order to recover the penalty for failure to settle a claim for damages within ninety days, etc., the burden is on plaintiff to show that the amount of his recovery be at least equal to the amount of his written demand. Watkins v. American Railway Express Co., 190 N. C. 605, 130 S. E. 305.

Settlement after Penalty Accrues.—The proviso that consignee must first recover the full amount claimed is only to protect the carrier against excessive demands and not to discourage settlements for losses, and the plaintiff's right to recover the penalty in such suits is not lost by accepting settlement for damages for full amount claimed after the penalty had accrued. Rabon v. Atlantic Coast Line R., 149 N. C. 59, 62 S. E. 743.

Plaintiff Must Prove Failure to Settle.—The burden is on plaintiff to show that the common carrier has failed to settle his claim in ninety days, etc., after written demand under the provisions of this section, applying to intrastate shipments, and the prima facie case made out by showing the unreasonable delay in the delivery of the shipment is not sufficient. Watkins v. American Ry. Express Co., 190 N. C. 605, 130 S. E. 305.

Measure of Damages for Delay.—In the trial of an action against a railroad company for loss occasioned by its delay in transporting machinery shipped over its line by plaintiff which was engaged in equipping a cotton factory, where it appeared that workmen employed by the plaintiff were forced to remain idle, though under pay of plaintiff, the measure of plaintiff's damages was the interest on the unemployed capital, the wages paid to workmen and such other costs and expenses incurred by plaintiff in consequence of the delay. Rocky Mount Mills v. Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854.

§ 60-121. Existing remedies to continue.—Section 60-120 shall not deprive any consignee of any rights or remedies now existing against common carriers in regard to freight charges or claims for loss or damage to freight, but shall be deemed and held as creating an additional liability upon such common carriers. (Rev., s. 2635; 1905, c. 330, s. 5; C. S. 3525.)

Common Law Remedies.—The common law remedies of shippers and passengers are not taken away by the provisions of this chapter. Bell v. Norfolk Sou. R. Co., 163 N. C. 180, 79 S. E. 42, and cases there cited.

Action May Be Brought in Contract or Tort.—A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transportation or operate its trains may bring an action on contract, or in tort, independent of the statute. Purcell v. Richmond & Danville R. Co., 108 N. C. 414, 12 S. E. 954, 956; Va-Carolina Peanut Co. v. Atlantic Coast Line R. Co., 155 N. C. 148, 71 S. E. 71.

§ 60-122. Carrier's right against prior carrier.—Any common carrier, upon complying with the provisions of §§ 60-114 and 60-120, shall have all the rights and remedies herein provided for against a common carrier from which it receives the freight in question. (Rev., s. 2636; 1905, c. 330, s. 3; C. S. 3526.)

Cross Reference.—As to power of utilities commission to act as arbitrator in disputes between carriers, see § 62-61.

§ 60-123. Regulation of demurrage.—No railroad or other transportation company doing business in the state shall make any charge on account of demurrage while a car, whether the same be a refrigerator car or not, is being loaded for shipment, until it has remained at the place of loading for forty-eight hours from the time it has been so placed; but the utilities commission may change this provision, if it considers it unreasonable, under the power vested in it under the chapter Utilities Commission, to make regulations as to demurrage and the loading of cars. (Ex. Sess. 1913, c. 55; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3527.)

Cross Reference.—As to power of utilities commission to regulate demurrage, see § 62-59.

§ 60-124. Shipment of livestock on Scuppernong river regulated; violation of regulations misdemeanor.—If any transportation company or common carrier shall receive livestock for shipment at any of the landings or shipping points on Scuppernong river, Columbia excepted, between the hours of sunset and sunrise, or shall during the time any livestock may be held for shipment at any landing or shipping point on such river, Columbia excepted, fail to keep the same in a covered pound or inclosure, supplied with necessary food and drinking water, and at all times in full view of the public, such transportation company, common carrier, or the agent of either, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. (Rev., s. 3675; 1903, c. 283; C. S. 3528.)

§ 60-125. Carload shipments of watermelons regulated; violation of regulations misdemeanor.—It shall be the duty of all common carriers to furnish the weights of all carload shipments of watermelons originating within the state to the shippers thereof within forty-eight hours after receipt of the same. Any common carrier violating the provisions of this section shall upon conviction be fined ten dollars for each offense. (Ex. Sess. 1913, c. 68; C. S. 3529.)

§ 60-126. Express companies to settle promptly for cash-on-delivery shipments; penalty.—Every express company which shall fail to make settlement with the consignor of a cash-on-delivery shipment, either by payment of the moneys stipulated to be collected upon the delivery of the articles so shipped or by the return to such consignor of the article so shipped, within twenty days after demand made by the consignor and payment or tender of payment by him of the lawful charges for transportation, shall forfeit and pay to such consignor a penalty of twenty-five dollars, where the value of the shipment is twenty-five dollars or less; and, where the value of the shipment is over twenty-five dollars, a penalty equal to the value of the shipment; the penalty not to exceed fifty dollars in any case: Provided, no penalty shall be collectible where the shipments, through no act of negligence of the company, is burned, stolen or otherwise destroyed: Provided further, that the penalties here named shall not be in derogation of any right the consignor may now have to recover of the company damages for the loss of any cash-on-delivery shipment or for negligent delay in handling the same. (1909, c. 866; C. S. 3530.)

§ 60-127. Failure to place name on produce shipped misdemeanor.—Any person, firm or corporation selling or offering for sale or consignment any barrel, crate, box, case, package or other receptacle containing any berries, fruit, melons, potatoes, vegetables, truck or other produce of any kind whatsoever, to be shipped to any point within or without the state of North Carolina, without the true name of the grower or packer either written, printed, stamped or otherwise placed thereon in distinct and legible characters, shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, that this section shall not apply to railroads, express companies and other transportation companies selling or offering for sale, for transportation or storage charges or any other charges accruing to such railroads, express companies or other transportation companies, any barrel, crate, box, case, package, or other receptacle containing berries, fruit, melons, potatoes, vegetables, truck or other produce. (1915, c. 193; C. S. 3531.)

§ 60-128. Unclaimed freight to be sold.—Every railroad, steamboat, express or other transportation company which shall have had unclaimed freight, not perishable, in its possession for a period of six months, may proceed to sell the same at public auction, and out of the proceeds may retain the charges of transportation and storage of such freight and the expenses of the advertisement and sale thereof; but no such sale shall be made until the expiration of four weeks from the first publication of notice of such sale in a state paper and also in a newspaper published at or nearest the place at which such freight was directed to be left, and also at the place where such sale is to take place. The expenses incurred for advertising shall be a lien upon such freight in a ratable proportion according to the value of each article, package or parcel, if more than one. (Rev., s. 2637; Code, s. 1985; 1871-2, c. 138, s. 48; C. S. 3532.)

What Storage Charges Allowed for.—Storage charges are allowed the carrier for the service rendered in taking care of the goods, the inconvenience to the warehouseman, and the liability for their safe custody if they do not exercise proper care. Holloman v. Southern R. Co., 172 N. C. 372, 90 S. E. 292.

Same—When Consignee Refuses Good. — Where a consignee of goods wrongfully refuses to receive goods on account of excessive charge made for their transportation, no demurrage charges are collectible by the carrier, but only reasonable storage charges, until, in the exercise of its rights under this section, it could properly dispose of the goods and thereby be relieved of further charge concerning them. Norfolk Southern R. Co. v. New Bern Iron Works, 172 N. C. 188, 90 S. E. 149.

Applies to Interstate Shipment.—This section applies to interstate as well as intrastate shipments, in the absence of any interfering regulation by Congress or of the Interstate Commerce Commission. Norfolk Southern R. Co. v. New Bern Iron Works, 172 N. C. 188, 90 S. E. 149.

§ 60-129. Sale of unclaimed perishable freight.—In case such unclaimed freight shall in its nature be perishable, then the same may be sold as soon as it can be, on giving the notice required in § 60-128, after its receipt at the place where it was directed to be left. (Rev., s. 2638; Code, s. 1986; 1871-2, c. 138, s. 49; C. S. 3533.)

§ 60-130. Funds from unclaimed freight to be paid to state university.—Such railroad, steamboat, express or other transportation company shall make an entry of the balance of the proceeds of the sale, if any, of each parcel of freight owned by or consigned to the same person, as near as can be ascertained, and at any time within five years thereafter shall refund any surplus so retained to the owner of such freight, his heirs or assigns, on satisfactory proof of such ownership; if no person shall claim the surplus within five years, such surplus shall be paid to the state university. (Rev., s. 2639; Code, s. 1987; 1871-2, c. 138, s. 50; C. S. 3534.)

Cross Reference.—As to unclaimed personalty escheating to the University of North Carolina, see § 116-23.

§ 60-131. Sale of unclaimed baggage or freight; notice; sale of neglected property.—Any common carrier which has had in its possession on hand at any destination in this state any article whether baggage or freight, for a period of sixty days from its arrival at destination, which said carrier cannot deliver because unclaimed, may at the expiration of said sixty days sell the same at public auction at any point where in the opinion of the carrier the best price can be obtained: Provided, however, that notice of such sale shall be mailed to the consignor and consignee, by registered mail, if known to such carrier, not less than fifteen days before such sale shall be made; or notice of the sale shall be published once a week for two consecutive weeks in some newspaper of general circulation published at the point of sale: Provided, that if there is no such paper published at such point, the publication may be made in any paper having a general circulation in the state: Provided further, however, that if the nondelivery of said article is due to the consignee's and consignor's rejection of it, then such article may be sold by the carrier at public or private sale, and at such time and place as will in the carrier's judgment net the best price, and this without further notice to either consignee or consignor, and without the necessity of publication. (1921, c. 124, s. 1; C. S. 3534(a).)

§ 60-132. Sale of live or perishable or cheap freight.—Where the article referred to in § 60-131 is live freight, or perishable freight, or freight of such low value as would not bring the accrued transportation and other charges if held for sixty days as provided in said section, the common carrier may, with or without advertisement, sell the same in such manner and at such time and in such place as will best in its judgment protect the interests of the carrier, the consignor and the consignee, and whenever practicable the consignor and consignee shall be notified of the proposed sale of such live or perishable freight, or freight of such low value. (1921, c. 124, s. 2; C. S. 3534(b).)

§ 60-133. Record of articles and prices; deduction of expenses; payment of balance.—The carrier shall keep a record of the articles sold, and of the prices obtained therefor, and shall, after deducting all charges and expenses of the sale, including advertisement, if advertised, pay the balance to the owner of such articles on demand therefor made at any time within two years from the date of the sale. (1921, c. 124, s. 3; C. S. 3534(c).)

Art. 14. Street and Interurban Railways.

§ 60-134. May build and maintain water-power plants.—Where any street or interurban railway company owns lands on one or both sides of a stream which can be used in developing a water-power, and desires to erect and maintain a water-power plant for the purpose of generating electricity to be used in operating such railway, then such railway company shall have the power to erect, maintain and operate such water-power plant for such purpose, and may build, maintain and operate any and all dams, ponds, canals, bridges, ferries, aqueducts, flumes, water-ways, wasteways, reservoirs, and all works, machinery, houses, shops and buildings necessary for the use and operation of a water-power plant for generating electricity. Whenever such company shall not own the entire water-front, or all of the lands, water rights, or other easements necessary to be used in fully developing such water-power, it shall have the power to acquire any other lands, water rights or easements which may be needed to fully develop such water-power; and if the company cannot agree with the owners for the purchase of such lands, water rights or other easements, the same may be condemned by the railway company for that purpose, and the procedure shall be the same as that provided for the condemnation of lands for railroads: Provided, that no dwelling house, yard, garden, orchard or burial-ground shall be condemned for such purpose: Provided further, that such company shall not have the power to condemn any water-power, right or property of any person, firm or corporation engaged in the actual service of the general public, where such power, right or property is being used or held to be used or to be developed for use in connection with or in addition to any power actually used by such person, firm or corporation serving the general public. Any surplus electric power generated by any plant erected under the provisions of this section may be sold by such company upon reasonable terms. (1907, c. 302; 1913, c. 94; C. S. 3535.)

Burden of Proof.—Where a quasi-public corporation brings action for condemnation, and the defendant resists upon the ground that the lands or power sought to be taken are protected by the statute, the burden of proof is upon the defendant to bring the lands or water-power within the provision of the statutes excepting them. Blue Ridge Interurban R. Co. v. Hendersonville Light, etc., Co., 171 N. C. 314, 88 S. E. 245.

Land to Be Used in Developing Power.—A public-service corporation, owning lands on one bank of stream, cannot condemn across the stream and take the water rights held in the stream by another public-service corporation, when it appears that the defendant holds its lands across the stream to supply power to operate its electric light and power plant, with which it is supplying such light and power to its patrons. Blue Ridge Interurban R. Co. v. Hendersonville Light, etc., Co., 169 N. C. 471, 86 S. E. 296; Blue Ridge Interurban R. Co. v. Oates, 164 N. C. 167; 80 S. E. 398.

§ 60-135. Separate accommodations for different races; failure to provide misdemeanor.—All street, interurban and suburban railway companies, engaged as common carriers in the transportation of passengers for hire in the state of North Carolina, shall provide and set apart so much of the front portion of each car operated by them as shall be necessary, for occupation by the white passengers therein, and shall likewise provide and set apart so much of the rear part of such car as shall be necessary, for occupation by the colored passengers therein, and shall require as far as practicable the white and colored passengers to occupy the respective parts of such car so set apart for each of them. The provisions of this section shall not apply to nurses or attendants of children or of the sick or infirm of a different race, while in attendance upon such children or such sick or infirm persons. Any officer, agent or other employee of any street railway company who shall willfully violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of

the court. (1907, c. 850, ss. 1, 5, 7; 1909, c. 851; C. S. 3536.)

Cross Reference.—As to railroads providing separate accommodations, see § 60-94.

"Willful," as used in a criminal statute, means something more than an intention to do a thing; it implies the doing of an act purposely and deliberately, without authority or careless whether one has the right to do the act or not, in violation of law. State v. Harris, 213 N. C. 758, 197 S. E. 594.

§ 60-136. Passengers to take certain seats; violation of requirement misdemeanor.—Any white person entering a street car or other passenger vehicle or motor bus for the purpose of becoming a passenger therein shall, in order to carry out the purposes of § 60-135, occupy the first vacant seat or unoccupied space nearest the front thereof, and any colored person entering a street car or other passenger vehicle or motor bus for a like purpose shall occupy the first vacant seat or unoccupied space nearest the rear end thereof, provided, however, that no contiguous seat on the same bench shall be occupied by white and colored passengers at the same time, unless and until all the other seats in the car have been occupied. Upon request of the person in charge of the street car or other passenger vehicle or motor bus, and when necessary in order to carry out the purpose of providing separate seats for white and colored passengers, it shall be the duty of any white person to move to any unoccupied seat toward or in the front of the car, vehicle or bus, and the duty of any colored person to move to any unoccupied seat toward or in the rear thereof, and the failure of any such person to so move shall constitute prima facie evidence of an intent to violate this section. Any person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. Any such person may also be ejected from the car, vehicle or bus by the person charged with the operation thereof. Each person now or hereafter charged with the operation of any such street car, passenger vehicle or motor bus is hereby invested with police powers and authority to carry out the provisions of this section. (1907, c. 850, ss. 2, 6; 1939, c. 147; C. S. 3537.)

Editor's Note.—The 1939 amendment inserted the words "or other passenger vehicle or motor bus" in the first sentence. It also inserted the second sentence and made other changes in the section.

§ 60-137. No liability for mistake in assigning passengers to wrong seat.—No street, suburban or interurban railway company, its agents, servants or employees, shall be liable to any person on account of any mistake in the designation of any passenger to a seat or part of a car set apart for passengers of the other race. (1907, c. 850, s. 8; C. S. 3538.)

§ 60-138. Misconduct on car; riding on front platform misdemeanor.—It shall be unlawful for any passenger to expectorate upon the floor or any other part of any street-car, or to use, while thereon, any loud, profane or indecent language, or to make any insulting or disparaging remark to or about any other passenger or person thereon within his or her hearing. It shall likewise be unlawful for any passenger to stand willfully upon the front platform, fender, bumper, running-board or steps of such car while the same is in motion, whether such passenger has or has not paid the usual fare for riding on such car. Any person willfully violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. He may also be ejected from the car by the conductor and other agent or agents charged with the operation of such car, who are hereby invested with police powers to carry out the provisions of this section. (1907, c. 850, ss. 3, 6; C. S. 3539.)

§ 60-139. Sections 60-135 to 60-138 extended to motor busses used as common carriers.—The provisions of §§ 60-135 to 60-138 are hereby extended to motor busses operated in the urban, interurban or suburban transportation of passengers for hire, and to the operator or operators thereof, and the agents, servants, and employees of such operators. (1933, c. 489.)

Applied in State v. Harris, 213 N. C. 758, 197 S. E. 594.

§ 60-140. Passenger riding on rear platform assumes risk; copies of section to be posted.—Any passenger who shall ride upon the rear platform of any street-car in motion, when there is room for such passenger either to sit or stand inside the car, shall be deemed to have assumed all the risks of being injured while so riding, as the result of any act of the street-car company: Provided, that such company shall make it appear that such passenger would not have been injured had he been on the inside of said car: Provided further, that before any street, interurban or suburban railway shall be allowed to invoke the provisions of this section it shall have copies thereof printed and framed and one copy hung in each end of all cars operated on its lines, and shall further have a placard hung in a conspicuous place on the rear of such cars, which shall read as follows: "Passengers are warned not to ride on this platform," and a placard hung on each side of open cars in a conspicuous place, which shall read as follows: "Passengers are warned not to ride on the running board." (1907, c. 850, s. 4; C. S. 3540.)

Cross Reference.—As to injury while on train platform, see § 60-105.

§ 60-141. Street-cars to have vestibule fronts; failure to provide them misdemeanor.—All street passenger railway companies shall use vestibule fronts, of frontage not less than four feet, on all passenger cars run by them on their lines during the latter half of the month of November and during the months of December, January, February and March of each year: Provided, that such companies shall not be required to close the sides of the vestibules: Provided further, that such companies may use cars without vestibule fronts in cases of temporary emergency in suitable weather, not to exceed four days in any one month within the period herein prescribed for the use of vestibule fronts. The utilities commission is hereby authorized to make exemptions from the provisions of this section in cases where in their judgment the enforcement of this section is unnecessary. Any such company that shall refuse or fail to comply with the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor more than

one hundred dollars for each day of such refusal or failure. (Rev., ss. 2615, 3800; 1901, c. 743; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3541.)

Duty of Street Car Company.—A street car company owes the duty to its passengers to use a high degree of care to see that they safely alight from its cars. Woods v. North Carolina Public-Service Corporation, 174 N. C. 697, 94 S. E. 459.

Plaintiff Must Prove Casual Connection.—The plaintiff must show a casual connection between the violation by defendant of this section and the injury sustained. Rich v. Asheville Electric Co., 152 N. C. 689, 68 S. E. 232.

§ 60-142. Street cars to have fenders; failure to provide them misdemeanor.—All street passenger railway companies shall use practical fenders in front of all passenger cars run by them. The utilities commission is hereby authorized to make exemptions from the provisions of this section in cases where in their judgment the enforcement of this section is unnecessary. Any such company that shall refuse or fail to comply with the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each day of such refusal or failure. (Rev., ss. 2616, 3801; 1901, c. 743, s. 2; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3542.)

"Practical Fenders."—The "practical fenders" required for street cars by this section are those which are efficient for the purpose of protecting human life, etc., or the most approved appliance in general use, and a violation of this statute is negligence per se. Smith v. Charlotte Elec. Ry. Co., 173 N. C. 489, 92 S. E. 382.

Violation Negligence Per Se.—The violation of this section by a street car company, in failing to provide a "practical fender" for its car, causing an injury, is evidence of actionable negligence per se. Hanes v. Southern Pub. Utilities Co., 191 N. C. 13, 131 S. E. 402; Ingle v. Asheville Power, etc., Co., 172 N. C. 751, 90 S. E. 953.

Travelers by Vehicles Protected. — The requirement of this section, that all street cars when operated must have practical fenders on the lead end thereof, applies to the protection of those traveling by vehicles, automobiles, etc. Hanes v. Southern Pub. Utilities Co., 191 N. C. 13, 131 S. E. 402.

Burden of Proof as to Exemption.—The burden of proof is on a street railway company to show that the Corporation Commission, in its judgment, had found it unnecessary to enforce the provisions of this section, requiring the use of "practical fenders" on their street cars, in an action to recover damages caused by its negligence in not using them. Smith v. Charlotte Elec. Ry. Co., 173 N. C. 489, 92 S. E. 382.

Exemption of All Companies Unauthorized.—This section does not authorize an exemption of all the street railway companies by the Corporation Commission, as this amounts to a suspension of the statute. Henderson v. Durham Traction Co., 132 N. C. 779, 44 S. E. 598.

Evidence.—In an action for the killing of a dog by a street car, it is not competent to show the condition of the fenders on particular cars other than the one by which the dog was killed, it being shown that the fenders were different on different cars. Moore v. Electric Ry., etc., Co., 136 N. C. 554, 48 S. E. 822.

Art. 15. Electric Interurban Railways.

§ 60-143. Organization.—Any electric interurban railway company, whether organized under the laws of this or any other State, may construct, maintain and operate electric interurban railways and engage in business in this State. (1927, c. 33, s. 1.)

§ 60-144. Right of eminent domain.—Any such company may exercise the right of eminent domain under the provisions of chapter forty and acts amendatory thereof, and for the purpose of constructing its roads and other works, shall have the powers given railroad corporations by this chapter, and acts amendatory thereof, except that no such company when organized under the laws of another state shall operate any part of its line of railway in this State by steam motive power, or as a part of a general steam railroad system of transportation. (1927, c. 33, s. 2.)

§ 60-145. Status defined.—All such companies shall be deemed public service corporations and shall be subject to the laws of this State regulating such corporations. (1927, c. 33, s. 3.)

Art. 16. Pipe Line Companies.

§ 60-146. Right of eminent domain conferred upon pipe line companies; other rights.—Any pipe line company transporting or conveying natural gas, gasoline, crude oil, or other fluid substances by pipe line for the public for compensation, and incorporated under the laws of the state of North Carolina, may exercise the right of eminent domain under the provisions of chapter forty and acts amendatory thereof, and for the purpose of constructing and maintaining its pipe lines and other works shall have all the rights and powers given railroads and other corporations by chapters fifty-six and sixty and acts amendatory thereof, provided the pipe lines of such companies transporting or conveying natural gas, gasoline, crude oil, or other fluid substances shall originate within this state. Nothing herein shall prohibit any such pipe line company granted the right of eminent domain under the laws of this state from extending its pipe lines from within this state into another state for the purpose of transporting natural gas into this state, nor to prohibit any such pipe line company from conveying or transporting natural gas, gasoline, crude oil, or other fluid substances from within this state into another state. All such pipe lines companies shall be deemed public service companies and shall be subject to the laws of this state regulating such corporations. (1937, c. 280.)

Cross Reference.—As to supervision by the utilities commission, see § 62-30.

Editor's Note.—Both chapters 108 and 280 of the Public Laws 1937, apply only to pipe lines originating in North Carolina. Chapter 108 amends § 40-2. See 15 N. C. L. Rev. 364.

Chapter 61. Religious Societies.

§ 61-1. Trustees may be appointed and removed.—The conference, synod, convention or other ecclesiastical body representing any church or religious denomination within the state, as also the religious societies and congregations within the state, may from time to time and at any time appoint in such manner as such body, society or congregation may deem proper, a suitable number of persons as trustees for such church, denomination, religious society, or congregation. The body appointing may remove such trustees or any of them, and fill all vacancies caused by death or otherwise. (Rev., ss. 2670, 2671; Code, ss. 3667, 3668; R. C., c. 97; 1796, c. 457, ss. 1, 2; 1844, c. 47; 1848, c. 76; C. S. 3568.)

Applies Only to Religious Societies.—This section applies only to religious societies and not to educational institutions. Allen v. Baskerville, 123 N. C. 126, 127, 31 S. E. 383; Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

Society May Remove Trustee.—Under the provisions of this section, a religious society may remove a trustee of church property who proves faithless to his trust, and may fill any vacancy thus created. Nash v. Sutton, 117 N. C. 231, 23 S. E. 178. Faithlessness is not required, however, it may remove trustees at will. Conference v. Allen, 156 N. C. 524, 72 S. E. 617.

Same—Trustee May Maintain Action.—A duly appointed trustee of a religious society may maintain an action for the removal of faithless or incompetent trustees, and compel them to convey the property held by them to the purposes for which it was designed, and such trustee may also maintain an action to set up a lost deed executed for the benefit of the cestui que trust. Nash v. Sutton, 109 N. C. 550, 14 S. E. 77.

Same—Member May Maintain Action.—In the absence of competent trustee and a governing body authorized to appoint trustees, any member of a religious society has such a beneficial interest as will enable him, in behalf of fellow members, to maintain such action as may be necessary to protect their common interest. Nash v. Sutton, 109 N. C. 550, 14 S. E. 77.

Same—Section Not Affected by Church Rule.—A church has authority to appoint a "suitable number" of its own trustees for the purpose of acquiring and holding church property, and remove them or any of them at will, and where the congregational regulations of the denomination with which a church is affiliated has provided a notice to be given for the trial of "offenses," it does not apply to the election or removal of trustees nor take from the church its rights when in conflict with the statutes. Conference v. Allen, 156 N. C. 524, 72 S. E. 617.

When All Trustees Are Dead.—Upon the death of the last survivor of a board of trustees named in a deed for property to be used as a "Baptist church and for the education of the youths of the colored race," it was held that their successors will be appointed under section 45-9, by the clerk of the court. Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

Voluntary Withdrawal of Members.—What amounts to a voluntary withdrawal of members from a religious association is a question of law. Perry v. Tupper, 74 N. C. 722.

Cited in dissenting opinion of Faircloth, C. J., in Tilley v. Ellis, 119 N. C. 233, 245, 26 S. E. 29.

§ 61-2. Trustees may hold property.—The trustees and their successors have power to receive donations, and to purchase, take and hold property, real and personal, in trust for such church or denomination, religious society or congregation; and they may sue or be sued in all proper actions, for or on account of the donations and property so held or claimed by them, and for and on account of any matters relating thereto. They shall be accountable to the churches, denominations, societies and congregations for the use and management of such property, and shall surrender it to any person authorized to demand it. (Rev., ss. 2670, 2671; Code, ss. 3667, 3668; R. C., c. 97; 1796, c. 457, ss. 1, 3; 1844, c. 47; 1848, c. 76; C. S. 3569.)

Cross References.—As to charitable trusts generally, see §§ 36-19 et seq. As to certain religious associations presumed to be incorporated, see § 55-13.

Applies Only to Property Held for Religious Purposes.—This section applies only to property held for religious purposes and not to property held in trust for a "Baptist church and for the education of the youths of the colored race." Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

No General Capacity of Acquisition.—Religious societies or their trustees have not a general capacity of acquisition; they can only take for the use of the society. Trustees v. Dickenson, 12 N. C. 189.

And by a conveyance to trustees, for purposes forbidden by the policy of the law, nothing passes. Trustees v. Dickenson, 12 N. C. 189.

Original Trustees May Sue though Not Legally Appointed.—Where a conveyance is made to three persons for a certain tract of land, as trustees for a church, a suit of trespass may be brought by them against the wrongdoers, though they may not have been appointed trustees according to law. Walker v. Fawcett, 29 N. C. 44.

It is only when a suit is brought by persons, who claim as "successors," that the question arises, whether the original bargainees were duly chosen the trustees of a religious congregation, and whether the persons suing were also duly chosen trustees, so as to give them legally the character of "successors" to the former, and thereby vest in them the title to the property, which is necessary to support an action. Walker v. Fawcett, 29 N. C. 44.

Trustees Are Agents.—The trustees of a church are merely agents and have no property interest as against the governing body of the church. Conference v. Allen, 156 N. C. 524, 527, 72 S. E. 617.

Same—May Mortgage Property.—A congregation taking possession of a church cannot contest the validity of a mortgage given by the trustees for the purchase money on the ground that it was ultra vires. Rountree v. Blount, 129 N. C. 25, 39 S. E. 631.

Same—Parties to Enforce Bequest.—Where a testator provides for building a fence around a certain chapel cemetery, the trustees of the chapel are the proper parties to require the executor to perform this provision. Cabe v. Vanhook, 127 N. C. 424, 37 S. E. 464.

Same—Cannot Recover for individual Suffering.—In suit by the trustees of a church against a railroad company for the improper use of its terminal or depot at or near the manse of the church, no recovery can be had for any physical suffering upon the part of their pastor, his family, or the individuals composing the congregation. Taylor v. Seaboard Air Line Ry., 145 N. C. 400, 59 S. E. 129.

Title Vested Individually.—The title to church property is vested in the trustees individually and they may recover at law, though in the writ and declaration they style themselves "trustees." Walker v. Fawcett, 29 N. C. 44.

Church Has Right to Use of Property.—A church of the congregational system having elected certain trustees to supersede several theretofore elected, holds the church property through those trustees later elected, and has the right to the use of the church for religious services without molestation from the trustees removed, or from its conference. Conference v. Allen, 156 N. C. 524, 72 S. E. 617.

Interest of Individual Member.—An individual member of a religious society has an equitable interest in the property held by the society. Nash v. Sutton, 117 N. C. 231, 23 S. E. 178.

Title Not in Controversy in Contest between Trustees.—In a contest between two committees, each claiming to be the rightful board of trustees, to hold the same title in trust for the same beneficial owner, the title does not come in controversy. Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

Levy on Communion Service. — A communion service of a church is not liable to seizure and sale under an execution by a pastor for salary due him. Lord v. Hardie, 82 N. C. 241.

Liability of Trustees.—The trustees of a church are liable for material ordered by one of their number and used in building the church although the order was not authorized. Tull v. Trustees, 75 N. C. 424. But the building committee of a church is not liable for injuries received by a workman. Wilson v. Clark, 110 N. C. 364, 14 S. E. 962.

§ 61-3. Title to lands vested in trustees, or in societies.—All glebes, lands and tenements, heretofore purchased, given, or devised for the support of any particular ministry, or mode of worship, and all churches and other houses built for the purpose of public worship, and all lands and donations of any kind of property or estate that have been or may be given, granted or devised to any church or religious denomination, religious society or congregagtion within the state for their respective use, shall be and remain forever to the use and occupancy of that church or denomination, society or congregation for which the glebes, lands, tenements, property and estate were so purchased, given, granted or devised, or for which such churches, chapels or other houses of public worship were built; and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees respectively of such churches, denominations, societies and congregations, for their several use, according to the intent expressed in the conveyance, gift, grant or will; and in case there shall be no trustees, then in such churches, denominations, societies and congregations, respectively, according to such intent. (Rev., s. 2672; Code, s. 3665; R. C., c. 97, s. 1; 1776, c. 107; 1796, c. 457, s. 4; C. S. 3570.)

Cross Reference.—See notes to the preceding section.

Editor's Note.—The rights of an individual member of the congregation under the congregational system is discussed in Conference v. Allen, 156 N. C. 524, 526, 72 S. E. 617; and the connectional system is discussed in Kerr v. Hicks, 154 N. C. 265, 268, 70 S. E. 468; Tilley v. Ellis, 119 N. C. 233, 242, 26 S. E. 29; Gold v. Cozart, 173 N. C. 612, 614, 92 S. E. 600; Simmons v. Allison, 118 N. C. 763, 770, 24 S. E. 716.

No Legal Provision for Diffusing Christianity.—There is no provision in our laws for donations, to be employed in any general system of diffusing the knowledge of Christianity throughout the earth. Bridges v. Pleasants, 39 N. C. 26.

Applies Only to Religious Societies.—This section applies only to religious societies and not to educational institutions. Allen v. Baskerville, 123 N. C. 126 127, 31 S. E. 383.

Specific Trust Must Be Imperative.—A specific trust will not be superimposed upon a title conveyed to a religious congregation, authorizing the courts to interfere and control the management and disposition of the property, unless this is the clear intent of the grantor expressed in language which should be construed as imperative. Hayes v. Franklin, 141 N. C. 599, 54 S. E. 432.

Purpose Must Be Definite.—A bequest for religious charity must, in this State, be to some definite purpose, and to some body or association of persons having a legal existence and with capacity to take. Bridges v. Pleasants, 39 N. C. 26.

Division of Devised Property.—Where a will devised certain lands to the diocese of a church and afterwards the diocese was divided into two dioceses the land becomes the property of both and not that of the diocese in which the land happens to be and in which the testator resided. Trustees v. Trustees, 102 N. C. 442, 9 S. E. 310.

Title by Adverse Possession.—A church holding real property for a hundred years, and using it for religious purposes, acquires a fee-simple title by adverse possession, independent of the validity of its deed. Gold v. Cozart, 173 N. C. 612, 92 S. E. 600.

Amount Insufficient.—A provision in a will that a church is to be built from certain funds will not fail because there is not sufficient amount of the funds to build a church as large as directed by the testator. Paine v. Forney, 128 N. C. 237, 38 S. E. 885.

No Trust Created.—The recital in a deed conveying land to the vestry and wardens of a church that it was made "for the purpose of aiding in the establishment of a Home for Indigent Widows or Orphans, or in the promotion of any other charitable or religious objects to which the property may be appropriated" by the grantee, creates no trust, and the grantee can convey a perfect title. St. James v. Bagley, 138 N. C. 384, 50 S. E. 841.

Doctrine of Cy-Pres Not Applicable.—In the case of devises to charitable purposes, the doctrine of cy-pres does not obtain in this State. Bridges v. Pleasants, 39 N. C. 26.

Cited in dissenting opinion of Faircloth, C. J., in Tilley v. Ellis, 119 N. C. 233, 245, 26 S. E. 29.

§ 61-4. Trustees may convey property.—The trustees of any religious body may mortgage or sell and convey in fee simple any land owned by such body, when directed so to do by such church, congregation, society or denomination, or its committee, board or body having charge of its finances, and all such conveyances so made or heretofore made, or hereafter to be made, shall be effective to pass the land in fee simple to the purchaser or to the mortgagee for the purposes in such conveyances or mortgage expressed; and they may sell or mortgage its personal property. (Rev., s. 2673; 1855, c. 384; 1889, c. 484; C. S. 3571.)

Sale to Promote Testator's Purpose.—Where a testator devised lands to the trustees of a certain church, "to be held by them as a rectory or residence for the ministers of said church; that the same shall not be disposed of, sold, or used in any other way or for any other purpose than the one designated," the trustees might sell the property if the purpose declared would be promoted thereby; or the court might order a sale under its general equity power. Church v. Ange, 161 N. C. 314, 77 S. E. 239.

Same—Lease of Part of Property.—Where land was conveyed to a church for the purpose of maintaining a church for worship, the court will not restrain the officers of the church from leasing a small portion of the lot for erecting a store. Hayes v. Franklin, 141 N. C. 599, 54 S. E. 432.

Cited in Bond v. Tarboro, 217 N. C. 289, 7 S. E. (2d) 617, 127 A. L. R. 695.

§ 61-5. Authority of bishops, ministers, etc., to acquire, hold and transfer property; prior transfers validated.—Whenever the laws, rules, or ecclesiastic polity of any church or religious sect, society or denomination, commits to its duly elected or appointed bishop, minister or other ecclesiastical officer, authority to administer its affairs, such duly elected or appointed bishop, minister or other ecclesiastical officer shall have power to acquire by gift, purchase or otherwise, and to hold, improve, mortgage, sell and convey the property, real or personal, of any such church or religious sect, society or denomination, for the purposes, in the manner and otherwise as authorized and permitted by its laws, rules or ecclesiastic polity; and in the event of the transfer, removal, resignation or death of any such bishop, minister or other ecclesiastical officer, the title and all rights with respect to any such property shall pass to and become vested in his duly elected or appointed successor immediately upon appointment or election, and pending appointment or election of such successor, such title and rights shall be vested in such person or persons as shall be designated by the laws, rules or ecclesiastic polity of such church or religious sect, society or denomination.

All deeds, deeds of trust, mortgages, wills or other instruments made prior to March 24, 1939,

to or by a duly elected or appointed bishop, minister or other ecclesiastical officer, who, at the time of the making of any such deed, deed of trust, mortgage, will or other instrument, or thereafter, had authority to administer the affairs of any church, religious sect, society or denomination under its laws, rules or ecclesiastic polity, transferring property, real or personal, of any such church or religious sect, society or denomination, are hereby ratified and declared valid; and all transfers of title and rights with respect to property, prior to March 24, 1939, from a predecessor bishop, minister or other ecclesiastical officer who has resigned or died, or has been transferred or removed, to his duly elected or appointed successor, by the laws, rules or ecclesiastic polity of any such church, or religious sect, society or denomination, either by written instruments or solely by virtue of the election or appointment of such successor, are also hereby ratified and declared valid.

This section shall not affect vested rights, or repeal any of the provisions of §§ 61-1 to 61-4, or of §§ 36-21 to 36-23. (1939, c. 177.)

§ 61-6. House on vacant land vests title.—All houses and edifices erected for public religious worship on vacant lands, or on lands of the state not for other purposes intended or appropriated, together with two acres adjoining the same, shall hereafter be held and kept sacred for divine worship, to and for the use of the society by which the same was originally established. (Rev., s. 2674; Code, s. 3666; R. C., c. 97, s. 2; 1778, c. 132, s. 6; C. S. 3572.)

Chapter 62. Utilities Commission.

Art. 1. Organization of the Commission.

§ 62-1. Number and appointment of commissioners; terms.—The North Carolina utilities commission shall consist of three commissioners, who shall be appointed by the governor, by and with the consent of the senate. The term of office of each commissioner shall be six years, provided that the first three commissioners shall be appointed one for a term of six years, one for a term of four years, and one for a term of two years, and their successors shall be appointed for a term of six years. (1941, c. 97, s. 2.)

§ 62-2. Salaries of commissioners. — The salary of the commissioners shall be as follows: chairman, six thousand and six hundred dollars ($6,600.00) per annum; commissioners, six thousand dollars ($6,000.00) each per annum; and the term of office for each commissioner shall begin on the first day of February, beginning with one thousand nine hundred and forty-one, provided, however, that the two commissioners to be named to serve with the chairman of the North Carolina utilities commission shall not draw salary until appointed and qualified. (1941, c. 97, s. 3.)

§ 62-3. Oath of office.—Each utilities commissioner before entering upon the duties of his office shall file with the secretary of state his oath of office to support the constitution and laws of the United States and the constitution and laws of the state of North Carolina, and to well and truly perform the duties of his said office as utilities commissioner, and that he is not the agent or attorney of any utility company or public-service corporation, or an employee thereof, and that he has no interest in any such company or corporation. (1933, c. 134, s. 5; 1935, c. 280; 1939, c. 404; 1941, c. 97.)

§ 62-4. Present utilities commissioner appointed to new commission; chairman.—The present utilities commissioner is hereby named a commissioner of the North Carolina utilities commission for a term of six years, beginning with February first, one thousand nine hundred and forty-one, and is hereby designated chairman of said commission, to hold such office during his term. Thereafter the governor of the state of North Carolina is hereby vested with the right to designate the chairman of the North Carolina utilities commission. (1941, c. 97, s. 4.)

§ 62-5. Clerical assistance.—The utilities commission shall be allowed such stenographic and other clerical assistance as it may require for the performance of the duties and functions of the said office, to be established and fixed by such department, bureau, or other state agency as may be charged by law with the duty of determining the extent of such assistance in said departments; all such stenographers, clerks, and assistants and special investigators so provided for to be appointed by the utilities commission and subject to removal or discharge by it. The salaries and compensation of such clerical assistants, special investigators, or other office force as may be allowed in the office of the utilities commission shall be fixed in the manner as now provided by law for fixing and regulating the salaries and compensation by other state departments. (1933, c. 134, s. 14; 1941, c. 97.)

Cross Reference.—As to determination of extent of assistance and regulation of salaries of stenographers, see § 143-36 and § 143-37.

§ 62-6. To report annually to governor.—It shall be the duty of the commission to make to the governor annual reports of its transactions, and recommend from time to time such legislation as it may deem advisable under the provisions of this chapter, and the governor shall have one thousand copies of such report printed for distribution. (Rev., s. 1117; 1899, c. 164, s. 27; 1911, c. 211, s. 9, 1913, c. 10, s. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1065.)

Reports of the Corporation Commission [now Utilities Commission] of North Carolina are matters of public record, of which the courts therein will take judicial notice. Staton v. Atlantic Coast Line R. Co., 144 N. C. 135, 56 S. E. 794.

§ 62-7. To keep record of receipts and disbursements. — The commission shall keep a record showing in detail all receipts and disbursements. (Rev., s. 1115; 1899, c. 164, s. 34; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1063.)

§ 62-8. To pay fees and money into treasury.—All license fees and seal tax and all other fees paid into the office of the utilities commission shall be turned into the state treasury; also all moneys received from fines and penalties. (Rev., s. 1114, 1899, c. 164, ss. 26, 33; 1941, c. 97; C. S. 1064.)

§ 62-9. Adoption and use of seal; certificate.—The North Carolina Utilities Commission shall adopt a seal; and in all cases where a seal is required on any document, such seal so adopted by the utilities commission shall be sufficient; and whenever any record, paper, or document is required to be certified or evidenced by the certificate of the utilities commission or its chief clerk or wherever any act or thing is required or permitted to be evidenced by such certificate, the certificate shall be made by the utilities commission. (1933, c. 134, s. 15; 1941, c. 97, s. 7.)

§ 62-10. Public record of proceedings; chief clerk.—The utilities commission shall keep in its office at all times a record of its official acts, rulings, and transactions, which shall be public records of the state of North Carolina, and all rulings and determinations of said commission upon matters and things authorized to be passed upon by this chapter, and shall have and appoint a chief clerk, who shall be experienced in railroad and other public utilities statistics, transportation and public-service charges, and whose term of office shall be for a period of two years, and he shall file with the secretary of state the oath of office similar to that prescribed for the utilities commission. The utilities commission shall have power to remove such clerk for cause at any time. (1933, c. 134, s. 13; 1941, c. 97.)

Art. 2. Procedure before the Commission.

§ 62-11. Commission constituted court of record.—For the purpose of making investigations and conducting hearings, the utilities commission is hereby constituted a court of record and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced within this chapter. The commissioners and their clerks shall have full power to administer oaths, hear and take evidence, and said commission or commissioners shall render their decisions upon

questions of law and of fact as other courts of similar jurisdiction. (1933, c. 134, s. 9; 1941, c. 97.)

Editor's Note.—For cases construing section 1023 of the Consolidated Statutes, containing similar provisions, see Caldwell v. Wilson, 121 N. C. 425, 472, 28 S. E. 554; State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563; State v. Southern R. Co., 151 N. C. 447, 66 S. E. 427; North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 563, 87 S. E. 785.

§ 62-12. Rules of practice.—The North Carolina utilities commission hereby created shall formulate and promulgate rules of practice, including rules for hearings by one or more members of the commission, provided that as to any hearing before less than a majority of the commission, the rules shall provide for a proposed report, exceptions to said report, and a final hearing before a majority of the commission upon the record, including the exceptions. (1941, c. 97, s. 6; 1943, c. 782, s. 1.)

Editor's Note.—The 1943 amendment omitted provisions relating to hearings before employees of the commission.

§ 62-13. Witnesses; production of papers; contempt. — The utilities commission shall have the same power to compel the attendance of witnesses, require the examination of persons and parties, and compel the production of books and papers, and punish for contempt, as by law is conferred upon the superior courts. (Rev., s. 1067; 1899, c. 164, ss. 1, 9, 10; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1090.)

Cross References.—As to attendance of witnesses, see § 8-59 to § 8-64. As to contempt, see §§ 5-1 et seq.

§ 62-14. Refusal of witness to testify.—If any person duly summoned to appear and testify before the utilities commission shall fail or refuse to testify without lawful excuse, or shall refuse to answer any proper question propounded to him by said commission in the discharge of duty, or shall conduct himself in a rude, disrespectful or disorderly manner before said commission deliberating in the discharge of duty, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than one thousand dollars. (Rev., s. 3691; 1899, c. 164, s. 10; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1091.)

§ 62-15. Rules of evidence.—In all cases under the provisions of this chapter the rules of evidence shall be the same as in civil actions, except as provided by this chapter. (Rev., s. 1069; 1899, c. 164, s. 26; C. S. 1093.)

Cross Reference.—As to rules of evidence generally, see §§ 8-1 et seq.

Rule Same as in Civil Actions.—The section provides that the rules of evidence shall be the same as in other civil actions. The petitioner must prove the existence of the facts alleged as the basis for the relief sought, unless the respondent admits them or fails to answer. In case of failure to answer, the Commission will take such proof of the charge as may be deemed reasonable and proper, and make such order thereon as the circumstances of the case appear to require. Subpoenas will issue requiring the attendance of witnesses or the production of books, papers, documents, etc., relating to any matter pending before the Commission. And depositions may be taken in any cause at issue, 2 N. C. Law Rev. 74.

§ 62-16. Subpoenas; issuance; service. — All subpoenas for witnesses to appear before the commission, and notice to persons or corporations, shall be issued by the commission or its clerk and be directed to any sheriff, constable or to the marshal of any city or town, who shall execute the same and make due return thereof as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court. (Rev., s. 1070; 1899, c. 164, s. 10; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1094.)

Cross Reference.—As to penalty upon sheriff for failing to execute and return process, see § 162-14.

§ 62-17. Service of orders.—The clerk of the commission may serve any notice issued by it, and his return thereof shall be evidence of said service; and it shall be the duty of the sheriffs and other officers to serve any process, subpoenas and notices issued by the commission, and they shall be entitled therefor to the same fees as are prescribed by law for serving similar papers issuing from the superior court. (Rev., s. 1071; 1899, c. 164, s. 9; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1095.)

Cross Reference.—As to sheriffs fees, see § 162-6.

§ 62-18. Undertakings.—All bonds or undertakings required to be given by any of the provisions of this chapter shall be payable to the state of North Carolina, and may be sued on as are other undertakings which are payable to the state. (Rev., s. 1072; 1899, c. 164, s. 7; C. S. 1096.)

§ 62-19. Judgments of commission.—The Utilities Commission shall hear and determine such matter, thing, or controversy in dispute, pass upon and determine the issues of fact raised thereon, and the questions of law involved therein, and make and enter their findings and conclusions thereon as the judgment of the said utilities commission. From the decision of said utilities commission any party to said proceeding may appeal to the superior court at term as designated in and under the rules of procedure required by §§ 62-20 to 62-25, said appeal to be prosecuted and the said matter and controversy there to be heard and disposed of as is now provided by law, and upon such appeal being taken, it shall be the duty of the utilities commission to certify its decision and rulings to the said superior court as now provided by law. (1933, c. 134, s. 12; 1941, c. 97.)

Cited in Utilities Comm. v. Carolina Scenic Coach Co., 216 N. C. 325, 4 S. E. (2d) 897; State v. Carolina Scenic Coach Co., 218 N. C. 233, 10 S. E. (2d) 824.

§ 62-20. Right of appeal; how taken.—From all decisions or determinations made by the utilities commission, any party affected thereby shall be entitled to an appeal. Before such party shall be allowed to appeal, he shall, within ten days after notice of such decision or determination, file with the commission exceptions to the decision or determination of the commission, which exceptions shall state the grounds of objection to such decision or determination. If any one of such exceptions shall be overruled, then such party may appeal from the order overruling the exception, and shall, within ten days after the decision overruling the exception, give notice of his appeal. When an exception is made to the facts as found by the commission, the appeal shall be to the superior court in term time; otherwise to the judge of the superior court at chambers. The party appealing shall, within ten days after the notice of appeal has been served, file with the commission exceptions to the decision or determination overruling the exception, which statement shall assign the errors complained of and the

grounds of the appeal. Upon the filing of such statement the commission shall, within ten days, transmit all the papers and evidence considered by it, together with the assignment of errors filed by the appellant, to a judge of the superior court holding court or residing in some district in which such company operates or the party resides. If there be no exceptions to any facts as found by the commission, it shall be heard by the judge at chambers at some place in the district, of which all parties shall have ten days notice. (Rev., s. 1074; 1899, c. 161, ss. 7, 28; 1903, c. 126; 1907, c. 469, s. 6; 1913, c. 127, s. 4; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1097.)

Right Confined to Parties.—The section distinctly confines the right of appeal to a party to the proceeding. North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 87 S. E. 785.

Appeal Limited to Party.—The right of appeal, conferred by this section, is limited to a party to the proceedings. For purposes of appeal, those who have no property or proprietary rights which are or may be affected by orders of the Commission are not such parties. An appeal by persons who are not parties to the proceeding will be dismissed by the Superior Court, for the reason that said court acquires no jurisdiction by such appeal. State v. Southern Ry. Co., 196 N. C. 190, 193, 145 S. E. 19; State v. Kinston, 221 N. C. 359, 20 S. E. (2d) 322.

Any Party Affected.—Under the provisions of our statute, any party affected by the order of the commission as to rates or charges for passengers by a street railway company, etc., is given the right of appeal to the court from such order. In re Southern Pub. Utilities Co., 179 N. C. 151, 101 S. E. 619.

"From all decisions or determinations made by the Corporation [now Utilities] Commission any party affected thereby shall be entitled to an appeal," must necessarily mean from a decision which affects or purports to affect some right or interest of a party to the controversy and in some way determinative of some material question involved. State v. Southern R. Co., 147 N. C. 483, 489, 61 S. E. 271.

It is the duty of a municipality granting a charter to a corporation to operate a street car system therein which, by contract, has limited the fares to be charged passengers within a certain amount, to represent the public in proceedings upon a petition filed by the railway company before the Commission requesting that it be permitted to raise the fares beyond those limited in the contract, and the municipality may appeal through the courts as the statute prescribes, when the order is adverse to it or the interest it represents, as a "party affected by the decision and determination of the Commission," expressly provided for by the statute. In re Southern Pub. Utilities Co., 179 N. C. 151, 101 S. E. 619.

Who Are Not Parties.—Citizens seeking to have a railway station moved may not appeal from the Commission's decision, because they are not parties. North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 87 S. E. 785.

Notice.—When notice of appeal to the superior court is given to the Commission by a railroad company, and other requirements of the section relating thereto have been met by the company, it is sufficient without giving notice of the appeal to the complaining party in the proceedings had before the Commission, as upon this appeal the statute makes the Commission the party plaintiff. North Carolina Corp. Comm. v. Southern R. Co., 151 N. C. 447, 66 S. E. 427.

Same—Mandatory.—The statutory notice of an appeal by a railroad company from an order of the Commission is mandatory and cannot be extended by the consent of the parties of record. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563.

To Superior Court.—Appeal from the Commission must be to the superior court. Pate v. Wilmington, etc., R. Co., 122 N. C. 877, 29 S. E. 334.

Same—De Novo.—And there the trial will be de novo, and from thence only will a further appeal lie to the Supreme Court, governed by the rule that it must not be fragmentary, but that it shall be from a final judgment or one final in its nature. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Jurisdiction of Superior Court—Dismissal.—The jurisdiction of the superior court with respect to the trial of law and fact on appeal under this section is derivative and not original, and therefore if the Commission was without jurisdiction of the proceeding in which the order was made, from which the appeal was taken, because of the absence of a necessary party, or upon any other ground, the Superior Court is likewise without jurisdiction, and the proceeding pending therein, upon appeal, should be dismissed by said court. State v. Southern Ry. Co., 196 N. C. 190, 193, 145 S. E. 19.

Hearing on Appeal.—Upon appeal by a party to a proceeding before the Corporation [now Utilities] Commission from an order made therein under §§ 62-42 and 62-43, the Superior Court has jurisdiction to try and determine both issues of law and issues of fact, duly presented by assignments of error based upon exceptions duly taken by the appellant during the hearing before the Commission. The trial of such issues by the Superior Court is de novo. State v. Southern Ry. Co., 196 N. C. 190, 193, 145 S. E. 19, citing S. v. R. R., 161 N. C. 270, 76 S. E. 554.

This and the next following section do not contain any provision that the findings of fact by the utilities commission shall be conclusive on appeal. State v. Willis Barber, etc., Shop, 219 N. C. 709, 713, 15 S. E. (2d) 4.

Appeals from the utilities commissioner are analogous to appeals from a justice of the peace rather than appeals from a referee, and since the trial in the superior court is de novo upon issues of fact raised by the exceptions, the superior court properly refuses to pass upon appellant's exceptions to the findings of fact seriatim. State v. Carolina Scenic Coach Co., 218 N. C. 233, 10 S. E. (2d) 824.

Final Process. — The Commission has no power to enforce its orders and decrees by final process issuing directly therefrom, and for such purpose resort must be had to ordinary courts, either by independent proceedings or in proper instances by process issued in cases carried before such courts on appeal. State v. Southern R. Co., 147 N. C. 483, 61 S. E. 271.

Removal to Federal Courts.—In proceedings for the removal of a cause from the state to the federal courts upon the question of diversity of citizenship under the federal statute applicable, the state court is not bound to surrender its jurisdiction until a case has been made which on the face of the petition, shows the petitioner has a right to the transfer of the cause to the federal courts. North Carolina Corp. Comm. v. Southern R. Co., 151 N. C. 447, 66 S. E. 427.

Same—Diverse Citizenship.—Assuming that the mere fact that an order of the Commission made to compel the carrier to change the location and conditions of its depot to promote the convenience, security and accommodation of the public would be an invasion of interstate commerce, it does not transform the proceedings in which the order is made into "a suit at law or in equity," and, as such, removable from the superior court of the state to an inferior federal tribunal, upon the ground of diverse citizenship. North Carolina Corp. Comm. v. Southern R. Co., 151 N. C. 447, 66 S. E. 427.

Orders of Commission Need No Confirmation.—The utilities commission is a state administrative agency of original and final jurisdiction, and its orders require no confirmation by any court to be effective. State v. Carolina Scenic Coach Co., 218 N. C. 233, 10 S. E. (2d) 824.

Removal of Franchise Restriction as to Carriage of Passengers.—This section authorizes a petitioner to appeal to the superior court from an adverse ruling of the utilities commission on its petition for the removal from its franchise of a restriction in regard to the carriage of passengers, and the contention that no appeal lies from such order because the right of appeal is governed by the motor carrier laws authorizing an appeal from an order affecting franchise only when entered for violation of law, is untenable. Utilities Comm. v. Carolina Scenic Coach Co., 216 N. C. 325, 4 S. E. (2d) 897.

Petitioner has the right to appeal to the superior court from the denial of its petition for the removal from its franchise of a restriction prohibiting it from transportng passengers between two cities along its route in purely local traffic between the said cities. State v. Carolina Scenic Coach Co., 218 N. C. 233, 10 S. E. (2d) 824.

Cited in Corporation Commission v. Southern R. Co., 197 N. C. 699, 150 S. E. 335.

§ 62-21. Appeal docketed; priority of trial; burden.—The cause shall be entitled "State of North Carolina on relation of the Utilities Commission against (here insert name of appellant)," and if there are exceptions to any facts found by the commission, it shall be placed on the civil issue docket of such court and shall have precedence of other civil actions, and shall be tried under

the same rules and regulations as are prescribed for the trial of other civil causes, except that the rates fixed or the decision or determination made by the commission shall be prima facie just and reasonable. (Rev., s. 1075; 1899, c. 164, s. 7; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1098.)

Presumptions.—The provision of this section that the decision of the utilities commissioner shall be deemed prima facie just and reasonable, merely raises a presumption of law, and places the burden of going forward with the proof upon the party appealing from the decision, but even if this section should be construed to raise a presumption of fact, an instruction that the findings and decision of the commissioner were prima facie just and reasonable gives appellee the benefit of a presumption of fact when the evidence fully apprises the jury of the substance and purport of the order. State v. Carolina Scenic Coach Co., 218 N. C. 233, 10 S. E. (2d) 824.

Issues of Fact.—While on appeal from the denial of a petition to remove certain restrictions from petitioner's franchise, the point at issue is the reasonableness of the commissioner's order which is a question of law, nevertheless the reasonableness of the order depends upon the attendant facts, and exceptions to the commissioner's findings upon which his order is predicated, raise issues of fact for the determination of the jury. State v. Carolina Scenic Coach Co., 218 N. C. 233, 10 S. E. (2d) 824.

Petitioner filed petition requesting the removal from its franchise of a restriction prohibiting it from transporting passengers between two cities along its route in purely local traffic between the said cities. The utilities commissioner denied the petition upon his findings, among others, that the present service between the two cities furnished by another carrier is ample, that there was no necessity for permitting petitioner to furnish service between the two cities, and that the removal of the restriction was not demanded by the public interest. Held: The exceptions raise issues of fact to be determined by a jury, a high degree of formality in separating findings and conclusions of fact from conclusions of law not being required, and the appeal was properly transferred to the civil issue docket and tried before a jury. Id.

Question for Decision on Appeal.—Petitioner filed petition requesting the removal from its franchise of a restriction prohibiting it from transporting passengers between two cities along its route in purely local traffic between said cities. Upon appeal to the superior court from the denial of the petition, the carrier intervening and opposing the granting of the petition objected to the refusal of the court to submit an issue as to whether the public interest demanded additional transportation facilities between the two cities and objected to the submission of the issue as to whether the public convenience and necessity required the removal of the restriction from the petitioner's franchise, contending that the sole question within the superior court's jurisdiction was whether the public convenience and necessity required additional service, and that upon an affirmative finding to this issue in the superior court the matter should be remanded to the commissioner in order that he might select the person or corporation to which he would award the franchise for such additional service. Held: The question for the decision in the superior court upon appeal is whether petitioner should be given the relief prayed and not whether the commissioner should be sustained in his ruling, and the superior court has jurisdiction to determine the matter and grant the relief prayed for upon an affirmative finding by the jury upon the issue submitted. State v. Carolina Scenic Coach Co., 218 N. C. 233, 10 S. E. (2d) 824.

Parties on Appeal.—In case of an appeal to the courts, the only authorized parties are the State of North Carolina on relation of the Commission as plaintiff and the railroad or other corporation as defendant. The statute is plain as to who may appeal, viz., the state and the corporation whose legal rights are affected by the decision. No one else can appeal, because they are, and under the statute can be, no other parties, and the right to appeal is of course confined to the parties to the proceeding. North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 561, 87 S. E. 785.

Any Relevant Evidence Admissible.—On appeal from an order of the Commission, the trial is de novo by express provision of the statute and tried under the same rules and regulations as are prescribed for the trial of other civil causes; and any relevant evidence may be there introduced, whether it had theretofore been introduced before the Commission or not. State v. Seaboard Air Line, etc., R. Co., 161 N. C. 270, 76 S. E. 554.

Irrelevant Evidence.—In a case wherein a union passenger depot had been ordered by the Commission it was reversible error in the superior court, on appeal from the Commission, for the trial judge to admit evidence as to the effect the relocation would have on property values in a near-by town, where the present station of one of the roads is located. State v. Seaboard Air Line, etc., R. Co., 161 N. C. 270, 76 S. E. 554.

§ 62-22. Appeal heard at chambers by consent.—By consent of all parties the appeal may be heard and determined at chambers before any judge of a district through or into which the railroad may extend, or any judge holding court therein, or in which the person or company does business. (Rev., s. 1076; 1899, c. 164, s. 7; C. S. 1099.)

Cited in State v. Carolina Scenic Coach Co., 218 N. C. 233, 10 S. E. (2d) 824 (dissenting opinion).

§ 62-23. Appeal to supreme court. — Either party may appeal to the supreme court from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals, except that the state of North Carolina, if it shall appeal, shall not be required to give any undertaking or make any deposit to secure the cost of such appeal, and such court may advance the cause on its docket so as to give the same a speedy hearing. (Rev., s. 1077; 1899, c. 164, s. 7; C. S. 1100.)

Cross Reference.—As to appeal generally, see §§ 1-268 et seq.

Right Confined to State and Corporation.—The section plainly indicates that the right of appeal is confined to the state and the corporation whose legal rights are affected by the Commission's order. North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 561, 87 S. E. 785.

Direct Appeal Does Not Lie.—An appeal will not lie directly from the Commission to the Supreme Court. North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 87 S. E. 785.

§ 62-24. Judgment of superior court not vacated by appeal.—Any freight or passenger rates fixed by the commission, when approved or confirmed by the judgment of the superior court, shall be and remain the established rates, and shall be so observed and regarded by an appealing corporation until the same shall be changed, revised or modified by the final judgment of the supreme court, if there shall be an appeal thereto, and until changed by the utilities commission. (Rev., s. 1079; 1899, c. 164, s. 7; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1101.)

§ 62-25. Judgment on appeal enforced by mandamus.—In all cases in which, upon appeal, a judgment of the utilities commission is affirmed, in whole or in part, the appellate court shall embrace in its decree a mandamus to the appellant to put said order in force, or so much thereof as shall be affirmed. (Rev., s. 1080; 1905, c. 107, s. 2; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1102.)

Performance Compelled by Mandamus.—The state court can compel performance only by resort to the high prerogative writ of mandamus, and that by authority of this section. North Carolina Corp. Comm. v. Southern R. Co., 151 N. C. 447, 454, 66 S. E. 427.

Under this section, the right to a mandamus to enforce a valid order is given in causes which have been carried to the superior court by appeal. State v. Southern R. Co., 147 N. C. 483, 488, 61 S. E. 271.

§ 62-26. Peremptory mandamus to enforce order, when no appeal.—If no appeal is taken from an order or judgment of the utilities commission within the time prescribed by law, but the

corporation affected thereby fails to put said order in operation, the utilities commission may apply to the judge riding the superior court district which embraces Wake County, or to the resident judge of said district at chambers, upon ten days notice, for a peremptory mandamus upon said corporation for the putting in force of said judgment or order; and if said judge shall find that the order of said commission was valid and within the scope of its powers, he shall issue such peremptory mandamus. An appeal shall lie to the supreme court in behalf of the utilities commission, or the defendant corporation, from the refusal or the granting of such peremptory mandamus. (Rev., s. 1081; 1905, c. 107; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1103.)

Mandamus to Enforce Final Order. — Where the Commission has ordered two railroad companies to erect a union depot at a junction after a hearing upon the petition of the citizens of the town, and the railroads have lost or waived their statutory right to appeal, such order is regarded as a final judgment, and mandamus proceedings to compel the enforcement of the final order upon failure of the railroads to except and appeal therefrom is the remedy authorized by the section. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563.

Independent Proceedings for Mandamus.—Under this section an appeal may be had by independent proceedings for mandamus to enforce a valid order from which no appeal has been taken. State v. Southern R. Co., 147 N. C. 483, 488, 61 S. E. 271.

Orders of Commission Are Not Judgments.—The Commission makes such order as the circumstances of the case justify, but these orders are not judgments of a court. The Commission cannot issue execution to enforce them, they simply serve as the basis for judicial action in the superior court to enforce them or to punish their violation. 2 N. C. L. R. 74. See also, Mayo v. Western Union Teleg. Co., 112 N. C. 343, 16 S. E. 1006.

The Corporation "Affected".—This section also reveals what is meant by the words "any party affected thereby," for it provides, if the corporation "affected" by the order fails to obey, how obedience may be enforced. North Carolina Corp. Comm. v. Winston-Salem, etc., R. Co., 170 N. C. 560, 561, 87 S. E. 785.

Art. 3. Powers and Duties of the Commission.

§ 62-27. General powers of commission.—The utilities commission shall have general power and control over the public utilities and public-service corporations of the state, and such supervision as may be necessary to carry into full force and effect the laws regulating the companies, corporations, partnerships, and individuals hereinafter referred to, and to fix and regulate the rates charged the public for service, and to require such efficient service to be given as may be reasonably necessary. (1933, c. 134, s. 2; 1941, c. 97.)

Editor's Note.—The General Assembly of 1891, c. 320, passed and ratified an Act establishing a Railroad Commission, and four days later passed another Act, Laws of 1891, c. 498, making the said Commission a court of record. As was said by Clark, C. J., in Corporation Comm. v. Railroad, 137 N. C. 1, 12, 49 S. E. 191, by the passage of these Acts, "the State made a radical change in its attitude towards railroads. * * * This Act was passed after the fullest discussion for years before the people of the State. It expressed their deliberate conviction that the time had arrived when the State, in the public interest, should supervise and control the charges and the conduct of common carriers, including express companies, telegraphs, telephones, and steamboats." The Amendatory Act of 1897, c. 206, extended very greatly the jurisdiction and powers of the Commission by giving it jurisdiction over street railways, express and telegraph companies, and power to require telephone companies to extend their lines and establish new agencies, to make rules for receiving, forwarding and delivering messages. A penalty was provided for a violation of these laws.

The acts discussed above were repealed by Public Laws, 1933, c. 134. The following cases, decided before the acts were repealed, construed section 1023 as it appeared in Michie's Code of 1931, and are made available to the practitioner as an aid in construing the present law, but they must be read in the light of the former law.

For comment on this and subsequent sections, see 12 N. C. Law Rev. 292 and references therein.

Legislative Power to Regulate.—The general power of the Legislature to provide reasonable rules and regulations, directly or through a commission, has been upheld in Atlantic Exp. Co. v. Wilmington, etc, Railroad, 111 N. C. 463, 472, 16 S. E. 393, 32 Am. St. Rep. 805; in Corporation Comm. v. Seaboard Air Line System, 127 N. C. 283, 288, 37 S. E. 266, and cases there cited. Among the federal decisions, this was asserted in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, and has been reiterated in numerous cases since, collected in 9 Rose's Notes, pp. 21-55. And in New York is stated in People v. Budd, 117 N. Y. 1, 5 L. R. A. 566, 51 Am. St. Rep. 460. See Corporation Comm. v. Railroad, 137 N. C. 1, 14, 49 S. E. 191.

The power of the Legislature, either directly or through appropriate governmental agencies, to establish reasonable regulations for public-service corporations in matters affecting the public interests is now universally recognized, and the principle has been approved in well considered decisions dealing directly with the question. Atlantic Coast Line Railroad v. Goldsboro, 155 N. C. 356, 71 S. E. 314, affirmed on writ of error to Supreme Court of United States, 232 U. S. 548, 558, 34 S. Ct. 364, 58 L. Ed. 721; Corporation Comm. v. Seaboard Air Line Railroad, 140 N. C. 239, 52 S. E. 941; Corporation Comm. v. Railroad, 137 N. C. 1, 49 S. E. 191; In re Southern Public Utilities Co., 179 N. C. 151, 159, 101 S. E. 619.

Does Not Interfere with Interstate Commerce.—The Railroad Commission, established by c. 320, Acts of 1891 existed solely under the Constitution and laws of this State and had no recognition in the laws of the United States, and being concerned solely in domestic affairs and trade, did not interfere with interstate commerce. Caldwell v. Wilson, 121 N. C. 425, 28 S. E. 554.

Cited in Russ v. Western Union Tel. Co., 222 N. C. 504, 23 S. E. (2d) 681.

§ 62-28. To make and enforce rules for public-service corporations. — The utilities commission has power to make any necessary and proper rules, orders and regulations for the safety, comfort and convenience of passengers, shippers or patrons of any public-service corporation, and to require the observance of and to enforce the same by the company and its employees, such power being the same as that provided in this chapter in respect to railroads and other transportation companies. (1907, c. 469, s. 1a; 1913, c. 127, s. 2; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1037.)

Cross Reference.—As to duty of the utilities commission to enforce laws relative to the hours of service for employees of carriers, see § 60-58.

Legislative Intent. — There was no intention to give a schedule of the thousands of appliances used in handling the business of common carriers, nor to enumerate the countless dealings between them and their patrons, which such Commission should supervise. The clearly declared purpose was to put the control and supervision of the whole matter in the hands of an impartial commission, with power to make reasonable rules and orders, subject to the right of appeal by either party, the shipper or the carrier, to the courts, instead of leaving such dealing to the unrestricted will of one party—the carrier. Corporation Comm. v. Atlantic Coast Line R. Co., 139 N. C. 126, 132, 51 S. E. 793.

Power to Make Orders and Regulations.—The Commission is given the power to make orders and regulations for the safety, etc., of shippers or patrons of any public-service corporation. Tilley v. Norfolk, etc., R. Co., 162 N. C. 37, 77 S. E. 994.

§ 62-29. Express and implied powers.—The utilities commission shall also have, exercise, and perform all the functions, powers, and duties and have all the responsibilities conferred by this article, and all such other powers and duties as may be necessary or incident to the proper discharge of the duties of its office. (1933, c. 134, s. 6; 1941, c. 97.)

§ 62-30. Supervisory powers.—Under the rules and regulations herein prescribed and subject to the limitations hereinafter set forth, the said utilities commission shall have general supervision over the rates charged and the service given, as follows, to wit:

(1) By railroads, street railways, steamboats, canals, express and sleeping-car companies, and all persons, firms or corporations engaged in the carrying of freight or passengers or otherwise engaged as common carriers;

(2) By telephone and telegraph companies and all other companies engaged in the transmission of messages, and by all firms and individuals owning or operating telephone or telegraph lines in the state;

(3) By electric light, power, water, and gas companies, pipe lines originating in North Carolina for the transportation of petroleum products, and corporations, other than such as are municipally owned or conducted, and all other companies, corporations, or individuals engaged in furnishing electricity, electric light current, power, or in transmitting or selling the same or producing the same from the water courses of this state: Provided, that the exemption given to municipally owned or conducted electric light, power, water and gas companies from supervision by the utilities commission shall not apply to municipally owned electric light or power systems which are leased to and operated by private individuals, firms, or corporations.

(4) By all water power and hydroelectric companies or corporations now doing business in this state or which may hereafter engage in doing business in this state, whether organized under the laws of this state or under the laws of any other state or country, and such companies and corporations are deemed to be public-service companies and subject to the laws of this state regulating the same;

(5) By flume companies, corporations, other than municipal corporations, or individuals owning or operating public sewerage systems in the state of North Carolina;

And the said utilities commissioner is hereby vested under this section with all power necessary to require and compel any public utility or public-service corporation of the kinds herein designated or any other class of public utility to provide and furnish to the citizens of this state reasonable service of the kind it underakes to furnish and fix and regulate the reasonable rates and charges to be made to the citizens of the state who may be entitled to use the same under such rules and regulations as may be lawfully prescribed.

The power of control and supervision vested in the commission under this section with respect to the various classes of public service corporations and individuals engaged in furnishing the public utilities mentioned shall be the same as that vested in it in respect to railroads and other transportation companies. (1913, c. 127, s. 7; 1933, c. 134, s. 3; 1937, c. 108, s. 2; 1941, cc. 59, 97; C. S. 1112(b).)

Cross References.—As to municipal control of public utilities, see §§ 160-282 to 160-285. As to report from municipality operating own utilities, see § 62-98.

Editor's Note.—The 1937 amendment inserted the reference to pipe lines in subsection (3). The 1941 amendment added the proviso at the end of subsection (3).

This section supersedes the very similar § 1035 of the Consolidated Statutes. The following cases, which were decided under that section, are given as an aid in construing the present law, but should be considered in the light of the former law.

General Considerations — Right of State to Regulate. — The right of the State to establish regulations for public service corporations, and over business enterprises in which the owners, corporate or individual, have devoted their property to a public use, and to enforce these regulations by appropriate penalties, is now and has long been too firmly established to require or permit discussion. Efland v. Southern R. Co., 146 N. C. 135, 138, 59 S. E. 355, citing Harrill Bros. v. Southern R. Co., 144 N. C. 532, 57 S. E. 383; Stone & Co. v. Atlantic Coast Line R. Co., 144 N. C. 220, 56 S. E. 932; Walker v. Railroad, 137 N. C. 163, 168, 49 S. E. 84; McGowan v. Wilmington, etc., Railroad, 95 N. C. 417; Branch v. Wilmington, etc., R. Co., 77 N. C. 347; Seaboard Air Line Railway v. Florida, 203 U. S. 261, 27 S. Ct. 109, 51 L. Ed. 175; Missouri Pac. R. Co. v. Humes, 115 U. S. 512, 513, 6 S. Ct. 110, 29 L. Ed. 463; Mobile v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77. See also Whiting Mfg. Co. v. Carolina Aluminum Co., 207 N. C. 52, 60, 175 S. E. 698.

Same—Classification Must Not Be Arbitrary.—As to intrastate or domestic matters, the general assembly has the right to establish regulations for public service corporations and for business enterprises in which the owners have devoted their property to public use, and to apply these regulations to certain classes of pursuits and occupations, imposing these requirements equally on all members of a given class, the limitation of this right of classification being that the same must be on some reasonable ground that bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. Efland v. Southern R. Co., 146 N. C. 135, 59 S. E. 355.

In Tullis v. Lake Erie, etc., R. Co., 175 U. S. 348, 20 S. Ct. 136, 44 L. Ed. 192, Chief Justice Fuller, quotes with approval from the decision in Orient Ins. Co. v. Daggs, 172 U. S. 557, 562, 19 S. Ct. 281, 43 L. Ed. 552: "The state in exercising the power to distinguish, select, and classify objects of legislation necessarily has a wide range of discretion; it was sufficient to satisfy the demands of the constitution if the classifications were practical and not palpably arbitrary." Id.

Same—Not a Federal Question.—Whether a regulation of a state railroad commission otherwise legal is arbitrary and unreasonable because beyond the scope of the powers delegated to the commission is not a federal question. Atlantic Coast Line R. Co. v. North Carolina Corp. Comm., 206 U. S. 1, 27 S. Ct. 585, 51 L. Ed. 933.

Subsection One—Legislature May Regulate Directly or Indirectly.—Railroad companies from the public nature of the business by them carried on, and the interest which the public has in their operation, are subject as to their state business to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end. Atlantic Coast Line R. Co. v. North Carolina Corp. Comm., 206 U. S. 1, 27 S. Ct. 585, 51 L. Ed. 933.

Same—Rate Fixing Power May Be Delegated.—The General Assembly has the power to establish a commission to supervise and regulate the rates of common carriers. Corporation Comm. v. Seaboard Air Line Railroad, 140 N. C. 239, 240, 52 S. E. 941; Corporation Comm. v. Railroad, 137 N. C. 114, et seq., 49 S. E. 191; Corporation Comm. v. Seaboard Air Line System, (Rate Case), 127 N. C. 283, 37 S. E. 266; Atlantic Exp. Co. v. Wilmington, etc., Railroad, 111 N. C. 463, 16 S. E. 393; Corporation Comm. v. Atlantic Coast Line R. Co., ("Track Scales case",) 139 N. C. 126, 51 S. E. 793.

Same—When State May Regulate Interstate Commerce. —The power of Congress over commerce between the states is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free from any restraint which it has the right to impose, except by such statutes as are passed by the states for the purpose of facilitating the safe transmission of goods and carriage of passengers, and are not in conflict with any valid federal legislation. Colley Const. Lim. 595; Mobile v. Kimball, 102 U. S. 691, 697, 26 L. Ed. 238; Wilson v. McNamee, 102 U. S. 572, 26 L. Ed. 234; Wilson v. Blackbird Creek Marsh Co., 2 Peters, 245, 7 L. Ed. 412; Pound v. Turck, 95 U. S. 459, 24 L. Ed. 525; Turner v. Maryland, 107 U. S. 38, 2 S. Ct. 44, 27 L. Ed. 370; Morgans Steamship Co. v. Louisana, 118 U. S. 455, 6 S. Ct. 1114, 30 L. Ed. 237; Morris, etc., Co. v. Southern Exp. Co., 146 N. C. 167, 173, 59 S. E. 667.

Same—Power of Commission Over Railroads.—This section gives the Commission general control and supervision of all railroad corporations. Tilley v. Norfolk, etc., R. Co., 162 N. C. 37, 39, 77 S. E. 994.

Same—Same—Lacks Power to Appraise and Assess.— Either intentionally or accidentally, the Corporation Commission was not clothed with the power of appraising and assessing railroad property. Southern R. Co. v. North Carolina Corp. Comm., 97 Fed. 513, 518.

Same—When Power to Regulate Arbitrarily Exercised.— The public power to regulate railroads and the private right of ownership of such property coexist, and the one does not destroy the other; and where the power to regulate is so arbitrarily exercised as to infringe the rights of ownership the exertion is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment. Atlantic Coast Line R. Co. v. North Carolina Corp. Comm., 206 U. S. 1, 27 S. Ct. 585, 51 L. Ed. 933.

Same—When Duty of Railroad Entails Pecuniary Loss.— The state has power to compel a railroad company to perform a particular and specified duty necessary for the convenience of the public even though it may entail some pecuniary loss. Atlantic Coast Line R. Co. v. North Carolina Corp. Comm. 206 U. S. 1, 27 S. Ct. 585, 51 L. Ed. 933.

Subsection Two — Telephone Company Subject to State Control.—A telephone company, acting under a quasi public franchise, is properly classified among the public service corporations, and as such is subject to public regulation and reasonable control. Clinton-Dunn Tel. Co. v. Carolina Tel., etc., Co., 159 N. C. 9, 14, 74 S. E. 636; Godwin v. Carolina Tel. Co., 136 N. C. 258, 48 S. E. 813; Leavell v. Western Union Teleg. Co., 116 N. C. 211, 21 S. E. 391; Horner v. Oxford Water, etc., Co., 163 N. C. 535, 69 S. E. 607; Griffin v. Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319; Telegraph v. Telegraph Co., 61 Vt. 241; Telephone Co. v. Telegraph Co., 66 Md. 399; Yancy v. Telephone Co., 81 Ark. 486; Cumberland Tel., etc., Co. v. Kelley, 160 Fed. 316.

A local telephone company having an arrangement for the transmission of long distance messages over the lines of another company for pay, is a public-service corporation and comes within the provisions of this section. Horton v. Interstate Tel., etc., Co., 202 N. C. 610, 163 S. E. 694.

Same—Jurisdiction of Court Not Ousted. — The section giving general control of telephone companies to the Corporation Commission does not oust the court of its jurisdiction to compel the company to perform a public duty it owes to an individual. Walls v. Strickland, 174 N. C. 298, 93 S. E. 857.

Same—When Message Not Interstate Commerce. — In State v. Western Union Teleg. Co. (Albea's case), 113 N. C. 213, 18 S. E. 389, the court held that telegraphic messages transmitted by a company from and to points in this state, although transversing another state in the route, do not constitute interstate commerce and are subject to the tariff regulation of the Commission. In this it followed the unanimous opinion of the Supreme Court of the United States, delivered by Fuller, C. J., in Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 12 S. Ct. 806, 36 L. Ed. 672, to the same purport, Campbell v. R. R., 86 Iowa 587; Leavell v. Western Union Teleg. Co., 116 N. C. 211, 220, 21 S. E. 391.

§ 62-31. Commission to keep itself informed as to utilities.—The said utilities commission shall at all times be required to keep itself informed as to the public-service corporations hereinbefore specified and enumerated, their rates and charges for service, and the service supplied to the citizens of the state and purposes therefor; and it shall at all times be empowered and required to inquire into such service and rates charged therefor, and to fix and determine as herein provided the reasonableness thereof, and upon petition or otherwise to make full inquiry into such rates and charges in behalf of the citizens of the state, and compel and require compliance with the regulations and charges, and final determination fixed therefor under the provisions of this article, and no corporation, association, partnership, or individual, other than carriers of passengers and property by rail, express, highway and/or water, doing business in the state of North Carolina as a public-service corporation, or any other corporation herein designated, shall be allowed to increase its rate and charge for service, or change its classification in any manner whatsoever except upon petition duly filed with the utilities commission and inquiry held thereon and final determination of the reasonableness and the necessity of any such increase or change in classification or service: Provided, however, that nothing herein shall be construed to prevent any public-service corporation under the jurisdiction of the commission from reducing its rates, either directly or by change in classification. (1933, c. 134, s. 16; 1937, c. 165; 1939, c. 365, ss. 1, 2; 1941, c. 97.)

Editor's Note.—The 1939 amendment changed the latter part of this section and repealed the 1937 amendment which had added a provision as to approval of rate increases in certain cases without a hearing. For a discussion of 1937 amendment, see 15 N. C. Law Rev. 365. For comment on the 1939 amendment, see 17 N. C. L. Rev. 374.

Reduction of Rates.—The proviso to this section deprived the Utilities Commission of jurisdiction over reductions in rates. This means that any railroad acting lawfully, that is, individually and with proper intent, may reduce its own rates free of the control of the Utilities Commission, but it does not mean that it can, acting unlawfully or as a result of a conspiracy with other railroads, use this uncontrolled power to injure a competitor and it does not follow that conspiracies in violation of chapter 75 are made legal by the proviso. Bennett v. Southern Ry. Co., 211 N. C. 474, 483, 191 S. E. 240.

Where certain carriers by truck sought injunctive relief against railroad carriers for reduction in rates as to certain commodities, and as between certain localities, it was held that they had no legal right to have their contract price protected against lawful competition from rail carriers, who could, under this section, reduce rates at will. Carolina Motor Service v. Atlantic Coast Line R. Co., 210 N. C. 36, 185 S. E. 479, 104 A. L. R. 1165.

§ 62-32. To investigate companies and businesses under its control.—The commission shall from time to time visit the places of business, and investigate the books and papers of all corporations, firms or individuals engaged in the transportation of freight or passengers, the transmission of messages either by telegraph or telephone, or in the furnishing of other public utilities the supervision and control of which is vested in the utilities commission to ascertain if all the orders, rules and regulations of the utilities commission have been complied with, and shall have full power and authority to examine all officers, agents and employees of such companies, individuals, firms or corporations, and all other persons, under oath or otherwise, and to compel the production of papers and the attendance of witnesses to obtain the information necessary for carrying into effect and otherwise enforcing the provisions of this chapter. (Rev., s. 1064; 1913, c. 127, ss. 1, 2, 7; 1917, c. 194; 1899, c. 164, s. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1060.)

§ 62-33. System of accounts.—The utilities commission may establish a system of accounts to be kept by the public utilities, under its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and prescribe the manner in which such accounts shall be kept. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97.)

Cross Reference.—As to the power of the commission to require separate accounts for interstate and intrastate business of public-service companies, see § 62-140.

§ 62-34. Reports. — The utilities commission shall at least once every twelve months require any public utility to file annual reports in such form and of such content as the commission may require and special reports concerning any matter about which the commission is authorized to inquire or to keep itself informed, or which it is authorized to enforce. All reports shall be under oath when required by the commission. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-35. Investigations. — The utilities commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or any particular utility. In conducting such investigation the commission may proceed either with or without a hearing as it may deem best, but shall make no order without affording the parties affected thereby a hearing.

If after such an investigation, or investigation and hearing, the commission, in its discretion, is of the opinion that the public interest shall be more greatly conserved by an appraisal of any properties in question, the investigation of any particular construction, the audit of any accounts or books, the investigation of any contracts, or the practices, contracts or other relations between the utility in question and any holding or finance agency with which such public utility may be affiliated, it shall be the duty of the commission to report its findings and recommendation to the governor and council of state with request for an allotment from the emergency and contingency fund to defray such expense which may be granted as provided by law for expenditures from such fund or may be denied. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97.)

§ 62-36. To fix rates for public utilities in cities. —The utilities commission shall have full power and authority to fix and establish any and all rates which any public-service or quasi public-service corporation other than railroads using steam as a motive power shall charge or exact from any person, firm or corporation in any city for the services rendered or commodity furnished. (1917, c. 136, sub-ch. 3, s. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 2783.)

City's Charter Subject to State Powers.—"The power conferred by its charter upon the city of Henderson 'to provide water and lights and to contract for same, provide for cleaning and repairing the streets, regulate the market, take proper means to prevent and extinguish fires,' is subject to the police power of the State, with respect to rates to be charged under such contracts as the city may make under its charter by a public-service corporation." Corporation Comm. v. Henderson Water Co., 190 N. C. 70, 73, 128 S. E. 465.

Contract Rate May Be Changed.—Although the rate to be charged is fixed by contract this may be changed by the Commission if it appears that the rate contracted for is too low, and the one fixed is just. The burden of proof is on the one alleging that the rate fixed by the Commission is unreasonable. Corporation Comm. v. Henderson Water Co., 190 N. C. 70, 128 S. E. 465.

Same—Rights of Party Relieved.—A public service corporation, having a contract with a city, applying to the commission for the increase of the rate contracted for with the city, and obtaining partial relief will not be granted an injunction by the Federal Court against the Commission on the grounds that the rate is confiscatory for such increase as is allowed by the Commission is that much more than could have been received under the contract with the city had the Commission refused to act. Henderson Water Co. v. Corporation Comm., 269 U. S. 278, 46 S. Ct. 112, 70 L. Ed. 273.

§ 62-37. Manner of enforcing above regulations. —The North Carolina utilities commission shall have the power to require such improvements and extensions to the service of public-service corporations mentioned in § 62-36 as it may deem necessary after the investigation of any complaint of any person, corporation, or municipality as to the inadequacy of such service. Upon application being made, the utilities commission shall proceed to hear, pass on, and determine, in the manner prescribed by law, a just or reasonable rate or charge for the service or other commodity rendered or furnished; the hearing before the utilities commission shall be governed by the law as to the commission relating to the fixing of rates and rules and orders of the commission as to the enforcement thereof by the commission. The utilities commission shall have the same power and authority in hearing and passing on any matter or case under § 62-36, enforcing or fixing of rates, supervising and regulating said corporation or otherwise as they now have under the general law. The failure or refusal to conform to or obey any decision, rule, regulation, or order made in such cases by the utilities commission shall subject said public-utility corporation or quasi public-utility corporation refusing or failing to comply herewith to the penalties provided in this chapter. (1917, c. 136, sub-ch. 3, s. 2; 1933, c. 134, s. 8; 1941, c. 97; C. S. 2784.)

§ 62-38. Sections 62-36 and 62-37 not to affect existing power.—Nothing contained in §§ 62-36 and 62-37 shall be construed to deprive the utilities commission of the authority and power which it now has under the laws of North Carolina to supervise and regulate and fix the rates for public-utility corporations or quasi public-utility corporations operating or doing business in such city. (1917, c. 136, sub-ch. 3, s. 3; 1933, c. 134, s. 8; 1941, c. 97; C. S. 2785.)

§ 62-39. To require transportation and transmission companies to maintain facilities. — The utilities commission has power to require all transportation and transmission companies to establish and maintain all such public-service facilities and conveniences as may be reasonable and just. It may require steamboat companies to provide such wharf and warehouse facilities as may be reasonable and just. (1907, c. 469, s. 2; Ex. Sess. 1913, c. 52, s. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1038.)

§ 62-40. To authorize lumber companies to transport commodities.—The utilities commission has power to authorize lumber companies, having logging roads, to transport all kinds of commodities other than their own and passengers, and to charge therefor reasonable rates to be approved by the commission. (1915, c. 160, s. 1; 1915, c. 6; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1039.)

Establishing Joint Rate of Transportation. — A lumber company, chartered and organized for the purpose of transporting its own products, may be created a limited public carrier by the order of the Commission, under the provisions of this section. Corporation Comm. v. Atlantic Coast Line R. Co., 187 N. C. 424, 121 S. E. 767.

§ 62-41. To establish and regulate stations for freight and passengers.—The commission is empowered and directed to require, where the public necessity demands, and it is demonstrated that the revenue received will be sufficient to justify it, the establishment of stations by any company or corporation engaged in the transportation of freight and passengers in this state, and to require the erection of depot accommodations commensurate with such business and revenue, and to require the erection of accommodations for loading and unloading livestock and for feeding, sheltering and protecting the same in transportation. The commission shall not require any company or corporation to establish any station nearer to another station than five miles. (Rev., s. 1097; 1899,

c. 164, s. 2, subsec. 12; 1913, c. 155; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1040.)

Cross Reference.—As to power of utilities commission to regulate the building of shelters at railroad division points, see § 60-54.

Power to Require and Regulate Depots.—The Commission can order new depots established wherever they are needed, Minneapolis, etc., R. Co. v. Minnesota, 193 U. S. 53, 63, 24 S. Ct. 396, 48 L. Ed. 614, and of course, has the lesser power to require proper facilities at those already established. Corporation Comm. v. Railroad, 139 N. C. 126, 130, 51 S. E. 793.

Orders Subject to Review by the Courts.—This power can not be unreasonably exercised, and such orders are subject to review by the superior and Supreme Courts. Corporation Comm. v. Atlantic Coast Line R. Co., 139 N. C. 126, 51 S. E. 793.

May Require Track Scales.—The Commission is empowered, under this section, to require "depot accommodations commensurate with such business and revenue", which justifies the Commission in requiring "track scales" at points along the line. Corporation Comm. v. Atlantic Coast Line R. Co., 139 N. C. 126, 131, 51 S. E. 793.

The court or the jury, upon proper instructions, as the case may be, should pass upon the reasonableness and necessity of an order of the Commission requiring track scales to be put in. Corporation Comm. v. Atlantic Coast R. Co., 139 N. C. 126, 51 S. E. 793.

Railroad Not Released from Private Contract.—The limitation on the powers of the Commission to require common carriers to establish stations within five miles of each other does not release the said carriers from a contract, with an individual, to maintain a flag stop within the bounds of his plantation. Parrott v. Atlantic, etc., R. Co., 165 N. C. 295, 81 S. E. 348.

§ 62-42. To require change, repair, and additions to stations.—The commission is empowered and directed to require a change of any station or the repairing, addition to, or change of any station house by any railroad or other transportation company in order to promote the security, convenience and accommodation of the public, and to require the raising or lowering of the track at any crossing when deemed necessary. (Rev., s. 1097; 1899, c. 164, s. 2, subsec. 13; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1041.)

Liberal Construction.—This section and section 62-43 are of a remedial nature, and will be liberally construed by the courts in favor of the exercise of the authority conferred. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563. See also State v. Southern R. Co., 196 N. C. 190, 145 S. E. 19.

Entire Expense on Railroad.—In New York, etc., R. Co. v. Bristol, 151 U. S. 556, 14 S. Ct. 437, 38 L. Ed. 269, it was held that the imposition upon a railroad company of the entire expense of a change of grade at a railroad crossing is not a violation of any constitutional right. Atlantic Coast Line Railroad v. Goldsboro, 155 N. C. 356, 359, 71 S. E. 514.

In the case of Cleveland v. Augusta, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638, the court held that the railroad company was liable for the expense of raising its roadbed to conform to the city grade, and said that it must yield to the reasonable burden imposed by the growth and development of the country or the city, and where the public welfare demands a change or grade of the highway or street, the railroad company must, at its own expense, make such alterations in the grade of its crossings as will conform to the new grade. In the course of its opinion the court said: "Upon streets or highways crossed by it, or subsequently laid out, the railroad company must construct proper crossings (Lancaster v. R. R., 29 Neb., 412; R. R. v. Smith, 91 Ind., 119, 13 Am. & Eng. R. R. Cases, 608), and must alter, change, or otherwise reconstruct such crossings whenever the public welfare demands." Eng. v. New Haven Co., 32 Conn. 240. Quoted and approved in Atlantic Coast Line Railroad v. Goldsboro, 155 N. C. 356, 361, 71 S. E. 514.

§ 62-43. To provide for union depots.—The commission is empowered and directed to require, when practicable, and when the necessities of the case, in its judgment, require, any two or more railroads which now or hereafter may enter any city or town to have one common or union passenger depot for the security, accommodation and convenience of traveling public, and to unite in the joint undertaking and expense of erecting constructing and maintaining such union passenger depot, commensurate with the business and revenue of such railroad companies or corporations, on such terms, regulations, provisions and conditions as the commission shall prescribe. The railroads so ordered to construct a union depot shall have power to condemn land for such purpose, as in case of locating and constructing a line of railroad: Provided, that nothing in this section shall be construed to authorize the commission to require the construction of such union depot should the railroad companies at the time of application for said order have separate depots, which, in the opinion of the commission, are adequate and convenient and offer suitable accommodations for the traveling public. (Rev., s. 1097; 1903, c. 126; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1042.)

Cross Reference.—As to power of railroads to condemn land for union station, see also, § 40-4.

Remedial in its Nature.—The statute in its principal purpose may be considered as remedial in its nature, and as to that feature will receive a liberal construction. Dewey v. Atlantic Coast Line R. Co., 142 N. C. 392, 399, 55 S. E. 292.

When Union Stations May Be Required.—Under the section the Commission is empowered to direct the establishment of union stations under certain conditions, to wit: when practicable, and when the necessities of the case require two or more railroads entering a city or town to have one common union passenger depot for the security, accomodation, and convenience of the traveling public. State v. Seaboard Air Line, etc., R. Co., 161 N. C. 270, 273, 76 S. E. 554.

The remedy was intended to apply to all the towns and cities in the state where, in the legal discretion of the commissioners, the move is practicable, the convenience of the traveling public requires it, and the existing facilities, in the judgment of the commissioners, are inadequate. Dewey v. Atlantic Coast Line R. Co., 142 N. C. 392, 401, 55 S. E. 292.

Same—Must Be Practicable.—Whenever the Commission requires and orders a union station to be built, the only restriction in the statute is when "practicable." The other matters as to the security, accommodation, and convenience of the public are simply reasons addressed to the judgment of the commissioners. When there is an appeal from their order, the sole query for a jury, under the statute, is whether the execution of the order is "practicable." The finding of the Commission that it is practicable is prima facie correct; and the burden is upon the defendant to show evidence to the contrary. State v. Seaboard Air Line, etc., R. Co., 161 N. C. 270, 274, 76 S. E. 554.

Same—To Be Commensurate with Business and Revenues.—When these conditions are found to exist, then the two railroads may be compelled to unite in the erecting, constructing, and maintaining such union passenger depot commensurate with the business and revenues of such railroad companies on such terms, regulations, provisions and conditions as the Commission shall prescribe. State v. Seaboard Air Line, etc., R. Co., 161 N. C. 270, 273, 76 S. E. 554.

New Union Station.—Under the provisions of this section and § 62-42, the commission has the power to require railroad companies subject to its jurisdiction, which have constructed or maintained a union passenger station in a city or town of the State, to construct or equip a new union passenger station in such city or town upon its finding that the present station is inadequate. State v. Southern Ry. Co., 196 N. C. 190, 145 S. E. 19.

Jurisdiction Original — Exercised upon Own Motion or Petition of Interested Parties. — The jurisdiction of the Commission with respect to the construction of passenger stations is original, and may be exercised either upon its own motion or upon petition of interested parties. State v. Southern Ry. Co., 196 N. C. 190, 145 S. E. 19.

Parties.—Under this section the commission is not without jurisdiction of a proceeding with respect to the erection, construction, and maintenance of a new union passenger station in city or town, because one or more railroad companies entering such city or town are not made parties in the proceeding. The presence of two or more

railroad companies as parties is sufficient. Corporation Commission v. Southern Ry. Co., 196 N. C. 190, 145 S. E. 19.

Same—Lessor—Appeal.—Where three railroad companies use a union station in a city in connection with the operation of their railroads, two as owners, and the other as lessee of a fourth road, it is not jurisdictional before the Commission or the Superior Court on appeal under § 62-20 that in the proceedings before the Commission under this section and § 62-42 to compel them to build and maintain an adequate station, that the lessor railroad be a party, but it is not error for the trial judge to order that the lessor road be made a party and the cause proceeded with therein. State v. Southern Ry. Co., 196 N. C. 190, 145 S. E. 19.

Section Valid Exercise of Legislative Power.—The power of the Legislature to enact a statute of this character has been established by numerous and well-considered decisions of this and other courts of Supreme jurisdiction, and is no longer open to question. Dewey v. Atlantic Coast Line R. Co., 142 N. C. 392, 399, 55 S. E. 292; Corporation Comm. v. Railroad, 140 N. C. 239, 52 S. E. 941; Corporation Comm. v. Atlantic Coast Line R. Co., 139 N. C. 126, 51 S. E. 793.

Powers Given by Necessary Implication.—The statute authorizing the Commission to order union stations to be built and maintained carries with it the power to do what is reasonably necessary to execute such order, including the use of the streets of a town for legitimate railroad purposes, the laying of tracks, etc., necessary to that end. Griffin v. Southern R. Co., 150 N. C. 312, 64 S. E. 16.

Inter and Intra-State Carriers.—The order of the Commission for the joint erection by an intrastate carrier and an interstate carrier of a union station at a junction cannot be regarded as objectionable so far as it relates to the intrastate carrier, as a burden on interstate commerce, when it appears that the commission was passing upon the petition of only a few cities or towns in the state separately and not as a part of a state wide scheme, and the expenditures required were in amount too small to affect such commerce. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563.

Same—"Esch-Cummings" Act Prospective.—The Federal Transportation or the "Esch-Cummings" Act is prospective in its enforcement, and cannot relate back to a final order of the Commission not appealed from, for the erection of a union station where the lines of an intrastate and interstate carrier cross each other, the execution of which has been stayed by the Commission until after the passage of the Federal Statute solely for the advantage of the carriers at their request. State v. Southern R. Co., 185 N. C. 435, 117 S. E. 563.

Cited in Cole v. Atlantic Coast Line R. Co., 211 N. C. 591, 191 S. E. 353.

§ 62-44. To provide for separate waiting rooms for races.—The commission is empowered and directed to require the establishment of separate waiting rooms at all stations for the white and colored races. (Rev., s. 1097; 1899, c. 64, s. 2, subsec. 14; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1043.)

Cross References.—As to separate accommodations for different races on train or steamboat, see § 60-94; on street railways, see § 60-135; on motor carriers, see § 62-109.

§ 62-45. To require construction of sidetracks.—The commission is empowered and directed to require the construction of sidetracks by any railroad company to industries already established or to be established: Provided, it is shown that the proportion of such revenue accruing to such sidetrack is sufficient within five years to pay the expenses of its construction. This shall not be construed to give the commission authority to require railroad companies to construct sidetracks more than five hundred feet in length. (Rev., s. 1097; 1899, c. 164, s. 2, subsec. 15; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1044.)

Cross Reference.—As to condemnations of land for an industrial siding, see § 40-5.

Editor's Note.—Prior to the enactment of this provision of the statute, the establishment of such sidings rested in the arbitrary will of the common carrier, who could also discontinue them at will. Such power, it will be seen at once, placed the industrial development of the state at the mercy of the railroad management, which could mar the prosperity of any plant along its line by refusing a siding, or arbitrarily discontinuing it, if established. This power could be used for both political and pecuniary advantage.

The General Assembly, while not prohibiting the carrier from continuing to establish sidings at its pleasure, deemed it wise to take the power of refusing to grant or continue such sidings out of the arbitrary will of the common carrier by authorizing the Commission to require the establishment of such sidings in proper cases. Corporation Comm. v. Seaboard Air Line Railroad, 140 N. C. 239, 241, 52 S. E. 941.

Not an Interference with Interstate Commerce.—The establishment of an industrial siding under the authority of the Commission is not an interference with interstate commerce. Missouri Pac. R. Co. v. State, 216 U. S., 262, 30 S. Ct. 330, 54 L. Ed. 472, State v. Southern R. Co., 153 N. C. 559, 563, 69 S. E. 621.

Restriction upon Power.—The Commission can require a railroad company to build a side track to an industrial plant only upon the company's right of way or when the right of way is tendered. State v. Southern R. Co., 153 N. C. 559, 69 S. E. 621.

Same — Revenue. — The power conferred upon the Commission to order a railroad company to build a side track, is with the restriction that the revenue from such side track shall be "sufficient within five years to pay the expenses of construction"; and the lower court having denied the authority of the Commission in this action, the presumption is in favor of its judgment, and it will be affirmed in the absence of evidence tending to show that the revenue will be sufficient according to the terms of the statute. State v. Southern R. Co., 153 N. C. 559, 69 S. E. 621.

Same — Length. — The section confers upon the Commission the power to establish sidings under certain conditions, and restricts the exercise of such a right to 500 feet in length. Hales v. Atlantic Coast Line R. Co., 172 N. C. 104, 90 S. E. 11, 13.

Rights of Intervening Owners.—A railroad company, of its own initiative or by virtue of a contract with private persons, can acquire no right to construct and use side tracks to private industries off their right of way and over the lands of intervening owners against the will of such owners. When they have once permanently located their line, they are, as a rule, restricted to that and the right of way incident to it. Pierce on Railroads, c. 9, p. 254; Elliot on Railroads (2d Ed.) section 930. Hales v. Atlantic Coast Line R. Co., 172 N. C. 104, 90 S. E. 11, 13.

Non-Resident Railroad without Power of Eminent Domain. — The Commission cannot confer the power of eminent domain, and when the Legislature has not conferred such power upon a nonresident railroad company respecting the construction of a side track over the lands of others, an order of the Commission for the railroad to build such a track is void. State v. Southern R. Co., 153 N. C. 559, 69 S. E. 621; Butler v. Pen. Tobacco Co., 152 N. C. 416, 68 S. E. 12.

Cited in Aileen Mills v. Norfolk-So. R. R. Co., 194 N. C. 647, 140 S. E. 306.

§ 62-46. To require trains to be run over railroads and connections at intersections.—The commission is empowered and directed to require, when practicable and when the necessities of the traveling public, in the judgment of the commission, demand, that any railroad in this state shall install and operate one or more passenger or freight trains over its road, and also require any two or more railroads having intersecting points to make close connection at such points: Provided, that no order under this section shall be made unless the business of the railroad justifies it. (1907, c. 469, s. 3; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1045.)

Connection Contemplated One of Trains as Well as Tracks.—The connection required is one of trains as well as of tracks. The public cannot travel upon a track alone, nor upon a train without a track. Both are required to furnish facilities for traveling at all, and close connection of both to secure the convenience of the traveling public. North Carolina Corp. Comm. v. Atlantic Coast Line R. Co., 137 N. C. 1, 49 S. E. 191, 195.

Running Additional Trains.—It is within the power of a state railroad commission to compel a railroad company to make reasonable connections with other roads so as to promote the convenience of the traveling public, and an order requiring the running of an additional train for that

purpose, if otherwise just and reasonable, is not inherently unjust and unreasonable because the running of such train will impose some pecuniary loss on the company. Atlantic Coast Line R. Co. v. North Carolina Corp. Comm., 206 U. S. 1, 27 S. Ct. 585, 51 L. Ed. 933.

§ 62-47. May authorize operation of fast mail trains; discontinuance of passenger service.—The utilities commission is hereby empowered, whenever it shall appear wise and proper to do so, to authorize any railroad company to run one or more fast mail trains over its road, which shall stop only at such stations on the line of the road as may be designated by the company: Provided, that in addition to such fast mail train such railroad company shall run at least one passenger train in each direction over its road on every day except Sunday, which shall stop at every station on the road at which passengers may wish to be taken up or put off: Provided further, that nothing in this section shall be construed as preventing the running of local passenger trains on Sunday. The utilities commission, or its successor, however, shall have and it is hereby vested with the power in any case in which the convenience and necessity of the traveling public do not require the running of passenger trains upon its railroad to authorize such railroad company to cease the operation of passenger trains as long as the convenience and necessity of the traveling public shall not require such operation: Provided that this section and any ruling hereafter made by the utilities commission, or its successors, shall not be construed as abrogating or repealing the provisions of any charter or franchise requiring such common carrier to furnish daily freight service over its lines, nor cause the discontinuance of daily freight service where now maintained. (Rev., s. 2614; 1893, c. 97; 1933, c. 528; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 3481.)

Editor's Note.—Public Laws 1933, c. 528, added the last sentence of this section relating to discontinuance of passenger service.

§ 62-48. To inspect railroads as to equipment and facilities, and to require repair.—The commission is empowered and directed, from time to time, to carefully examine into and inspect the condition of each railroad, its equipment and facilities, in regard to the public's safety and convenience; and if any are found by it to be unsafe, it shall at once notify and require the railroad company to put the same in repair. (1907, c. 469, s. 3; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1046.)

§ 62-49. To require installation and maintenance of block system and safety devices. — The commission is empowered and directed to require any railroad company to install and put in operation and maintain upon the whole or any part of its road a block system of telegraphy or any other reasonable safety device, but no railroad company shall be required to install a block system upon any part of its road unless at least eight trains each way per day are operated on that part. (1907, c. 469, s. 1b; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1047.)

The lack of a "block system", when required, is held to be negligence per se. Gerringer v. North Carolina R. Co., 146 N. C. 32, 59 S. E. 152; Stewart v. Raleigh, etc. R. Co., 137 N. C. 687, 50 S. E. 312; Stewart v. Railroad, 141 N. C. 253, 53 S. E. 877.

§ 62-50. To regulate crossings and to abolish grade crossings.—The commission is empowered and directed to require the raising or lowering of any tracks or highway at any highway or railroad crossing, and to designate who shall pay for the same; and, when it thinks proper, partition the cost of abolishing grade crossings and the raising or lowering of said track or highway among the railroads and municipalities interested. (1907, c. 469, s. 1 (c); 1911, c. 197, s. 1; 1933, c. 34, s. 8; 1941, c. 97; C. S. 1048.)

Cross References.—As to intersection with highways, see § 60-42. As to obstructing highways and maintaining defective crossings, see § 60-43. As to cattleguards and private crossings, see § 60-48. As to the power of the state highway commission to require the installation of signals and other safety devices, see § 136-20.

Editor's Note.—Throughout Europe grade crossings are forbidden by law. Some few of the American States, including New York, New Jersey, and Connecticut have followed the European example and abolished such crossing. This section confers upon the Utilities Commission the power to require the track to be raised or lowered at crossings where deemed necessary.

See section 62-42 and the notes thereto.

The General Assembly can make the abolition of grade crossings by railroads imperative instead of leaving it, as now, unexercised in the discretion of the Corporation [now Utilities] Commission, and can place the cost of doing so upon the corporations, whose duty it is to remove them. Northern Pac. R. Co. v. Minnesota, 208 U. S. 583, 28 S. Ct. 341, 52 L. Ed. 630, cited in Atlantic Coast Line Railroad v. Goldsboro, 155 N. C. 356, 362, 71 S. E. 514. In the meantime, like any collision, or a derailment, the act itself is prima facie negligence on the part of the railroad company. Marcom v. Raleigh, etc., R. Co., 126 N. C. 200, 35 S. E. 423. This matter has heretofore been called to the public attention in Cooper v. Railroad, 140 N. C. 209, 52 S. E. 932; Wilson v. Railroad, 152 N. C. 333; 55 S. E. 257; Gerringer v. Railroad, 146 N. C. 32, 59 S. E. 152; Atlantic Coast Line Railroad v. Goldsboro, 155 N. C. 356, 71 S. E. 514, (affirmed on writ of error) Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S., 548, 34 S. Ct. 364, 58 L. Ed. 721, McMillian v. Atlantic, etc., R. Co. 172 N. C. 853, 90 S. E. 683 (where the matter is fully discussed with full citation of authorities), and Bordeu v. Southern R. Co., 175 N. C. 179, 95 S. E. 146. Goff v. Atlantic Coast Line R. Co., 179 N. C. 216, 224, 102 S. E. 320.

That the State may exercise its police power either directly, or indirectly through some delegated agency is undisputed. The fact that some particular agency is delegated does not of necessity make that exclusive. Hence, while the section gives to the Utilities Commission the power to regulate crossings and require grade crossings, it is merely a delegated power, and does not preclude the State from direct, or indirect action. See 2 N. C. Law Rev. 104.

Commission Vested with Full Power.—The Corporation [now Utilities] Commission is vested with full and complete power to compel the raising or lowering of the track, to remove all danger to those using the public roads. Gerringer v. North Carolina R. Co., 146 N. C. 32, 37, 59 S. E. 152.

Authority is conferred by statute upon the Corporation [now Utilities] Commission to abolish grade crossing by a railroad company when by the operation of the railroads they become dangerous or inconvenient to the public traveling along the highways or private ways. Tate v. Seaboard Air Line R. Co., 168 N. C. 523, 84 S. E. 808.

Municipal Authority. — See § 160-54 and notes thereto.

§ 62-51. To require installation and maintenance of automatic signals at railroad intersections, etc. —The commission is empowered and directed to require, when public safety demands, when and in case two or more railroads now cross or may hereafter cross each other at a common grade, or any railroad crosses any stream or harbor by means of a bridge, to install and maintain such a system of interlocking or automatic signals as will render it safe for engines and trains to pass over such crossings or bridge without stopping, and to apportion the cost of installation and maintenance between said railroads as may be

just and proper. (1911, c. 197, s. 2; Ex. Sess. 1913, c. 63, s. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1049.)

§ 62-52. To require railroads to enter towns and maintain depots in certain cases.—Where two or more railroads may maintain freight depots and a union passenger depot within one mile of a town of two thousand population for the convenience of the inhabitants thereof, and do not enter the corporate limits of the town, it is the duty of the utilities commission, upon the petition of a majority of the qualified voters of the said town, which petition shall be properly sworn to by the signers thereof, to require and compel, where practicable, the said railroads to run their lines into or through the corporate limits of the said town, and construct, equip, and maintain suitable passenger and freight depots at some convenient place or places therein, and the passenger depot shall be a union station and be built and maintained by the several railroads according to a plan and in such a manner as shall be approved by the commission.

When a petition is filed with the utilities commission as aforesaid, the commission shall set a day for the hearing thereof, which day shall be not more than twenty days from the filing of said petition, and shall immediately cause a notice to issue to the railroads interested in the matter set out in the petition, and after the hearing of the matter on the day named in the notice, the commission, if it deem it practicable, shall thereupon cause an order to be made requiring the said railroads to build, equip, and maintain in a suitable manner roadbeds, yards and depots, and any other necessary buildings or equipment, at convenient places within the limits of said town, as to it seems proper for the needs and growth of the business and inhabitants of the said town.

The order of the utilities commission to the railroads shall name a time within which all the necessary work of entering the said town and construction of depots and other buildings shall be completed and opened to the public for the transaction of business, and the said railroads, for every day beyond the said time that they shall not be in operation according to the said order, shall pay the sum of fifty dollars for each and every day of such failure and neglect, to the board of commissioners or aldermen of said town, which shall be for the benefit of the said town, this amount to be recovered as in other actions.

This section shall also apply to any railroad that may hereafter enter into or run within one mile of the corporate limits of said town, and the utilities commission shall have the power to require such railroads to unite with the other railroads in maintaining the depots, tracks, and other structures, and also pay such part of the cost thereof as to the said utilities commission may seem proper.

The railroads have the power to condemn such quantity of lands, including gardens, yards, residences and the premises pertaining thereto, as are necessary for the purposes of this section, the condemnation proceedings to be had in the same manner as now provided by law. (1907, c. 465; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1050.)

§ 62-53. To consent to abandonment or relocation of depots.—A railroad corporation which has established and maintained for a year a passenger station or freight depot at a point upon its road shall not abandon such station or depot, nor substantially diminish the accommodation furnished by the stopping of trains, except by consent of the commission. Freight or passenger depots may be relocated upon the written approval of the commission. (Rev., s. 1098; 1899, c. 164, ss. 19, 20; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1051.)

§ 62-54. To regulate crossings of telephone, telegraph and electric power lines.—Power is conferred on the utilities commission whenever any telephone, telegraph or electric power lines cross, to require such crossings to be constructed and maintained in a safe manner, so that the wires of one line will not fall upon the other; to prescribe the manner in which this shall be done; to discontinue or prohibit such crossings where they are unnecessary and can reasonably be avoided; and to apportion the cost of proper changing and construction of such crossings among the lines interested, as to said commission may seem just: Provided, that in all crossings made dangerous by the presence of high tension wire or wires of any power or light company, the cost shall be paid by such power or light company. (1913, c. 130, s. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1052.)

Local Modification.—Ashe: 1929, c. 101.

§ 62-55. To regulate delivery of freight, express, and baggage.—The utilities commission shall make reasonable and just rules—

1. For the handling of freight and baggage at stations.

2. As to charges by any company or corporation engaged in the carriage of freight or express for the necessary handling and delivery of the same at all stations. (Rev., s. 1094; 1899, c. 164, s. 2, subsecs. 2, 7; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1053.)

Cross Reference.—As to penalty for failure to deliver freight upon tender of payment for carriage, see § 60-114.

§ 62-56. To prevent discriminations.—The utilities commission shall make reasonable and just rules and regulations—

1. To prevent discrimination in the transportation of freight or passengers, or in furnishing electricity, electric light, current, power or gas.

2. To prevent the giving, paying or receiving of any rebate or bonus, directly or indirectly, or the misleading or deceiving the public in any manner as to real rates charged for freight, express or passengers, or in furnishing electricity, electric light, current, power or gas. (Rev., s. 1095; 1899, c. 164, s. 2, subsecs. 3, 5; 1913, c. 127, s. 6; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1054.)

Cross Reference.—As to discrimination in railroad rates, see § 60-5 to § 60-8, § 60-92, and § 62-143.

Discrimination Defined.—Discrimination in freight tariffs by railroad companies, means to charge shippers of freight unequal sums for carrying the same quantity of freight equal distances; that is, more in proportion for a short than for a long distance. Hines v. Wilmington, etc., Railroad, 95 N. C. 434.

Discrimination by Log Road. — A railroad carrying logs to a sawmill cannot charge a shipper agreeing to ship the manufactured products by the same line less for the same service than it charges a shipper who makes no such agreement. Lumber Co. v. Railroad, 136 N. C. 479, 48 S. E. 813.

§ 62-57. To fix a standard for gas.—The utilities commission shall fix, establish and promulgate a standard of quality for gas and prescribe rules and regulations for the enforcement of and obedience to the same. (1919, c. 32; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1055.)

§ 62-58. To regulate shipment of inflammable substances.—The utilities commission is authorized and empowered to adopt and promulgate rules for the shipment of inflammable and explosive articles; cotton which has been partially consumed by fire, and such other like articles as in its opinion may be apt to render transportation dangerous. And after the promulgation of such rules, no common carrier shall be required to receive or transport any such articles except when tendered in accordance with the said rules; nor shall such common carrier be liable for any penalty for refusal to receive such article for shipment until all the rules prescribed by the utilities commission in regard to the shipments of the same shall be complied with. (1907, c. 471, s. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1056.)

The commission is particularly authorized to regulate the carriage of inflammable articles as freight. Tilley v. Norfolk, etc., R. Co., 162 N. C. 37, 39, 77 S. E. 994.

§ 62-59. To regulate demurrage, storage, placing, and loading of cars.—The commission shall make rules, regulations and rates governing demurrage and storage charges by railroad companies and other transportation companies; and shall make rules governing railroad companies in the placing of cars for loading and unloading and in fixing time limit for delivery of freights after the same have been received by the transportation companies for shipment. (Rev., s. 1100; 1903, c. 342; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1057.)

Cross References.—As to time before charge for demurrage may be made, see § 60-123. As to placing cars for loading, see § 60-118. As to reasonable time for transporting freight, see § 60-112.

§ 62-60. To fix rate of speed through towns; procedure.—If a railroad company is of the opinion that an ordinance of a city or town through which a line of its railroad passes regulating the speed at which trains may run while passing through said city or town, is unreasonable or oppressive, such railroad company may file its petition before the utilities commission, setting forth all the facts, and asking relief against such ordinance, and that the utilities commission prescribe the rate of speed at which trains may run through said municipality. Upon the filing of the petition a copy thereof shall be mailed, in a registered letter, to the mayor or chief officer of the town or municipality, together with a notice from the utilities commission, setting forth that on a day named in the notice the petition of the railroad company will be heard, and that the city or town named in the petition will be heard at that time in opposition to the prayer of the petition. And upon the return day of the notice the utilities commission shall hear the petition, but any hearing granted by the utilities commission shall be had at the town, city or locality where the conditions complained of are alleged to exist, or some member of the said commission shall take evidence, both for the petition and against it, at such city, town or locality, and report to the full commission before any decision is made by the commission.

Either party, petitioner or respondent, has the right to introduce testimony and to be heard by counsel; and the utilities commission, after hearing the petition, answer, evidence and argument, shall render judgment thereon. If the commission finds that such ordinance is reasonable and just the petition shall be dismissed, and the petitioner shall pay all the costs, to be taxed by the clerk to the utilities commission. If the commission is of the opinion that the ordinance is unreasonable, it shall so adjudge; and in addition thereto it shall prescribe the maximum rates of speed for passing through such town. And thereafter the railroad company may run its trains through such town or city at speeds not greater than those prescribed by the utilities commission, and the ordinance adjudged to be unreasonable shall not be enforced against such railroad company.

If the judgment of the utilities commission is in favor of the petitioner, it shall be lawful for the utilities commission to make such order as to the payment of the costs as shall seem just. It may require either party to pay the same or it may divide the same. The costs in such proceeding shall be the same as are fixed by law for similar services in the superior court. (Rev., ss. 1101, 1102, 1103; 1903, c. 552; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1058.)

Local Modification. — Cumberland, Rockingham, Union, Wayne: C. S. 1058.

Regulation within Police Power of State.—In Gladson v. Minnesota, 166 U. S. 427, 430, 17 S. Ct. 628, 41 L. Ed. 1064, the court said: "The state which created the corporation may make all needful regulations of a police character for the government of the company while operating its road within the jurisdiction. It may prescribe the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management in order to secure the object of its incorporation, and the safety, good order, convenience and comfort of its passengers and of the public." North Carolina Corp. Comm. v. Atlantic Coast Line R. Co., 137 N. C. 1, 49 S. E. 191, 197.

§ 62-61. To hear and determine controversies submitted.—When a company or corporation embraced in this chapter has a controversy with another corporation or person, and all the parties to such controversy agree in writing to submit such controversy to the commission as arbitrator, the commission shall act as such, and after due notice to all parties interested shall proceed to hear the same, and its award shall be final. Such award in cases where land or an interest in land is concerned shall immediately be certified to the clerk of the superior court of the county in which said land is situated, and shall by such clerk be docketed in the judgment docket for such county, and from such docketing shall be a judgment of the superior court for such county. Parties may appear in person or by attorney before such arbitrator. (Rev., s. 1073; 1899, c. 164, s. 25; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1059.)

Cross Reference.—As to power of utilities commission to settle dispute between a railroad and a drainage district, see § 156-91.

§ 62-62. To investigate accidents.—The commission may investigate the causes of any accident on a railroad or steamboat which it may deem to require investigation, and any evidence taken upon such investigation shall be reduced to writing, filed in the office of the commission, and be subject to

public inspection. (Rev., s. 1065; 1899, c. 164, s. 24; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1061.)

§ 62-63. To notify of violation of rules and institute suit.—The commission, whenever in its judgment any public utility has violated any law, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice, shall forthwith present the facts to the attorney-general, who shall take such proceedings thereon as he may deem expedient. (Rev., s. 1113; 1899, c. 164, s. 8; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1062.)

Construed as Mandatory.—This provision is positive, and must be construed as being mandatory. In this case the statute of North Carolina makes it clearly the duty of the Attorney-General, when called upon, to prosecute any suit or action which may be deemed necessary to secure the enforcement of the laws of the State, in regard to the fixing of maximum rates. This section, when construed in accordance with the rule laid down in the Regan case, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014, and the Ames case, 169 U. S. 466, 18 S. Ct. 418, 43 L. Ed. 819, clearly charges the Attorney-General with a duty in relation to the enforcement of the act in question. Southern R. Co. v. McNeill, 155 Fed. 756, 775.

Procedure.—The section provides that the Commission, whenever in its judgment any corporation has violated any law, shall first give notice of such violation to the offending corporation, and, in the event of a failure on the part of such corporation to comply with the law, to present the facts to the Attorney-General. Southern R. Co. v. McNeill, 155 Fed. 756, 775.

§ 62-64. Utilities commission authorized to enter agreement of indemnity as to oyster beds in New River.—The utilities commission is authorized and empowered to enter into a contract with the United States or the Secretary of War on behalf of the State of North Carolina, by the terms of which it shall be agreed that the State of North Carolina will save the United States free from liability for damages to oyster beds in New River arising from the dredging and maintenance of a channel ten feet deep and ninety feet wide therein, between the Inland Waterway and Jacksonville: Provided, the liability of the State of North Carolina under such contract shall not exceed the total sum of five thousand dollars ($5,000).

The enactment of this statute shall not be treated or considered as any admission on the part of the State that the owner of such oyster beds who have not executed waivers or releases prior to February 24, 1939, shall be entitled to any damages by reason of the dredging and maintenance of the said channel, and no payment shall be made on account of such claims unless and until the owners of such oyster beds shall show that there has been sustained actual damages to such oyster beds on account of the dredging and maintenance of said channel. (1939, c. 51; 1941, c. 97.)

Art. 4. Public Utilities Act of 1933

§ 62-65. Definitions.—(a) The term "corporation," when used in this article, includes a private corporation, an association, a joint stock association or a business trust.

(b) The term "person," when used in this article, includes a natural person, a partnership or two or more persons having a joint or common interest, and a corporation as hereinbefore defined.

(c) The term "municipality," when used in this article, includes a city, a county, a village, a town, and any other public corporation existing, created or organized as a governmental unit under the constitution or laws of the State.

(d) The term "commission" shall mean the utilities commission.

(e) The term "public utility," when used in this article, includes persons and corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for:

(1) Producing, generating, transmitting, delivering or furnishing gas, electricity, steam or any other agency for the production of light, heat or power to or for the public for compensation;

(2) Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation;

(3) Transporting persons or property by street, suburban or interurban railways for the public for compensation;

(4) Transporting persons or property by motor vehicles for the public for compensation, but not including taxicab, operating on call, or truck transfer service in cities or towns;

(5) Transporting or conveying gas, crude oil or other fluid substance by pipe line for the public for compensation;

(6) Conveying or transmitting messages or communications by telephone or telegraph, where such service is offered to the public for compensation;

(7) The term "public utility" shall for rate making purposes only include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.

The term "public utility" shall not include any person not otherwise a public utility, who furnishes the services or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others. The business of any public utility other than of the character defined in subdivisions 1 to 7, inclusive, of subdivision (e) of this section is not subject to the provisions of this article.

(f) The term "rate," when used in this article, means and includes every compensation, charge, fare, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service, product or commodity offered by it to the public, and any rules, regulations, practices or contracts affecting any such compensation, charge, fare, toll, rental or classification. (1933, c. 307, s. 1; c. 134, s. 8; 1941, c. 97.)

The provisions of this article as to rate regulation are not in conflict with chapter 75. Bennett v. Southern Ry. Co., 211 N. C. 474, 191 S. E. 240.

Cited in Russ v. Western Union Tele. Co., 222 N. C. 504, 23 S. E. (2d) 681.

§ 62-66. Rates must be just and reasonable.—Every rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable. (1933, c. 307, s. 2.)

§ 62-67. Service.—Every public utility shall furnish adequate, efficient and reasonable service. (1933, c. 307, s. 3.)

§ 62-68. To file rate schedules with commission.—Under such rules and regulations as the commission may prescribe, every public utility shall file with the commission, within such time and in such form as the commission may designate, schedules showing all rates established by it and

collected or enforced, or to be collected or enforced within the jurisdiction of the commission. The utility shall keep copies of such schedules open to public inspection under such rules and regulations as the commission may prescribe. (1933, c. 307, s. 4.)

Cited in Russ v. Western Union Tele. Co., 222 N. C. 504, 23 S. E. (2d) 681; High Point v. Duke Power Co., 34 F. Supp. 339.

§ 62-69. Rates varying from schedule prohibited. —No public utility shall directly or indirectly, by any device whatsoever, or in any wise, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such public utility than that prescribed in the schedules of such public utility applicable thereto then filed in the manner provided in this article, nor shall any person receive or accept any service from a public utility for a compensation greater or less than that prescribed in such schedules. (1933, c. 307, s. 5.)

Where, at termination of contract between city and electric company, city officials were doubtful whether it would be advantageous to adopt new schedule of electric company and elected to take current on basis from month to month, electric company was not exacting an unlawful rate by billing the city for current on rates contained in old contract rather than under new schedule. High Point v. Duke Power Co., 34 F. Supp. 339.

Cited in Russ v. Western Union Tele. Co., 222 N. C. 504, 23 S. E. (2d) 681.

§ 62-70. Discrimination prohibited. — No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. The commission may determine any questions of fact arising under this section. (1933, c. 307, s. 6.)

Editor's Note.—For a discussion of this and related sections, see 11 N. C. Law Rev. 246.

Party Entitled to Injunctive Relief.—Where certain carriers by truck sought injunctive relief against railroad carriers for discrimination in rates against certain cities and against certain commodites, it was held that the basis for injunctive relief must be an interference or threatened interference with a legal right of the petitioner, not of a third party and that the shippers would be the real parties in interest, not the contract truck carriers. Carolina Motor Service v. Atlantic Coast Line R. Co., 210 N. C. 36, 38, 185 S. E. 479, 104 A. L. R. 1165.

§ 62-71. Change of rates.—Unless the commission otherwise orders, no public utility shall make any changes in any rate which has been duly established under this article, except after thirty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The utility shall also give such notice of the proposed changes to other interested persons as the commission in its discretion may direct. All proposed changes shall be shown by filing new schedules, or shall be plainly indicated upon schedules filed and in force at the time and kept open to public inspection. The commission, for good cause shown, may allow changes in rates, without requiring the thirty days' notice, under such conditions as it may prescribe. All such changes shall be immediately indicated upon its schedules by such public utility.

Whenever there is filed with the commission by any public utility any schedule stating a new rate or rates, the commission may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the utility affected thereby a statement in writing of its reasons therefor, may, at any time before they become effective, suspend the operation of such rate or rates, but not for a longer period than ninety (90) days beyond the time when such rate or rates would otherwise go into effect unless the commission shall find that a longer time will be required, in which case the commission may extend the period for not to exceed six (6) months: Provided, and notwithstanding any such order of suspension, the public utility may put such suspended rate or rates into effect on the date when it or they would have become effective, if not so suspended, by filing with the commission a bond in a reasonable amount approved by the commission, with sureties approved by the commission, conditioned upon the refund, in a manner to be prescribed by order of the commission to the persons entitled thereto of the amount of the excess, if the rate or rates so put into effect are finally determined to be excessive; or there may be substituted for such bond, other arrangements satisfactory to the commission for the protection of the parties interested. If the public utility fails to make refund within thirty (30) days after such final determination, any person entitled to such refund may sue therefor in any court of this state of competent jurisdiction and be entitled to recover, in addition to the amount of the refund due, all court costs, but no suit may be maintained for that purpose unless instituted within two years after such final determination. Any number of persons entitled to such refund may join as plaintiffs and recover their several claims in a single action; in which action the court shall render a judgment severally for each plaintiff as his interest may appear. During any such period of suspension the commission may, in its discretion, require that the public utility involved shall furnish to its consumers or patrons a certificate or other evidence of payments made by them. (1933, c. 307, s. 7.)

A public service corporation has a right to maintain optional schedules. High Point v. Duke Power Co., 34 F. Supp. 339.

§ 62-72. Changing unreasonable rates after hearing.—Whenever the commission, after a hearing had after reasonable notice upon its own motion or upon complaint, finds that the existing rates in effect and collected by any public utility for any service, product, or commodity, are unjust, unreasonable, insufficient or discriminatory, or in any wise in violation of any provision of law, the commission shall determine the just, reasonable and sufficient rates to be thereafter observed and in force, and shall fix the same by order as hereinafter provided. (1933, c. 307, s. 8.)

§ 62-73. Compelling telephone and telegraph

companies to form continuous lines to certain points.—The commission may upon complaint, in writing, by any person, or on its own initiative after a hearing on reasonable notice, by order require any two or more telephone or telegraph companies whose lines or wires form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections or the joint use of equipment, or the transfer of messages at common points, between different localities which can not be communicated with or reached by the lines of either company alone, where such service is not already established or provided, to establish and maintain through lines within the state between two or more such localities. The rate for such service shall be just and reasonable and the commission shall have power to establish the same, and declare the portion thereof to which each company affected thereby is entitled and the manner in which the same must be secured and paid. All necessary construction, maintenance and equipment in order to establish such service shall be constructed and maintained in such manner and under such rules, with such division of expense and labor as may be required by the commission. (1933, c. 307, s. 9.)

§ 62-74. Compelling efficient service after hearing.—Whenever the commission, after a hearing after reasonable notice had upon its own motion or upon complaint, finds that the service of any public utility is unreasonable, unsafe, inadequate, insufficient or unreasonably discriminatory, the commission shall determine the reasonable, safe, adequate sufficient service to be observed, furnished, enforced or employed and shall fix the same by its order, rule or regulation. (1933, c. 307, s. 10.)

§ 62-75. Fixing standards, classifications, etc.; testing service. — The commission may, after hearing upon reasonable notice had upon its own motion or upon complaint, ascertain and fix just and reasonable standards, classifications, regulations, practices or service to be furnished, imposed, observed and followed by any or all public utilities; ascertain and fix adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage or other condition pertaining to the supply of the product, commodity or service furnished or rendered by any and all public utilities; prescribe reasonable regulations for the examination and testing of such product, commodity or service and for the measurement thereof; establish or approve reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurement; and provide for the examination and testing of any and all appliances used for the measurement of any product, commodity or service of any public utility. (1933, c. 307, s. 11.)

§ 62-76. Valuing and revaluing utility property.—The commission may, on hearing after reasonable notice, ascertain and fix the value of the whole or any part of the property of any public utility insofar as the same is material to the exercise of the jurisdiction of the commission, and may make revaluations from time to time and ascertain the value of all new construction, extension and additions to the property of every public utility. (1933, c. 307, s. 12.)

§ 62-77. Establishment of accounting system. —The commission may establish a system of accounts to be kept by the public utilities, subject to its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and prescribe the manner in which such accounts shall be kept. (1933, c. 307, s. 13.)

§ 62-78. Visitorial and inspection powers of commission.—The commissioners and the officers and employees of the commission may during all reasonable hours enter upon any premises occupied by any public utility, for the purpose of making the examinations and tests and exercising any power provided for in this article, and may set up and use on such premises any apparatus and appliances necessary therefor. Such public utility shall have the right to be represented at the making of such examination, tests and inspections. (1933, c. 307, s. 14.)

§ 62-79. Annual reports. — The commission may require any public utility to file annual reports in such form and of such content as the commission may require and special reports concerning any matter about which the commission is authorized to inquire or to keep itself informed, or which it is required to enforce. All reports shall be under oath when required by the commission. (1933, c. 307, s. 15.)

§ 62-80. Investigation into management of utilities. — The commission may, on its own motion and whenever it may be necessary in the performance of its duties, investigate and examine the condition and management of public utilities or any particular utility. In conducting such investigations the commission may proceed either with or without a hearing as it may deem best, but it shall make no order without affording the parties affected thereby a hearing. (1933, c. 307, s. 16.)

§ 62-81. Permission to pledge assets or pay fees. —No public utility shall pledge its faith, credit, moneys or property for the benefit of any holder of its preferred or common stocks or bonds, nor for any other business interest with which it may be affiliated through agents or holding companies or otherwise by the authority of the action of its stockholders, directors, or contract or other agents, the compliance or result of which would in any manner deplete, reduce, conceal, abstract or dissipate the earnings or assets thereof, decrease or increase its liabilities or assets, without first making application to the commission and by order obtain its permission so to do; nor shall any such utility pay any fees, commissions or compensation of any description whatsoever to any holding, managing, operating, constructing, engineering, financing, or purchasing company or agency including subsidiary or affiliated companies, for services rendered or to be rendered without first filing copies of all proposed agreements and contracts with the commission and obtaining its approval. (1933, c. 307, s. 17.)

§ 62-82. Assumption of certain liabilities and obligations to be approved by commission.—No

utility shall issue any securities, or assume any liability or obligation as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect to the securities of any other person unless and until, and then only to the extent that, upon application by the utility, and after investigation by the commission of the purposes and uses of the proposed issue, and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object within the corporate purposes of the utility, (b) is compatible with the public interest, (c) is necessary or appropriate for or consistent with the proper performance by the utility of its service to the public as such utility and will not impair its ability to perform that service, and, (d) is reasonably necessary and appropriate for such purpose. Any such order of the commission shall specify the purposes for which any such securities or the proceeds thereof may be used by the utility making such application. (1933, c. 307, s. 18.)

§ 62-83. Commission may approve in whole or in part or refuse approval.—The commission, by its order, may grant or deny the application provided for in the preceding section as made, or may grant it in part or deny it in part or may grant it with such modification and upon such terms and conditions as the commission may deem necessary or appropriate in the premises and may, from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate and may, by any such supplemental order, modify the provisions of any previous order as to the particular purposes, uses, and extent to which or the conditions under which any securities so theretofore authorized or the proceeds thereof may be applied; subject always to the requirements of the foregoing section. (1933, c. 307, s. 19.)

§ 62-84. Contents of application for permission.—Every application for authority for such issue or assumption shall be made in such form and contain such matters as the commission may prescribe. Every such application and every certificate of notification hereinafter provided for, shall be made under oath, signed and filed on behalf of the utility by its president, a vice-president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the utility. (1933, c. 307, s. 20.)

§ 62-85. Applications to receive immediate attention; continuances. — All applications for the issuance of securities or assumption of liability or obligation shall be placed at the head of the commission's docket and disposed of promptly, and all such applications shall be disposed of in thirty (30) days after the same are filed with the commission, unless it is necessary for good cause to continue the same for a longer period for consideration. Whenever such application is continued beyond thirty (30) days after the time it is filed, the order making such continuance must state fully the facts necessitating such continuance. (1933, c. 307, s. 21.)

§ 62-86. Notifying commission as to disposition of securities.—Whenever any securities set forth and described in any such application for authority or certificate of notification as pledged or held unincumbered in the treasury of the utility shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of, by the utility, such utility shall, within ten days after such sale, pledge, repledge, or other disposition, file with the commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the commission. (1933, c. 307, s. 22.)

§ 62-87. No guarantee on part of state. — Nothing herein shall be construed to imply any guarantee or obligation as to such securities on the part of the state of North Carolina. (1933, c. 307; s. 23.)

§ 62-88. Article not applicable to note issues; renewals likewise excepted.—The provisions of the foregoing sections shall not apply to notes issued by a utility for the proper purposes and not in violation of law, payable at a period of not more than two (2) years from the date thereof, and shall not apply to like notes issued by a utility payable at a period of not more than two (2) years from date thereof, to pay, retire, discharge, or refund in whole or in part any such note or notes and shall not apply to renewals thereof from time to time not exceeding in the aggregate six (6) years from the date of the issue of the original note or notes so renewed or refunded. No such notes payable at a period of not more than two (2) years from the date thereof, shall, however, in whole or in part, directly or indirectly, be paid, retired, discharged or refunded by any issue of securities of another kind of any term or character or from the proceeds thereof without the approval of the commission. (1933, c. 307, s. 24.)

§ 62-89. Not applicable to debentures of court receivers; notice to commission.—Nothing contained in this article shall limit the power of any court having jurisdiction to authorize or cause receiver's certificates or debentures to be issued according to the rules and practice obtaining in receivership proceedings in courts of equity. Within ten (10) days after the making of any such notes, so payable at periods of not more than two (2) years from the date thereof, the utility issuing the same shall file with the commission a certificate of notification, in such form as may from time to time be determined and prescribed by the commission. (1933, c. 307, s. 25.)

§ 62-90. Periodical or special reports. — The commission shall require periodical or special reports from each utility hereafter issuing any security including such notes payable at periods of not more than two (2) years from the date thereof, which shall show, in such detail as the commission may require, the disposition made of such securities and the application of the proceeds thereof. (1933, c. 307, s. 26.)

§ 62-91. Failure to obtain approval not to invalidate securities or obligations.—(a) Securities issued and obligations and liabilities assumed by a utility, for which under the provisions of this

article the authorization of the commission is required, shall not be invalidated because issued or assumed without such authorization therefor having first been obtained or because issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption. (b) Securities issued or obligations or liabilities assumed in accordance with all the terms and conditions of the order of authorization therefor shall not be affected by a failure to comply with any provision of this article or rule or regulation of the commission relating to procedure and other matters preceding the entry of such order of authorization or order supplemental thereto. (c) A copy of any order made and entered by the commission as in this article provided (duly certified by the clerk of the commission) approving the issuance of any securities or the assumption of any obligation or liability by a utility shall, in and of itself, be sufficient evidence, for all purposes, of full and complete compliance by the applicant for such approval with all procedural and other matters required precedent to the entry of such order. (d) Any utility which willfully issues any such securities, or assumes any such obligation or liability, or makes any sale or other disposition of securities, or applies any securities or the proceeds thereof to purposes other than the purposes specified in an order of the commission with respect thereto, contrary to the provisions of this article, shall be liable to a penalty of not more than ten thousand dollars, but such utility is only required to specify in general terms the purpose for which any securities are to be issued, or for which any obligation or liability is to be assumed, and the order of the commission with respect thereto shall likewise be in general terms. (1933, c. 307, s. 27.)

§ 62-92. Commission may act jointly with agency of another state where utility operates. — If a commission or other agency or agencies is empowered by another state to regulate and control the amount and character of securities to be issued by any public utility within such other state, then the utilities commission of the state of North Carolina shall have the power to agree with such commission or other agency or agencies of such other state on the issue of stocks, bonds, notes or other evidences of indebtedness by a public utility owning or operating a public utility both in such state and in this state, and shall have the power to approve such issue jointly with such commission or other agency or agencies and to issue joint certificate of such approval: Provided, however, that no such joint approval shall be required in order to express the consent to an approval of such issue by the state of North Carolina if said issue is separately approved by the utilities commission of the state of North Carolina. (1933, c. 307, s. 28; c. 134, s. 8; 1941, c. 97.)

§ 62-93. Willful acts of employees deemed those of utility. — The willful act of any officer, agent, or employee of a utility, acting within the scope of his official duties of employment, shall, for the purpose of this article be deemed to be the willful act of the utility. (1933, c. 307, s. 29.)

§ 62-94. Actions to recover penalties. — Actions to recover penalties under this article shall be brought in the name of the state of North Carolina, in the county in which the offense was committed. Whenever any utility is subject to a penalty under this article, the commission shall certify the facts to the attorney-general, who shall institute and prosecute an action for the recovery of such penalty: Provided, the commission may compromise such action and dismiss the same on such terms as the court will approve. (1933, c. 307, s. 30.)

§ 62-95. Penalties to school fund.—All penalties recovered by the state in such action shall be paid into the state treasury to the credit of the school fund. (1933, c. 307, s. 31.)

§ 62-96. Abandonment and reduction of service. —Upon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a utility realizing sufficient revenue from the service to meet its expenses, the commission shall have power, after petition, notice and hearing, to authorize by order any utility to abandon or reduce its service or facilities. (1933, c. 307, s. 32.)

Order Must Be Obtained.—Where a power company discontinued its service for nonpayment of charges, the customer, upon payment of the charges, is entitled to restoration of the service where the company did not obtain an order under this section. Sweetheart Lake v. Carolina Power, etc., Co., 211 N. C. 269, 271, 189 S. E. 785.

§ 62-97. Water gauging stations. — The commission may require the location, establishment, maintenance and operation of water gauging stations, and the commission and the North Carolina department of conservation and development may co-operate with each other as to such locations, construction and reports and upon the results of operation. (1933, c. 307, s. 33.)

§ 62-98. Reports from municipalities operating own utilities. — Every municipality engaged in operating any works or systems for the manufacture and supplying of gas or electricity, or purchasing same for distribution and resale, or operating telephone exchanges, shall make an annual report to the commission, verified by the oath of the general manager or superintendent thereof, on the same blanks as now provided for reports of privately owned utilities, giving the same information as required of such utilities. (1933, c. 307, s. 34.)

§ 62-99. Refusal to permit commission to inspect records made misdemeanor. — Any public utility, its officers or agents in charge thereof, that fails or refuses upon the written demand of the commission, or a majority of said commission, and under the seal of the commission, to permit the commission, its authorized representatives or employees to examine and inspect its books, records, accounts and documents, or its plant, property, or facilities, as provided for by law, shall be guilty of a misdemeanor. Each day of such failure or refusal shall constitute a separate offense and each such offense shall be punishable by a fine of not less than five hundred and not more than five thousand dollars. (1933, c. 307, s. 35.)

§ 62-100. Willful disobedience to orders of commission incurs forfeiture.—Every public utility and the officers, agents and employees there-

of shall obey, observe and comply with every order made by the commission under authority of this article so long as the same shall be and remain in force. Any such person or corporation, or any officer, agent or employee thereof, who knowingly fails or neglects to obey or comply with such order, or any provision of this article, shall forfeit to the state of North Carolina not to exceed the sum of one thousand dollars for each offense. Every distinct violation of any such order or of this article shall be a separate and distinct offense, and in case of a continuing violation each day shall be deemed a separate and distinct offense.

No present provision of law shall be deemed to be repealed by this article except such as are directly in conflict therewith. (1933, c. 307, ss. 36, 37.)

Art. 5. Miscellaneous Provisions as to Public Utilities.

§ 62-101. Certificate of convenience and necessity. — No person, or corporation, their lessees, trustees or receivers shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control of, either directly or indirectly, without first obtaining from the utilities commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation: Provided, that this section shall not apply to new construction in progress on May 27, 1931, nor to construction into territory contiguous to that already occupied and not receiving similar service from another utility, nor to construction in the ordinary conduct of business.

The utilities commission is hereby empowered to make rules governing the application for, and the issuance of such certificates of public convenience and necessity. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97.)

Cross Reference.—As to necessity for certificate of convenience and necessity for housing projects, see § 157-28.

Editor's Note.—For article, "Public Utilities—Rural Electrification Co-operatives—Certificate of Convenience and Necessity," see 16 N. C. Law Rev. 46.

This section is not applicable to an electric membership corporation, organized under the provisions of §§ 117-6 to 117-27. And by reason of the provisions of section 117-27 of the statute under which it was organized, there was no error in the holding of the lower court that the defendant electric membership corporation was not required, before beginning the construction or operation of its facilities for serving its members by furnishing them electricity for lights and power, to obtain from the Utilities Commissioner of North Carolina a certificate that public convenience and necessity requires or will require the construction and operation of said facilities by said defendant. Carolina Power, etc., Co. v. Johnston County Elec. Membership Corp., 211 N. C. 717, 720, 192 S. E. 105.

Cited in Tennessee Elec. Power Co. v. Tennessee Valley Authority 306 U. S. 118, 59 S. Ct. 366, 83 L. Ed. 543; McGuinn v. High Point, 219 N. C. 56, 13 S. E. (2d) 48 (opinion of Clarkson, J.).

§ 62-102. Contracts of public service corporations.—All public service corporations when requested by the utilities commission shall submit copies of contracts made with any person, firm or corporation classed as a holding, managing or operating company or selling service of any kind, and the utilities commission shall have the right to disapprove any such contract, after hearing, if in its judgment it is found to be unjust or unreasonable, and designed, or entered into for the purpose of concealing, abstracting, or dissipating the net earnings of the public service corporation receiving such services. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97.)

Art. 6. Motor Carriers.

§ 62-103. Definitions.—In all matters relating to the administration of this article, whenever and wherever the following terms are used they shall be construed and defined as follows:

(a) The term "article" means this article.

(b) The term "state" means the State of North Carolina.

(c) The term "person" means an individual, a firm or a co-partnership.

(d) The term "corporation" means a corporation, a company, an association or a joint-stock association.

(e) The term "commission" means the Utilities Commission of North Carolina.

(f) The term "certificate" means the franchise certificate, granting authority to a motor vehicle carrier to operate motor vehicle service over a specific route.

(g) The term "driver's permit" means the permit issued, after examination, authorizing a person to drive a motor vehicle operating under the article.

(h) The term "vehicle permit" means the card, or other marker, bearing the identification of the motor vehicle and the highway routing.

(i) The term "motor vehicles" means vehicles driven by gas, oil, electric or steam motors and not operated on rails.

(j) The term "trailer" means a vehicle without attached motor, designed for carrying property wholly on its own structure and for being drawn by a motor vehicle.

(k) The term "motor vehicle carrier" means every corporation or person, as the term "corporation" and the term "person" are hereinbefore defined, or their lessees, trustees or receivers owning, controlling, operating or managing any motor vehicle used in the business of transporting persons or property for compensation between cities, or between towns, or between cities and towns, or over a regular route, over the public highways of the state, as public highways are defined herein.

(l) The term "city" means any collection of people incorporated pursuant to the provisions of section four, article eight, of the Constitution of North Carolina.

(m) The term "town" means any unincorporated community, point, or collection of people having a geographical name by which it may be generally known and is so generally designated.

(n) The term "service" means that motor vehicle service which is held out to the public and of which the public may avail itself at will for transportation over the public highways between cities or between towns, or between cities and towns, irrespective of whether the service is upon regular schedule or otherwise.

(o) The term "public highway" means every street, road or highway in this State, whether within or without the corporate limits of any municipality.

(p) The term "between fixed termini or over a regular route" means the termini or route, respectively, between or over which any motor ve-

hicle carrier usually or ordinarily operates any motor vehicle, even though there may be periodical or irregular departures from such termini or route.

(q) The term "casual trip" means a trip on call for the purpose of transporting passengers or property to a given destination and return, or either.

(r) The term "broker" means any person not included in the term "motor vehicle carrier" and not a bona fide employee or agent of any such carriers, who or which as principal or agent sells or offers for sale any transportation, or negotiates for or holds himself, or itself, out by solicitation, advertisement, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for such transportation for compensation, either directly or indirectly.

(s) The term "forwarder" means any person not included in the terms "motor vehicle carrier" or "broker" as herein defined, who or which issues receipts of billings for property received by it for transportation, forwarding, or consolidating or for distribution by any medium of transportation or combination of mediums of transportation, and who is not a carrier by rail, water, air or express, and other than the operations of a bona fide warehouseman.

(t) The term "restricted common carrier by motor vehicle" means any person not included in the definition "common carrier by motor vehicle" who or which undertakes, whether directly or by lease or other arrangement, to transport passengers or property restricted to any class or classes of passengers or to any class, kind or commodity or property by motor vehicle for compensation, whether over regular or irregular routes, and/or "excursion passenger vehicles" as defined in § 20-38 subsection (q). (1925, c. 50, s. 1; 1927, c. 136, s. 1; 1929, c. 193, s. 1; 1933, c. 134, s. 8; 1937, c. 247, ss. 1, 2; 1941, c. 97.)

Editor's Note.—The Bus Law of 1925 was repealed, amended, and re-enacted by the Act of 1927.

The Act of 1929 amended subsection (q) of this section by striking out the words "under contract or" following the word "trip."

The 1937 amendment inserted the words "or over a regular route" in subsection (k), and added subsections (r), (s) and (t).

Purpose of Article.—It was the intent of this statute, to regulate the public service of automobiles on the highways of the State between cities and towns through classifications of the commission requiring a license therefor, and making a violation thereof indictable as a criminal offense. State v. Andrews, 191 N. C. 545, 132 S. E. 568.

Article Contemplates a Continuous Business.—This statute contemplates a continuous business. The "service" rendered in contemplation of this statute construed with the classifications made by the commission, does not include within the intent and meaning thereof an occasional service rendered at the request of the passenger, and not constituting a regular business of practice of a public service between or at the termini of designated or fixed routes, and an indictment under it will not be upheld. State v. Andrews, 191 N. C. 545, 132 S. E. 568.

§ 62-104. To whom applicable.—No corporation or person, their lessees, trustees, or receivers shall operate over the public highways in this state any motor vehicle or motor vehicle with trailer, as hereinbefore defined as a motor vehicle carrier, for the transportation of persons or property between cities, or between towns, or between cities and towns, or over a regular route, for compensation, except in accordance with the provisions of this article, and said operation shall be subject to control, supervision, and regulation by the commission in the manner provided by this article: Provided, that where the corporate limits of two or more cities join, they shall be treated as one for purposes of administering this article: provided, further, that nothing in this article shall prohibit a motor vehicle carrier under this article, nor any motor vehicle on which the franchise tax has been paid as provided in the current revenue act, from making casual trips on call over routes established hereunder; provided, that on said casual trips no one shall be allowed to pick up any passenger or property along the route, nor be permitted on the return trip to carry any passengers or property other than those or that included in the original trip; nor shall it apply to motor vehicles used exclusively for transporting school students from and to their homes; nor to motor vehicles used exclusively for transporting persons to or from religious services; nor to motor vehicles used exclusively in carrying the United States mail; nor to motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to warehouse, creamery or other original storage or market; nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors; nor to motor vehicles used exclusively in the transportation of bona fide employees of an industrial plant to and from the places of their regular employment: Provided, that if a franchise operator shall furnish such transportation facilities to such mill or factory maintaining a residential unit of one thousand inhabitants or more, the foregoing exception shall not be operative. (1925, c. 50, s. 2; 1927, c. 136, s. 2; 1929, cc. 193, s. 1, 254, s. 1; 1935, c. 111; 1937, c. 247, s. 2.)

Editor's Note.—This section was twice amended by Public Laws of 1929. Chapter 193 struck out the words "under contract or" following the word "trips" in line 20. Chapter 254 inserted in lines 18 to 20 the words "on which the franchise tax has been paid as provided in the current revenue act" in lieu of the words formerly appearing.

The amendment of 1935 added the proviso at the end of the section and the clause immediately preceding such proviso reading: "nor to motor vehicles used exclusively," etc.

The 1937 amendment inserted the words "or over a regular route" in the eighth line of this section.

A person transporting persons or property by motor vehicle for hire between cities and towns as a business, accepting all persons for the transportation who properly present themselves, must obtain the franchise required by this and the following section, unless he becomes within the exception specifically pointed out, regardless whether or not any other person or corporation holds a valid franchise covering that section of highway, while persons operating motor vehicles for hire without regard to fixed termini are required to obtain only a "for hire" license. Winborne v. Mackey, 206 N. C. 554, 174 S. E. 577; Winborne v. Browning, 206 N. C. 557, 174 S. E. 579.

The requirement of a franchise under this and following section, for hire between fixed termini which are cities or towns, is not affected by the fact that no other person or corporation has a valid franchise covering the same section of highway, nor does the exception relating to U. S. mail apply unless the motor vehicle is used exclusively for carrying mail. Winborne v. Sutton, 206 N. C. 559, 174 S. E. 580.

Motor vehicles are not "used exclusively in carrying United States mail," where they also carry passengers and property for compensation, and such operation does not come within the exception relating to United States mail under this section. Winborne v. Browning, 206 N. C. 557, 559, 174 S. E. 579.

§ 62-105. Application for franchise certificate.—Every corporation or person, their lessees, trustees, or receivers, before operating any motor

vehicle upon the public highways of the State for the transportation of persons or property for compensation, within the purview of this article, shall apply to the commission and obtain a franchise certificate authorizing such operation, and such franchise certificate shall be secured in the manner following:

(a) Application for such certificate shall be made by such corporation or person, their lessees, trustees, or receivers, to the commission in the manner prescribed, and on forms furnished, by the commission.

(b) Upon the filing of said application, the commission may, in its discretion, fix a time and place for the hearing of said application. When the time and place for the hearing has been fixed, the applicant shall, at least ten days prior to said hearing, cause to be published in a newspaper of general circulation in the territory to be served a notice reciting the fact of the filing of said application together with a statement of the time and place for the hearing of said application.

(c) At the time specified in said notice, or at such time as may be fixed by the commission, a public hearing upon said application shall be held by said commission: Provided, that in passing upon applications for certificates, the commission may take into consideration the reliability of the applicant, his court record, and any other matters tending to qualify or disqualify him as a carrier. After such hearing, the commission may issue the license certificate, or refuse to issue it, or may issue it with modifications and upon such terms and conditions as in its judgment the public convenience and necessity may require.

(d) Before granting the franchise certificate to an applicant for operation of passenger or freight motor vehicles over the public highways of the State, the commission shall request and the Highway Commission of the State shall furnish to the commission its recommendations as to the size and weight of the motor vehicles and the type of tires with which said motor vehicles may be equipped, which may be safely operated over said highways and may be operated over the same without greatly damaging them, and such recommendations made by the Highway Commission shall in all cases be observed by the commission in granting franchise certificates to applicants for operation over said highways.

(e) No license certificates shall be issued for the operation on any highway in the State of any motor propelled vehicles of greater width than eighty-six (86) inches and greater loaded weight than fifteen thousand (15,000) pounds for passenger traffic, and greater width than eighty-six (86) inches and greater loaded weight than nine (9) tons for freight traffic, and the commission shall have power at any time, when in its judgment the public convenience or safety requires, or upon request of the Highway Commission, to reduce the size and weight of motor vehicles operated upon the public highways under this article, whether upon hard-surfaced or other types of highway construction.

(f) The commission may refuse to grant any application for a franchise certificate where the granting of such application would duplicate, in whole or in part, a previously authorized similar class of service, unless it is shown to the satisfaction of the commission that the existing operations are not providing sufficient service to reasonably meet the public convenience and necessity and the existing operators, after thirty days' notice, fail to provide the service required by the commission: Provided, that where two or more highways intersect within less than twenty-five miles of any incorporated city and the business of such lines transacted at such intersection is insufficient to warrant the maintenance of a bus station, then the commission may in its discretion route all operators to the next city in which a bus station is established and maintained.

(g) All applications not acted upon by the commission within sixty days from date same were filed because of request of applicant shall become null and void.

(h) No license certificate shall be issued to two or more persons until such persons have executed a partnership agreement and registered the same in each county in which they propose to operate.

(i) Applications may be tentatively granted pending purchase of equipment and equipment specifications and insurance, or bond; but no franchise certificate shall be issued until equipment has been purchased and equipment specifications and insurance, or bond, have been filed and approved.

(j) Franchise certificates may be granted to restricted common carriers as defined herein for any period in the discretion of the commission not to exceed three years.

(k) A brokerage license shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this article and the requirements, rules and regulations of the commission thereunder, and that the proposed service, to the extent to be authorized by the license, is or will be consistent with the public interest and policy declared herein; otherwise, such application shall be denied.

(l) No person shall engage in the business of a forwarder, subject to the provisions of this article, in intrastate operations within this state unless such person makes application to the commission and obtains a certificate issued by the commission authorizing such person to engage in such business as provided herein for other common carriers by motor vehicle: Provided, that where any such forwarder hires instead of owning motor vehicle equipment, such forwarder shall become subject to the provisions herein prescribed for brokers: Provided further, that it shall be unlawful for any such forwarder in the performance of its operation in intrastate commerce to employ or use any motor vehicle carrier which is not the lawful holder of an effective certificate issued as provided in this article. The commission may in any certificate issued restrict or prohibit the direct operation of any motor vehicles by such forwarder in intrastate commerce. Subject to the foregoing part of this subsection (l), a certificate shall be issued to any qualified applicant to conduct the business of for-

warder in whole or in part, if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this article and the requirements rules and regulations of the commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be consistent with the public interest and policy declared by this article: otherwise, such application shall be denied. (1925, c. 50, s. 3; c. 137; 1927, c. 136, s. 3; 1931, c. 182; 1933, c. 440, s. 1; 1937, c. 247, s. 3.)

Editor's Note.—The Act of 1931 added the proviso to subsection (f) of this section.

Prior to the 1933 amendment subsection (f) of this section provided that the commission could not refuse to grant the certificate because of the multiplicity of operators over the proposed route.

The 1937 amendment added subsections (j), (k) and (l).

Quoted in Love v. Queen City Lines, 206 N. C. 575, 577, 174 S. E. 514.

§ 62-106. Franchise certificate. — Upon granting a franchise under this article, the commission shall issue to such applicant a franchise certificate which shall expire automatically three years from the date thereof and shall contain the following matters:

(a) The name and post office address of the grantee.

(b) The public highway or highways over which, and the fixed termini between which, the grantee is permitted to operate.

(c) The kind of transportation, whether passenger or freight, in which the grantee is permitted to engage.

(d) Such additional matters as said commission may deem necessary or proper. (1927, c. 136, s. 4.)

§ 62-107. Sale or other disposition of franchise.—No franchise certificate, issued under the provisions of this article, may be assigned or transferred, or pledged, or hypothecated in any way without the written consent of the commission. (1927, c. 136, s. 5.)

§ 62-108. Insurance. — The commission shall, in granting a franchise certificate, require the applicant to procure and file with the commission acceptable liability and property damage insurance in a company licensed to do business in the State; or, in lieu of such insurance may accept bond with solvent surety, on such motor vehicles to be used in such service, in such amount as the commission may determine, insuring passengers and the public receiving personal injury by reason of an act of negligence arising from the operation of any motor vehicle by the applicant upon the public highways of the State, and for damage to baggage in the custody of the assured and for loss of baggage when checked by the assured; and insuring the passengers and the public receiving personal injury by reason of any act of negligence arising from the operation of any motor vehicle by the applicant upon the route designated in the applicant's franchise certificate, whether such motor vehicle shall be specifically named, numbered or designated in the insurance policy or bond, or not, and whether such motor vehicle be in regular or temporary use by the applicant. Such policy, or bond, shall contain such other conditions, provisions and limitations as the commission may prescribe, and shall be kept in full force and effect. Property carriers may, in the discretion of the commission, be required to secure and file acceptable cargo insurance, or bond, which shall cover damage to or loss of property only when listed on a duly prescribed and authorized bill of lading and receipted for by the assured or his agent. Before final judgment has been rendered by a competent court of jurisdiction, in any cause arising from the operation under any franchise certificate, no attachment shall lie against motor vehicles used in such operation by any motor vehicle carrier, who has filed with the commission such damage liability policy, or bond, so long as such policy or bond is in full force and effect. In any action in the courts arising out of damage to person or property, the assurer shall not be joined in the action against the assured; but upon final judgment against the assured, the assurer shall be liable within the limitations of the policy for the amount recovered and all court costs. Provided, that the commission may permit the filing by any licensed assurer of a uniform master insurance policy contract, the terms of which shall conform to the foregoing, and when approved and accepted by the commission, shall be applicable to all insurance policy contracts filed by such assurer for motor vehicle carriers under this article, and thereafter, so long as the master policy contract shall remain in force, carriers under this article may be permitted to file certificates, in such form as the commission may prescribe, evidencing fleet coverage under the term of such master policy instead of filing a separate individual policy contract in each case: Provided, that brokers and forwarders not operating motor vehicles under a certificate shall be required to file bond to cover financial responsibility not in excess of amounts required by the interstate commerce commission. (1927, c. 136, s. 6; 1937, c. 403; 1941, c. 97.)

Editor's Note.—The 1937 amendment added the two provisos at the end of the section.

See 13 N. C. Law Rev. 101.

Purpose of Section.—It seems that the Legislature enacted this section to meet the decision in Harrison v. Transit Co., 192 N. C. 545, 135 S. E. 460; Williams v. Frederickson Motor Express Lines, 195 N. C. 682, 684, 143 S. E. 256; Brown v. Brevard Auto Service Co., 195 N. C. 647, 143 S. E. 258.

Joinder of Assurer Forbidden.—The provision of this section prohibiting the joinder of the assurer in an action against the assured, relates to the remedy, and its enforcement does not impair the obligations of a continuing contract of indemnity when the injury in suit occurs after the time the act went into effect. Williams v. Frederickson Motor Express Lines, 195 N. C. 682, 143 S. E. 256; Brown v. Brevard Auto Service Co., 195 N. C. 647, 143 S. E. 258.

And where an assurer was joined in such action the complaint was properly dismissed upon demurrer. Williams v. Frederickson Motor Express Lines, 195 N. C. 682, 143 S. E. 256.

Cited in Virginia Beach Bus Line v. Campbell, 73 F. (2d) 97, 98.

§ 62-109. Regulatory powers of commission; separation of races.—The commission is hereby vested with power and authority to supervise and regulate every motor vehicle carrier under this article; to make or approve the rates, fares, charges, classifications, rules and regulations for service and safety of operation and the checking of baggage of each such motor vehicle carrier; to supervise the operation of union passenger stations in any manner necessary to promote harmony among the operators and efficiency of service to the traveling public; to fix and prescribe the speed limit, which may be less but shall

not be greater than that prescribed by law; to regulate the accounts and to require the filing of annual and other reports and of other data by such motor vehicle carriers; to require the increase of equipment capacity to meet public convenience and necessity; and to supervise and regulate motor vehicle carriers in all other matters affecting the relationship between such carriers and the traveling and shipping public. The commission shall have power and authority, by general order or otherwise, to prescribe rules and regulations applicable to any and all motor vehicle carriers, and the said commission is authorized, directed and empowered, whenever the public convenience and necessity may require, to increase, or decrease, or suspend temporarily the service upon any route for which a franchise certificate has been issued; and is hereby authorized, empowered, and directed to see that such rules and regulations and all, and singularly, the provisions of this article are enforced. The commission shall require any motor vehicle carrier operating on a franchise granted by the utilities commission and coming within the provisions of this article, if engaged in the transportation of both white and colored passengers for hire, to provide separate but equal accommodations for the white and colored races at passenger stations or waiting rooms where the carrier receives passengers of both races and/or on all busses or motor vehicles operating on a route or routes over which such carrier transports passengers of both races. Such accommodations may be furnished either by separate motor vehicles or by equal accommodations in motor vehicles. Provided that any requirement as to separate accommodation for the races shall not apply to specially chartered motor vehicles or to negro servants and attendants on their employers, or to officers or guards transporting prisoners; and provided that operators of motor vehicles or bus lines or taxicabs engaged in the transportation of passengers of one race only shall not be required to provide any accommodations for the other race, and provided that an operator shall not be required to furnish any accommodations to the other race over a line or route where he has undertaken and is engaged in the transportation of passengers of only one race, and provided, further, that nothing contained in this section shall be construed to declare operators of busses and/or taxicabs common carriers. (1925, c. 50, s. 4; 1927, c. 136, s. 7; 1929, c. 216, s. 1; 1933, c. 134, s. 8; 1941, c. 97.)

Cross References.—As to separate waiting rooms for races, see § 62-44. As to provisions for equal accomodations for the races traveling by railroad, see § 60-94 to § 60-98.

Editor's Note.—The Act of 1929 added all of this section beginning with the word "The" in line 33.

In Corporation Commission v. Interracial Commission, 198 N. C. 317, 151 S. E. 648 (1930), the Interracial Commission petitioned the Corporation Commission to make regulations to insure the negro traveling public separate but equal accommodations on the busses and in the passenger stations of the respondent bus companies. The petition was dismissed by the Corporation Commission on the ground that it had no power to interpret carriers by bus to be common carriers within the terms of the 1927 statute. On appeal to the Supreme Court it was held, (1) That bus lines operating within the state are common carriers, and (2) That the Corporation Commission has plenary power under the 1927 statute to require bus lines operating between points within the state in carrying passengers for hire to provide separate bus and station accommodations for white and negro passengers.

The legislature has authority to provide reasonable rules and regulations for the supervision of common carriers and to prevent unjust discriminations and preferences. This authority may be delegated to an administrative board or commission. The Corporation Commission is specifically vested by the 1927 statute with power to supervise and regulate motor vehicle carriers in matters affecting the relationship between such carriers and the traveling public. It seems clear from the language of this statute, without necessity of construction by the Corporation Commission, that the motor vehicle carriers provided for were common carriers. In accord with the policy of the state with regard to separation of races in public conveyances, the Commission should have issued orders for segregation upon the petition of the Interracial Commission.

Since the above litigation began, chapter 216, Public Laws of 1929 has gone into effect, but not being necessarily involved in the case was not thereby construed, although the Court discussed it. The statute provides that operators of motor vehicles or bus lines or taxicabs engaged in the transportation of passengers of one race only shall not be required to provide any accommodations for the other race. A state statute which requires the separation of the races, with equal accommodations, is not a denial of equal protection of the laws. But no one can be excluded by a common carrier on account of color, and a state law which authorizes race discrimination by a public carrier of passengers is unconstitutional. It is submitted therefore that the portion of the 1929 statute above set out is contrary to the equal protection clause of the fourteenth amendment.

The statute also provides that nothing contained in this act or the law amended hereby shall be construed to declare operators of busses and/or taxicabs common carriers. This provision appears to be superfluous. Whether a carrier is private or public depends upon the service it renders and not on legislation. Whether the service rendered is public or private depends on the facts, and the fourteenth amendment prevents the legislature from declaring a carrier private or public unless there is a reasonable basis of fact for so doing. 8 N. C. L. Rev. 455.

§ 62-110. Violations investigated; hearing; revocation of license; appeal.—The commission shall, at any time, upon complaint, or upon its own motion, that any operator transporting persons or property by a motor vehicle, licensed under the provisions of this or any other act by the state of North Carolina, is engaged in violating the provisions of this article or any rules or regulations prescribed by the commission, or violating any of the laws of the state with respect to the rights, duties, and privileges of motor vehicle carriers for the transportation of either persons or property on franchise certificate issued under the provisions of this article, cause an order to be issued directing the owner of the motor vehicle alleged to be engaged in any of the acts specified to appear before the commission at a fixed time and place, at which time the commission shall investigate the complaint made; and if the commission shall be satisfied after such hearing that the said motor vehicle carrier has been engaged in practice or practices violating the terms of his franchise or the rules and regulations for the enforcement thereof, or, if not a franchise carrier, has been invading the prerogatives, privileges, or rights of a duly licensed franchise carrier by operating on the route of a common carrier, by soliciting or transporting passengers or property at lower than approved rates for the common carrier, or without a bona fide contract, the commission shall issue an order requiring the suspension of such practice or practices conditioned upon the revocation of the motor vehicle license of the offending party if he shall fail within the time specified by the commission to desist from such offending practice or practices; and upon the failure of any offending motor vehicle carrier to obey such order of the commission, the commision shall certify this fact to the commissioner of motor vehicles,

whereupon the commissioner of motor vehicles shall cause the license or licenses of the offending motor vehicle carrier to be canceled, and such offending carrier who shall thereafter engage in the hauling of any persons or property for compensation shall be guilty of a misdemeanor, and each day's operation shall constitute a separate offense: Provided, the holder of any certificate, franchise or license whose certificate, franchise or license is ordered canceled hereunder shall have the right of appeal to the superior court as is now provided by law for appeals from the commission, but no such holder shall operate pending such appeal unless permitted to do so by order of the commission. (1927, c. 136, s. 8; 1937, c. 247, s. 4; 1941, cc. 36, 97.)

Editor's Note.—This section is leveled at those carriers operating or purporting to operate under contract with particular shippers rather than operating under a franchise and serving the public generally. Such contract carriers must now have bona fide contracts. This probably means that they may not take occasional business, but must have contracts with shippers running over a period of time and calling for continued service. The provisions designed to prevent contract carriers from obtaining business by cutting rates below those of common carriers are a step in the direction already taken by other states which have set up systems of control of private contract motor carriers. 15 N. C. Law Rev. 360, 361.

§ 62-111. Cancellation of franchise certificates.

(a) Franchise certificates issued under this article shall become null and void for the following causes:

(1) For failure for thirty days to pay the franchise tax as provided by law.

(2) For abandonment of authorized operation for a period of thirty days without the written consent of the commission.

(3) For failure to begin operation within thirty days after the issuance of certificate.

(b) Such franchise certificates may be cancelled in the discretion of the commission after ten days' notice for the following causes:

(1) For failure to pay station rent where a station has been designated and the expense apportioned among the operators by the commission.

(2) For failure to provide tickets for sale at the several stations designated by the commission.

(3) For failure to check baggage as provided by this article and the commission's regulations.

(4) For failure to keep equipment in safe and sanitary condition.

(5) For operating a motor vehicle over a route established hereunder without first obtaining a motor vehicle permit therefor.

(6) For operating a motor vehicle over a route established hereunder without having insurance, or bond, as provided in § 62-108 on file with the commission and in full force and effect at the time of the operation of such motor vehicle.

(7) For failure to observe and comply with schedules and tariffs made or approved by and on file with the commission.

(8) For removing a number plate from a motor vehicle designated by the commission for such motor vehicle, or for attaching or placing on a motor vehicle a number plate not authorized or designated therefor.

(9) For the violation of any other provision of this article, or the commission's regulations, or the wilful or negligent violation of any other statute of this State, relating to the use or operation of motor vehicles on the public highways.

(10) For the violation and conviction of the criminal laws of this State, or for such other acts or conduct that may, in the opinion of the commission, disqualify such operator for rendering the public service contemplated by this article.

Sufficient notice shall be deemed to have been given under this article when notice in writing shall have been addressed to an operator and posted by registered mail to the address contained in the certificate with return receipt requested, or when such written notice has been delivered by a duly authorized agent of the commission or by any officer authorized by law to serve process in this State. (1927, c. 136, s. 10.)

Cross References.—As to sale under execution and cancellation of franchise for failure to pay franchise tax, see § 20-99. As to forfeiture of railroad charter for preferences to shippers, see § 60-52.

§ 62-112. Depots and stations. — The commission shall designate the towns and cities in which stations shall be maintained by passenger carriers and shall prescribe the rules and regulations under which the expense shall be borne by the respective carriers using such stations and may prescribe rules and regulations governing the maintenance and operation thereof. (1927, c. 136, s. 11.)

§ 62-113. Inspection of bus stations by State Board of Health; reports; action by N. C. Utilities Commission.—The State Board of Health is hereby authorized and directed to inspect bus stations with reference to general sanitation thereof and upon inspection to file with the bus station manager, the North Carolina Utilities Commission, and any and all bus companies operating into the station a copy of the report of inspection, together with such recommendations as said State Board of Health may make. The North Carolina Utilities Commission, upon the receipt of any report of inspection is authorized and empowered to take such action with reference thereto as the public interest may require. If the North Carolina Utilities Commission shall propose any change with reference to the station inspected, it shall give notice to the bus companies affected of the time and place to be heard in connection therewith, and after hearing, the commission may make such order as in its discretion promotes the public interest. (1941, c. 228.)

§ 62-114. Baggage, express, loading, etc.—The amount of express or baggage that may be carried in any motor vehicle with passengers shall not be greater than can be safely and conveniently carried, without causing discomfort to the passengers; and no motor vehicle shall be operated with any baggage, trunk, crate, or other article extending beyond the running board on the left side of such motor vehicle; doorways and aisles of passenger motor vehicles shall be kept clear of all obstruction, and the front seat of all motor vehicles of greater passenger capacity than seven shall be considered an emergency seat, and no passenger shall be allowed to occupy the same unless all other seats of such vehicle are fully occupied. (1927, c. 136, s. 12.)

§ 62-115. Fares, charges, and free transporta-

tion.—No motor vehicle carrier shall charge, demand, collect, or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares, and charges applicable to such carrier as specified in its tariffs filed with and approved by the commission and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person, firm, copartnership, or corporation, or other organization, or association, privileges or facilities in the transportation of persons or property except such as are regularly and uniformly extended to all; and no such carrier shall, directly or indirectly, issue, give, tender, or honor any free fares except to its bona fide officers, agents, employees, and members of their immediate families, and such persons as the commission may designate in its employ, the employ of the state highway and public works commission and/or the motor vehicle department, for the inspection of equipment and supervision of traffic upon the highways of the state: Provided, that motor vehicle carriers under the article may exchange free transportation within the limits of this section. Provided, that any motor vehicle carrier may carry free any blind preacher within the state of North Carolina upon its busses or motor vehicles operating in the state of North Carolina, under the condition that said preacher shall carry or present to such motor vehicle carrier a certificate showing what church or sect he may represent and that he is in good and regular standing with that denomination or sect. (1927, c. 136, s. 13; 1929, c. 58, s. 1; 1937, c. 247, s. 5; 1941, c. 36.)

Cross Reference.—As to free carriage, see §§ 62-133 and 62-134.

Editor's Note.—The 1937 amendment added the clause relating to employees of the state highway and public works commission and the motor vehicle department.

The act of 1929 added the last proviso to this section.

§ 62-116. Renewal of franchise certificates.—Any holder of a franchise certificate granted under this article, which is in force and effect on the date that such certificate expires automatically under the law, who makes application for the renewal thereof, other qualifications of applicants in the discretion of the commission being equal, shall be given preference over other applicants. (1927, c. 136, s. 14.)

§ 62-117. Foreign and interstate commerce.—Neither this article nor any provisions thereof shall apply or be construed to apply to commerce with foreign nations, or commerce among the several states of this Union, or business conducted for the United States Government, except insofar as the same may be permitted under the Constitution of the United States and the acts of Congress, as construed by the United States Supreme Court. (1927, c. 136, s. 15.)

§ 62-118. Violations. — Every corporation and every officer, agent, or employee of any corporation, and every other person who wilfully violates or fails to comply with, or who procures, aids or abets the violation of any provision of this article, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction or requirement of the commission, made under the provisions of this article, or any part or provision thereof, or who operates any motor vehicle for the transportation of persons or property for compensation while under the influence of intoxicating liquors or drugs or in such a reckless manner or at such a rate of speed as would endanger the safety of the passengers or any other person along such highway, shall be guilty of a misdemeanor, and upon conviction shall be punishable by fine of not less than fifty dollars nor more than five hundred dollars, or imprisonment, in the discretion of the court, or both fine and imprisonment, in the discretion of the court. (1927, c. 136, s. 16.)

§ 62-119. Maintenance of actions; fees; funds for enforcement; conferences, etc.—The commission shall have the right and authority to enforce by injunction or other ancillary remedy the provisions of this article or the rules and regulations made under this article.

(a) Fees.—Each applicant for a certificate shall deposit with the commission as a filing fee the sum of ten dollars ($10.00) at the time of application, and fee of one dollar ($1.00) for each motor vehicle added thereafter; and for annual re-registration for the purchase of license, number plates, or tags, a fee of twenty-five cents (25c) for each motor vehicle so re-registered; and for renewal of certificate, a fee of twenty-five cents (25c) for each motor vehicle being operated under the certificate at the time application for renewal is filed: Provided, that brokers and forwarders not applying for nor holding certificates for the operation of motor vehicles shall deposit a filing fee of twenty-five dollars ($25.00) each at the time of application and twenty-five dollars ($25.00) per annum thereafter in addition to any other tax or fee provided by law. Such fees, when received by the commission, shall be paid forthwith to the state treasurer and credited to the highway fund for enforcement purposes.

(b) Funds for Enforcement.—The highway and public works commission is hereby empowered, with the approval of the director of the budget, from time to time to appropriate sufficient funds for the use of the commission for the reasonable enforcement of this article, to be by him disbursed under the supervision of the director of the budget.

(c) Conferences and Joint Hearings.—The commission or its authorized representative is authorized to confer with and hold joint hearings with the authorities of any other state or representatives of the interstate commerce commission in connection with any matter arising under the Federal Motor Carrier Act, one thousand nine hundred thirty-five, or in establishing jurisdiction under this article or the Federal Act. (1927, c. 136, s. 18; 1937, c. 247, s. 6; 1941, c. 97.)

Editor's Note.—The 1937 amendment added subsections (a), (b) and (c) to this section.

§ 62-120. Construction of article.—Nothing herein contained shall be construed to relieve any motor vehicle carrier, as herein defined, from any regulation otherwise imposed by law or lawful authority; neither shall chapter 136 of the Public Laws of 1927 be construed to affect any obligation arising under duty imposed by nor right of action accruing under chapter 50, Public Laws of 1925, and amendments thereto. (1927, c. 136, s. 20.)

Applied in Kelly v. Hunsucker, 211 N. C. 153, 189 S. E. 664.

§ 62-121. Enforcement employees. — The commission shall have authority to employ such persons as may be necessary to enforce the provisions of this article, and their compensation shall be fixed in the manner now provided by law. (1927, c. 136, s. 21.)

Art. 7. Rate Regulation.

§ 62-122. Commission to fix rates for public utilities.—Subject to the provisions as to passenger rates in the chapter, Railroads, and as to railroad freight rates in this chapter, the commission shall make reasonable and just rates and charges, in intrastate traffic, and regulate the same, of and for—

Cross References.—As to railroad passenger rates, see §§ 60-89 et seq. As to railroad freight rates, see §§ 62-135 et seq. As to utilities commission's authority to fix rates charged by public utilities, see also § 62-36. As to penalty for overcharge, see § 60-110. As to the regulation of rates for ferries connecting links of the state highway system, see §§ 136-84 and 136-85.

Editor's Note.—See 12 N. C. Law Rev. 289, 294, for article on "Electric Rates."

General Rate Fixing Power.—By the section the Commission is given broad and general powers to make rates for freight and passengers service. Tilley v. Norfolk, etc., R. Co., 162 N. C. 37, 39, 77 S. E. 994.

Duty to Fix Rates.—When the Commission is called upon, by either a corporation or those to whom the services are rendered, under its franchise to exercise its rate fixing power and authority, it is its duty to fix and establish just and reasonable rates to be charged for such services. Corporation Comm. v. Henderson Water Co., 190 N. C. 70, 72, 128 S. E. 465.

Power to Classify.—The Legislature has absolutely no power to classify persons, natural or artificial, engaged in precisely the same occupation, laying a tax upon some of them and exempting others, or imposing a tax not operating uniformly upon all. Efland v. Southern R. Co., 146 N. C. 135, 143, 59 S. E. 355.

Same—Must Not Be Arbitrary.—In Gulf, etc., R. Co. v. Ellis, 165 U. S. 150, 151, 41 L. Ed. 666, 17 S. Ct. 255, it was said: "The mere fact of classification in rate regulating is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear, not merely that a classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection." Efland v. Southern R. Co., 146 N. C. 135, 140, 59 S. E. 355.

"Traffic" Defined.—The word "traffic," used in the section includes the transportation and also the sale and distribution of the commodities affected. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

1. Railroads, street railways, steamboats, canal and express companies or corporations, and all other transportation companies or corporations engaged in the carriage of freight, express or passengers.

"Company" Defined.—The term "company" was used and intended to include all corporations, companies, firms or individuals who were engaged as common carriers in the transportation of freight. Efland v. Southern R. Co., 146 N. C. 135, 142, 59 S. E. 355.

Supervisory Power of Commission.—The Commission is given general supervision over railways, street railways, and like companies of the State, and empowered to fix such rates, charges and tariffs as may be reasonable and just, having in view the value of the property, the cost of improvements and maintenance, the probable earning capacity under the proposed rates, the sums required to meet operating expenses, and other specific matters pertinent to such an inquiry, and these are police powers delegated to this commission, governmental so far as they extend. In re Southern Pub. Utilities Co., 179 N. C. 151, 152, 101 S. E. 619.

When Fares of Street Railway May Be Raised.—A public service street railway company, operating under a city charter, and under a contract with the city restricting the passenger fare authorized to be charged its patrons, may be authorized by the Commission to raise its charges to its passengers, when in the opinion of the Commission such is necessary for it to properly maintain its system, allowing a reasonable profit, to meet the requirements of the public for adequate, safe, and convenient service. In re Southern Pub. Utilities Co., 179 N. C. 151, 152, 101 S. E. 619.

Cannot Fix Fares by Contract.—A public service railway corporation operating in various localities may not by contract fix its passenger fares and thus prevent the Commission, under the authority conferred by statute, from determining what rates are, under the circumstances, just and reasonable, for such would authorize such companies to discriminate, unlawfully, among its patrons. In re Southern Pub. Utilities Co., 179 N. C. 151, 152, 101 S. E. 619.

2. The transmission and delivery of messages by any telegraph company, and for the rental of telephone and furnishing telephonic communication by any telephone company or corporation.

Telephone System Must Not Discriminate.—In Telegraph Co. v. Telephone Co., 61 Vt. 241, 15 Am. St. Rep. 893, 3 Am. Elec. Cases, at p. 435, it is said: "A telephonic system is simply for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all." Walls v. Strickland, 174 N. C. 298, 300, 93 S. E. 857.

Telephones are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railway company, as a comomn carrier, can rightfully refuse to perform its duty to the public. Telephone Co. v. Telegraph Co., 66 Md., 399, at p. 414, 59 Am. Rep., 167; quoted with approval in Walls v. Strickland, 174 N. C. 298, 300, 93 S. E. 857.

In Clinton-Dunn Tel. Co. v. Carolina Tel. Co., 159 N. C. 9, 16, 74 S. E. 636, the court says of the duty and the remedy: "It is very generally recognized that a telephone company acting under a quasi public franchise, is properly classified among the public-service corporations, and as such is subject to public regulations and reasonable control, and is required to afford its service at uniform and reasonable rates and without discrimination among its subscribers and patrons for like service under the same or substantially similar conditions." Godwin v. Telephone Co., 136 N. C. 258, 48 S. E. 636; Walls v. Strickland, 174 N. C. 298, 300, 93 S. E. 857.

Same—Preference to Railroad. —A contract whereby a telegraph company gives to a railroad company a preference of business over its line to the exclusion of others is an illegal discrimination. Leavell v. Western Union Tele. Co., 116 N. C. 211, 21 S. E. 391.

Mandamus to Compel Telephonic Accommodations. — In Godwin v. Telephone Co., 136 N. C. 258, 259, 48 S. E. 636, the court declares: "A mandamus lies to compel a telephone company to place telephones and furnish telephonic facilities without discrimination for those who will pay for the same and abide by the reasonable regulations of the company." State v. Telephone Co., 52 Am. Rep. 404; Am & Eng. Ency. (2d Ed.), 1022, 19 ib., 877; Joyce on Electric Law, sec. 1036; Walls v. Strickland, 174 N. C. 298, 300, 93 S. E. 857.

When Message Transmitted Over Lines of Another Company.—Where a telegraph company has a continuous line between two points in this State, the fact that, in transmitting a message, it sent the message over the lines of another company does not excuse its violation of the rate prescribed by the Railroad Commission for the transmission of a message sent over the lines of one company. Leavell v. Western Union Tele. Co., 116 N. C. 211, 21 S. E. 391.

Messages Traversing Another State.—Telegraphic messages transmitted by a company from and to points in this State, although traversing another State in the route, are subject to the tariff regulations of the Commission of this State. State v. Western Union Tele. Co., 113 N. C. 213, 18 S. E. 389.

Public Duty to Transmit Messages.—It is the duty of a telegraph company to have sufficient facilities to transmit all the business offered to it for all points at which it has offices, since it is not a mere private duty but a public duty which its franchise authorizes it to perform. Leavell v. Western Union Teleg. Co., 116 N. C. 211, 21 S. E. 391.

Power to Ascertain Corporation in Control.—The Commission has the incidental power (subject to the right of appeal) to ascertain what particular corporation is in the control of or operates any line in this State, in order that it may exercise its authority to fix rates, as well as to know against whom to proceed for a violation of its regulations. State v. Western Union Teleg. Co., 113 N. C. 213, 18 S. E. 389.

Cited in Russ v. Western Union Tel. Co., 222 N. C. 504, 23 S. E. (2d) 681.

3. Persons, companies and corporations, other than municipal corporations, engaged in furnishing electricity, electric lights, current, power or gas, or owning or operating a public sewerage system in North Carolina.

Discrimination Remedied by Mandamus.—Where a public-service corporation has discriminated among its patrons in its charges for the same or similar service, a mandamus will lie to compel it to charge a uniform or undiscriminating rate; for the question does not require the courts to fix a rate, or pass upon its reasonableness, the lowest rate charged becoming, automatically, the proper one. North Carolina Public Service Co. v. Southern Power Co., 179 N. C. 18, 101 S. E. 593.

Rates Coextensive with State's Jurisdiction.—When the Commission has finally established, under the provisions of the statute, rates to be charged by a public-service corporation for furnishing electrical power, the rates are coextensive with the State's jurisdiction and territory, and conclusively bind all corporations, companies, or persons who are parties to the suit and have been afforded an opportunity to be heard. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Police Power of State.—The authority, conferred upon the Commission to establish reasonable and just rates of charges by a public-service corporation for furnishings to its customers electrical power, comes within the police powers of the State, and contracts previously made are subordinate to the public interest that such rates be reasonable and just, and afford the corporation supplying the service a safe return upon its investments, having proper regard to the public interest that plants of this character should be properly run and maintained. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Sale of Electricity Generated in Another State.—While the generation of electricity in another State when transported to purchasers in this State may be regarded as interstate commerce, its distribution and sale here is local to the State, permitting the Commission to establish a just and reasonable rate of charge in conformity with the statutory powers, there being no interfering act of Congress relating to the subject. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Hydroelectric Company Authorized to Sell to Other Companies.—Where a public-service corporation engages in a class of business authorized by its charter, it dedicates its property to that particular class of use, and where a hydroelectric company having a monopoly has been authorized by its charter to sell to other electric companies, etc., power, etc., for retail or distribution among customers, it may not resist the jurisdiction of our courts upon the ground that they were not legally required to do so, though the distributing or retail company is in some sense a competitor, and has the charter right to generate or manufacture its own electricity. North Carolina Pub. Service Co. v. Southern Power Co., 179 N. C. 18, 101 S. E. 593.

4. The through transportation of freight, express or passengers.

5. The use of railway cars carrying freight or passengers.

6. And shall make rules and regulations as to contracts entered into by any railroad company or corporation to carry over its line or any part thereof the car or cars of any other company or corporation.

7. And it shall make, require or approve for intrastate shipments what is known as milling-in-transit, or warehousing in transit rates on grain, or lumber to be dressed, or cotton or peanuts or tobacco.

Editor's Note.—This subsection was amended by c. 37 of the Acts of 1925, by adding at the end the provision giving the Commission "authority to make, require and approve what is known as warehousing-in-transit rates on cotton." Chapter 82 and 91 of the Public Laws of 1929, which are identical, substituted the above in lieu of the subsection as amended by the 1925 act.

Milling in Transit.—"Milling in Transit," is where freight is shipped a long distance and the carrier will, at his own cost, defray the expense of its change in form en route because of the easier handling in a more compact shape, as, for example, Cowan v. Bond, 39 Fed. 54, where a railroad company receiving cotton in Louisiana for shipment to mills in New England had it compressed en route at Vicksburg at its own expense, charging the shipper no more than if it had carried the uncompressed cotton all the way, the same privilege being open to all shippers. Lumber Co. v. Railroad, Discrimination Case, 136 N. C. 479, 486, 48 S. E. 813.

8. And, conjointly with such railroad companies, shall have authority to make special rates for the purpose of developing all manufacturing, mining, milling and internal improvements in the state.

Nothing in this chapter shall prohibit railroad or steamboat companies from making special passenger rates with excursion or other parties, also rates on such freights as are necessary for the comfort of such parties, subject to the approval of the commission.

The powers vested in the commission by this section over the several subjects enumerated shall be the same as that vested in it in respect to railroads and other transportation companies. (Rev., ss. 1096, 1099; 1899, c. 164, ss. 2, 14; 1903, c. 683; 1907, c. 469, s. 4; 1913, c. 127, s. 2; 1917, c. 194; 1925, c. 37; 1929, cc. 82, 91; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1066.)

§ 62-123. Rates established deemed just and reasonable.—The rates or charges established by the commission shall be deemed just and reasonable, and any rate or charge made by any corporation, company, copartnership or individual engaged in the businesses enumerated in the preceding section other than those so established shall be deemed unjust and unreasonable. Provided, however, that upon petition filed by any shipper or receiver of freight, and a hearing thereon, if the commission shall find the rates or charges collected to be unjust, unreasonable, discriminatory or preferential, the commission may enter an order awarding such petitioner a sum equal to the difference between such unjust, unreasonable, discriminatory or preferential rates or charges and the rates or charges found by the commission to be just and reasonable, nondiscriminatory and nonpreferential upon all shipments made or received by said petitioner within two years prior to the filing of such petition; provided, however that this shall only apply to charges assessed and collected on and/or after March 19, 1929. (1913, c. 127, s. 3; 1929, cc. 241, 342; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1067.)

Editor's Note.—This section was amended twice by Public Laws of 1929. Chapter 241 inserted the first proviso and Chapter 342 added the other.

Burden of Proof.—The rates or charges, established by the Commission, shall be deemed just and reasonable. The burden was therefore upon the appellant to offer evidence sufficient for the jury to find upon appeal and under the instructions of the court, that the schedule of rates established by the Commission, in this case, was not just and reasonable to both petitioner and respondent. Corporation Comm. v. Henderson Water Co., 190 N. C. 70, 72, 128 S. E. 465.

Rates Other Than Those Fixed Deemed Unjust.—Including public-service corporations furnishing their customers electricity for power, etc., the Commission is authorized by statute to fix just and reasonable rates of charges, and when these rates are so fixed, other or lower rates are to be deemed as unjust and unreasonable. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Deemed Reasonable Until Modified.—Under the provisions of our statute, § 62-20, any party affected by the order of the Commission as to rates or charges for passengers by a street railway company, etc., is given the right of appeal to the courts from such order, and the charges so fixed are to be considered just and reasonable charges for the services rendered, unless and until they shall be changed or modified on appeal or by the further action of the commis-

sion itself. State v. Seaboard Air Line Ry. Co., 173 N. C. 413, 92 S. E. 150, was approved. In re Southern Pub. Utilities Co., 179 N. C. 151, 101 S. E. 619.

Cited in Russ v. Western Union Tel. Co., 222 N. C. 504, 23 S. E. (2d) 681.

§ 62-124. How maximum rates fixed.—In fixing any maximum rate or charge, or tariff of rates or charges for any common carrier, person or corporation subject to the provisions of this chapter, the commission shall take into consideration if proved, or may require proof of, the value of the property of such carrier, person or corporation used for the public in the consideration of such rate or charge or the fair value of the service rendered in determining the value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all its property within the state; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person or corporation, and all other facts that will enable it to determine what are reasonable and just rates, charges and tariffs. (Rev., s. 1104; 1899, c. 164, s. 2, subsec. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1068.)

Editor's Note.—See 12 N. C. Law Rev. 289, 298, for comment on this section.

Section Controls.—In establishing rates the Commission is governed and controlled by the provision of this section. Southern R. Co. v. McNeill, 155 Fed. 756, 769.

Word "Maximum" Explained.—The word "maximum," used in an order of the Commission for fixing the rates of charges allowed to a petitioning public-service corporation, was not intended to mean that a descending rate therefrom was to be allowed under the contract set up by the customers or users, but to distinguish it from the word "minimum," which also was used in reference to the subject. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

Manner of Arriving at Rate. — Under the provisions of this section, which is a valid statute, the Commission, in fixing a reasonable and just rate of charges for public-service corporations, may make a fair estimated value of the property presently used, and in relation thereto consider the tax valuation of the plant. State v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178.

§ 62-125. Hearing before utilities commission upon request for change of rates, etc.—Whenever there shall be filed with the utilities commission any schedule stating an increase in any new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a public carrier or carriers by railroad, or express, or highway, or water, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing and its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, for a period of ninety days, and if the proceeding has not been concluded and a final order made within such period, the commission may, from time to time, extend the period of suspension by order, but not for a longer period in the aggregate than one hundred and eighty days beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, may go into effect at the end of such period. At any hearing involving a rate, fare, charge, or classification, increased or sought to be increased, or involving a rule, regulation, or practice, resulting in an increase, the burden of proof shall be upon the carrier to show that the increased rate, fare, charge, or classification, or rule, regulation, or practice, or the proposed increased rate, fare, charge, or classification, or the proposed rule, regulation, or practice, is just and reasonable. (1939, c. 365, s. 3; 1941, c. 97.)

§ 62-126. Notice required for increase in rates, etc.—No increase shall be made in any rate, fare, charge, or classification, nor shall any change be made in any rule, regulation, or practice, the result of which will be an increase, which has been published and filed by any of the transportation companies named in the preceding section, except upon not less than thirty days' notice to the commission and the public: Provided, that the commission may, in its discretion, and for good cause shown, authorize the publication and filing of increased rates, fares, charges, or classification, or rules, regulations, or practices, upon less than thirty days' notice. (1939, c. 365, s. 4; 1941, c. 97.)

§ 62-127. Revision of rates. — The commission shall from time to time, and as often as circumstances may require, change and revise or cause to be changed or revised any schedules of rates fixed by the commission, or allowed to be charged by any carrier of freight, passengers, or express, or by any telegraph or telephone company. The powers of the commission, under this section, shall be exercised with respect to railroad freight and passenger rates under the limitations prescribed by article 8 of this chapter and article 12 of the chapter entitled Railroads. (Rev., s. 1106; 1899, c. 164, s. 7; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1071.)

Cross Reference.—As to limitation of powers of utilities commission over railroad passenger rates, see § 60-93.

Limitation on Rate Fixing Authority.—Article 8 herein referred to is chapter 20, Laws Extra Session 1913, and it limited the authority of the Commission as to increasing the maximum rates for freight carriers. Corporation Comm. v. Atlantic Coast Line R. Co., 187 N. C. 424, 429, 121 S. E. 767.

Joint Rate between Lumber Road and Connecting Carrier.—When a lumber road is of standard gauge and of sufficient equipment and extensiveness to affect the interest of the public, the Commission may make a valid order establishing a joint rate of transportation in the same cars between it and a connecting common carrier by rail to points beyond the initial road. Corporation Comm. v. Atlantic Coast Line R. Co., 187 N. C. 424, 121 S. E. 767.

§ 62-128. Long and short hauls.—It shall be unlawful for any common carrier to charge or re-

ceive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this chapter to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the commission, such common carrier may in special cases be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided, that nothing in this chapter contained shall be taken as in any manner abridging or controlling the rates of freight charged by any railroad in this state for conveying freight which comes from or goes beyond the boundaries of the state and on which freight less than local rates on any railroad carrying the same are charged by such railroads. (Rev., s. 1107; 1899, c. 164, s. 14; Ex. Sess. 1913, c. 20, s. 9; 1915, c. 17, s. 1; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1072.)

§ 62-129. Contracts as to rates.—All contracts and agreements between railroad companies as to rates of freight and passenger tariffs shall be submitted to the commission for inspection and correction, that it may be seen whether or not they are a violation of law or the rules and regulations of said commission, and all arrangements and agreements whatever as to the division of earnings of any kind by competing railroad companies shall be submitted to the commission for inspection and approval in so far as they affect the rules and regulations made by the commission to secure to all persons doing business with such companies just and reasonable rates of freight and passenger tariffs, and the commission may make such rules and regulations as to such contracts and agreements as may then be deemed necessary and proper, and any such agreements not approved by the commission, or by virtue of which rates shall be charged exceeding the rates fixed for freight and passengers, shall be deemed, held and taken to be violations of this chapter and shall be illegal and void. (Rev., s. 1108; 1899, c. 164, s. 6; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1073.)

§ 62-130. Rates to be published.—All carriers shall, whenever required by the commission, file with it a schedule of their rates of charges for freight and passengers, and the commission is authorized and required to publish the rates, or a summary thereof, in some convenient form for the information of the public, and quarterly thereafter the changes made in such schedules, if it deems it advisable. (Rev., s. 1109; 1899, c. 164, s. 7; 1907, c. 217, s. 5; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1074.)

Interstate Commerce.—In Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co., 166 N. C. 62, 82 S. E. 1, it was held that the posting of interstate freight charges, required by a provision of the Interstate Commerce Commission, was not necessary to the effectiveness of the schedule of rates, such provision being merely for the convenience of the public. See also Hardware Co. v. Seaboard Air Line, 170 N. C. 395, 86 S. E. 1025.

Effect of Private Agreements.—The rates or transportation allowed are established by the Interstate Commerce Commission, and the State Corporation Commission, which may not be affected by any agreement to the contrary between the carriers or their agents or employees and the shipper; and, notwithstanding such agreement, the carrier may demand and enforce the rates established by law. Southern R. Co. v. Latham, 176 N. C. 417, 97 S. E. 234.

§ 62-131. Interstate commerce. — The utilities commission, or other body charged by law with the supervision and regulation of intrastate rates, is authorized and empowered upon its own investigation to bring such cases before the Interstate Commerce Commission, or other body of the National Government supervising and regulating the interstate freight rates, rules and practices, as in its opinion may be necessary to secure for the receivers and shippers of freight in this State such just and reasonable schedule of freight rates as in its opinion may be necessary; and is authorized to maintain before the courts of this State, or the United States, such action as in its opinion may be necessary for the enforcement of just and reasonable schedules of freight rates. In the performance of this duty the said commission shall receive upon application the services of the Attorney General of the State to represent it before the Interstate Commerce Commission or the courts of this State or the United States. (Rev., s. 1110; 1899, c. 164, s. 14; 1907, c. 469, s. 5; 1929, c. 235; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1075.)

Editor's Note.—The Act of 1929 struck out the former section and inserted in lieu thereof the above.

Cited in Inter-Island Steam Nav. Co. v. Hawaii, 305 U. S. 306, 59 S. Ct. 202, 83 L. Ed. 189.

§ 62-132. Schedule of rates to be evidence.—The schedule of rates fixed by statute or under this article shall, in suits brought against any company wherein is involved the charges of any company for the transportation of any passenger or freight or cars or unjust discrimination in relation thereto, be taken in all courts as prima facie evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freight and cars upon the railroads. All such schedules shall be received and held in all suits as prima facie evidence of the schedules of the commission without further proof than the production of the schedules desired to be used as evidence, with a certificate of the clerk of the commission that the same is a true copy of the schedule prepared or approved by it for the railroad company or corporation therein named. (Rev., s. 1112; 1899, c. 164, s. 7; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1077.)

Prima Facie Evidence.—The schedules of rates are declared to be prima facie evidence that such rates are just and reasonable, by the section, which also provides for the certification of copies of all such schedules by the clerk of the Commission. Tilley v. Norfolk, etc., R. Co., 162 N. C. 37, 39, 77 S. E. 994.

§ 62-133. Commission entitled to free carriage. —The commission and its clerks shall be transported free of charge over all railroads and transportation lines which are under the supervision of the commission; and when traveling on official business, they may take with them experts or other agents whose services they may deem temporarily of public importance. (Rev., s. 1105; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1069.)

§ 62-134. Free carriage.—Nothing in this chapter shall prevent or prohibit—

1. The carriage, storage, or handling of property free or at reduced rates for the United States, state or municipal governments, or for charitable or educational purposes; or for any corporation or association incorporated for the preservation and adornment of any historic spot, or to the employees or officers of such company or association while traveling in the performance of their duties, provided they shall not travel further than ten miles one way on any one trip free of charge or to or from fairs or exhibitions for exhibition thereat.

2. The free carriage of destitute or homeless persons transported by charitable societies, and the necessary agents employed in such transportation; or the free transportation of persons traveling in the interest of orphan asylums or homes for the aged or infirm, or any department thereof, or traveling secretaries of Railroad Young Men's Christian Associations, or ex-Confederate soldiers attending annual reunions.

3. The use of passes for journeys wholly within this state which have been or may be issued for interstate journeys under the authority of the United States interstate commerce commission.

4. The issuance of mileage, excursion or commutation passenger tickets.

5. Common carriers from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes.

6. Common carriers from giving free carriage to their own officers and employees and members of their families, or furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of such common carrier, and the remains of a person killed in the employment of a common carrier, and employees traveling for the purpose of entering the service of such common carrier, and the families of those persons named; also the families of persons killed, and the widows during widowhood, and minor children during minority of persons who died while in the service of such common carrier.

7. The principal officers of any common carrier from exchanging passes, franks or tickets with other common carriers for their officers or employees, and members of their families.

8. Transportation companies from contracting with newspapers for advertising space in exchange for transportation over their lines to such an extent as may be agreed upon between the parties for said consideration.

9. Transportation companies, if they so desire, from furnishing transportation to such agricultural extension and demonstration workers as are engaged in work in the field in efforts to increase production on the farm and to improve the farm home, when such workers are actually engaged in the performance of duties requiring travel.

10. Any common carrier that is operating under lease a railroad in this state, in which the state owns a majority of the capital stock, from giving free carriage, according to the contract of lease, to the officers and their families and the committees of the lessor owning such leased railroad, nor prevent such operating common carrier from issuing annually free transportation to ex-presidents of such lessor owning companies and their families in compliance with the contract of lease entered into by them or according to and for such period of time as may have been prescribed by any by-law of the lessor which was in force at the time such lease was made. (Rev., s. 1105; 1899, c. 164, s. 22; 1899, c. 642; 1901, c. 679, s. 2; 1901, c. 652; 1905, c. 312; 1911, cc. 49, 148; 1913, c. 100; 1915, c. 215; 1917, cc. 56, 160; C. S. 1070.)

Cross References.—As to free transportation by motor carriers, see § 62-115. As to accepting or giving free transportation illegally, see § 60-92.

Unlawful Transportation.—The transportation, by a common carrier, of any person except of the classes specified without charge, is unlawful the offense being the actual free transportation and not the issuance of the free pass. State v. Southern R. Co., 122 N. C. 1052, 30 S. E. 133.

A gratuitous passenger is not in pari delicto with the common carrier. McNeill v. Railroad Co., 135 N. C. 682, 47 S. E. 765.

Injured while Riding on Pass Illegally Issued. — The rights, privileges and protection attaching to the relation of the passenger are imposed by law upon common carriers upon consideration of the public policy, independent of contract, and arise from the nature of their public employment. Hence, one injured while riding on a pass illegally issued may recover from the railroad. McNeill v. Railroad Co., 135 N. C. 682, 47 S. E. 765.

Construction of Penal Statute.—In construing a penal statute prohibiting discrimination between passengers, the construction placed on it by common carriers generally, and by private individuals and officials, will not be considered. State v. Southern R. Co., 122 N. C. 1052, 30 S. E. 133.

Art. 8. Railroad Freight Rates.

§ 62-135. Charging or receiving greater rates forbidden.—No railroad company being engaged in the business of common carrier of property within the state of North Carolina shall charge, take, or receive any sum for carrying property entirely within the state of North Carolina between initial and terminal points which are within the state, greater than the amount specified by the utilities commission for the respective classes and commodities, and for the respective distances except in the manner and to the extent and on the conditions mentioned in this article. (Ex. Sess. 1913, c. 20, s. 5; C. S. 1082.)

Cross References.—As to penalty for discrimination in rates, see §§ 60-5 and 60-6. As to charge in excess of printed tariffs, see § 60-110.

§ 62-136. Application for investigation of rates; appeal; rates pending appeal. — The utilities commission, or such commission or body upon which jurisdiction and power may be conferred to fix rates for the transportation of property to be charged by the railroads doing business in North Carolina, may, and upon request of any person directly interested in such charge shall, under rules and regulations fixed by law or prescribed and established by such commission, hear evidence as to the reasonableness of the maximum rates fixed by law, or by such commission or body, and establish such rates, in the manner prescribed and allowed by law, as may, in the judgment of said commission, be just, subject to the limitations fixed by this article; and from such an order of such commission any

shipper or railroad company directly affected by such order may, under rules and regulations prescribed by law, or under reasonable rules and regulations prescribed by such commission, appeal to the superior court of North Carolina: Provided, that pending the appeal of any railroad company from an order of such commission fixing maximum rates, there shall be no suspension of such order of such commission.

All incorporated cities and towns in the state are deemed to be directly interested in the rates charged for the transportation of property by railroads and other common carriers operating into and out of such municipalities and in any discrimination in such rates and services as between municipalities; and, their welfare being thereby affected, any incorporated city or town in North Carolina is authorized and empowered to file its petition with the utilities commission for investigation and determination of all matters affecting rates for the transportation of property by railroads and other common carriers to or from such municipality, and also to prevent or remove any unfair or unreasonable difference or discrimination, to its prejudice or disadvantage, between the rates or the services at, in or to another such municipality within the state; and such municipality shall have the right, as a party in interest, to be represented and appear before, and to appeal from any decision which may be rendered therein by the utilities commission, in the manner provided by § 62-20. (Ex. Sess. 1913, c. 20, s. 7; 1933, c. 134, s. 8; 1937, c. 401; 1941, c. 97; C. S. 1083.)

Editor's Note.—The 1937 amendment added the second paragraph of this section.

The authority given to municipalities to appear before the utilities commissioner and to appeal from his decisions relates to intrastate rates only, as the commissioner has no authority over interstate rates. 15 N. C. Law Rev. 366.

Commission to Investigate Rates upon Request.—This section expressly confers authority upon the Commission to investigate rates upon the request of any person directly interested. It permits that body to hear evidence as to the reasonableness of the maximum rates fixed by law or by the Commission, and to establish such rates as it may deem just. The authority conferred upon the Commission is plenary. Corporation Comm. v. Atlantic Coast Line R. Co., 187 N. C. 424, 429, 121 S. E. 767.

§ 62-137. Rates between points connected by more than one route.—When there is more than one railroad route between given points in North Carolina, and freight is routed or directed by the shipper or consignee to be transported over a shorter route, and it is in fact shipped by a longer route between such points, the rate fixed by law or by such commission for the shorter route shall be the maximum rate which may be charged, and it shall be unlawful to charge more for transporting such freight over the longer route than the lawful charge for the shorter route. (Ex. Sess. 1913, c. 20, s. 11; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1085.)

§ 62-138. Action for double amount of overcharge; penalty.—Any railroad company in the state of North Carolina which shall charge a rate for transporting property wholly within the state of North Carolina, between terminals within the state, in excess of that fixed by law or by the lawful order of such commission or board, and which shall omit to refund the same within thirty days after written notice and demand of the person or corporation overcharged, shall be liable to an action for double the amount of such overcharge, and to a penalty of ten dollars per day for each day's delay after thirty days from such notice, in case of shipments of less than carload lots, and to a penalty of twenty dollars per day in the event of shipments of carload lots. (Ex. Sess. 1913, c. 20, s. 12; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1086.)

Cross References.—As to overcharge and penalty therefor, see also § 60-110 and § 62-148.

§ 62-139. Double penalty.—Any such railroad company so doing business in the state of North Carolina that shall knowingly charge a rate in excess of that fixed by law or by such board or commission, for shipments wholly within the state, shall be subject to a penalty and shall pay double the penalty above prescribed. (Ex. Sess. 1913, c. 20, s. 13; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1087.)

§ 62-140. Persons to receive penalties; accounts and receipts kept separate.—The penalties herein provided for shall be payable to the person or corporation who pays the freight or against whom the freight is charged, and such person or corporation may sue such railroad company and recover such penalty and the amount of such overcharge. The commission shall require the railroad companies, and may require all other such public-service companies as are mentioned in this chapter, to keep separate the cost of doing interstate and intrastate business in North Carolina, and to keep separate receipts from the respective classes, and to direct the manner of keeping the accounts, and to enforce, by penalties, contempt, or otherwise as the law provides, obedience to its orders. (Ex. Sess. 1913, c. 20, s. 14; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1088.)

Art. 9. Penalties and Actions.

§ 62-141. For violating rules.—If any railroad company doing business in this state by its agents or employees shall be guilty of the violation of the rules and regulations provided and prescribed by the commission, and if after due notice of such violation given to the principal officer thereof, if residing in the state, or, if not, to the manager or superintendent or secretary or treasurer if residing in the state, or, if not, then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation as may be directed by the commission shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of five hundred dollars. (Rev., s. 1086; 1899, c. 164, s. 15; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1105.)

Section Is Valid.—The section giving authority to the Commission after notice for failure of any railroad company to make full and ample recompense for the violation of such rules and regulations to proceed in the courts, to enforce the penalties to be prescribed herein for such violation is valid without providing in detail the methods of procedure. Atlantic Exp. Co. v. Wilmington, etc., Railroad, 111 N. C. 463, 16 S. E. 393.

Duty to Enforce Rules and Orders.—While the Commission has no power to render a judgment for the payment of money, etc., it is their duty to enforce their rules and orders, and the power to do so is given by this section. State v. Southern R. Co., 147 N. C. 483, 489, 61 S. E. 271.

Right to Investigate Complaint.—Under this section the commission had the undoubted right and it was eminently proper for them to institute an inquiry and inform them-

selves as to whether a complaint was grounded in truth. They were not required to institute an action for the penalty simply because a citizen feeling himself aggrieved had made a complaint before them. They did right to investigate the matter for themselves, but the end of such investigation was simply to afford them information and enable them to act intelligently in determining whether they would sue for the penalty of $500 given by the statute. State v. Southern R. Co., 147 N. C. 483, 490, 61 S. E. 271.

§ 62-142. Refusing to obey orders of commission.—Any railroad or other corporation which violates any of the provisions of this chapter or refuses to conform to or obey any rule, order or regulation of the utilities commission shall, in addition to the other penalties prescribed in this chapter, forfeit and pay the sum of five hundred dollars for each offense, to be recovered in an action to be instituted in the superior court of Wake County, in the name of the state of North Carolina on the relation of the utilities commission; and each day such company continues to violate any provision of this chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the utilities commission shall be a separate offense. (Rev., s. 1087; 1899, c. 164, s. 23; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1106.)

§ 62-143. Discrimination between connecting lines.—All common carriers subject to the provisions of this chapter shall according to their powers afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and freights to and from their several lines and those connecting therewith, and shall not discriminate in their rates, routes and charges against such connecting lines, and shall be required to make as close connection as practicable for the convenience of the traveling public. And common carriers shall obey all rules and regulations made by the commission relating to trackage. (Rev., s. 1088; 1899, c. 164, s. 21; 1933, c. 134, s. 8; 1935, c. 258; 1941, c. 97; C. S. 1107.)

Cross Reference.—See also, § 60-7.

Editor's Note.—The amendment of 1935 inserted the word "routes" making the section applicable as to discrimination as to routes.

As to the practice of specifying in published tariffs particular routes formed with connecting carriers, see foot note, 13 N. C. L. Rev. 364.

Declaratory of Common Law.—A similar section in the act creating the Railroad Commission was held, in Atlantic Exp. Co. v. Wilmington, etc., R. Co., 111 N. C. 463, 16 S. E. 393, to be merely declaratory of the common law, and not to enlarge its scope.

May Require Trains to Make Connection.—The Commission has power to require a railroad company to have a train arrive at a certain station on its road at a certain schedule time, so as to connect with the train of another company. Corp. Comm. v. Railroad, 137 N. C. 1, 49 S. E. 191.

Express Facilities.—A railroad company is not compelled to furnish express facilities to another to conduct an express business over its road the same as it provides for itself or affords to any other express company. Atlantic Exp. Co. v. Wilmington, etc., Railroad, 111 N. C. 463, 16 S. E. 393.

§ 62-144. Failure to make reports.—Every officer, agent or employee of any railroad company, express or telegraphic company, who shall wilfully neglect or refuse to make and furnish any report required by the commission for the purposes of this chapter, or who shall willfully or unlawfully hinder, delay or obstruct the commission in the discharge of the duties hereby imposed upon it, shall forfeit and pay five hundred dollars for each offense, to be recovered in an action in the name of the state. A delay of ten days to make and furnish such report shall raise the presumption that the same was willful. (Rev., s. 1089; 1899, c. 164, s. 18; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1108.)

Construction of Similar Statute.—In construing a statute (Code of 1883, s. 1960) which provided a similar penalty against corporations for failure to make the returns into the court, in State v. Marietta, etc., Railroad, 108 N. C. 24, 12 S. E. 1041, it was held, that it could only be recovered in an action brought by the state. A private relator could not maintain the action.

§ 62-145. Offenses by railroads, not otherwise provided for.—If any railroad company shall violate the provisions of this chapter not otherwise provided for, such railroad company shall incur a penalty of one hundred dollars for each violation, to be recovered by the party injured. (Rev., s. 1090; 1899, c. 164, s. 17; C. S. 1109.)

Action Ex Contractu.—It would seem that an action for the penalty hereunder is an action ex contractu for breach of an implied contract to perform a statutory duty. State v. Wilmington, etc., R. Co., 126 N. C. 437, 442, 36 S. E. 14.

Construction of Penal Statute.—The rule that a penal statute must be strictly construed, means no more than that the court, in ascertaining the meaning of such a statute, cannot go beyond the plain meaning of the words and phraseology employed in search of an intention not certainly implied by them, and when there is reasonable doubt as to the meaning of the words used in the statute, the court will not give them such an interpretation as to impose the penalty, nor will the purpose of the statute be extended by implication, so as to embrace cases not clearly within its meaning. Hines v Wilmington, etc., Railroad, 95 N. C. 434.

§ 62-146. Violation of rules, causing injury; damages; limitation.—If any railroad company doing business in this state shall, in violation of any rule or regulation provided by the commission, inflict any wrong or injury on any person, such person shall have a right of action and recovery for such wrong or injury, in any court having jurisdiction thereof, and the damages to be recovered shall be the same as in an action between individuals, except that in case of willful violation of law such railroad company shall be liable to exemplary damages: Provided, that all suits under this chapter shall be brought within one year after the commission of the alleged wrong or injury. (Rev., s. 1091; 1899, c. 164, s. 16; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1110.)

There is no requirement at common law, and no statute in the state, obliging railroad companies to fence their tracks. Jones v. Western North Carolina Railroad, 95 N. C. 328.

§ 62-147. Action for penalty; when and how brought.—An action for the recovery of any penalty under this chapter shall be instituted in the county in which the penalty has been incurred, and shall be instituted in the name of the state of North Carolina on the relation of the utilities commission against the company incurring such penalty; or whenever such action is upon the complaint of any injured person or corporation, it shall be instituted in the name of the state of North Carolina on the relation of the utilities commission upon the complaint of such injured person or corporation against the company incurring such penalty. Such action shall be instituted and prosecuted by the attorney-general or the solicitor of the judicial district in which such penalty has been incurred. The procedure in such actions, the

right of appeal and the rules regulating appeals shall be the same as are now provided by law in other civil actions. (Rev., s. 1092; 1899, c. 164, s. 15; 1933, c. 134, s. 8; 1941, c. 97; C. S. 1111.)

§ 62-148. Remedies, cumulative.—The remedies given by this chapter to persons injured shall be regarded as cumulative to the remedies now given or which may be given by law against railroad corporations, and this chapter shall not be construed as repealing any statute giving such remedies. (Rev., s. 1093; 1899, c. 164, s. 26; C. S. 1112.)

Cited in Powell v. Hamlet Ice Co., 209 N. C. 195, 183 S. E. 386, dissenting opinion.

Division XI. Police Regulations.

Chapter 63. Aeronautics.

Art. 1. Municipal Airports.

§ 63-1. Definition.—Airport or landing field for the purposes of this article is defined as any plot of land or water formally set aside, and designated as a place where aircraft may land or take off. (1929, c. 87, s. 1.)

Cited in Goswick v. Durham, 211 N. C. 687, 191 S. E. 728.

§ 63-2. Cities and towns authorized to establish airports.—The governing body of any city or town in this state is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft, either within or without the limits of such cities and towns and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city or town. (1929, c. 87, s. 2.)

Cross References.—As to power of eminent domain, see §§ 63-5 and 63-6. As to adoption of airport zoning regulations, see §§ 63-31 et seq.

§ 63-3. Counties authorized to establish airports.—The governing body of any county in this state is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft within or without the limits of such counties, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such county. (1929, c. 87, s. 3.)

§ 63-4. Joint airports established by cities and towns and counties.—The governing bodies of any city, town and county in this state are hereby authorized to jointly acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft within or without the limits of such cities, towns and counties, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be jointly owned or controlled by such city, town and county. (1929, c. 87, s. 4.)

§ 63-5. Airport declared public purpose; eminent domain.—Any lands acquired, owned, controlled, or occupied by such cities, towns, and/or counties, for the purposes enumerated in §§ 63-2, 63-3 and 63-4, shall and are hereby declared to be acquired, owned, controlled and occupied for a public purpose, and such cities, towns and/or counties shall have the right to acquire property for such purpose or purposes under the power of eminent domain as and for a public purpose. (1929, c. 87, s. 5.)

§ 63-6. Acquisition of sites; appropriation of moneys.—Private property needed by a city, town and/or county for an airport or landing field may be acquired by gift or devise or shall be acquired by purchase if the city town and/or county is or are able to agree with the owners on the terms thereof, and otherwise by condemnation, in the manner provided by law under which the city, town and/or county is or are authorized to acquire real property for public purposes, other than street purposes, or if there be no such law, in the manner provided for and subject to the provisions of the condemnation law. The purchase price, or award for property acquired for an airport or landing field may be paid for by appropriation

of moneys available therefor, or wholly or partly from the proceeds of the sale of bonds of the city, town and/or county, as the governing body and/or bodies of such city, town and/or county shall determine. (1929, c. 87, s. 6.)

Cross References.—As to proceedings for eminent domain, see §§ 40-11 et seq. As to zoning regulations and acquisition of air rights, see §§ 63-31, 63-32 and 63-36.

§ 63-7. Airports already established declared public charge; regulations and fees for use of.—The governing body or bodies of a city, town and/or county which has or have established an airport or landing field, and acquired, leased, or set apart real property for such purpose, may construct, improve, equip, maintain, and operate the same. The expenses of such construction, improvement, maintenance, and operation shall be a city, town and/or county charge as the case may be. The governing body or bodies of a city, town and/or county may adopt regulations and establish fees or charges for the use of such airport or landing field. (1929, c. 87, s. 7.)

§ 63-8. Appropriations.—The governing body or bodies of a city, town and/or county to which this article is applicable, having power to appropriate, individually or jointly, money therein, are hefeby authorized to annually appropriate and cause to be raised by taxation in such city, town and/or county or to use from the net proceeds derived from the operation, by such city, town or county, of any public utility a sum sufficient to carry out the provisions of this article in such proportion and upon such pro-rata basis as may be determined upon by a joint board to be appointed by and from the governing body or bodies of the city, town and/or the county or individually as the case may be. Provided, nothing herein shall be construed to permit the governing bodies of any county, city or town to issue bonds under the provisions of this article without a vote of the people. (1929, c. 87, s. 8.)

§ 63-9. Partial invalidity.—If any part or parts of this article shall be held to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this article. The General Assembly expressly declares that it would have passed the remaining parts of this article, if it had known that such part or parts thereof would be declared unconstitutional. (1929, c. 87, s. 9.)

Art. 2. State Regulation.

§ 63-10. Definition of terms. — In this article "aircraft" includes balloon, airplane, hydroplane, and every other vehicle used for navigation through the air. A hydroplane while at rest on water and while being operated on or immediately above water shall be governed by the rules regarding water navigation; while being operated through the air otherwise than immediately above water, it shall be treated as an aircraft. "Aeronaut" and "airman" includes aviator, pilot, balloonist, and every other person having any part in the operation of aircraft while in flight. "Passenger" includes any person riding in an aircraft but having no part in its operation. (1929, c. 190, s. 1.)

§ 63-11. Sovereignty in space. — Sovereignty in space above the lands and waters of this State is declared to rest in the State, except where granted to and assumed by the United States. (1929, c. 190, s. 2.)

§ 63-12. Ownership of space.—The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in § 63-13. (1929, c. 190, s. 3.)

§ 63-13. Lawfulness of flight.—Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable as provided in § 63-14. (1929, c. 190, s. 4.)

See 8 N. C. Law Rev. 281, 282.

§ 63-14. Damage on land. — The owner of every aircraft which is operated over the lands or waters of this State is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable, and they may be sued jointly, or either or both of them may be sued separately. An aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence. The injured person, or owner or bailee of the injured property, shall have a lien on the aircraft causing the injury to the extent of the damage caused by the aircraft or objects falling from it. (1929, c. 190, s. 5.)

§ 63-15. Collision of aircraft.—The liability of the owner of one aircraft, to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air shall be determined by the rules of law applicable to torts on land. (1929, c. 190, s. 6.)

§ 63-16. Jurisdiction over crimes and torts.—All crimes, torts, and other wrongs committed by or against an aeronaut or passenger while in flight over this State shall be governed by the laws of this State; and the question whether damage occasioned by or to an aircraft while in flight over this State constitutes a tort, crime or other wrong by or against the owner of such aircraft shall be determined by the laws of this State. (1929, c. 190, s. 7.)

Cross References.—See also, § 63-24. As to criminal jurisdiction generally, see §§ 7-63 and 7-64.

§ 63-17. Jurisdiction over contracts.—All contractual and other legal relations entered into by aeronauts or passengers while in flight over this State shall have the same effect as if entered into on the land or water beneath. (1929, c. 190, s. 8.)

§ 63-18. Dangerous flying a misdemeanor.—Any aeronaut or passenger who, while in flight over a thickly inhabited area or over a public gathering within this State, shall engage in trick or acrobatic flying, or in any acrobatic feat, or shall except while in landing or taking off, fly at such a low level as to endanger the persons on the surface beneath, or drop any object except loose water or loose sand ballast, shall be guilty of a misdemeanor and punishable by a fine of not more than five hundred dollars ($500.00) or imprisonment for not more than one year, or both. (1929, c. 190, s. 9.)

§ 63-19: Repealed by Session Laws 1943, c. 543.

§ 63-20. Qualifications of operator; federal license.—The public safety requiring, and the advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that a person engaging within this State in operating aircraft, in any form of aerial navigation for which a license to operate aircraft issued by the United States Government would then be required if such aerial navigation were interstate, should have the qualifications necessary for obtaining and holding such a license, it shall be unlawful for any person to engage in operating aircraft within the State, in any such form of aerial navigation, unless he have such Federal license. (1929, c. 190, s. 11.)

§ 63-21. Possession and exhibition of license certificate.—The certificate of the license, herein required, shall be kept in the personal possession of the licensee when he is operating aircraft within this State and must be presented for inspection upon the demand of any passenger, any peace officer of this State, or any official, manager or person in charge of any airport or landing field in this State upon which he shall land. (1929, c. 190, s. 12.)

§ 63-22. Aircraft; construction, design and airworthiness; federal registration. — The public safety requiring, and the advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that aircraft to be operated within this State should conform, with respect to design, construction and airworthiness, to standards then prescribed by the United States Government with respect to aerial navigation of aircraft subject to its jurisdiction, it shall be unlawful for any person to operate an aircraft within this State unless it is registered pursuant to the lawful rules and regulations of the United States Government then in force, if the circumstances of such aerial navigation are of a character that such registration would be required in the case of interstate aerial navigation. (1929, c. 190, s. 13.)

§ 63-23. Penalties.—A person who violates any provision of §§ 63-20, 63-21 or 63-22 of this article shall be guilty of a misdemeanor and punishable by a fine of not more than one hundred dollars ($100.00), or by imprisonment for not more than ninety days, or both; provided, however, that acts or omissions made unlawful by §§ 63-20, 63-21 or 63-22 of this article shall not be deemed to include any act or omission which violates the laws or lawful regulations of the United States. (1929, c. 190, s. 14.)

§ 63-24. Jurisdiction of state over crimes and torts retained.—Provided that this article shall not be construed as a waiver of jurisdiction of the courts of the State of North Carolina over any crime or tort committed within the State of North Carolina, and provided, further, that the General Assembly of North Carolina may at any time amend, regulate or control any of the powers which may be assumed by the United States Department of Commerce under this article. (1929, c. 190, s. 15.)

Art. 3. Stealing, Tampering with, or Operating While Intoxicated.

§ 63-25. Taking of aircraft made crime of larceny.—Any person who, under circumstances not constituting larceny shall, without the consent of the owner, take, use or operate or cause to be taken, used or operated, an airplane or other aircraft or its equipment, for his own profit, purpose or pleasure, steals the same, is guilty of larceny and is punishable accordingly. (1929, c. 90, s. 1.)

Cross References.—As to larceny generally, see §§ 14-70 et seq. As to punishment, see § 14-2.

§ 63-26. Tampering with aircraft made crime.—Any person who shall without the consent of the owner, go upon or enter, tamper with or in any way damage or injure any airplane or other aircraft shall be guilty of a misdemeanor and shall be punishable by fine of not more than one hundred ($100.00) dollars or imprisonment of not more than sixty days, or both, in the discretion of the court and it shall not be necessary to conviction hereunder to show wilful or malicious intent. (1929, c. 90, s. 2.)

§ 63-27. Operation of aircraft while intoxicated made crime.—Any person who operates an airplane or other aircraft, whether on the ground or in the air while in an intoxicated condition, shall be guilty of a misdemeanor and punishable by fine not to exceed one hundred dollars or by imprisonment not to exceed sixty days, or both, in the discretion of the court. (1929, c. 90, s. 3.)

Cross Reference.—As to punishment, see § 14-2.

§ 63-28. Infliction of serious bodily injury by operation of aircraft while intoxicated made felony.—Any person who, operating an airplane or other aircraft whether on the ground or in the air while in an intoxicated condition, does serious bodily injury to another shall be guilty of a felony. (1929, c. 90, s. 4.)

Art. 4. Model Airport Zoning Act.

§ 63-29. Definitions.—As used in this article, unless the context otherwise requires:

(1) "Airport" means any area of land or water designed for the landing and taking off of aircraft and utilized or to be utilized by the public as a point of arrival or departure by air.

(2) "Airport hazard" means any overhead power line, not constructed, operated and maintained according to standard engineering practices in general use, which interferes with radio communication between a publicly owned airport and aircraft approaching or leaving same, or any structure or tree which obstructs the aerial approaches of such an airport or is otherwise hazardous to its use for landing or taking off.

(3) "Political subdivision" means any municipality, city, county, or town.

(4) "Person" means any individual, firm, copartnership, corporation, company, association, joint stock association or body politic, and includes any trustee, receiver, assignee, or other similar representative thereof.

(5) "Structure" means any object constructed or installed by man, including, but without limitation, buildings, towers, smokestacks, and overhead transmission lines.

(6) "Tree" means any object of natural growth. (1941, c. 250, s. 1.)

For comment on this enactment, see 19 N. C. Law Rev. 548.

§ 63-30. Airport hazards not in public interest.—It is hereby found and declared that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein, and is therefore not in the interest of the public health, public safety, or general welfare. (1941, c. 250, s. 2.)

§ 63-31. Adoption of airport zoning regulations.—(1) Every political subdivision may adopt, administer, and enforce, under the police power and in the manner and upon the conditions hereinafter prescribed, airport zoning regulations, which regulations shall divide the area surrounding any airport within the jurisdiction of said political subdivision into zones, and, within such zones, specify the land uses permitted, and regulate and restrict the height to which structures and trees may be erected or allowed to grow. In adopting or revising any such zoning regulations, the political subdivision shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain, the height of existing structures and trees above the level of the airport, the possibility of lowering or removing existing obstructions, and the views of the agency of the federal government charged with the fostering of civil aeronautics, as to the aerial approaches necessary to safe flying operations at the airport.

(2) In the event that a political subdivision has adopted, or hereafter adopts, a general zoning ordinance regulating, among other things, the height of buildings, any airport zoning regulations adopted for the same area or portion thereof under this article, may be incorporated in and made a part of such general zoning regulations, and be administered and enforced in connection therewith, but such general zoning regulations shall not limit the effectiveness or scope of the regulations adopted under this article.

(3) Any two or more political subdivisions may agree, by ordinance duly adopted, to create a joint board and delegate to said board the powers herein conferred to promulgate, administer and enforce airport zoning regulations to protect the aerial approaches of any airport located within the corporate limits of any one or more of said political subdivisions. Such joint boards shall have as members two representatives appointed by the chief executive officer of each political subdivision participating in the creation of said board and a chairman elected by a majority of the members so appointed.

(4) The jurisdiction of each political subdivision is hereby extended to the promulgating, administering and enforcement of airport zoning regulations to protect the approaches of any airport which is owned by said political subdivision but located outside the corporate limits of said political subdivision. In case of conflict with any airport zoning or other regulations promulgated by any other political subdivision, the regulations adopted pursuant to this section shall prevail.

(5) All airport zoning regulations adopted under this article shall be reasonable, and none shall require the removal, lowering, or other change or alteration of any structure or tree not conforming to the regulations when adopted or amended, or otherwise interfere with the continuance of any nonconforming use, except as provided in § 63-32, subsection (1).

(6) Nothing herein contained shall be construed to prevent trees existing at the time any zoning regulations are adopted to continue their natural growth. (1941, c. 250, s. 3.)

§ 63-32. Permits, new structures, etc., and variances.—(1) Permits.—Where advisable to facilitate the enforcement of zoning regulations adopted pursuant to this article, a system may be established by any political subdivision for the granting of permits to establish or construct new structures and other uses and to replace existing structures and other uses or make substantial changes therein or substantial repairs thereof. In any event, before any nonconforming structure or tree may be replaced, substantially altered or repaired, rebuilt, allowed to grow higher, or replanted, a permit must be secured from the administrative agency authorized to administer and enforce the regulations, authorizing such replacement, change or repair. No such permit shall be granted that would allow the structure or tree in question to be made higher or become a greater hazard to air navigation than it was when the applicable regulation was adopted; and whenever the administrative agency determines that a nonconforming structure or tree has been abandoned or more than eighty per cent torn down, destroyed, deteriorated, or decayed: (a) no permit shall be granted that would allow said structure or tree to exceed the applicable height limit or otherwise deviate from the zoning regulations; and (b) whether application is made for a permit under this paragraph or not, the said agency may by appropriate action compel the owner of the nonconforming structure or tree, at his own expense, to lower, remove, reconstruct, or equip such object as may be necessary to conform to the regulations or, if the owner of the nonconforming structure or tree shall neglect or refuse to comply with such order for ten days after notice thereof, the said agency may proceed to have the object so lowered, removed, reconstructed, or equipped. Except as indicated, all applications for permits for replacement, change or repair of nonconforming uses shall be granted.

(2) Variances. — Any person desiring to erect any structures, or increase the height of any structure, or permit the growth of any tree, or otherwise use his property, in violation of airport zoning regulations adopted under this article, may

apply to the board of appeals, as provided in § 63-33, subsection (3), for a variance from the zoning regulations in question. Such variances shall be allowed where a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of the regulations and this article.

(3) Obstruction Marking and Lighting. — In granting any permit or variance under this section, the administrative agency or board of appeals may, if it deems such action advisable to effectuate the purposes of this article and reasonable in the circumstances, so condition such permit or variance as to require the owner of the structure or tree in question to permit the political subdivision, at its own expense, to install, operate, and maintain suitable obstruction markers and obstruction lights thereon. (1941, c. 250, s. 4.)

§ 63-33. Procedure. — (1) Adoption of Zoning Regulations. — No airport zoning regulations shall be adopted, amended, or changed under this article except by action of the legislative body of the political subdivision in question, or the joint board provided for in § 63-31, subsection (3), after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days' notice of the hearing shall be published in an official paper, or a paper of general circulation, in the political subdivision or subdivisions in which the airport is located.

(2) Administration of Zoning Regulations—Administrative Agency.—The legislative body of any political subdivision adopting airport zoning regulations under this article may delegate the duty of administering and enforcing such regulations to any administrative agency under its jurisdiction, or may create a new administrative agency to perform such duty, but such administrative agency shall not be or include any member of the board of appeals. The duties of such administrative agency shall include that of hearing and deciding all permits under § 63-32, subsection (1), but such agency shall not have or exercise any of the powers delegated to the board of appeals.

(3) Administration of Airport Zoning Regulations—Board of Appeals.—Airport zoning regulations adopted under this article shall provide for a board of appeals to have and exercise the following powers:

(a) To hear and decide appeals from any order, requirement, decision, or determination made by the administrative agency in the enforcement of this article or of any ordinance adopted pursuant thereto;

(b) To hear and decide special exceptions to the terms of the ordinance upon which such board may be required to pass under such ordinance;

(c) To hear and decide specific variances under § 63-32, subsection (2). Where a zoning board of appeals or adjustment already exists, it may be appointed as the board of appeals. Otherwise, the board of appeals shall consist of five members, each to be appointed for a term of three years and to be removable for cause by the appointing authority upon written charges and after public hearing.

The board shall adopt rules in accordance with the provisions of any ordinance adopted under this article. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. The chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall immediately be filed in the office of the board and shall be a public record.

Appeals to the board may be taken by any person aggrieved, or by any officer, department, board, or bureau of the political subdivision affected, by any decision of the administrative agency. An appeal must be taken within a reasonable time, as provided by the rules of the board, by filing with the agency from which the appeal is taken and with the board, a notice of appeal specifying the grounds thereof. The agency from which the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal shall stay all proceedings in furtherance of the action appealed from, unless the agency from which the appeal is taken certifies to the board, after the notice of appeal has been filed with it, that by reason of the facts stated in the certificate a stay would, in its opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board or by a court of record on application on notice to the agency from which the appeal is taken and on due cause shown.

The board shall fix a reasonable time for the hearing of the appeal, give public notice and due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

The board may, in conformity with the provisions of this article, reverse or affirm, wholly or partly, or modify, the order, requirement, decision, or determination appealed from and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the administrative agency from which the appeal is taken.

The concurring vote of a majority of the members of the board shall be sufficient to reverse any order, requirement, decision, or determination of the administrative agency, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance. (1941, c. 250, s. 5.)

§ 63-34. Judicial review. — (1) Any person aggrieved by any decision of the board of appeals, or any taxpayer, or any officer, department, board, or bureau of the political subdivision, may present to the superior court a verified petition setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality. Such petition shall be presented to the court with-

in thirty days after the decision is filed in the office of the board.

(2) Upon presentation of such petition the court may allow a writ of certiorari directed to the board of appeals to review such decision of the board. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

(3) The board of appeals shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by the writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

(4) The court shall have exclusive jurisdiction to affirm, modify, or set aside the decision brought up for review, in whole or in part, and if need be, to order further proceedings by the board of appeals. The findings of fact by the board, if supported by substantial evidence, shall be accepted by the court as conclusive, and no objection to a decision of the board shall be considered by the court unless such objection shall have been urged before the board, or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(5) Costs shall not be allowed against the board of appeals unless it appears to the court that it acted with gross negligence, in bad faith, or with malice, in making the decision appealed from. (1941, c. 250, s. 6.)

§ 63-35. Enforcement and remedies. — Each violation of this article or of any regulations, order, or ruling promulgated or made pursuant to this article, shall constitute a misdemeanor and shall be punishable by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than thirty days or by both such fine and imprisonment, and each day a violation continues to exist shall constitute a separate offense. In addition, the political subdivision within which the property is located may institute in any court of competent jurisdiction, an action to prevent, restrain, correct or abate any violation of this article, or of airport zoning regulations adopted under this article, or of any order or ruling made in connection with their administration or enforcement, and the court shall adjudge to the plaintiff such relief, by way of injunction (which may be mandatory) or otherwise, as may be proper under all the facts and circumstances of the case, in order fully to effectuate the purposes of this article and of the regulations adopted and orders and rulings made pursuant thereto. (1941, c. 250, s. 7.)

§ 63-36. Acquisition of air rights. — In any case in which: (1) it is desired to remove, lower, or otherwise terminate a nonconforming use; or (2) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this article; or (3) it appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by airport zoning regulations, the political subdivision within which the property or nonconforming use is located or the political subdivision owning the airport or served by it may acquire, in the manner provided by the law under which municipalities are authorized to acquire real property for public purposes, such an air right, easement, or other estate or interest in the property or nonconforming use in question as may be necessary to effectuate the purposes of this article.

If any political subdivision, or if any board or administrative agency appointed or selected by a political subdivision, shall adopt, administer or enforce any airport zoning regulations which results in the taking of, or in any other injury or damage to any existing structure, such political subdivision shall be liable therefor in damages to the owner or owners of any such property and the liability of the political subdivision shall include any expense which the owners of such property are required to incur in complying with any such zoning regulations. (1941, c. 250, s. 8.)

§ 63-37. Short title.—This article shall be known and may be cited as the "Model Airport Zoning Act." (1941, c. 250, s. 10.)

Chapter 64. Aliens.

§ 64-1. Rights as to real property.—It is lawful for aliens to take both by purchase and descent, or other operation of law, any lands, tenements or hereditaments, and to hold and convey the same as fully as citizens of this state can or may do, any law or usage to the contrary notwithstanding. (Rev., s. 182; Code, s. 7; 1870-1, c. 255; 1935, c. 243; 1939, c. 19; C. S. 192.)

Cross Reference.—As to rules of descent, see § 29-1.

Editor's Note.—This section was inadvertently repealed by P. L. 1935, c. 243. See an article appearing in 13 N. C. Law Rev. 355. Public Laws 1939, c. 19, corrected the inadvertence.

§ 64-2. Contracts validated.—All contracts to purchase or sell real estate by or with aliens, heretofore made, shall be deemed and taken as valid to all intents and purposes. (Rev., s. 183; Code, s. 8; 1870-1, c. 255, s. 2; C. S. 193.)

Chapter 65. Cemeteries.

Art. 1. Care of Rural Cemeteries.

§ 65-1. County commissioners to provide list of public and abandoned cemeteries.—It shall be the duty of the boards of county commissioners of the various counties in the state to prepare and keep on record in the office of the register of deeds a list of all public cemeteries in the counties outside the limits of incorporated towns and cities, and not established and maintained for the use of an incorporated town or city, together with the names and addresses of the persons in possession and control of the same. To such list shall be added a list of the public cemeteries in the rural districts of such counties which have been abandoned, and it shall be the duty of the boards of county commissioners to furnish to the division of publications in the office of the Secretary of State copies of the lists of such public and abandoned cemeteries, to the end that it may furnish to the boards, for the use of the persons in control of such cemeteries, suitable literature, suggesting methods of taking care of such places. (1917, c. 101, s. 1; 1939, c. 316; C. S. 5019.)

§ 65-2. Appropriations by county commissioners.—To encourage the persons in possession and control of the public cemeteries referred to in § 65-1 to take proper care of and to beautify such cemeteries, to mark distinctly their boundary line with evergreen hedges or rows of suitable trees, and otherwise to lay out the grounds in an orderly manner, the board of county commissioners of any county, upon being notified that two-thirds of the expense necessary for so marking and beautifying any cemetery has been raised by the local governing body of the institution which owns the cemetery, and is actually in hand, is hereby required to appropriate from the general fund of the county one-third of the expense necessary to pay for such work, the amount appropriated by the board of commissioners in no case to exceed fifteen dollars for each cemetery. (1917, c. 101, s. 2; C. S. 5020.)

§ 65-3. County commissioners to have control of abandoned cemeteries.—The county commissioners of the various counties are required to take possession and control of all abandoned public cemeteries in their respective counties, to see that the boundaries and lines are clearly laid out, defined, and marked, and to take proper steps to preserve them from encroachment, and they are hereby authorized to appropriate from the general fund of the county whatever sums may be necessary from time to time for the above purposes. (1917, c. 101, s. 3; C. S. 5021.)

Art. 2. Care of Confederate Cemetery.

§ 65-4. State highway and public works commission to furnish labor.—The state highway and public works commission is hereby authorized and directed to furnish at such time, or times, as may be convenient, such prisoner's labor as may be available, to properly care for the Confederate Cemetery situated in the City of Raleigh, such services to be rendered by the State's prisoners without compensation. (1927, c. 224, s. 1; 1933, c. 172.)

Art. 3. Cemeteries for Inmates of County Homes.

§ 65-5. County commissioners may establish new cemeteries.—The boards of county commissioners of the various counties in the state are authorized and empowered to locate and establish new graveyards or cemeteries upon the lands of their respective counties for the burial of the inmates of the county homes. (1917, c. 151, s. 1; C. S. 5022.)

§ 65-6. Removal and reinterment of bodies.—Whenever the county commissioners have established new graveyards or cemeteries, they are authorized and empowered to remove to such graveyards or cemeteries all bodies of deceased inmates of the county homes. (1917, c. 151, s. 2; C. S. 5023.)

Art. 4. Trust Funds for the Care of Cemeteries.

§ 65-7. Money deposited with clerk of superior court.—For the maintenance and preservation of graves, burial plats, graveyards and cemeteries which may be neglected, any person, firm, or corporation may, by will or otherwise, place in the hands of the clerk of the superior court of any county in the state where such grave or lot is located any sum of money not less than one hundred dollars nor more than two thousand dollars, the income from which is to be used for keeping in good condition any grave, burial plat, graveyard, or cemetery in the county in which the money is placed, with specific instructions as to the use of the fund. (1917, c. 155, s. 1; C. S. 5024.)

§ 65-8. Separate record of accounts to be kept.—It shall be the duty of the clerk of the superior court to keep a separate record for keeping account of the money deposited as above provided, to keep a perpetual account of the same therein, and to record therein the specific instructions about the use of the income on such money. He shall see that the income is spent according to such specific instructions, and shall make report of the same from year to year in the same manner as if it were guardian funds. (1917, c. 155, s. 1; C. S. 5025.)

§ 65-9. Funds to be kept perpetually. — All money placed in the office of the superior court clerk in accordance with this article shall be held perpetually, and no one shall have authority to withdraw or change the direction of the income on same. (1917, c. 155, s. 2; C. S. 5026.)

§ 65-10. Investment of funds. — Such money shall be invested in the same manner as is provided by law for the investment of other trust funds by the clerk of the superior court. (1917, c. 155, s. 3; 1943, c. 97, s. 1; C. S. 5027.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 65-11. Clerk's bond and fees; substitution of bank or trust company as trustee.—The official bond of the clerk of the superior court shall be liable for all such sums as shall be paid over to him on account of the provisions of this article. The clerk shall receive for his services and responsibilities a commission of ten per cent on the net income each year of such money; and the fees or commissions so received by him under this article shall not be taken into consideration as a part of his salary.

In lieu of the provisions of the first paragraph of this section, the clerk of the superior court may, with the consent and approval of the sheriff and register of deeds, appoint any bank or trust company authorized to do business in this state as trustee for the funds authorized to be paid into his office by virtue of this article; provided, that no bank or trust company shall be appointed as such trustee unless such bank or trust company is authorized and licensed to act as fiduciary under the laws of this state.

Before any clerk shall turn over such funds to the trustee so appointed, he shall require that the trustee so named qualify before him as such trustee in the same way and manner and to the same extent as guardians are by law required to so qualify. After such trustee has qualified as herein provided, all such funds coming into its hands may be invested by it only in the securities set out in § 2-55 and the income therefrom invested for the purposes and in the manner heretofore set out in this article. All trustees appointed under the provisions of this article shall render and file in the office of the clerk of the superior court all reports that are now required by law of guardians. (1917, c. 155, ss. 3, 4; 1939, c. 18; 1943, c. 97, s. 2; C. S. 5028.)

Editor's Note.—The 1939 amendment added the second and third paragraphs.

The 1943 amendment rewrote the first sentence of this section.

§ 65-12. Funds exempt from taxation. — All money referred to in the preceding sections of this article shall be exempt from all state, county, township, town, and city taxes. (1917, c. 155, s. 4; C. S. 5029.)

Cross Reference.—See notes and sections referred to under § 65-13.

Art. 5. Removal of Graves.

§ 65-13. Removal to enlarge or erect churches, etc., or to establish hydro-electric reservoirs.—In those cases where any church authorities desire to enlarge a church building and/or erect a new church and/or parish house and/or parsonage and where it becomes necessary or expedient to remove certain graves in order to secure the necessary room for such enlargement, it shall be lawful for such church authorities after thirty days' notice to the relatives of deceased, if any are known, and if none are known, then after notice posted at the church door for a like time, to remove such graves to a suitable plat in the church cemetery, or in another cemetery, due care being taken to protect tombstones and replace them properly, so as to leave the graves in as good con-

dition as before removal. When any lands are owned by any hydro-electric power or lighting company for use as a reservoir, on which lands there are graves, it shall be lawful for said company, after thirty (30) days' notice to the surviving husband or wife, or next of kin of the deceased, or the person in control of such graves, if any are known, and if not known, then after publishing a notice for four (4) weeks in a newspaper, published in the county and in a daily State paper, to open any such graves, and to take therefrom any dead body, or part thereof buried therein, and anything interred therewith, and to remove and re-inter the same in some other cemetery or suitable place in the same county to be selected by the next of kin, or the welfare officer of the county or the Clerk of the Superior Court in the order named. Due care shall be taken to do said work in a proper and decent manner, and, if necessary, to furnish suitable coffins or boxes for re-interring said remains. Due care shall also be taken to remove, protect and replace all tombstones or other markers; so as to leave the new grave in as good condition as the former one. All of said work shall be done under the supervision and direction of the welfare officer of the county, if one, or his representatives; but if no welfare officer, then under the supervision and direction of the clerk of the court, or his representatives. All the expense connected with said work, including the actual expense of one of "next of kin" in attending to same, shall be borne by the company doing, or causing same to be done. (1919, c. 245; 1927, c. 23, s. 1; 1937, c. 3; C. S. 5030.)

Cross References.—As to condemnation of burial grounds, see §§ 40-10, 56-6; as to removal of or interference with monuments and tombstones, see § 14-148; as to interference with graveyards, see §§ 14-144, 14-149; as to disturbance of graves, see § 14-150; as to burial grounds on watersheds, see § 130-118.

Editor's Note.—The 1937 amendment inserted the words "and/or erect a new church and/or parish house and/or parsonage" in the first sentence.

The building of a new vestry room of a church to be used with the one as presently located in relation to the use of the choir, etc., comes within the purview of the statute permitting the removal of the bodies buried in the churchyard by the proper authorities of the church, when nceessary or expedient to do so, in carrying out the arrangement. Mayo v. Bragaw, 191 N. C. 427, 132 S. E. 1.

§ 65-14. Conveyance by church; removal of graves.—Where any church has conveyed, or is about to convey real estate on which there are graves, and where it becomes necessary and expedient to remove said graves, it shall be lawful for such church authorities after thirty days notice to the relatives of deceased, if any are known, and if none are known, then after notice posted at the church door for a like time, to remove such graves to a suitable plot in some other cemetery, due care being taken to protect tombstones and replace them properly, so as to leave the graves in as good condition as before removal. (Ex. Sess. 1920, c. 46; C. S. 5030(a).)

§ 65-15. Removal after abandonment of cemetery.—When any person, firm, or corporation, owns any land on which is situated any cemetery or burying ground, and where it becomes necessary and expedient in the opinion of the governing body of the county or town in which any such graves are situated to remove said graves, it shall be lawful for such person, firm or corporation, after thirty days' notice to the relatives of the deceased persons buried therein, if any are known, and if none are known, then after thirty days' notice printed in some newspaper published in said county where said property lies, and if no newspaper is published in said county, then by posting notice at the courthouse door of said county, to remove said graves to a suitable plot in some other cemetery, due care being taken to protect tombstones and replace them properly so as to leave the graves in as good condition as before removal: Provided, that all of said work shall be done under the supervision of the county health officer and the board of county commissioners: Provided, further, that the conveyance of the land without reservation of the burying ground shall itself be evidence of the abandonment of the same sufficient for the purposes of this section. (1927, c. 175, s. 1.)

Art. 6. Cemetery Associations.

§ 65-16. Land holdings.—All cemetery associations or corporations created by any local, private or special act or resolution before January tenth, one thousand nine hundred and seventeen are authorized and fully empowered to hold amounts of land in excess of the limitation provided in the local, private or special act or resolution incorporating or chartering such cemetery association or corporation. (1923, c. 76, s. 1; C. S. 5030(b).)

§ 65-17. Change of name of association or corporations.—Any corporation or association chartered or incorporated by any special act of the legislature, as set forth in § 65-16, is authorized and fully empowered to change the name of such association or corporation by a majority vote of its directors, and upon such change in name it shall be the duty of the officers of the board of directors of such corporation or association to file with the clerk of the superior court a copy of resolution changing the name, which resolution must show the act of the legislature creating or incorporating the same and the reasons for the change thereof. (1923, c. 76, s. 2; C. S. 5030(c).)

Art. 7. Cemeteries Operated for Private Gain.

§ 65-18. Cemeteries to which article applies.—This article shall apply only to public cemeteries which are privately owned and operated for private gain or profit or which may hereafter be established for such purpose, and which may advertise or offer perpetual care of grave space in connection therewith. (1943, c. 644, s. 1.)

Local Modification.—Buncombe: 1943, c. 644, s. 20.

§ 65-19. Words and phrases defined.—When consistent with the context of this article and not obviously used in a different sense, the term "cemetery," "public cemetery," or "owner or owners" of such cemetery, as used in this article, includes only such corporations, associations, partnerships, or individuals, as are engaged in the operation for private gain or profit of a public cemetery for the interment of the dead of the human race or the sale of grave space or interment rights therein, and who advertise or offer perpetual care of grave space in connection therewith.

The words "burial commissioner," "burial association commissioner," or "commissioner" used herein shall be deemed to refer to the burial association commissioner of North Carolina, and the words "sale" or "conveyance," as used herein, unless obviously used in some other sense, shall be deemed to refer to and authorize any form of contract by means of which cemetery transfers or agrees to transfer to purchaser title to or exclusive right of interment in a grave space or family burial plot. (1943, c. 644, s. 2.)

§ 65-20. Reports by cemeteries to burial association commissioner.—Every such public cemetery shall, on or before July first one thousand nine hundred and forty-three, and on or before February first, one thousand nine hundred and forty-four, and on February first of each year thereafter, file or cause to be filed with the burial association commissioner of North Carolina, in his office in Raleigh, on forms to be supplied by said commissioner, a report giving the name of the cemetery, name of all owners thereof, name of managing or directing head, including name of sales manager or agency handling sales, if any, and stating whether or not such cemetery offers, directly or indirectly, or advertises perpetual care of burial lots or spaces sold to the public, together with copy of all forms of agreements offered to prospective purchasers, and shall, with said first report, file a plat of such cemetery, showing, as of date of ratification of this article, number and location of all lots actually surveyed and permanently staked, together with such other information as may be required under § 65-25, and as may be required by burial association commissioner of North Carolina. (1943, c. 644, s. 3.)

§ 65-21. Information as to perpetual care fund to be reported.—If such cemetery shall report that it advertises or claims to provide the perpetual care of lots or grave spaces included in its property, such report shall state the amount of its perpetual care fund as of date of above required report, manner of computing same, how and by whom controlled, description of securities in which fund is invested, and copies of all agreements entered into by the cemetery relating thereto. (1943, c. 644, s. 4.)

§ 65-22. Requirements for advertising of perpetual care fund.—No such cemetery shall hereafter cause or permit advertising of perpetual care fund in connection with the sale or offer for sale of its property unless the amount deposited in said fund from all sales made subsequent to the passage of this article shall be equal to not less than four dollars per grave space, sold, said sum to be deposited in perpetual care fund as provided in § 65-23. (1943, c. 644, s. 5.)

§ 65-23. Trustee for perpetual care fund; irrevocable trust agreement; investments.—The perpetual care fund for any cemetery licensed hereunder, as hereinafter authorized, shall immediately be turned over to a reliable trustee, to be approved by the North Carolina burial association commissioner, under an irrevocable trust agreement for safekeeping and for investment only in such securities as may now or hereafter be approved for the investment by a domestic insurance company of its legal reserve. The trustee may, by permission of said burial association commissioner, be changed from time to time, but the trust shall be irrevocable, and the form and substance of the agreement relating thereto shall be approved by the burial association commissioner. (1943, c. 644, s. 6.)

§ 65-24. Amount set aside in perpetual care fund; use of income.—Such cemetery shall set aside in its perpetual care fund not less than four dollars per grave space hereafter sold. The income only derived from the investment of such fund may be used to defray expense of development, upkeep and maintenance of such cemetery. (1943, c. 644, s. 7.)

§ 65-25. Sale of lots under "certificate plan"; certificate indemnity fund.—If such cemetery shall offer for sale and sell its said lots or grave spaces under plan or agreement evidenced by certificate (hereinafter referred to as "certificate plan"), which may involve the transfer of family burial plot or grave spaces, or exclusive right of interment therein, to families, individuals, or their representatives, conditioned upon the continuance or cessation of human life or upon limited pay plan or plans where death of certificate holder prior to payment of all sums due to be paid thereunder may terminate his or her liability for further payment, such cemetery shall set aside and reserve unencumbered and shall keep unencumbered lots or grave spaces suitable for burial in sufficient number to enable the cemetery to comply with the terms of each certificate issued, and shall set aside and deposit with the trustee of its perpetual care fund an additional one dollar per grave space sold, same to be known as "certificate indemnity fund" and continue the making of such deposit until from such sales the total deposits to credit of said fund shall amount to five thousand dollars, same to be held and invested separate and apart from the perpetual care fund of such cemetery, as a fund to indemnify lot and grave space purchasers against loss by reason of the cemetery's failure to reserve, unencumbered, the identical grave space(s) selected by purchaser, if selection has been made, and if not, a sufficient number of grave spaces suitable for burial to enable the cemetery to comply with the terms of its certificate, such fund to be calculated, become due, be deposited and invested, and the cemetery to become liable therefor, only in like manner as for such cemetery's perpetual care fund, and shall be maintained and kept separate so long as there is outstanding any liability of cemetery to reserve grave space under a certificate issued on the above plan, but income therefrom shall be paid to cemetery for such use as income from its perpetual care fund may be used. When such liability no longer exists, said fund shall become a part of the perpetual care fund of such cemetery. Any certificate holder sustaining any loss due to failure of the cemetery to comply with all of the provisions of this section shall have a right of action therefor against said cemetery and upon obtaining a final judgment, such certificate holder shall be entitled to an order directing said trustee to pay the amount of said judgment. Every cemetery licensed under this article shall set aside for and deposit in its perpetual care fund not less

than four dollars per grave space agreed by cemetery to be reserved under certificate, or sold by cemetery under any other form of contract: Provided, purchaser is not in default in the payment of any premium or installment becoming due under such certificate or contract, such amount to become due to and be deposited in said fund as such payments are received by the cemetery: Provided, the total amount which said cemetery shall be required to pay into said fund annually shall be only such sum as may be equal to total amount of perpetual care deposit to become due under certificate or contract, divided by the number of years accorded purchaser thereunder to qualify to receive conveyance agreed by cemetery to be made under such certificate or contract, or, if sale has been made under certificate providing for payment of premiums for life, division shall be by life expectancy of certificate holder, computed under American Men Table of Mortality: Provided, further, if purchaser shall pay off or otherwise discharge his or her obligations, as evidenced by certificate or contract, in advance of due date, the deposit of perpetual care shall be ratably increased. Perpetual care earned or deposited under contracts which are in default at time report to burial association commissioner is required to be made hereunder, shall be deducted and shall not be considered in arriving at above total. The income only resulting from the investment of such fund may be used in the sole discretion of the cemetery for the purpose of defraying expense of developing and maintaining the cemetery. Detailed report of amount due to be deposited in such fund, showing the amount actually deposited therein, listed securities in which same is invested, and giving such other details as shall be required by the burial association commissioner, shall be made to said commissioner annually on the first day of February in each and every year, and more frequently if said commissioner, in his discretion, so requires. Upon compliance with the terms of this article, including the provisions contained in this section, such cemetery shall be licensed by burial association commissioner and may issue its contracts of sale of grave space or interment rights therein on the certificate plan and on any other plan not prohibited by law. A cemetery complying with all provisions of this article, excepting only those provisions authorizing the cemetery to operate under the certificate plan, shall be entitled to be licensed hereunder, but any cemetery failing to qualify to so operate shall not be entitled to issue or enter into a contract under such plan. (1943, c. 644, s. 8.)

§ 65-26. License and provision for perpetual care requisite for establishment of cemetery.—No corporation, association, partnership, or individual, shall, after the ratification of this article, be permitted to establish a public cemetery for private gain or profit without obtaining a license therefor, as provided in this article, and without providing for the perpetual care of such cemetery in accordance with the terms of this article, including the setting aside of an initial perpetual care fund of not less than five thousand dollars, same to be in addition to the four dollars per grave space required by this article, to be deposited in such fund. Said perpetual care fund and all additions thereto shall be held and invested as required under § 65-23. (1943, c. 644, s. 9.)

§ 65-27. Deposits in perpetual care fund when fund amounts to $100,000.00.—When the amount deposited in the perpetual care fund of such cemetery shall amount to one hundred thousand dollars, anything in this article to the contrary notwithstanding, the amount to be deposited in said fund thereafter shall be equal to not less than two dollars per grave space, instead of four dollars, said sum to be deposited in the perpetual care fund as provided in § 65-23. (1943, c. 644, s. 10.)

§ 65-28. Amount of deposits for perpetual care fund in certain instances.—Where such cemetery shall sell its lots for not exceeding thirteen dollars or less than eight dollars per grave space, as to such grave space so sold the amount to be deposited in the perpetual care fund shall be three dollars per grave space; if such lots shall be sold for not exceeding eight dollars per grave space, the amount deposited in the perpetual care fund shall be two dollars per grave space. (1943, c. 644, s. 11.)

§ 65-29. Agreements as to retention of perpetual care fund where cemetery property sold to municipality.—In event of the voluntary purchase by any city or town of a cemetery providing perpetual care of lots under this article, it shall be lawful for the cemetery to provide in its agreement with purchasers that in event of the voluntary purchase by such municipality of such cemetery property, such cemetery may retain for its own any amount accumulated in such perpetual care fund on sale of lots made subsequent to the ratification of this article: Provided, such municipality purchasing and accepting a conveyance of said cemetery property shall, as part consideration for making by such cemetery of said conveyance, assume in writing all obligations of such cemetery in connection with the maintenance thereof. (1943, c. 644, s. 12.)

§ 65-30. Burial association commissioner to administer article; examinations.—This article shall be administered by the burial association commissioner of North Carolina, who shall make periodic examination of affairs of such cemeteries to ascertain whether they are in fact complying with the terms hereof. Examinations shall be made not less frequently than once a year and more frequently if by him deemed necessary. (1943, c. 644, s. 13.)

§ 65-31. Violation of article a misdemeanor.—Any such cemetery owner or manager who fails to comply with any of the provisions of this article shall be guilty of a misdemeanor and upon conviction therefor shall be fined two hundred dollars, or imprisoned for not exceeding thirty days. (1943, c. 644, s. 14.)

§ 65-32. Licenses for persons selling grave space; revocation.—All persons offering to sell grave space under any plan herein authorized shall be licensed by said commissioner without payment of any license fee, and such license, for good cause shown, may, in the discretion of the commissioner, be revoked. (1943, c. 644, s. 15.)

§ 65-33. Certain powers delegated to cemetery manager.—The superintendent, manager, and as-

sistant superintendent of such cemetery shall have all the powers of a deputy sheriff of the county in which such cemetery is located to enforce the law, maintain order, abate nuisances, and prevent vandalism in such cemetery. (1943, c. 644, s. 16.)

§ 65-34. Prosecution of violations; revocation and restoration of license; article part of contracts.—It shall be the duty of the burial commissioner to prosecute or cause to be prosecuted all violations of this article, and upon the conviction of the owner or manager of a public cemetery of such violation, and upon failure of such owner or manager to correct such violation within thirty days thereafter, then, in addition to such other penalties as may result from such conviction, the burial commissioner may, in his discretion, revoke the license of such cemetery. Said commissioner may, in his discretion, upon application by such cemetery, thereafter restore to it its license if such cemetery corrects the violation of this article, on account of which its owner or manager was convicted, as well as any other violations thereof known to the commissioner. This article shall be written into and become a part, where applicable, of all contracts and certificates issued hereunder. (1943, c. 644, s. 17.)

§ 65-35. Effect of certain other laws.—This article shall not be subject to any other laws respecting insurance companies of any class, nor shall same be subject to the laws affecting the sale of securities or laws affecting mutual burial or assessment insurance associations, excepting only as this article, or amendments hereof, shall expressly provide. (1943, c. 644, s. 18.)

§ 65-36. Article not to apply to certain counties or cemeteries.—This article, anything to the contrary notwithstanding, shall not apply to any county, which, according to the last United States census, had a population of less than twenty-five thousand, nor shall it apply to any existing cemetery which does not advertise or charge for perpetual care of lots offered for sale to the public. Such existing cemetery shall have the right to advertise and provide perpetual care of its lots and to be licensed hereunder upon depositing in a perpetual care fund the amount per grave space applicable under the terms hereof. (1943, c. 644, s. 19.)

Chapter 66. Commerce and Business.

Art. 1. Regulation and Inspection.

§ 66-1. County commissioners to appoint inspectors.—The board of county commissioners may appoint for their county or any township thereof inspectors for any article of commerce the inspection of which is not otherwise provided for by law, who shall hold office for the term of five years after their employment. (Rev., ss. 4637, 4669; C. S. 5068.)

§ 66-2. Vacancies in office of inspectors; assistants; principal liable.—Whenever there shall be a vacancy in the office of inspector while the county commissioners are not in session, any three justices may appoint some other fit person until the next succeeding meeting of the board; or if any inspector shall be rendered incapable of performing his duty by sickness or other accident, he may, with the consent of three justices, appoint some other person as assistant during his sickness or other disability, which consent shall be certified under their hands and lodged with the clerk of the board of commissioners, and such assistant shall take the same oaths as inspectors; and the inspector shall be liable to the same fines and penalties for the assistant's misbehavior as for his own. (Rev., s. 4638; Code, s. 2989; R. C., c. 60, s. 9; 1784, c. 206, s. 3; 1793, c. 386; 1799, c. 539, s. 2; 1811, c. 807, s. 6; 1811, c. 812; C. S. 5069.)

§ 66-3. Bond of inspector; fees.—The said inspector shall enter into bond in the sum of five hundred dollars, payable to the state of North Carolina, conditioned for the faithful performance of the duties of his office, which bond the board shall take; and he shall be entitled to such fees as may be prescribed by the board. (Rev., s. 4671; Code, s. 3053; R. C., c. 60, s. 76; 1848, c. 43, s. 3; C. S. 5071.)

§ 66-4. Falsely acting as inspector.—If any person, who is not a legal or sworn inspector of lumber or other articles, presume to act as such, he shall forfeit and pay one hundred dollars, and be guilty of a misdemeanor. (Rev., s. 3580; Code, s. 3046; R. C., c. 60, s. 69; 1824, c. 1254, s. 3; C. S. 5072.)

§ 66-5. Penalty for sale without inspection.—If any person shall sell any article of forage or provision, of which inspection is required in accordance with this article, without the same having been inspected as required, he shall, for every offense, forfeit and pay one hundred dollars. (Rev., s. 4672; Code, s. 3054; R. C., c. 60, s. 77; 1850, c. 74, s. 2; C. S. 5073.)

§ 66-6. Penalty on master receiving without inspection.—No master or commander of any vessel shall take on board any cask or barrel or other commodity, liable to inspection as aforesaid, without its being inspected and branded as required, under the penalty of two hundred dollars for each offense. (Rev., ss. 4657, 4658; Code, ss. 3036, 3037; R. C., c. 60, s. 59; 1784, c. 206, s. 6; C. S. 5074.)

Local Modification.—Town of New Bern: C. S. 5074.

§ 66-7. Who to pay inspectors' fees; penalty for extortion.—The fees of inspectors shall be paid by the purchaser or exporter of the articles inspected, and if any inspector shall receive any greater fees than are by law allowed, he shall forfeit and pay ten dollars for every offense to any person suing for the same. (Rev., s. 4673; Code, s. 3055; R. C., c. 60, s. 79; 1824, c. 1254, ss. 1, 2; C. S. 5075.)

§ 66-8. Firewood in towns.—All firewood sold in incorporated towns shall be sold by the cord and not otherwise; and each cord shall contain eight feet in length, four feet in height and four feet in breadth; and shall be corded by the seller, under the penalty of two dollars for each offence, to the use of the informer. (Rev., s. 4667; Code, s. 3049; R. C., c. 60, s. 72; 1784, c. 211; 1880, c. 401; C. S. 5081.)

§ 66-9. Gas and electric light bills to show reading of meter.—It shall be the duty of all gas companies and electric light companies selling gas and electricity to the public to show, among other things, on all statements or bills rendered to consumers, the reading of the meter at the end of the preceding month, and the reading of the meter at the end of the current month, and the amount of electricity, in kilowatt hours, and of gas, in feet, consumed for the current month.

Any gas or electric light company failing to render bills or statements, as provided for in this section, shall be subject to a penalty of ten dollars for each violation of this section or failure to render such statements, recoverable before a justice of the peace by any person suing for the same; but this section shall not apply to bills and accounts rendered customers on flat rate contracts. (1915, c. 259; C. S. 5082.)

§ 66-10. Failure of junk dealers to keep record of purchases misdemeanor.—Every person, firm, or corporation buying brass or copper, or any other metal, or any rubber, or leather and rubber belts and belting, as junk, shall keep a register and shall keep therein a true and accurate record of each purchase, showing the description of the article purchased, the name from whom purchased, the amount paid for the same, the date thereof, and also any and all marks or brands upon said metal, rubber, or leather and rubber belts and belting. The said register and the metal and rubber, and leather and rubber belts and belting purchased shall be at all times open to the inspection of the public. A failure to comply with these requirements or the making of a false entry concerning such metals, rubber, or leather, or rubber belts or belting shall constitute a misdemeanor. (1917, c. 46; C. S. 5090.)

Local Modification.—Anson, Buncombe, Caldwell, Davidson, Randolph, Robeson: C. S. 5090; Stanly: 1939, c. 154.

§ 66-11. Dealing in certain metals regulated; purchasing from minors; violations of section misdemeanor.—Every person, firm, or corporation buying railroad brasses or any composition metal specially used in the operation of trains, or brasses, composition metals, or copper of the kind or quality used by manufacturing or power plants, shall keep a register and shall insert therein a true and accurate record of each purchase, showing the name of the person from whom purchased, the amount paid for the same, the date thereof, and also any and all marks or brands upon such metal. The register shall be at all times open to the inspection of the public. Any person or dealer buying or selling metals without complying with this section shall be guilty of a misdemeanor; and any person making a false entry in such register shall be guilty of a misdemeanor. Every person, firm, or corporation who shall buy or receive any such metals from persons under twenty-one years old, or who shall buy or receive any such metals after the same have been broken up and the marks or brands obliterated, shall be guilty of a misdemeanor; and every person buying, receiving or selling, or offering for sale metals broken into small pieces, or so broken as to obliterate the marks or brands, shall be prima facie presumed to have received such metals knowing the same to have been stolen. (1907, c. 464; 1909, c. 855, s. 1; C. S. 5091.)

Art. 2. Manufacture and Sale of Matches.

§ 66-12. Requirements for matches permitted to be sold.—No person, association, or corporation shall manufacture, store, offer for sale, sell or otherwise dispose of or distribute white phosphorous, single-dipped, strike-anywhere matches of the type popularly known as "parlor matches"; nor manufacture, store, sell, offer for sale, or otherwise dispose of, or distribute, white phosphorous, double-dipped, strike-anywhere matches or any other type of double-dipped matches, unless the bulb or first dip of such match is composed of a so-called safety or inert composition, non-ignitible on an abrasive surface; nor manufacture, store, sell, or offer for sale, or otherwise dispose of or distribute matches which when packed in a carton of five hundred approximate capacity and placed in an oven maintained at a constant temperature of two hundred degrees F., will ignite in eight hours; nor manufacture, store, offer for sale, sell or otherwise dispose of, or distribute, blazer, or so-called wind matches, whether of the so-called safety or strike-anywhere type. (1915, c. 109, s. 12, I; C. S. 5113.)

§ 66-13. Packages to be marked.—No person, association, or corporation shall offer for sale, sell or otherwise dispose of, or distribute, any matches, unless the package or container in which such matches are packed bears, plainly marked on the outside thereof, the name of the manufacturer and the brand or trade-mark under which the matches are sold, disposed of, or distributed. (1915, c. 109, s. 12, II; C. S. 5114.)

§ 66-14. Storage and packing regulated.—No more than one case of each brand of matches of any type or manufacture shall be opened at any one time in the retail store where matches are sold or otherwise disposed of; nor shall loose boxes or paper-wrapped packages of matches be kept on shelves or stored in such retail stores at a height exceeding five feet from the floor; all matches when stored in warehouses must be kept only in properly secured cases, and not piled to a height exceeding ten feet from the floor; nor be stored within a horizontal distance of ten feet from any boiler, furnace, stove, or other like heating apparatus; nor within a horizontal distance of twenty-five feet from any explosive material kept or stored on the same floor. All matches shall be packed in boxes or suitable packages, containing not more than seven hundred matches in any one box or package: Provided, however, that when more than three hundred matches are packed in any one box or package the said matches shall be arranged in two nearly equal portions, the heads of the matches in the two portions shall be placed in opposite directions, and all boxes containing three hundred and fifty or more matches shall have placed over the matches a center-holding or protecting strip, made of chip board, not less than one and one-quarter inches wide; said strip shall be flanged down to hold the matches in position when the box is nested into the shuck or withdrawn from it. (1915, c. 109, s. 12, II; C. S. 5115.)

§ 66-15. Shipping containers regulated. — All match boxes or packages shall be packed in strong shipping containers or cases; maximum number of match boxes or packages contained in any one shipping container or case shall not exceed the following number:

Number of Boxes	Nominal Number of Matches per Box
½ gross	700
1 gross	500
2 gross	400
3 gross	300
5 gross	200
12 gross	100
20 gross over 50 and under	100
25 gross under	50

No shipping container or case constructed of fiber board, corrugated fiber board, or wood, nailed or wirebound, shall exceed a weight, including its contents, of seventy-five pounds; and no lock-cornered wooden case containing matches shall have a weight, including its contents, exceeding eighty-five pounds; nor shall any other article or commodity be packed with matches in any such container or case; and all such containers and cases in which matches are packed shall have plainly marked on the outside of the container or case the words "Strike-anywhere Matches" or "Strike-on-the-Box Matches." (1915, c. 109, s. 12, III; C. S. 5116.)

§ 66-16. Violation of article a misdemeanor.— Any person, association, or corporation violating any of the provisions of this article shall be fined for the first offense not less than five dollars nor more than twenty-five dollars, and for each subsequent violation not less than twenty-five dollars. (1915, c. 109, s. 12, IV; C. S. 5117.)

Art. 3. Candy and Similar Products.

§ 66-17. Sale, etc., of candy or other food not complying with health and pure food laws.—It shall be unlawful for any person, firm or corporation, or agent of any person, firm or corporation, to consign, sell, possess or use any candy or other product within this state that does not comply with all federal and state health and pure food laws in force and effect in North Carolina. (1939, c. 323, s. 1.)

Editor's Note.—For comment on this enactment, see 17 N. C. Law Rev. 384.

§ 66-18. Manufacturer to pay tax upon products consigned to person, etc., other than licensed wholesale or retail merchant.—Any manufacturer of candy or similar products, or the agent of such manufacturer, who consigns any such products to any person, firm or corporation other than a licensed wholesale or retail merchant in the state of North Carolina shall be liable for and pay to the state of North Carolina a tax of three per cent (3%) upon the gross retail sales price of merchandise so consigned and/or sold: Provided such manufacturers shall be entitled to a refund or credit for taxes paid on such consigned goods as are returned by the consignee to said manufacturers. (1939, c. 323, s. 2.)

§ 66-19. Regulations as to possession and sale. —It shall be unlawful for any person, firm or corporation other than a licensed wholesale or retail merchant in the state of North Carolina to consign, possess or use any article upon which the tax provided for in § 66-18 preceding is payable, or for any consignee to sell such product, unless the manufacturer thereof is registered with the commissioner of revenue of the state of North Carolina for payment of said tax. (1939, c. 323, s. 3.)

§ 66-20. Commissioner of revenue may require reports. — The commissioner of revenue shall have authority to require a report, at such times as he may require, from every person, firm or corporation manufacturing candy or similar products, or from the agent of any such manufacturer, of the names and addresses of all consignors, other than licensed merchants, to whom consignment of such merchandise is made. (1939, c. 323, s. 4.)

§ 66-21. Violators deprived of legal redress. —The consignor shall not have the right to sue in any court of law in this state for the collection of monies resulting from the sale of merchandise sold in violation of this article. (1939, c. 323, s. 5.)

§ 66-22. Violations made misdemeanor.—Any person convicted for the violation of this article shall be guilty of a misdemeanor and subject to a fine of not exceeding one hundred dollars ($100.00) or imprisonment for not exceeding thirty days or both fine and imprisonment in the discretion of the court. (1939, c. 323, s. 6.)

Art. 4. Electrical Materials, Devices, Appliances and Equipment.

§ 66-23. Sale of electrical goods regulated.— Every person, firm or corporation before selling, offering for sale or exposing for sale, at retail to the general public or disposing of by gift as premiums or in any similar manner any electrical material, devices, appliances or equipment shall first determine if such electrical materials, devices, appliances and equipment comply with the provision of this article. (1933, c. 555, s. 1.)

§ 66-24. Identification marks required. — All electrical materials, devices, appliances and equipment offered for sale, exposed for sale at retail to the general public, or disposed of by gift as premiums or in any similar manner shall have the maker's name, trademark, or other identification symbol placed thereon, together with such other markings giving voltage, current, wattage, or other appropriate ratings as may be necessary to determine the character of the material, device, appliance or equipment and the use for which it is intended; and it shall be unlawful for any person, firm or corporation to remove, alter, change or deface the maker's name, trademark or other identification symbol. (1933, c. 555, s. 2.)

§ 66-25. Acceptable listings as to safety of goods.—The electrical inspector shall accept, without further examination or test, the listings of Underwriters' Laboratories, Inc., as evidence of safety of such materials, etc., so long as the listing continues in effect to his knowledge and, so long as information and experience have not demonstrated, in his judgment, that any specific listed materials, etc., are not safe.

The electrical inspector may accept as evidence of safety of such materials, etc., where not of

types for which such Underwriters' laboratories listings are in effect, such evidence by way of records of tests and examinations by bodies he deems properly qualified, as he deems necessary to assure him of the safety of such materials, etc. But such acceptance cannot be made to apply to other than the stock of materials, etc., for which such evidence has been specifically secured. One body whose evidence of safety shall be accepted by the electrical inspector for specific stocks is the insurance commission of the state of North Carolina, if the stock in question has been submitted to the examinations and tests required by that commission, and that commission has certified that in its judgment the stock conforms to the state law, to the requirements of this article, and to any additional requirements deemed necessary for safety in the judgment of that commission.

The electrical inspector may decline to accept any evidence of safety other than that provided by Underwriters' laboratories listings, for specific materials, etc., of types for which such listings are available.

The electrical inspector, in accepting listings of Underwriters' laboratories, shall keep in file as far as practicable, copies of all Underwriters' laboratories listings in effect, and copies of the recorded standards, requirements, test and examinations of Underwriters' laboratories for such materials, etc., or shall when necessary refer to the files of such information maintained by the insurance commission of North Carolina. The words "electrical inspector" when used in this article shall be construed to refer to any duly licensed and employed electrical inspector of the state or any governmental agency thereof. (1933, c. 555, s. 3.)

§ 66-26. Legal responsibility of proper installations unaffected.—This article shall not be construed to relieve from or to lessen the responsibility or liability of any party owning, operating, controlling or installing any electrical materials, devices, appliances or equipment for damages to persons or property caused by any defect therein, nor shall the electrical inspector be held as assuming any such liability by reason of the approval of any material, device, appliance or equipment authorized herein. (1933, c. 555, s. 4.)

§ 66-27. Violation made misdemeanor. — Any person, firm or corporation who shall violate any of the provisions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than fifty ($50.00) dollars or imprisonment for not more than thirty days. (1933, c. 555, s. 5.)

Art. 5. Sale of Phonograph Records or Electrical Transcriptions.

§ 66-28. Prohibition of rights to further restrict or to collect royalties on commercial use.—When any phonograph record or electrical transcription, upon which musical performances are embodied, is sold in commerce for use within this state, all asserted common law rights to further restrict or to collect royalties on the commercial use made of such recorded performances by any person is hereby abrogated and expressly repealed. When such article or chattel has been sold in commerce, any asserted intangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself, and the right to further restrict the use made of phonograph records or electrical transcriptions, whose sole value is in their use, is hereby forbidden and abrogated.

Nothing in this section shall be deemed to deny the rights granted any person by the United States Copyright Laws. The sole intendment of this enactment is to abolish any common law rights attaching to phonograph records and electrical transcriptions, whose sole value is in their use, and to forbid further restrictions of the collection of subsequent fees and royalties on phonograph records and electrical transcriptions by performers who were paid for the initial performance at the recording thereof. (1939, c. 113.)

Art. 6. Sale of Nursery Stock.

§ 66-29. Agreements for spraying, pruning, etc.—Every person, firm or corporation, who shall sell, barter or exchange any nursery stock in the state of North Carolina, who shall promise or agree, either in the written contract of sale, orally or otherwise, that such person, firm or corporation, selling, exchanging or bartering such nursery stock, will spray, prune or otherwise look after or service such nursery stock for any period of time after the said sale is made, shall before engaging in such business in the state of North Carolina post with the commissioner of agriculture a good and sufficient bond in the sum of one thousand dollars ($1,000.00) payable to the state of North Carolina, and conditioned that such person, firm or corporation, shall well and truly comply with the contract of sale containing such promise and agreements either written or oral.

This regulation shall apply to any agent or employee of any person, firm or corporation engaging in such business in the state of North Carolina, but one bond given by the principal shall be sufficient for all agents representing such principal. (1939, c. 189.)

Art. 7. Tagging Secondhand Watches.

§ 66-30. Definitions.—The following terms as used in this article are hereby defined as follows:

(a) "Person" means a person, firm, partnership or corporation, but shall not include a receiver, trustee in bankruptcy, trustee under a mortgage, deed of trust or contract securing any indebtedness, and executor or administrator while acting as such, or any person acting under an order of court or as a licensed pawnbroker.

(b) "Consumer" means an individual, firm, partnership, association or corporation, who buys for their own use or for the use of another, but not for resale.

(c) "Secondhand watch" means a watch as a whole, or any part thereof, which has previously been sold to a consumer, or a watch whose case or movement, serial numbers or other distinguishing numbers or identification marks have been erased, defaced, removed, altered or covered, or a watch any part of which has been replaced by parts from another make or model watch. (1941, c. 244, s. 1.)

§ 66-31. Tags required; "sell" defined.—Any person, or agent or employee thereof, who sells a secondhand watch, as herein defined, shall affix and keep affixed to the same a tag with the words

"secondhand" legibly written or printed thereon in the English language. For the purpose of this subsection, "sell" includes an offer to sell or exchange, expose for sale or exchange, possess with intent to sell or exchange and to sell or exchange. (1941, c. 244, s. 2.)

§ 66-32. Invoices delivered to purchasers; duplicate invoices open to inspection.—Any person, or agent or employee thereof who sells a secondhand watch, shall deliver to the purchaser a written invoice or bill of sale, setting forth the name and address of the seller, the name and address of the purchaser, the date of the sale, and a full description of the secondhand watch so sold, with the serial numbers, if any, or other distinguishing numbers or identification marks on its case and movements. A duplicate of such invoice or bill of sale shall be kept on file by the vendor for at least one year from the date of such sale, and such duplicate shall be open to inspection during all business hours by any peace officer or by any person authorized by any such peace officer to make an investigation regarding same. (1941, c. 244, s. 3.)

§ 66-33. Advertisements. — Any person advertising in any manner secondhand watches for sale shall state in such advertising that the watches so advertised are secondhand watches. (1941, c. 244, s. 4.)

§ 66-34. Violation of article made misdemeanor.—Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty ($50.00) dollars, or by imprisonment for not more than thirty (30) days, or both. (1941, c. 244, s. 5.)

Art. 8. Public Warehouses.

§ 66-35. Who may become public warehousemen.—Any person or any corporation organized under the laws of this state whose charter authorizes it to engage in the business of a warehouseman, may become a public warehouseman and authorized to keep and maintain public warehouses for the storage of cotton, goods, wares, and other merchandise as hereinafter prescribed upon giving the bond hereinafter required. (Rev., s. 3029; 1901, c. 678; 1919, c. 212; C. S. 5118.)

Cited in Champion Shoe Machinery Co. v. Sellers, 197 N. C. 30, 32, 147 S. E. 674.

§ 66-36. Bond required.—Every person or every corporation organized under § 66-35, to become a public warehouseman, except such as shall have a capital stock of not less than five thousand dollars, shall give bond in a reliable bonding or surety company, or an individual bond with sufficient sureties, payable to the state of North Carolina, in an amount not less than ten thousand dollars, to be approved, filed with and recorded by the clerk of the superior court of the county in which the warehouse is located, for the faithful performance of the duties of a public warehouseman; but if such person or corporation has a capital stock of not less than five thousand dollars, then it shall not be required to give the bond mentioned in this section. (Rev., s. 3030; 1901, c. 678, s. 2; 1905, c. 540; 1908, c. 56; 1919, c. 212; C. S. 5119.)

§ 66-37. Person injured may sue on bond.—Whenever such warehouseman fails to perform any duty or violates any of the provisions of this article, any person injured by such failure or violation may bring an action in his name and to his own use in any court of competent jurisdiction on the bond of said warehouseman. (Rev., s. 3031; 1901, c. 678, s. 3; C. S. 5120.)

Carrier's Liability as Warehouseman.—The liability of a common carrier continues until notice is given consignee of arrival of shipment of goods at destination and a reasonable time given to remove it. Thereafter the carrier's liability is that of a warehouseman. Poythress v. Durham & Southern R. Co., 148 N. C. 391, 62 S. E. 515.

As to railroad's liability as a warehouseman, see Bank v. Sou. Ry. Co., 153 N. C. 346, 347, 69 S. E. 261.

Care Required of Bailee.—Where it was known to bailor at time of storage that the bailee knew nothing about tobacco, and had no experience in handling it, the bailee will not be held liable for injury resulting from want of skill and experience; but will be bound to use such ordinary care as a prudent man would exercise to guard against moisture in the structure of the warehouse and the location of the tobacco. Motley v. Southern Finishing Co., 126 N. C. 339, 35 S. E. 601.

While warehousemen are not insurers like common carriers, they are liable for damages, caused by their negligence, to articles stored with them. Motley Co. v. Warehouse Co., 122 N. C. 347, 30 S. E. 3.

Warehousemen Liable for Negligence. — Warehousemen are liable under the general law for damages caused by their negligence. Motley v. Southern Finishing, etc., Co., 124 N. C. 232, 32 S. E. 555.

Provision against Liability.—A provision in a charter of a warehouse corporation to the effect that such corporation shall not be liable for loss or damages not provided for in its warehouse receipt or contract, attempts to confer exclusive privileges and is therefore unconstitutional and void. Motley Co. v. Warehouse Co., 122 N. C. 347, 30 S. E. 3.

The measure of damages for property damaged while in the care of a storage or warehouse company is the difference between the market value of the property in its damaged condition and what it would have sold for, if undamaged, on the day of its return to the owner. Motley Co. v. Warehouse Co., 122 N. C. 347, 30 S. E. 3.

§ 66-38. When insurance required; storage receipts.—Every such warehouseman shall, when requested thereto in writing by a party placing property with it on storage, cause such property to be insured; every such warehouseman shall give to each person depositing property with it for storage a receipt therefor. (Rev., s. 3032; 1901, c. 678, s. 4; 1905, c. 540, s. 2; C. S. 5121.)

Cross Reference.—As to Uniform Warehouse Receipts Act, see §§ 27-1 et seq.

§ 66-39. Books of account kept; open to inspection.—Every such warehouseman shall keep a book in which shall be entered an account of all its transactions relating to warehousing, storing, and insuring cotton, goods, wares, and merchandise, and to the issuing of receipts therefor, which books shall be open to the inspection of any person actually interested in the property to which such entry relates. (Rev., s. 3035; 1901, c. 678, s. 7; C. S. 5122.)

§ 66-40. Unlawful disposition of property stored.—If any person unlawfully sells, pledges, lends, or in any other way disposes of or permits or is a party to the unlawful selling, pledging, lending, or other disposition of any goods, wares, merchandise, or anything deposited in a public warehouse, without the authority of the party who deposited the same, he shall be punished by a fine not to exceed two thousand dollars and by imprisonment in the state's prison for not more than three years; but no officer, manager, or agent of such public warehouse shall be liable to the penalties provided in this section unless, with the in-

tent to injure or defraud any person, he so sells, pledges, lends, or in any other way disposes of the same, or is a party to the selling, pledging, lending, or other disposition of any goods, wares, merchandise, article, or thing so deposited. (Rev., s. 3831; 1901, c. 678, s. 11; C. S. 5123.)

Cross Reference.—As to warehouse receipts, see §§ 27-1 et seq.

Art. 9. Collection of Accounts.

§ 66-41. Permit from Insurance Commissioner.—Any person, firm or corporation within the State of North Carolina engaging in the collection of accounts for a percentage consideration of the account collected, or upon any other basis than regular employment, shall, before engaging in such business within the State of North Carolina, apply to and receive from the Insurance Commissioner, a permit to engage in such business, which permit shall at all times be prominently displayed in the main office of the person, firm, or corporation to whom or to which the permit is issued, and the number of said permit shall be printed in bold type upon all letterheads, stationery and forms used by the person, firm or corporation holding said permit. (1931, c. 217, s. 1.)

Editor's Note.—The title of the Act from which this section was taken includes detective agencies, but the body of the act makes no reference to such agencies.

§ 66-42. Application to Commissioner for permit.—The person, firm, or corporation desiring to secure a permit as provided in § 66-41, shall make application to the Insurance Commissioner upon such form as the Commissioner may provide, and shall submit with such application any and all information which the Commissioner may require to assist him in determining the financial condition, business integrity, method of operation and protection to the public offered by the person, firm or corporation filing the application. All information submitted shall be sworn to by the responsible officer, member of the firm, or individual, as in each case necessary, and the Commissioner shall have the right to require any and all additional information which, in his judgment, might assist him in determining whether or not the applicant is entitled to the permit sought. (1931, c. 217, s. 2.)

§ 66-43. Hearing granted applicant if application declined; appeal.—If, for any reason, upon the application made and upon the consideration of the data submitted with the application or items, the Commissioner shall be of the opinion that a permit should not be issued to the applicant, he shall decline the same, giving notice of his action to the applicant. Following notice, the applicant shall have ten days within which to submit additional information in support of his application, and if, upon further hearing upon the application and additional information, the Commissioner shall again decline to issue the permit, the applicant shall have the right to appeal to the Superior Court and his appeal shall stand for hearing in the Superior Court of the County of Wake, and the evidence, data and information submitted to the Commissioner shall constitute the record in the Superior Court, and the same shall be heard by the Judge of the Superior Court to determine whether or not the Commissioner had evidence sufficient to justify his action. (1931, c. 217, s. 3.)

§ 66-44. Application fee; issuance of permit; contents and duration.—Upon the filing of the application and information hereinbefore required, the commissioner may require the applicant to pay a fee of $50.00, and no permit may be issued until this fee is paid. The commissioner may issue a permit if he finds it proper, and in that case no part of the $50.00 shall be returned. If the application is denied, the commissioner shall retain $5.00 of the application fee and return the remainder to the applicant. The $5.00 so retained upon applications not granted, and the full fee of $50.00 upon applications granted, shall be used in paying the expenses incurred in connection with the consideration of such applications and the issuance of such permits.

Each permit shall state the name of the applicant, his place of business, and the nature and kind of business he is engaged in. The commissioner shall assign to the permit a serial number for each year beginning with July first, one thousand nine hundred and thirty-one. Each permit shall be for a period of one year, beginning with July first and ending with June thirtieth of the following year. (1931, c. 217, s. 4.)

§ 66-45. Revocation of permit.—If the Commissioner shall have issued any permit to any person, firm, or corporation as herein provided, and shall have information that the holder of the permit is not conducting his business in a business-like way, he shall notify the holder of the permit of a date for a hearing, which notice shall name a time and place for the hearing, and at which hearing any and all evidence as to the conduct of the business may be heard by the Commissioner. If, upon the hearing of the evidence, the Commissioner shall be of the opinion that the applicant is not entitled to the permit, the Commissioner shall cancel said permit, after which time it shall be unlawful for the person, firm or corporation whose permit is cancelled to engage in the business covered by the permit. If the permit be cancelled upon hearing, either the holder of the permit or the complaining party shall have the right to appeal as hereinbefore provided in case the application is denied, and the record of the hearing before the Commissioner shall be the record in the Superior Court upon which the Judge shall determine whether or not the Commissioner had sufficient evidence upon which to base his action. (1931, c. 217, s. 5.)

Editor's Note.—Though "business-like way," as used in this section, is an exceedingly indefinite standard of conduct, the statute is probably valid, in view of the right of appeal to the courts. 9 N. C. Law Rev. 390.

§ 66-46. Rules and regulations; schedule of fees.—The Commissioner shall have the right to make any rules or regulations necessary to enforce the provisions of this article and may approve schedules of fees and methods of collecting the same, or make any other rule or regulation necessary to secure the proper conduct of the business referred to in this article. (1931, c. 217, s. 6.)

§ 66-47. Violation of article a misdemeanor.—Any person, firm or corporation who shall engage in the business referred to in this article

without first receiving a permit, or who shall fail to secure a renewal of his permit upon the expiration of the license year, or shall engage in the business herein referred to after the permit has been canceled as herein provided, or who shall fail or refuse to furnish the information required of the Commissioner, or who shall fail to observe the rules and regulations made by the Commissioner pursuant to this article, shall, upon conviction, be guilty of a misdemeanor punishable in the discretion of the court. (1931, c. 217, s. 7.)

§ 66-48. Disposition of fees.—All fees collected hereunder shall be credited to the account of the Insurance Commissioner for the specific purpose of providing the personnel, equipment and supplies necessary to enforce this article, but the Director of the Budget shall have the right to budget the revenues received in accordance with the requirements of the Commissioner for the purposes herein required, and at the end of the fiscal year, if any sum whatever shall remain to the credit of the Commissioner, derived from the sources herein referred to, the same shall revert to the General Treasury of the State to be appropriated as other funds. (1931, c. 217, s. 8.)

§ 66-49. Attorneys at law and local county agencies excepted.—Nothing in this article shall be construed to apply to legally licensed attorneys at law engaged in the practice of the profession of law unless, however, such attorneys shall engage in the business herein referred to under a trade name or as a corporation, nor shall this article apply or be construed to apply to any person, firm or corporation whose business of collecting accounts is limited to the collection of such accounts against debtors having residence in the county of the residence of such person or firm, or the principal office of such corporations so engaged in such business. (1931, c. 217, s. 9.)

Art. 10. Fair Trade.

§ 66-50. Title of article.—This article may be known and cited as the "Fair Trade Act." (1937, c. 350, s. 10.)

§ 66-51. Definitions.—The following terms, as used in this article, are hereby defined as follows:

(a) "Commodity" means any subject of commerce.

(b) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor or publisher.

(c) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(d) "Retailer" means any person selling a commodity to consumers for use.

(e) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust or any unincorporated organization. "Person" shall not include the state of North Carolina or any of its political sub-divisions. (1937, c. 350, s. 1.)

Editor's Note.—For a discussion of the act from which this article was codified, see 15 N. C. Rev., No. 4, p. 367.

§ 66-52. Authorized contracts relating to sale or resale of commodities bearing trademark, brand or name.—No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others, shall be deemed in violation of any law of the state of North Carolina by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(c) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price. (1937, c. 350, s. 2.)

Article Is Constitutional.—The North Carolina Fair Trade Act, permitting the manufacturer or distributor of trade-marked goods to establish the minimum retail sale price of such goods by contract with wholesalers and retailers, and providing that sale by retailers not parties to the contracts at prices less than those stipulated in the contracts should be deemed unfair competition, is not void as creating or tending to create monopolies in contravention of Art. I, § 31, of the state Constitution, since the restrictions imposed by the act are limited and apply solely to trade-marked goods in their vertical distribution from manufacturer or distributor through the wholesalers and retailers to the consumer, which goods are sold by the retailer in competition with goods of the same general class of other manufacturers or, in the case of patented goods, in competition with comparable products of other manufacturers, and therefore the act does not create or tend to create a monopoly by horizontal agreements between persons in the same business in competition with each other. Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308.

The North Carolina Fair Trade Act, permitting the establishment of minimum retail prices on trade-marked goods by agreement, does not deprive a retailer not a party to a contract with the manufacturer or distributor of any property right in preventing such retailer from selling the trade-marked article at a price less than that stipulated by contract, since such retailer acquires title with knowledge and subject to the stipulations relative to the minimum retail price permitted by the law in protecting the property right of the manufacturer or distributor in his trade-mark and good will, which property right subsists while the goods bear his trade-mark, even after he has parted with title of the commodity itself. Id.

Nor is it a special act regulating trade in contravention of Constitution, Art. II, § 29. Id.

Nor is it unconstitutional as a delegation of legislative authority. Id.

§ 66-53. Certain evasions of resale price restrictions, prohibited.—For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this article (except to the extent authorized by the said contract):

(a) The offering or giving of any article of

value in connection with the sale of such commodity;

(b) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(c) The sale or offering for sale of such commodity in combination with any other commodity shall be deemed a violation of such resale prices restriction, for which the remedies prescribed by § 66-56 shall be available. (1937, c. 350, s. 3.)

§ 66-54. Contracts with persons other than the owner of the brand, etc., not authorized.—No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this article, by any person other than the owner of the trade-mark, brand or name used in connection with such commodity or a distributor specifically authorized to establish said price by the owner of such trade-mark, brand or name. (1937, c. 350, s. 4.)

§ 66-55. Resales not precluded by contract.—No contract containing any of the provisions enumerated in § 66-52 shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and when plain notice of the fact is given to the public: Provided, the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(b) When the trade-mark, brand or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;

(c) When the goods are altered, second-hand, damaged or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(d) By any officer acting under an order of court.

(e) When any commodity is sold to a religious, charitable or educational organization or institution, provided such commodity is for the use of such organization or institution and not for resale. (1937, c. 350, s. 5.)

§ 66-56. Violation of contract declared unfair competition.—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this article, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby. (1937, c. 350, s. 6.)

Retailer Deemed to Contract in Contemplation of Article.—The fact that a manufacturer or distributor of trade-marked commodities permits the sale of such commodities to a noncontracting retailer does not preclude the manufacturer or distributor from maintaining a suit against such retailer under this article, since the manufacturer or distributor has the option to obtain a contract or rely upon the statute, and since the sale to the noncontracting retailer does not confer upon him the right to violate the statute with reference to which he is deemed to have contracted in making the purchase. Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308.

Permanent Injunction Authorized.—This section authorizes a suit by a manufacturer or distributor protected by the act against a noncontracting retailer to permanently enjoin such retailer from selling trade-marked commodities of the manufacturer or distributor in violation of the act upon allegations of accrued and prospective irreparable damages. Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308.

Reasonable Profit Is No Defense.—The fact that a retailer makes a reasonable profit upon trade-marked articles is no defense in a suit against such retailer for selling such articles at a price below that allowed by this article, since the standard of the statute is one of retail price and not of reasonable profit. Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308.

§ 66-57. Exemptions.—This article shall not apply to any contract or agreement between or among producers or distributors or, except as provided in sub-division (c) of § 66-52, between or among wholesalers, or between or among retailers, as to sale or resale prices. This article shall not apply to any prices offered in connection with or contracts or purchases made by the state of North Carolina or any of its agencies, or any of the political subdivisions of the said state. (1937, c. 350, s. 7.)

Art. 11. Government in Business.

§ 66-58. Sale of merchandise by governmental units.—It shall be unlawful for any unit or agency of the state government or any individual employee or employees of any such unit or agency in his, or her, or their capacity as employee or employees of said unit or agency to purchase for or sell to any person, firm or corporation any article of merchandise in competition with citizens of the state: Provided, however, that as regards educational institutions, the provisions of this section shall not apply to articles produced incident to the operation of an instructional department, or incident to educational research, or to articles of merchandise incident to classroom work, meals, books and/or other articles of merchandise not exceeding fifteen cents in value when sold to members of the educational staff, or staff auxiliary to education, or sold to duly enrolled students, or to members of charitable institutions, or on occasion to immediate members of the families of members of the educational staff or of duly enrolled students: Provided further, that the provisions of this section shall not apply to the sale of meals, or merchandise aforesaid, to persons attending meetings or conventions at state institutions as invited guests of such institutions, or to the products of experiment stations at any state institution: Provided further, that the provisions of this section shall not apply to the sale of learned journals or books, or to the business operation of endowment funds established for the purpose of producing income for educational purposes: Provided further, that the provisions of this section shall not apply to counties and municipalities, to the state board of health, to the division of purchase and contract, to the state highway and public works commission, to state hospitals for the insane, to the state commission for the blind, to the North Carolina school for the blind at Raleigh, to the North Carolina school for the deaf at Morganton, to Appalachian State Teachers College at

Boone, to Western Carolina Teachers College at Cullowhee, or to any state correctional institutions or agencies, or to farm, dairy, livestock, or poultry products of any state institution or agency; provided that nothing in this section shall apply to Highlands School in Macon county; provided further, that this section shall not be construed to apply to any high school or public school: Provided further, that this section shall not apply to child-caring institutions or orphanages receiving state aid.

Any person knowingly or willfully violating the provisions of this section shall be subject to a fine of ten dollars for each such violation. (1939, c. 122.)

Art. 12. Coupons for Products of Photography.

§ 66-59. Title of article.—The title of this article shall be "An Act to Prevent the Perpetration of Certain Fraudulent Practices by Photographers within the State of North Carolina." (1943, c. 25, s. 1.)

§ 66-60. Definitions.—The term "photographer" as used herein shall mean any individual, firm, partnership, association, corporation, or other group or combination acting as a unit.

The term "coupon" as used herein shall mean any coupon, certificate, receipt or similar device, by whatever name called.

The term "solicitor" as used herein shall mean any agent, salesman, employee, solicitor, canvasser, or any other person acting for or on behalf of a photographer. (1943, c. 25, s. 2.)

§ 66-61. Coupons redeemable in products of photography prohibited unless bond given.—No photographer or solicitor shall sell or issue any coupon, whether for a consideration or otherwise, purporting to be exchangeable, redeemable, or payable, in whole or in part, for any product of photography, including photographs, coloring, tinting, frames, mounts, folders, copying or the reproduction of photographs, and all other products of photography, unless the principal for which said business is conducted shall first file with the clerk of the superior court in each and every county in which said business is to be conducted a good and sufficient bond in the principal sum of two thousand dollars ($2,000.00), the condition of such bond being that the principal shall well and truly discharge all contracts, representations and other obligations made by said principal and all contracts, representations and other obligations made by any solicitor of such principal. (1943, c. 25, s. 3.)

§ 66-62. Method of withdrawing bond.—The coupons, as above defined, issued in any county shall be serially numbered, and before any bond, herein required to be filed, can be withdrawn, the principal on said bond shall file a sworn statement with the clerk of the superior court, in a form approved by said clerk, showing the lowest and highest serial number of the coupon, the total number issued, and the total number that has been redeemed. On the unredeemed coupons, the said principal shall show the name and address of the person to whom the said coupon was issued; that each of said persons have been notified, in writing, at the address shown, at least thirty (30) days prior thereto, to redeem said coupons, or otherwise that said coupon would become void on a day certain stated in said notice. (1943, c. 25, s. 4.)

§ 66-63. Remedies for loss sustained through non-performance of obligation in connection with sale of coupons.—Any person sustaining any loss or damage by reason of any photographer or solicitor failing to fully perform and discharge any contract, representation or other obligation in connection with the sale of any coupon purporting to be exchangeable, redeemable or payable, in whole or in part, for any product of photography, whether such contract, promise or representation be made by the photographer or solicitor, may recover in any court of competent jurisdiction against the principal and his, her or its surety, the sum of twenty-five dollars ($25.00), in addition to any actual loss or damage sustained, and any amount so recovered shall be a specific lien on the bond filed as herein required. (1943, c. 25, s. 5.)

§ 66-64. Violation a misdemeanor.—Any person violating the provisions of this article, including the make of any false statement in the affidavit required under § 66-62, shall be guilty of a misdemeanor and, upon conviction, be fined or imprisoned, or both, in the discretion of the court. (1943, c. 25, s. 6.)

Art. 13. Miscellaneous Provisions.

§ 66-65. Indemnity bonds required of agents, etc., to state maximum liability and period of liability.—Wherever any person, firm, or corporation, engaged in the business of merchandising any articles whatsoever, shall require of its agents, solicitors, salesmen, representatives, consignees, or peddlers, or other persons selling or handling its merchandise, as a condition precedent to selling or handling any of the merchandise of said person, firm, or corporation, that such agents, solicitors, salesmen, representatives, consignees, or peddlers should furnish and provide a bond or guaranty or indemnity contract guaranteeing the full and faithful accounting of moneys collected from such merchandise, such bond or indemnity contract shall state specifically therein the maximum amount of money or other liability which the principal and the sureties or guarantors thereof undertake thereby to pay in event of default of said bond or indemnity or guaranty contract; and said bond or indemnity or guaranty contract shall also state specifically the period of time during which liability may be incurred on account of any default in said bond or indemnity or guaranty contract.

Any bond or indemnity or guaranty contract which does not comply with the provisions of this section shall be null and void and no action may be maintained against the surety or guarantor to recover any sum due thereon in any court of this state. (1943, c. 604, ss. 1, 2.)

§ 66-66. Manufacture or sale of anti-freeze solutions compounded with inorganic salts or petroleum distillates prohibited.—The manufacture or sale of anti-freeze solutions which are designated, intended, advertised, or recommended by the manufacturer or seller for use in the cooling systems of motor vehicles or gasoline combustion engines, and which are compounded with calcium

chloride, magnesium chloride, sodium chloride, or other inorganic salts or with petroleum distillates is hereby prohibited.

Any person, firm, or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (1943, c. 625, ss. 1, 2.)

Chapter 67. Dogs.

Art. 1. Owner's Liability.

§ 67-1. Liability for injury to livestock or fowls.—If any dog, not being at the time on the premises of the owner or person having charge thereof, shall kill or injure any livestock or fowls, the owner or person having such dog in charge shall be liable for damages sustained by the injury, killing, or maiming of any livestock, and costs of suit. (1911, c. 3, s. 1; C. S. 1669.)

Cross References.—As to dog-fighting, a misdemeanor, see § 14-362. As to admittance of dogs to bedrooms by innkeeper or guest, a misdemeanor, see § 72-7; but see also provision for "seeing-eye" dogs, § 67-29.

Editor's Note.—By the ancient common law dogs were considered as of too base a nature to be the subject of larceny. But now they are deemed property for which an action will lie for wrongful injury. As to liability for wrongfully killing a dog, see Beasley v. Byrum, 163 N. C. 3, 79 S. E. 270; State v. Smith, 156 N. C. 628, 72 S. E. 321.

Property in dogs is recognized by the law and they are protected against wanton and needless injury for which a civil action for damages may be maintained by the owner. Dodson v. Mock, 20 N. C. 282; Mowery v. Salisbury, 82 N. C. 175.

The property in dogs therefore, is not of the same character as that of ordinary domestic animals, in which the right of property is absolute, but it is of an imperfect or qualified nature. Sentell v. New Orleans, etc., R. Co., 166 U. S. 698, 701, 17 S. Ct. 693, 41 L. Ed. 1169.

The law authorizes the killing of a dog found on a man's premises in the act of attempting to destroy his sheep, calves, conies in a warren, deer in a park or other reclaimed animals used for human food and unable to defend themselves. Parrott v. Hartsfield, 20 N. C. 242; State v. Smith, 156 N. C. 628, 72 S. E. 321.

As to owner's liability for injury by his dog to other persons, see Harris v. Fisher, 115 N. C. 318, 20 S. E. 461; Perry v. Phipps, 32 N. C. 259. See also, 1 Enc. Dig. 347 et seq.

§ 67-2. Permitting bitch at large.—If any person owning or having any bitch shall knowingly permit her to run at large during the erotic stage of copulation he shall be guilty of a misdemeanor and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3303; Code, s. 2501; 1862-3, c. 41, s. 2; C. S. 1670.)

§ 67-3. Sheep-killing dogs to be killed.—If any person owning or having any dog that kills sheep or other domestic animal, upon satisfactory evidence of the same being made before any justice of the peace of the county, and the owner duly notified thereof, shall refuse to kill it, and shall permit such dog to go at liberty, he shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days, and the dog may be killed by any one if found going at large. (Rev., s. 3304; Code, s. 2500; 1862-3, c. 41, s. 1; 1874-5, c. 108, s. 2; C. S. 1671.)

Cross References.—As to what dogs may be killed, see § 67-14. As to liability for killing listed dogs, see § 67-27.

Cited in Daniels v. Homer, 139 N. C. 219, 252, 51 S. E. 922; Parrott v. Hartsfield, 20 N. C. 242.

§ 67-4. Failing to kill mad dog.—If the owner of any dog shall know, or have good reason to believe, that his dog, or any dog belonging to any person under his control, has been bitten by a mad dog, and shall neglect or refuse immediately

to kill the same, he shall forfeit and pay the sum of fifty dollars to him who will sue therefor; and the offender shall be liable to pay all damages which may be sustained by any one, in his property or person, by the bite of any such dog, and shall be guilty of a misdemeanor, and fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3305; Code, s. 2499; R. C., c. 67; C. S. 1672.)

Cross References.—As to killing mad dogs, see §§ 67-14, 67-27. As to rabies, vaccination, etc., generally, see §§ 106-364 et seq.

Actual Knowledge Unnecessary.—In an action under this section it is not necessary to prove that the biting dog was in fact mad. The words "good reason to believe" apply both to the condition of the biting dog and to the fact that the dog was bitten by a mad dog. Wallace v. Douglas, 32 N. C. 79.

Dog Can Be Destroyed.—If owner refuses to destroy a dog, which is mad or is bitten by a mad dog, he subjects himself to the possibility of a fine and imprisonment and the dog can be destroyed by order of the justice issuing the warrant under this section. Beasley v. Byrum, 163 N. C. 3, 4, 79 S. E. 270.

For the effect of contributory negligence on the part of the person bitten by a mad dog, see Holton v. Moore, 165 N. C. 549, 81 S. E. 779.

Art. 2. License Taxes on Dogs.

§ 67-5. Amount of tax.—Any person owning or keeping about him any open female dog of the age of six months or older shall pay annually a license or privilege tax of two dollars. Any person owning or keeping any male dog, or female dog other than an open female dog of the age of six months or older, shall pay annually on each dog so owned or kept a license or privilege tax of one dollar. (1919, c. 116, ss. 1, 2; C. S. 1673.)

Local Modification.—Cherokee: 1933, c. 90; Clay: 1933, c. 301; Graham: 1931, c. 35; Macon: 1933, c. 301; Swain: 1933, c. 149.

Cross Reference.—As to credit of vaccination fee on dog tax, see § 106-372.

Constitutional Exercise of Police Power.—A statute imposing a specified tax upon all persons owning or keeping a dog within a certain county is for the privilege of keeping the dog therein and comes under the police regulations of the county. It is therefore constitutional and valid and will not be restrained. Newall v. Green, 169 N. C. 462, 86 S. E. 291; McAlister v. Yancey County, 212 N. C. 208, 193 S. E. 141.

§ 67-6. License tags; optional with county commissioners.—To every person paying the license or privilege tax prescribed in § 67-5 there shall be issued by the sheriff a metal tag bearing county name, a serial number, and expiration date, which shall be attached by owner to a collar to always be worn by any dog when not on premises of the owner or when engaged in hunting. The superintendent of public instruction shall at all times keep on hand a supply of tags to be furnished the sheriffs of the several counties. Provided, that the county commissioners of each county shall, by order duly made in regular session, make an order determining whether the collar and tag shall be applied to that county. (1919, c. 116, s. 2½; Ex. Sess. 1920, c. 37; C. S. 1674.)

Editor's Note.—This section was amended by ch. 37, Ex. Sess. 1920 by having the metal tags kept by the superintendent of public instruction. They were formerly kept by the commissioner of agriculture.

§ 67-7. Dogs to be listed; penalty for failure to list.—It shall be the duty of every owner or keeper of a dog to list the same for taxes at the same time and place that other personal property is listed, and the various tax listers in the state shall have proper abstracts furnished them for listing dogs for taxation, and any person failing or refusing to list such dog or dogs shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. The owner of the home or lessee of such owner shall be responsible for listing of any dog belonging to any member of his family. (1919, c. 116, s. 3; C. S. 1675.)

Local Modification.—Mitchell: Pub. Loc. 1925, c. 265. (See § 67-18.)

§ 67-8. When tax is due.—The license or privilege tax herein imposed shall be due and payable on the first day of October of each and every year. (1919, c. 116, s. 3; 1943, c. 119; C. S. 1676.)

Editor's Note.—The 1943 amendment omitted a provision as to penalty for failure to pay tax.

§ 67-9. Receipt for tax a license.—Upon the payment to the sheriff or tax collector of the license or privilege tax aforesaid, such sheriff or tax collector shall give the owner or keeper of such dog or dogs a receipt for the same which shall constitute a license under the provisions of this article. (1919, c. 116, s. 3; C. S. 1677.)

§ 67-10. Tax listers to make inquiry, compile reports; compensation.—The tax listers for each township, town, and city in this state shall annually, at the time of listing property as required by law, make diligent inquiry as to the number of dogs owned, harbored, or kept by any person subject to taxation. The list-takers shall, on or before the first day of July in each year, make a complete report to the sheriff or tax collector on a blank form furnished them by the proper authority, setting forth the name of every owner of any dog or dogs, how many of each and the sex owned or kept by such person. The county commissioners may pay the tax listers for such services such amounts as may be just out of the money arising under this article. (1919, c. 116, ss. 4, 6; C. S. 1678.)

§ 67-11. Purchasers to ascertain listing.—Any person coming in possession of any dog or dogs after listing time shall immediately ascertain whether such dog or dogs have been listed for taxes or not, and if not so listed, it is hereby made the duty of such owner or keeper of such dog or dogs to go to the sheriff or tax collector of his county and list such dog or dogs for taxes, and it is made the duty of the owner or keeper of such dog or dogs to pay the privilege or license tax as is herein provided for in other cases. (1919, c. 116, s. 4; C. S. 1679.)

§ 67-12. Permitting dogs to run at large at night; penalty; liability for damage.—No person shall allow his dog over six months old to run at large in the night time unaccompanied by the owner or by some member of the owner's family, or some other person by the owner's permission. Any person intentionally, knowingly, and willfully violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, and shall also be liable in damages to any person injured or suffering loss to his property or chattels. (1919, c. 116, s. 5; C. S. 1680.)

Local Modification.—Buncombe, Halifax, New Hanover,

Wake: 1925, c. 314; Watauga: Pub. Loc. 1927, c. 503. (See § 67-18.)

Cross Reference.—As to permitting dogs to run at large on Capitol Square, see § 14-396.

Valid Exercise of Police Power.—A city ordinance which prohibits the owner from allowing dogs to run at large without muzzles is a valid exercise of the police power. State v. Clifton, 152 N. C. 800, 67 S. E. 751.

§ 67-13. Proceeds of tax to school fund; proviso, payment of damages; reimbursement by owner.—The money arising under the provisions of this article shall be applied to the school funds of the county in which said tax is collected: Provided, it shall be the duty of the county commissioners, upon complaint made to them of injury to person or injury to or destruction of property by any dog, upon satisfactory proof of such injury or destruction, to appoint three freeholders to ascertain the amount of damages done, including necessary treatment, if any, and all reasonable expenses incurred, and upon the coming in of the report of such jury of the damage as aforesaid, the said county commissioners shall order the same paid out of any moneys arising from the tax on dogs as provided for in this article. And in cases where the owner of such dog or dogs is known or can be ascertained, he shall reimburse the county to the amount paid out for such injury or destruction. To enforce collection of this amount the county commissioners are hereby authorized and empowered to sue for the same. Provided, further that all that portion of this section after the word, "collected" in line three, shall not apply to Anson, Beaufort, Bladen, Caldwell, Chatham, Columbus, Currituck, Davie, Duplin, Durham, Gates, Graham, Harnett, Hertford, Lincoln, McDowell, Moore, New Hanover, Perquimans, Rowan, Rutherford, Scotland, Stokes, Transylvania, Union, Wayne and Yadkin counties. (1919, c. 77, s. 7; 1919, c. 116, s. 7; Pub. Loc. 1925, c. 54; Pub. Loc. 1927, cc. 18, 219, 504; 1929, cc. 31, 79; 1933, cc. 28, 387, 477, 526; 1935, c. 402; 1937, cc. 63, 75, 118, 282, 370; 1939, cc. 101, 153; 1941, cc. 8, 46, 132, 287; 1943, cc. 211, 371, 372; C. S. 1681.)

Local Modification.—Alamance: 1935, c. 50; Avery, Forsyth, McDowell, Orange, Randolph, Watauga: 1931, c. 283; Avery, Mitchell: 1933, c. 273; Bertie: 1943, c. 189; Buncombe: 1937, c. 119; Cabarrus: 1939, c. 225; Caldwell: 1937, c. 23; Caswell: 1935, c. 188; 1941, c. 19; Chowan: 1925, c. 15; Cumberland: 1935, c. 361; Dare: 1939, c. 155; Davidson: 1925, c. 79; Duplin: 1937, c. 47; Greene: 1937, c. 92; Guilford, Forsyth: 1933, c. 547; Jones: 1939, c. 151; Madison: 1935, c. 412; Mitchell: 1937, c. 73; Mecklenburg, Stanly: 1935, c. 30; Onslow: 1933, c. 200; 1939, c. 85; Pender: 1937, c. 76; Pitt: 1933, c. 561; Rockingham: 1925, c. 25; Surry: 1933, c. 310; Union: Pub. Loc. 1927, c. 501; Vance: Pub. Loc. 1925, c. 103; Warren: 1943, c. 545; Wayne: 1939, c. 39; Wilson: 1931, c. 37; Yancey: Pub. Loc. 1925, c. 57, s. 2.

Cross Reference.—As to provision that it shall be unlawful for proceeds of dog taxes to be used for other than school purposes, see § 115-382.

In General.—This section is a police regulation not estopping the defendant in the county's action from establishing any defense available to him under the pleadings, nor does it change the method of procedure as to the burden of proof, or otherwise, except that it limits recovery of the injured person, electing to proceed under this statute, to a sum not exceeding the amount thereunder ascertained. Board v. George, 182 N. C. 414, 109 S. E. 77.

Mandamus Will Lie.—Where a person having a legal right to recover under this section, makes satisfactory proof to the county commissioners of injury inflicted by a dog, it is the legal duty of the commissioners to appoint freeholders to ascertain the amount of damage done, and mandamus will lie to compel them to perform this duty. White v. Holding, 217 N. C. 329, 7 S. E. (2d) 825.

Constitutional.—This section does not deprive the defendant of a jury trial, and it is constitutional. Board v. George, 182 N. C. 414, 109 S. E. 77.

Testimony of Non-Expert Witness.—Admission of judgment of a non-expert witness upon the personal observation of the carcass of the sheep, as to the length of time it had been killed, is not erroneous as the expression of a theoretical or scientific opinion. Board v. George, 182 N. C. 414, 109 S. E. 77.

Right to Trial by Jury.—The ascertainment of damages by three disinterested freeholders, and the payment thereof by county commissioners from the dog taxes, with the right of the county to sue to recover the amount so paid from the owner of the dog if known or discovered, as provided by this section, reserves to such owner the right to a trial by jury in the action of the commissioners, and does not permit recovery in excess of the sum awarded for the damages caused as ascertained under the provisions of the statute. Board v. George, 182 N. C. 414, 109 S. E. 77.

Cost of Assessment.—In an action by the county, under this section, the reasonable cost of the services of the persons chosen to make the assessment, which is paid by the county, is a part of the money paid on account of the injury or destruction caused by the dog, and defendant's exception thereto will not be sustained. Semble, the question of the reasonableness of this amount is a question for the jury, when aptly and properly raised and presented. Board v. George, 182 N. C. 414, 109 S. E. 77.

§ 67-14. Mad dogs, dogs killing sheep, etc., may be killed.—Any person may kill any mad dog, and also any dog if he is killing sheep, cattle, hogs, goats, or poultry. (1919, c. 116, s. 8; C. S. 1682.)

Cross References.—As to liability of owner who fails to kill sheep-killing dog, see § 67-3. As to liability of owner who fails to kill mad dog, see § 67-4. As to protection of listed dogs, see § 67-27.

§ 67-15. Dogs, when listed, personal property; larceny of dog a misdemeanor. — All dogs, when listed for taxes, become personal property and shall be governed by the laws governing other personal property: Provided, the larceny of any dog upon which aforesaid tax has been paid shall be a misdemeanor. (1919, c. 116, s. 9; C. S. 1683.)

Cross Reference.—As to larceny of a listed dog, see §§ 14-84, 67-27.

Not Larceny.—In the absence of a statute, stealing a dog is not larceny in this State. State v. Holder, 81 N. C. 527.

§ 67-16. Failure to discharge duties imposed under this article. — Any person failing to discharge any duty imposed upon him under this article shall be guilty of a misdemeanor, and upon conviction shall pay a fine not exceeding fifty dollars or be imprisoned not more than thirty days. (1919, c. 116, s. 10; C. S. 1684.)

§ 67-17: Deleted.

This section has been deleted as it appeared to be local legislation of the type contemplated by § 67-18 and repealed by that section. It was held to have been so repealed in McAlister v. Yancey County, 210 N. C. 208, 193 S. E. 141.

§ 67-18. Application of article.—This article, §§ 67-5 to 67-18, inclusive, is hereby made applicable to every county in the State of North Carolina, notwithstanding any provisions in local, special or private acts exempting any county or any township or municipality from the provisions of the same enacted at any General Assembly commencing at the General Assembly of nineteen hundred and nineteen and going through the General Assembly of nineteen hundred and twenty-nine. (1929, c. 318.)

Applied in McAlister v. Yancey County, 212 N. C. 208, 193 S. E. 141.

Art. 3. Special License Tax on Dogs.

§ 67-19. Nothing in this article abrogated by

Art. 2; special tax an additional tax. — Nothing contained in Article 2 of this chapter shall have the effect of abrogating any of the provisions of this article, and the special license tax on dogs provided for under this article shall be in addition to the license tax on dogs provided for under Article 2 of this chapter: Provided that Article 2 shall not be construed as repealing any existing ordinance of any city or town or any ordinance of any city or town hereafter enacted, regulating the keeping or use of dogs in cities and towns. (1919, c. 116, s. 11; Ex. Sess. 1920, c. 53; C. S. 1685.)

Editor's Note.—The proviso to this section was added by ch. 53, Ex. Sess. 1920.

§ 67-20. Special dog tax submitted to voters on petition. — Upon the written application of one-third of the qualified voters of any county in this state made to the board of commissioners of such county, asking that an election be held in said county to adopt the provisions of this article for levying and collecting a special dog tax in said county, it shall be the duty of said board of commissioners from time to time to submit the question of "special dog tax" or "no special dog tax" to the qualified voters of said county; and if at any such election a majority of the votes cast shall be in favor of said special dog tax, then the provisions of this article shall be in full force and effect over the whole of said county, and the special dog tax hereinafter provided for shall be levied and collected in said county; but if a majority of the votes cast at such election shall be against said special dog tax, then the provisions of this article shall not apply to any part of said county. (1917, c. 206, s. 1; C. S. 1686.)

§ 67-21. Conduct of elections.—Every election held under the provisions of this article shall be held and conducted under the same rules and regulations and according to the same penalties provided by law for the election of members of the general assembly: Provided, that no such election shall be held in any county oftener than once in two years. (1917, c. 206, s. 3; C. S. 1687.)

§ 67-22. Commissioners to provide for registration; ballots and machinery. — The board of commissioners of any county in this state in which an election is to be held under the provisions of this article may provide for a new registration of voters in said county if they deem necessary, or they may provide for the use of the registration of voters in effect at the general election for county officers in said county next preceding the holding of the election hereunder, and they shall appoint such officers as may be necessary to properly hold such election and shall designate the time and places for holding such elections, and make all rules, regulations, and do all other things necessary to carry into effect the provisions of this article. (1917, c. 206, s. 4; C. S. 1688.)

§ 67-23. Canvass of votes and returns.—At the close of said election the officers holding same shall canvass the vote and certify the returns to the said board of commissioners of said county, and the said board of commissioners shall canvass the said returns and declare the results of said election in the manner now provided by law for holding special-tax school elections. (1917, c. 206, s. 4; C. S. 1689.)

§ 67-24. Contents and record of petition; notice of election. — The qualified voters of any county who shall make written application to the board of commissioners of said county asking that an election be held under the provisions of this article shall designate and insert in said application the amount of special dog tax to be levied and collected in said county, which tax shall not exceed the sum of five dollars nor be less than the sum of one dollar for each dog, whether male or female, and the board of commissioners shall have said written application, specifying the amount of said special dog tax to be voted for in said county, recorded in the records of their proceedings, and shall cause to be published in some newspaper published or circulated in said county, and posted at the courthouse door and five other public places in said county, a notice of the time and places for holding said election and specifying the amount of tax to be voted for in said county. (1917, c. 206, s. 5; C. S. 1690.)

§ 67-25. License tax.—Any person or persons, firm or corporation, owning or keeping any dog or dogs, whether male or female, in any county which shall adopt the provisions of this article for the levy and collection of said special dog tax shall pay annually a license or privilege tax on each dog, whether male or female, such sum or sums as may be designated and inserted in the written application of the qualified voters of said county asking for said election and as recorded in the proceedings of the board of county commissioners of said county, which shall not exceed the sum of five dollars nor be less than the sum of one dollar for each dog: Provided, the tax voted for and levied on female dogs may be greater than the tax on male dogs, but in no event shall said special tax exceed the sum of five dollars, nor be less than the sum of one dollar for any dog, whether male or female. (1917, c. 206, s. 6; C. S. 1691.)

Local Tax Valid.—The Legislature may empower the authorities of a town to regulate the manner in which dogs may be kept in the said town. Hence a tax levied under this authority is constitutional and valid. Mowery v. Salisbury, 82 N. C. 175.

§ 67-26. Collection and application of tax.—The special dog tax voted for under the provisions of this article shall be due and collectible at the same time and in the same manner as provided by law for the collection of taxes on other personal property in said county, and shall be collected by the collector of other taxes in said county in the same manner and under the same penalties provided by law for collection of taxes on other personal property in said county, and shall be applied to the road fund, or school fund, of said county, as may be directed by the board of commissioners of said county. (1917, c. 206, s. 8; C. S. 1692.)

Cross Reference.—As to application of the proceeds of the general dog tax, see § 67-13.

§ 67-27. Listed dogs protected; exceptions.—Any person who shall steal any dog which has been listed for taxation as herein provided shall be guilty of a misdemeanor and fined or imprisoned, in the discretion of the court; and any person who shall kill any dog the property of another, after the same has been listed as herein

provided, shall be liable to the owner in damages for the value of such dog. Nothing in this article shall prevent the killing of a mad dog, sheepkilling dog, or egg-sucking dog on sight, when off the premises of its owner, and the owner shall not recover any damages for the loss of such dog. (1917, c. 206, s. 9; C. S. 1693.)

Cross References.—As to listed dogs as personal property, see § 67-15. As to larceny of taxed dogs, a misdemeanor, see § 14-84.

§ 67-28. Application of article to counties having dog tax.—Any county in this state which now has a local law taxing dogs may, by election in the manner herein provided for, accept the provisions of this article, and if adopted by a majority of the qualified voters of said county at such election, the local law taxing dogs in such county shall thereby be repealed and annulled, and the provisions of this article shall be in full force and effect in such county. (1917, c. 206, s. 10; C. S. 1694.)

Art. 4. "Seeing-Eye" Guide Dogs.

§ 67-29. Accompanying blind persons in public conveyances, etc.—Any blind person accompanied by a dog described as a "seeing-eye dog," or any dog educated by a recognized training agency or school, which is used as a leader or guide, is entitled with his dog to the full and equal accommodations, advantages, facilities and privileges of all public conveyances, and all places of public accommodation, subject only to the conditions and limitations applicable to all persons not so accompanied. (1943, c. 111.)

Chapter 68. Fences and Stock Law.

Art. 1. Lawful Fences.

Art. 2. Division Fences.

Art. 3. Stock Law.

Art. 1. Lawful Fences.

§ 68-1. Fences to be five feet high.—Every planter shall make a sufficient fence about his cleared ground under cultivation, at least five feet high, unless otherwise provided in this chapter, unless there shall be some navigable stream or deep watercourse that shall be sufficient, instead of such fence, and unless his lands shall be situated within the limits of a county, township or district wherein the stock law may be in force. (Rev., s. 1660; Code, s. 2799; R. C., c. 48, s. 1; 1777, c. 121, s. 2; 1791, c. 354, s. 1; C. S. 1827.)

Local Modification.—Bertie, Buncombe, Carteret, Hyde, Madison, McDowell, New Hanover, Northampton, Pamlico: C. S. 1829.

Requirements Mandatory.—Proof that plaintiff's fence is a "good ordinary one" such as the neighbors have, does not dispense with the obligation imposed by this section. Runyan v. Patterson, 87 N. C. 343.

A pasture field is not "ground under cultivation," within the meaning of this section, irrespective of whether it is woods pasture or cleared pasture. State v. Perry, 64 N. C. 305, 306.

The word "planter" as used in this section does not include hirelings, laborers or employees who have no discretion as to the plans for fencing. State v. Taylor, 69 N. C. 543.

Effect of Failure to Comply with Section.—If the statu-

tory requirement is not complied with one cannot recover damages caused by animals of another, although the animal may be vicious and the fences are "good ordinary ones" such as the plaintiff's neighbors have. Runyan v. Patterson, 87 N. C. 343.

Cited in State v. Anderson, 123 N. C. 705, 31 S. E. 219.

§ 68-2. Local: Four and a half feet in certain counties.—A fence four and one half feet high is a lawful fence in the counties of Alleghany, Bladen, Brunswick, Burke, Caldwell, Cherokee, Craven, Cumberland, Currituck, Davie, Davidson, Duplin, Harnett, Henderson, Jackson, Lenoir, Perquimans, Randolph, Richmond, Robeson, Rutherford, Sampson, Tyrrell, Yancey, Wake, Washington and Wilkes. This section does not apply to stock-law fences. (Rev., s. 1661; 1889, c. 175; 1891, c. 36; 1905, c. 333; 1909, cc. 55, 94; P. L. 1911, c. 15; C. S. 1828.)

Local Modification.—Tyrrell: C. S. 1828.

§ 68-3. Watercourse made lawful fence by county commissioners.—Any five electors, residents of the same county, may apply to the board of commissioners of the county, at any regular meeting of the same, by written petition praying that any watercourse, or any part of any watercourse, in the county, may be made a lawful fence. Notice of such petition shall be posted forty days at the courthouse door, by the clerk of the board, before such petition shall be acted upon. Upon the hearing of such petition, the board of county commissioners is authorized to declare any watercourse, or any part of any watercourse to which the petition applies, a lawful fence. And the several acts of the general assembly, declaring certain watercourses, in part or in whole, lawful fences, are so far repealed as to enable the board of commissioners of any county to declare any of such acts, or parts thereof, to be null and void in said county. Any order made under this section shall be of record and signed by the chairman, and may be rescinded by the board of commissioners at any regular meeting. (Rev., s. 1663; Code, ss. 2808, 2809, 2810; 1872-3, c. 98; C. S. 1830.)

§ 68-4. Injury to wire fence forbidden.—If any person shall willfully destroy, cut or injure any part of a wire fence or a fence composed partly of wire and partly of wood situated on the land of another, he shall be guilty of a misdemeanor, and upon conviction shall be imprisoned not exceeding thirty days or fined not exceeding fifty dollars. (Rev., s. 3413; 1889, c. 516; C. S. 1831.)

Purpose of Section.—This section is not in conflict with section 14-144, as that section was meant to protect the inclosure while this one was meant to protect the fences irrespective of whether or not they enclosed any field. State v. Biggers, 108 N. C. 760, 12 S. E. 1024.

§ 68-5. Local: Building unguarded barbed-wire fences along public highways.—If any person shall erect or maintain a barbed-wire fence along any public road or highway, and within ten yards thereof, without putting a railing, smooth wire, board or plank on the top of such fence not less than three inches in width, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court. This section shall apply to the counties of Rowan, Swain, Catawba, Greene, Richmond, Stokes, Rutherford, Forsyth, Yadkin, Brunswick, Durham, Wilkes, Stanly, Cumberland, Iredell, Macon and Mitchell: Provided, that in Rutherford county only a railing or plank shall be used at the top of such fence. (Rev., s. 3769; 1895, c. 65; 1899, c. 43; 1899, c. 225; 1905, c. 220; 1909, cc. 318, 604, 629, 810; C. S. 4422.)

Art. 2. Division Fences.

§ 68-6. Division fences maintainable jointly.—Where two or more persons have lands adjoining, which are either cultivated or used as a pasture for stock, the respective owners of each piece of land shall make and maintain one-half of the fence upon the dividing line. (Rev., s. 1664; Code, s. 2800; 1868-9, c. 275, s. 1; C. S. 1832.)

§ 68-7. Remedy against delinquent owner.—If any person who is liable to build or keep up a part of any division fence fails at any time to do so, the owner of the adjoining land, after notice, may build or repair the whole, and recover of the delinquent one-half of the cost before any court having jurisdiction. (Rev., s. 1670; Code, s. 2807; 1868-9, c. 275, s. 7; C. S. 1833.)

Only Civil Liability.—A violation of this section does not subject the wrongdoer to indictment. His liability is civil only. State v. Watson, 86 N. C. 626.

§ 68-8. Fence erected because of changed use of land.—If the owner of a tract of land, who chooses neither to cultivate it, to use it as a pasture, nor to permit his stock to run on it, afterwards uses it in either of these ways and does not so enclose his stock that they cannot enter on the lands of an adjoining owner, he shall refund to such owner one-half the value of any fence erected by the latter on the dividing line. (Rev., s. 1665; Code, s. 2801; 1868-9, c. 275, s. 2; C. S. 1834.)

§ 68-9. When owner may remove his part of division fence.—If any owner of land liable to contribute for the keeping up of a division fence determines neither to cultivate his land nor permit his stock to run thereon, he may give the adjoining owner three months notice of his determination; and in that case, at any time after the expiration of such notice and between the first day of January and the first day of March, but at no other time, he may remove the half of the fence kept up by himself, and shall be no longer liable to keep up the same. (Rev., s. 1671; Code, s. 2802; 1903, c. 20; 1868-9, c. 275, s. 8; 1883, c. 111; C. S. 1835.)

Counties Not Subject to Stock Law.—In counties where the "stock law" is applicable, this section will not be applied and a division fence may be dispensed with at any time without notice. State v. Edmonds, 121 N. C. 679, 28 S. E. 545.

Liability for Violating.—A violation of this section will not subject one to indictment. State v. Watson, 86 N. C. 626.

§ 68-10. Proceeding to value division fence.—The value of such fence shall be ascertained as follows: Either owner may summon the other to appear before any justice of the peace of the township in which the dividing line is situate; or if it be situate in more than one township, then before any justice of the peace of any township in which any part of it is situate. In his summons he shall name a certain day, not less than five days after the summons, for the appearance of the defendant; he shall also state the purpose of the summons to be the adjustment of all matters in controversy respecting the dividing fence

between the parties. The justice shall hear the complaint and defense. If the facts be found such as entitle either party to demand contribution of the other, the justice shall call on the complainant to name an indifferent person, qualified to act as a juror of the township, and if the complainant refuses the justice shall name one for him. The justice shall then call on the defendant to name an indifferent person, qualified to act as a juror of the township, and if the defendant refuses the justice shall name one for him. The justice shall then name a third indifferent person. These three persons, or any two of them, shall view the premises and decide all matters in controversy between the parties, relating to a fence on the dividing line. They shall make a written report to the justice, who shall give judgment thereon, and for the costs, which shall be paid by the owners of the several pieces of land equally. The jurors shall each receive one dollar per day. The fees of the justice and constable shall be as in other cases. Either party may appeal as provided in other cases of justices' judgments. (Rev., s. 1666; Code, s. 2803; 1868-9, c. 275, s. 3; C. S. 1836.)

§ 68-11. Contents of jurors' report.—The report of the jurors shall also state the kind of fence which ought to be kept up, and assign to each owner, in such manner as that it may be identified, the part which he shall keep up. (Rev., s. 1667; Code, s. 2804; 1868-9, c. 275, s. 4; C. S. 1837.)

§ 68-12. Register to record report.—The justice shall return the report, together with a transcript of the proceedings, to the register of deeds of his county for registration. The justice shall collect from the parties the fees of the register, and pay the same to him. (Rev., s. 1668; Code, s. 2805; 1868-9, c. 275, s. 5; C. S. 1838.)

§ 68-13. Final judgment on report; effect.—The final judgment upon the report of the jurors shall be binding on the owners of the respective lands and their assigns, so long as such ownership shall continue, or until the same shall be set aside, modified or reversed. (Rev., s. 1669; Code, s. 2806; 1868-9, c. 275, s. 6; C. S. 1839.)

§ 68-14. Removal of common fence misdemeanor.—If any person owning, occupying, cultivating or being in possession of any lands under a common fence protecting the lands, crops or property of others, shall remove such fence or any part thereof during the time in which any crops are growing or being actually cultivated thereon, or property is protected by such fence, and before such crops are harvested, without the consent and permission of such person or persons whose crop or property is protected by such common fence, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days: Provided, that the provisions of this section shall not apply when ninety days notice of such removal shall have been given to all persons owning, cultivating or in possession of lands surrounded by such common fence, or having property protected thereby, and when thereafter such fence shall be removed between the first day of January and the first day of March following such notice of intended removal. (Rev., s. 3412; Code, s. 2820; 1903, c. 20; C. S. 1840.)

Editor's Note.—When a fence is altogether on the land of a person, although used as a common fence he has the right to move it and he is not subject to criminal prosecution, but a civil right might arise under sec. 68-9. State v. Watson, 86 N. C. 626. Neither will an indictment lie for removing a fence when the party removing the fence has possession of the land on both sides of the fence although title may be in the prosecutor, and the defendant is only a tenant by curtesy. State v. Williams, 44 N. C. 197.

Cited in State v. Dunn, 95 N. C. 697.

Art. 3. Stock Law.

§ 68-15. Term "stock" defined. — The word "stock" in this chapter shall be construed to mean horses, mules, colts, cows, calves, sheep, goats, jennets, and all neat cattle, swine and geese. (Rev., s. 1681; Code, s. 2822; C. S. 1841.)

Local Modification.—Currituck: 1937, c. 389; Dare: 1935, c. 263; 1937, c. 213; Onslow: 1935, c. 151; 1937, c. 356; Robeson: 1917, c. 662.

Dogs.—A dog is not "stock" within the meaning of the section, but is nevertheless subject to larceny. Meekins v. Simpson, 176 N. C. 130, 96 S. E. 894.

§ 68-16. County elections.—Upon the written application of one-fifth of the qualified voters of any county made to the board of commissioners thereof, it shall be the duty of the commissioners from time to time to submit the question of "stock law" or "no stock law" to the qualified voters of said county. And if at any such election a majority of the votes cast is in favor of "stock law," then the provisions of this chapter relating to the stock law shall be in force over the whole of said county. (Rev., s. 1672; Code, s. 2812; C. S. 1842.)

Cross Reference.—As to "majority of qualified voters," see N. C. Const., Art. VII, sec. 7.

In General.—In a county where only a part of the townships have stock laws, an election covering the whole county is held valid, and it does not interfere with the principles of local self-government. Smalley v. Board, 122 N. C. 607, 29 S. E. 904; Perry v. Board, 130 N. C. 558, 41 S. E. 787.

Mandamus to Compel Election.—When a petition duly signed by the required number of voters is filed with the commissioners, and they refuse to call an election, mandamus may be brought to compel them to grant the petition. Perry v. Board, 130 N. C. 558, 41 S. E. 787.

§ 68-17. Township elections.—Upon the written application of one-fifth of the qualified voters in any township, made to the board of commissioners of the county wherein the township is situated, it shall be the duty of the commissioners to submit the question of "stock law" or "no stock law" to the qualified voters of the township; and if at any such township election a majority of the votes cast is in favor of "stock law," then the stock law shall be in force in said township. (Rev., s. 1673; Code, s. 2813; C. S. 1843.)

In General.—The fact that a township has "stock laws" does not bar the voters in that township from voting in a county election. Smalley v. Board, 122 N. C. 607, 29 S. E. 904.

§ 68-18. District elections.—Upon the written application of one-fifth of the qualified voters of any district or territory, whether the boundaries of said district follow township lines or not, made to the board of county commissioners at any time, and setting forth well-defined boundaries of the district, it shall be the duty of the commissioners to submit the question of "stock law" or "no stock law" to the qualified voters of the district, and if at any such election a majority

of the votes cast is in favor of "stock law," then the stock law shall be in force over the whole of said district. (Rev., s. 1674; Code, s. 2814; C. S. 1844.)

"Well Defined Boundaries."—The words are not too indefinite to admit of proof to locate the boundaries where the beginning is "at a certain tract of land," and the difficulty as to the uncertainty of the point of beginning is removed where there is a call for the boundaries of lands of successive proprietors, thence to a certain point. Newsom v. Earnheart, 86 N. C. 391.

Right to Join Districts.—The commissioners have no power when several districts adjoin each other to unite them into one territory, provide for the construction of one boundary fence, and assess a uniform tax on all the real property in the several districts so united to meet the expense of the fence. Bradshaw v. Board, 92 N. C. 278.

§ 68-19. Local: How territory released from stock law.—Upon the written application of a majority of the qualified voters in any district, territory or well defined boundary, made to the board of county commissioners, at any time, setting forth that the citizens of said district, territory or boundary are within the stock-law boundary, and are desirous of being released from the laws governing stock-law territory, it shall be the duty of the commissioners to submit the question of "no stock law" or "stock law" to the qualified voters of said district or territory, and if at any such election a majority of the votes cast is against stock law, then the said district or territory shall be released and free from the operation of the stock law: Provided, the expense incurred in changing the fence in such boundary, district or territory so released be paid by the property holders in such boundary, district or territory, and that the commissioners of the county levy the tax to pay the same on the property holders of such boundary, district or territory so released, but they shall not be further liable for keeping up said stock-law fence: Provided, that in any territory where stock law now prevails no election against stock law shall be held in less than two years from the date of the election adopting stock law in said territory: Provided further, that if "no stock law" should carry, it shall not take effect until six months from the date of its ratification: Provided still further, that neither "stock law" nor "no stock law" shall take effect during crop season.

This section applies only to the counties of Cherokee, Clay, Graham, Jackson, Macon, Mitchell, Pender, Randolph, Swain, and to Hogback Township in Transylvania County. (Rev., s. 1675; 1895, c. 35; 1897, cc. 461, 516; 1903, c. 60; 1907, c. 874, s. 3; P. L. 1911, cc. 265, 469; P. L. 1915, c. 379; P. L. 1917, c. 662; C. S. 1845.)

Local Modification.—Currituck: 1937, c. 389; Dare: 1935, c. 263; 1937, c. 213.

Editor's Note.—It was at one time the public policy of the State to allow stock to run at large. Jones v. Witherspoon, 52 N. C. 555. A land holder was required to inclose his fields to protect his crops. But this policy has now been changed and except in cases of a petition and majority vote by the residents of a county or district for "no stock-law" the stock must be kept within the close of the owner.

When a "no stock-law" is duly passed, before the stock can be turned out to run at large the district or county passing such law must be inclosed so that the stock will not range out of "no stock-law" territory and on the crops of others, not in the "no stock-law" territory. Marsburn v. Jones, 176 N. C. 516, 97 S. E. 422.

This section provides that the expense incurred in building such a fence shall be paid by a tax on the property holders of the district or county. This certainly does not authorize a tax solely upon the real estate in the county or district. Hawes v. Commissioners, 175 N. C. 268, 95 S. E. 482. Therefore, to raise this fund an election must be held and authority granted by the majority of the voters. Marsburn v. Jones, 176 N. C. 516, 97 S. E. 422.

Section 68-34 provides for a tax on the real property of a district or county, but that section is applicable only to districts or counties that pass the "stock-law" and cannot be applied to those passing "no stock-law."

§ 68-20. How election conducted.—Every election under this chapter shall be held and conducted under the same rules and regulations and according to the same penalties provided by law for the election of members of the general assembly: Provided, no such county, township or district election shall be held oftener than once in any one year, although the boundaries of such district may not be the same. (Rev., s. 1676; Code, s. 2815; C. S. 1846.)

§ 68-21. Powers and duties of county commissioners.—The board of commissioners of the county may provide for a new registration of voters, designate places for holding elections, and make all regulations, and do all other things necessary to carry into effect the provisions of this chapter relating to the stock law. (Rev., s. 1677; Code, s. 2826; C. S. 1847.)

Building and Repairing Fences.—County commissioners are not required by the stock-law to personally superintend the fence around the no fence territory; they discharge their duty under the statute when they levy the necessary taxes, appoint the committees, etc., to keep the fence in repair. State v. Commissioners, 97 N. C. 388, 1 S. E. 641.

But an owner of stock, however, who resides outside of such territory, is not liable to have his stock impounded within such territory, unless the county commissioners have kept the fence in good repair. In such case the presumption is that the fence is in good order, and the burden of showing the contrary on the party alleging it. Coor v. Rogers, 97 N. C. 143, 1 S. E. 613.

§ 68-22. Admission of lands adjoining stock-law territory.—Any person, or any number of persons, owning land in a county, district or township which shall not adopt the stock law, or adjoining any county, township or district where a stock law prevails, may have his or their lands enclosed within any fence built in pursuance of this chapter. All such adjacent lands, when so enclosed, shall be subject to all the provisions of law with respect to livestock running at large within the original district so enclosed, as if it were a part of the township, county or district with which it is hereby authorized to be enclosed. Any number of landowners, whose lands are contiguous, may at any time build a common fence around all their lands, with gates across all public highways; and no livestock shall run at large within any such enclosure, under the pains and penalties prescribed in this chapter. (Rev., s. 1678; Code, s. 2821; C. S. 1848.)

Cited in Edwards v. Supervisors, 127 N. C. 62, 37 S. E. 73.

§ 68-23. Allowing stock at large in stock-law territory forbidden.—If any person shall allow his livestock to run at large within the limits of any county, township or district in which a stock law prevails or shall prevail pursuant to law, he shall be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3319; Code, s. 2811; 1889, c. 504; C. S. 1849.)

Editor's Note.—For act declaring Nash county to be stock law territory, see Session Laws 1943, c. 451.

This section implies knowledge, consent or willingness on

the part of the owner that the animals be at large, or negligence equivalent thereto, and the mere fact that animals are at large does not raise the presumption that the owner permits them to run at large, nor does the doctrine of res ipsa loquitur apply upon the establishment of the fact that animals are found at large. Gardner v. Black, 217 N. C. 573, 9 S. E. (2d) 10.

Cited in State v. Brigman, 94 N. C. 888; dissenting opinion, Daniels v. Homer, 139 N. C. 219, 252, 51 S. E. 992.

§ 68-24. Impounding stock at large in territory.—Any person may take up any livestock running at large within any township or district wherein the stock law shall be in force and impound the same; and such impounder may demand fifty cents for each animal so taken up, and twenty-five cents for each animal for every day such stock is kept impounded, and may retain the same, with the right to use it under proper care, until all legal charges for impounding said stock and for damages caused by the same are paid, the damages to be ascertained by two disinterested freeholders, to be selected by the owner and the impounder, the freeholders to select an umpire, if they cannot agree, and their decision to be final. (Rev., s. 1679; Code, s. 2816; C. S. 1850.)

Local Modification.—Camden, Currituck, Gates, Pasquotank, Perquimans: Pub. Loc. 1927, c. 327.

Cross Reference.—As to larceny of stock and malicious injury thereto, see § 14-85.

Constitutionality. — This and the following sections are constitutional. Hogan v. Brown, 125 N. C. 251, 34 S. E. 411. And resident owners may be required to pay a higher penalty than non-resident owners. Broadfoot v. Fayetteville, 121 N. C. 418, 28 S. E. 515.

Not Applicable to Stock in Control.—This section does not authorize the taking up and impounding of livestock unless running at large, and does not apply to cows securely tied to trees under the immediate control of the owner with the permission of the lessee of the land, and it is forcible trespass to take them away over the protest of the owner, to prevent which the owner may use all necessary force, unless the taking is by appropriate legal proceedings. Kirkpatrick v. Crutchfield, 178 N. C. 348, 100 S. E. 602. See also, State v. Hunter, 118 N. C. 1196, 24 S. E. 708.

Strays from No Fence Territory.—In State v. Mathis, 149 N. C. 546, 548, 63 S. E. 99, Connor, J., said: "While it is usual for the counties or townships which adopt a 'stock law' to build a common fence, it is not necessary that they do so." In State v. Garner, 158 N. C. 630, 74 S. E. 458, the court held that the owner of cattle who permits them to run at large in fence territory, but they stray across the line into a no-fence territory, is liable, though he does not turn them out for that purpose. Owen v. Williamston, 171 N. C. 57, 59, 87 S. E. 959.

Liability for Killing Strayers.—Under this section one has the power to take up a stray, and the law requires that he do so in preference to killing or injuring it. If he wantonly kills such stray, he is guilty of a misdemeanor. State v. Brigman, 94 N. C. 888. See sec. 14-366.

Applied in Beasley v. Edwards, 211 N. C. 393, 190 S. E. 221.

§ 68-25. Owner notified; sale of stock; application of proceeds.—If the owner of such stock be known to the impounder he shall immediately inform the owner where his stock is impounded, and if the owner shall for two days after such notice willfully refuse or neglect to redeem his stock, then the impounder, after ten days written notice posted at three or more public places within the township where the stock is impounded, and describing the stock and stating place, day and hour of sale, or if the owner be unknown, after twenty days notice in the same manner, and also at the courthouse door, shall sell the stock at public auction, and apply the proceeds in accordance with the provisions of this article, and the balance he shall turn over to the owner if known, and if the owner be not known, to the county commissioners for the use of the school fund of the district wherein said stock was taken up and impounded, subject in their hands for six months to the call of the legally entitled owner. (Rev., s. 1680; Code, s. 2817; C. S. 1851.)

Cross-Reference.—As to constitutionality, see notes to preceding section.

Where a party lawfully impounds a sow, sells same under provisions of a recorder's judgment, and pays himself his lawful fees for impounding the sow and his damages caused by the sow, and pays to the owner the amount due him out of the purchase price, the owner may not complain. Beasley v. Edwards, 211 N. C. 393, 190 S. E. 221.

Cited in dissenting opinion, Daniels v. Homer, 139 N. C. 219, 252, 51 S. E. 992.

§ 68-26. Impounding unlawfully misdemeanor.—If any person shall willfully and unlawfully toll, drive, or in any way move any other person's horse, mule, ass, neat cattle, sheep, hog, goat, or dog, from the range or elsewhere, into any stock-law district, or into the limits of any city or town having the right to impound or destroy the same, with intent to secure the poundage or other penalty, or with intent to injure the owner of such animal, or to require him to pay any poundage or penalty on account of such animal, or for hire or reward, he shall be guilty of a misdemeanor. If any person shall unlawfully and willfully remove any animal above named from any lawful inclosure, with intent to injure the owner, he shall be guilty of a misdemeanor. (Rev., s. 3309; 1895, c. 141, s. 1; C. S. 1852.)

§ 68-27. Illegally releasing or receiving impounded stock misdemeanor.—If any person unlawfully receives or releases any impounded stock, or unlawfully attempts to do so, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3310; Code, s. 2819; 1889, c. 504; C. S. 1853.)

§ 68-28. Impounded stock to be fed and watered.—If any person shall impound, or cause to be impounded in any pound or other place, any animal, and shall fail to supply to the same during such confinement a sufficient quantity of good and wholesome food and water, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3311; Code, s. 2484; 1891, c. 65; 1881, c. 368, s. 3; C. S. 1854.)

§ 68-29. Right to feed impounded stock; owner liable.—In case any animal is at any time impounded as aforesaid, and shall continue to be without necessary food and water for more than twelve successive hours, it shall be lawful for any person from time to time, and as often as it shall be necessary, to enter into and upon any such pound or other place in which any animal shall be so confined, and to supply it with necessary food and water so long as it shall remain so confined. Such person shall not be liable to any action for such entry, and the reasonable cost of such food and water may be collected by him of the owner of such animal. (Rev., s. 1682; Code, s. 2485; 1881, c. 368, s. 4; C. S. 1855.)

In General.—The law recognizes the difference between an impounding fee and a charge for food; for sec. 68-24 prescribes the impounding fees for taking up stock running at large, and this section prescribes for payment of feeding such stock when taken up. The former fees go to the

officer or the town or county, and the latter is a humane provision without which the stock might suffer for want of food and water. Owen v. Williamston, 171 N. C. 57, 60, 87 S. E. 959.

§ 68-30. Injuring lands in stock-law territory by riding or driving.—If any person, by riding or driving upon the lands of another without permission, or while driving livestock along any roadway, public or private, shall willfully, deliberately or recklessly do or permit to be done any actual injury to said land, or to the crops or other property growing or being thereon, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. But no such offender shall be proceeded against unless the party injured, or some one in his behalf, shall cause a warrant to be issued or an indictment to be found against the party offending, within fifteen days after the commission of the offense. (Rev., s. 3321; Code, s. 2828; 1889, c. 118; C. S. 1856.)

§ 68-31. Owner in stock-law territory allowing stock outside.—If any person having stock within the limits of a stock-law territory shall allow the same to run at large beyond the boundaries of said territory, he shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than fifty dollars or imprisoned not more than thirty days: Provided, that a person owning or renting land outside of the stock-law territory may turn his stock upon the said land outside of the stock-law district. (Rev., s. 3322; Code, s. 2827; 1889, c. 266; 1885, c. 371; C. S. 1857.)

§ 68-32. Stock-law territory to be fenced around.—The stock-law authorized by this chapter shall not be enforced until a fence has been erected around any territory proposed to be enclosed, with gates on all the public roads passing into and going out of said territory: Provided, all streams which are or may be declared to be lawful fences shall be sufficient boundaries, in lieu of fences: Provided further, no fence shall be erected along the boundary lines of any county, township or district where a stock law prevails. (Rev., s. 1683; Code, s. 2823; C. S. 1858.)

§ 68-33. Commissioners may declare natural barrier sufficient fence.—In any county in the state in which or in any portion of which the stock law is now in force or may hereafter be adopted, the county commissioners of said county in their discretion may declare any watercourse, mountain, mountain range or parts of same, and also other natural and sufficient obstruction along the line of said stock-law territory to be and constitute a sufficient stock-law fence, and in that event such watercourse, mountain, mountain range or part thereof and obstructions so declared by said commissioners shall be and constitute a lawful fence to all intents and purposes. (Rev., s. 1684; 1901, c. 542; C. S. 1859.)

In General.—It is competent for the county commissioners to forbid stock from running at large within the county, and declare a mountain range, a creek, or other natural line, a fence as the limit within which the law shall operate, and it is not a valid defence that no fence had been built on the line to prevent the stock from the adjoining county to run at large on his side of the line when one is prosecuted for allowing his stock to run at large. State v. Mathis, 149 N. C. 546, 63 S. E. 99.

§ 68-34. Assessment of landowners for fence.—For the purpose of building stock-law fences, the board of commissioners of the county may levy and collect a special assessment upon all real property, taxable by the county, within the county, township or district which may adopt the stock law, but no such assessment shall be greater than one-fourth of one per centum on the value of said property. (Rev., s. 1685; Code, s. 2824; C. S. 1860.)

Cross Reference.—As to tax for no stock-law fence, see notes to sec. 68-19.

In General.—In Busbee v. Commissioners, 93 N. C. 143, Smith, C. J., says: "But these local assessments are not under all the restraints put upon the taxing power. They stand upon a different footing and rest upon the equitable and just consideration that lands rendered more valuable by the improvements ought to contribute to the expense of making the improvements, and that these expenses ought not to fall upon the entire body of the taxpayers. The advantage is to the land, and to the persons only as owners of the land."

This section does not authorize the imposition of the assessment on the real estate of a township withdrawn from the benefit of the stock law by express legislative enactment for the purpose of raising money to replace the money withdrawn from the general fund to pay the expenses of fences erected by the commissioners. Harper v. Commissioners, 133 N. C. 106, 45 S. E. 526.

Constitutionality.—This section does not come within the prohibition of the State Constitution providing for uniform tax, as this is not of the nature of a tax, but is an assessment to defray expenses of local improvements, although called a tax by the Legislature. Shuford v. Commissioners, 86 N. C. 552; Cain v. Commissioners, 86 N. C. 8.

When Applicable.—The provisions of this section apply both to the cases where the adoption of the stock law is dependent on a popular vote, and where it is made absolute by an act of the General Assembly. Busbee v. Commissioners, 93 N. C. 143.

District in Two Counties.—If the district organized lies in two counties the assessment shall be as if it was all in one county. Commissioners v. Commissioners, 92 N. C. 180.

Railroad's Liability.—The roadbed and right of way of a railroad are liable to an assessment for local improvements. Commissioners v. Seaboard Air Line R. Co., 133 N. C. 216, 45 S. E. 566.

Assessment Must be for Stock-Law Fences Only.—An assessment by a county upon the real estate to build a fence for the purpose of keeping the stock in anti-stock-law territory from trespassing is unauthorized by law. Hawes v. Commissioners, 175 N. C. 268, 95 S. E. 482.

§ 68-35. Condemnation of land for fence.—If the owner of any land objects to the building of any fence herein allowed, his land, not exceeding twenty feet in width, shall be condemned for the fenceway in accordance with the procedure specified in the article Condemnation Proceedings under the chapter Eminent Domain. (Rev., s. 1686; Code, s. 2825; C. S. 1861.)

§ 68-36. Injury to stock-law fences misdemeanor in stock-law territory.—If any person willfully tears down, or in any manner breaks a fence or gate, or leaves open a gate erected around a stock-law territory, or willfully breaks any enclosure within any township, district or county where a stock law is in force, and wherein any stock is confined, so that the same may escape therefrom, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3411; Code, s. 2820; 1889, c. 504; C. S. 1862.)

Cited in State v. Dunn, 95 N. C. 697, 698.

§ 68-37. Impounder violating stock law misdemeanor.— If any impounder willfully misappropriates money that he may receive from sale of stock impounded, or in any manner willfully vio-

lates any provisions of the law in regard thereto, he shall be guilty of a misdemeanor, and on conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3312; Code, s. 2820; 1889, c. 504; C. S. 1863.)

Cited in State v. Dunn, 95 N. C. 697, 698.

§ 68-38. Local: Depredations of domestic fowls in certain counties.—In the counties and parts of counties hereinafter enumerated, where the stock law prevails, it shall be unlawful for any person to permit any turkeys, geese, chickens, ducks or other domestic fowls to run at large, after being notified as provided in this section, on the lands of any other person while such lands are under cultivation in any kind of grain or feedstuff, or while being used for gardens or ornamental purposes.

Any person so permitting his fowls to run at large, after having been notified to keep them up, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding five dollars or imprisoned not exceeding five days, or if it shall appear to any justice of the peace that after two days notice any person persists in allowing his fowls to run at large and fails or refuses to keep them upon his own premises, then the said justice of the peace may, in his discretion, order any sheriff, constable or other officer to kill said fowls when so depredating. (C. S. 1864.)

Alamance, 1901, c. 645.
Avery, 1935, c. 77.
Beaufort, Pub. Loc. 1927, c. 316.
Bladen, 1901, c. 645.
Buncombe, 1907, c. 508.
Burke, 1907, c. 508.
Cabarrus, 1901, c. 645.
Caldwell, Pub. Loc. 1911, c. 244.
Caswell, 1943, c. 64.
Clay, 1935, c. 51.
Cleveland, 1901, c. 645.
Columbus, 1933, c. 308.
Currituck, 1901, c. 645.
Davidson, Pub. Loc. 1911, c. 244.
Duplin, Ex. Sess. 1908, c. 73; 1933, c. 186.
Edgecombe, 1901, c. 645.
Gaston, Pub. Loc. 1919, c. 31.
Gates, 1935, c. 77.
Graham, 1901, c. 645.
Granville, Pub. Loc. 1911, c. 244.
Guilford, 1901, c. 645.
Harnett, 1931, c. 443.
Henderson, Pub. Loc. 1911, c. 636.
Iredell, 1935, c. 170.
Jackson, Pub. Loc. 1919, c. 31.
Johnston, 1935, c. 78.
Lee, Pub. Loc. 1913, c. 725.
Lenoir, Pub. Loc. 1911, c. 244.
Macon, Pub. Loc. 1919, c. 31.
Martin, 1935, c. 77.
Mecklenburg, 1901, c. 645.
Moore, 1935, c. 77.
Nash, 1943, c. 451.
Onslow, Pub. Loc. 1911, c. 244.
Orange, 1903, c. 115.
Pasquotank, 1901, c. 645.
Richmond, Pub. Loc. 1927, c. 72.
Rockingham, Ex. Sess. 1924, c. 205; 1931, c. 434.
Rowan, 1909, c. 847.
Sampson, 1935, c. 196.
Stokes, 1931, c. 22.
Surry, 1901, c. 645.
Swain, Pub. Loc. 1911, c. 244.
Transylvania, Pub. Loc. 1911, c. 244.
Tyrrell, Ex. Sess. 1921, c. 41.
Union, 1935, c. 77.
Vance, 1909, c. 748.
Wayne, Pub. Loc. 1911, c. 244.
Wilson, 1937, c. 122.

Local Modification.—Catawba, Chatham: 1903, c. 482; Davie: Pub. Loc. 1915, c. 167; Duplin: 1933, c. 186; Forsyth: Pub. Loc. 1915, c. 39; Greene: 1907, c. 917; Ex. Sess. 1908, c. 78; Lincoln: Pub. Loc. 1915, c. 312; McDowell: Pub. Loc. 1917, c. 328; Pitt: Pub. Loc. 1915, c. 462; Randolph: Pub. Loc. 1913, c. 645; Scotland: Pub. Loc. 1915, c. 714; Wake: Pub. Loc. 1915, c. 378; Yadkin: Pub. Loc. 1915, c. 39; Pub. Loc. 1917, c. 321; Yancey: Pub. Loc. 1913, c. 739.

§ 68-39. Eastern North Carolina, territory placed under stock law. — From and after January first, one thousand nine hundred and twenty-two, all of that part of eastern North Carolina lying east of that branch of the Atlantic Coast Line Railroad running from Wilmington, North Carolina, northerly to the Virginia line and passing through Goldsboro, Wilson, and Weldon (formerly known as the Wilmington and Weldon Railroad), shall be and is hereby declared to be "stock law territory," and shall be subject to all of the provisions of §§ 68-15 to 68-38, inclusive: Provided, that that portion of North Carolina which borders the Atlantic Ocean and which is separated from the mainland by a body of water such as an inlet or sound, shall not be considered to fall within the provisions of this law. (1921, c. 50, s. 1; C. S. 1864(a).)

Local Modification.—Currituck: 1937, c. 389; Dare: 1935, c. 263; 1937, c. 213; Onslow: 1933, c. 151; 1937, c. 356.

§ 68-40. Counties divided by railroad.—Wherever the railroad referred to in § 68-39 shall divide a county so that a part of the county lies east and a part west of the said railroad, then the whole of said county shall be "stock law territory," and under the provisions of this article from and after January first, one thousand nine hundred and twenty-two. (1921, c. 50, s. 2; C. S. 1864(b).)

§ 68-41. Repeal of local laws or regulations.—Sections 68-39 and 68-40 shall not be construed to repeal or change local laws or regulations regarding the subject-matter covered by those sections except so far as said local laws and regulations actually conflict with the provisions thereof and prevent the proper enforcement of said provisions, and the said local laws, rules, and regulations on the subject-matter similar to that covered by said sections shall remain in full force and effect, except as they do and until they do actually interfere with the enforcement of the said provisions. (1921, c. 230; C. S. 1864(c).)

Chapter 69. Fire Protection.

Art. 1. Investigation of Fires and Inspection of Premises.

Art. 2. Fire-Escapes.

Art. 3. State Volunteer Fire Department.

Art. 1. Investigation of Fires and Inspection of Premises.

§ 69-1. Fires investigated; reports; records.— The insurance commissioner and the chief of the fire department, or chief of police where there is no chief of fire department, in municipalities and towns, and the sheriff of the county where such fire occurs outside of a municipality, are hereby authorized to investigate the cause, origin, and circumstances of every fire occurring in such municipalities or counties in which property has been destroyed or damaged, and shall specially make investigation whether the fire was the result of carelessness or design. A preliminary investigation shall be made by the chief of fire department or chief of police, where there is no chief of fire department in municipalities, and by the sheriff of the county where such fire occurs outside of a municipality, and must be begun within three days, exclusive of Sunday, of the occurrence of the fire, and the insurance commissioner shall have the right to supervise and direct the investigation when he deems it expedient or necessary. The officer making the investigation of fires shall forthwith notify the insurance commissioner, and must within one week of the occurrence of the fire furnish to the commissioner a written statement of all the facts relating to the cause and origin of the fire, the kind, value, and ownership of the property destroyed, and such other information as is called for by the blanks provided by the commissioner. The insurance commissioner shall keep in his office a record of all fires occurring in the state, together with all facts, statistics, and circumstances, including the origin of the fires, which are determined by the investigations provided for by this article. This record shall at all times be open to public inspection. (Rev., s. 4818; 1899, c. 58; 1901, c. 387; 1903, c. 719; C. S. 6074.)

Cross Reference.—As to provision requiring the insurance company to notify the insurance commissioner of the losses to property by fire, before payment thereof, see § 58-161.

§ 69-2. Insurance commissioner to make examination; arrests and prosecution. — It is the duty of the insurance commissioner to examine, or cause examination to be made, into the cause, circumstances, and origin of all fires occurring within the state to which his attention has been called in accordance with the provisions of § 69-1, or by interested parties, by which property is accidentally or unlawfully burned, destroyed, or damaged, whenever in his judgment the evidence is sufficient, and to specially examine and decide whether the fire was the result of carelessness or the act of an incendiary. The commissioner shall, in person, by deputy or otherwise, fully investigate all circumstances surrounding such fire, and, when in his opinion such proceedings are necessary, take or cause to be taken the testimony on oath of all persons supposed to be cognizant of any facts or to have means of knowledge in relation to the matters as to which an examination is herein required to be made, and shall cause the same to be reduced to writing. If he is of the opinion that there is evidence sufficient to charge any person with the crime of arson, or other wilful burning, he shall cause such person to be arrested, charged with such offense, and prosecuted, and shall furnish to the solicitor of the district all such evidence, together with the names of witnesses and all the information obtained by him, including a copy of all pertinent and material testimony taken in the case. (Rev., s. 4819; 1899, c. 58, s. 2; 1901, c. 387, s. 2; 1903, c. 719; C. S. 6075.)

§ 69-3. Powers of commissioner in investigations.—The insurance commissioner, or his deputy appointed to conduct such examination, has the powers of a trial justice for the purpose of summoning and compelling the attendance of witnesses to testify in relation to any matter which is by provisions of this article a subject of inquiry and investigation, and may administer oaths and affirmations to persons appearing as witnesses before them. False swearing in any such matter or proceeding is perjury and shall be punished as such. The commissioner or his

deputy has authority at all times of the day or night, in performance of the duties imposed by the provisions of this article, to enter upon and examine any building or premises where any fire has occurred, and other buildings and premises adjoining or near the same. All investigations held by or under the direction of the commissioner or his deputy may, in their discretion, be private, and persons other than those required to be present by the provisions of this article may be excluded from the place where the investigation is held, and witnesses may be kept apart from each other and not allowed to communicate with each other until they have been examined. (Rev., s. 4820; 1899, c. 58, s. 3; 1901, c. 387, s. 3; C. S. 6076.)

§ 69-4. Inspection of premises; dangerous material removed.—The insurance commissioner, or the chief of fire department or chief of police where there is no chief of fire department, or local inspector of buildings in municipalities where such officer is elected or appointed, has the right at all reasonable hours, for the purpose of examination, to enter into and upon all buildings and premises in their jurisdiction. It is the duty of the insurance commissioner to require in all municipalities of the state that such officers make in their respective municipalities annual inspection of the buildings therein and quarterly inspection of all premises within the fire limits, and report in detail the results of their inspection to the insurance commissioner upon blanks furnished by him. When any of such officers find in any building or upon any premises combustible material or inflammable conditions dangerous to the safety of such building or premises they shall order the same to be removed or remedied, and this order shall be forthwith complied with by the owner or occupant of such building or premises. The owner or occupant may, within twenty-four hours, appeal to the insurance commissioner from the order, and the cause of the complaint shall be at once investigated by his direction, and unless by his authority the order of the officer above named is revoked it remains in force and must be forthwith complied with by the owner or occupant. The insurance commissioner, fire chief, or fire committee shall make an immediate investigation as to the presence of combustible material or the existence of inflammable conditions in any building or upon any premises under their jurisdiction upon complaint of any person having an interest in such building or premises or property adjacent thereto. The commissioner may, in person or by deputy, visit any municipality and make such inspections alone or in company with the local officer. The local inspector shall be paid by the municipality a reasonable salary or proper fees to be fixed by its governing board. (Rev., s. 4821; 1899, c. 58, s. 4; 1901, c. 387, s. 4; 1903, c. 719; C. S. 6077.)

Cross Reference.—As to regulation of buildings by municipalities, see §§ 160-115 et seq.

§ 69-5. Deputy investigators.—It shall be the duty of the insurance commissioner to appoint two or more persons as deputies, whose particular duty it shall be to investigate forest fires and endeavor to ascertain the persons guilty of setting such fires and cause prosecution to be instituted against those who, as a result of such investigation, are deemed guilty. (Rev., s. 4823; 1899, c. 58, s. 6; 1901, c. 387, s. 6; 1903, c. 719, s. 2; 1915, c. 109, s. 2; 1919, c. 186, s. 7; Ex. Sess. 1924, c. 119; C. S. 6078.)

Editor's Note.—The provision as to the appointment of deputies to investigate forest fires, and the prosecution of guilty persons, was inserted by the amendment of 1924.

Cited in O'Neal v. Wake County, 196 N. C. 184, 189, 145 S. E. 28.

§ 69-6. Reports of insurance commissioner.—The insurance commissioner shall submit annually, as early as consistent with full and accurate preparation, and not later than the first day of June, a detailed report of his official action under this article, and it shall be embodied in his report to the general assembly. He shall, in his annual report, make a statement of the fires investigated, the value of property destroyed, the amount of insurance, if any, the origin of the fire, when ascertained, and the location of the property damaged or destroyed, whether in town, city, or country. (Rev., s. 4824; 1899, c. 58, s. 7; 1901, c. 387, s. 7; 1915, c. 109, s. 1; C. S. 6079.)

§ 69-7. Fire prevention and fire prevention day.—It is the duty of the insurance commissioner and superintendent of public instruction, as far as practicable, to provide, except to schools taught in one-story houses, a pamphlet containing printed instructions for properly conducting fire drills in schools, and the superintendent or principal of every public school in this State, except schools taught in one-story houses, shall conduct at least one fire drill every month during the regular school session, such fire drills to include all children and teachers and the use of all ways of egress, and the Insurance Commission and Superintendent of Public Instruction shall further provide for the teaching of "Fire Prevention" in the colleges and schools of the state, and to arrange for a text-book adapted to such use. The ninth day of October of every year shall be set aside and designated as "Fire Prevention Day," and the governor shall issue a proclamation urging the people to a proper observance of the day, and the insurance commissioner shall bring the day and its observance to the attention of the officials of the municipalities of the state, and especially to the firemen, and where possible arrange suitable programs to be followed in its observance. (1915, c. 166, s. 5; 1925, c. 130; C. S. 6080.)

Editor's Note.—The provision requiring the commissioner to provide for a pamphlet of fire drill instructions, and the provision making it a duty of the superintendent or principal of every public school to conduct monthly fire drills, are new with the amendment of 1925.

Art. 2. Fire-Escapes.

§ 69-8. Construction of buildings regulated.—All hotels, lodging houses, school dormitories, hospitals, sanitariums, apartment houses, flats, tenement houses and all buildings other than private dwellings not over three stories in height, in which rooms are to be rented or leased or let or offered for rent, let or leased for living or sleeping purposes, hereafter constructed in this state shall be constructed so that the occupants of all rooms above the first floor shall have unobstructed access to two separate and distinct ways

of egress extending from the uppermost floor to the ground, such ways of egress to be so arranged in reference to rooms that in case of fire on one stairway the other stairway can be reached by the occupant without his or her having to pass the stairway involved. Entrance to all such ways of egress aforementioned in this section shall be from corridors or hallways of not less than three feet in width, and in no case shall entrance to such ways of egress be through a room or closet, and where such building is in the opinion of the insurance commissioner of sufficient size to require more than two ways of egress the "National Fire Protection Association" standard governing corridors and stair areas shall be adhered to. Every hotel, lodging house, school dormitory, hospital, sanatorium, apartment house, flat, tenement or other building, other than a private dwelling not over three stories in height, in which rooms are rented, leased, let or offered for rent, leased or let, shall forthwith, at the owner's expense, be provided with additional ways of egress as the insurance commissioner shall deem practicable in order that the object of this article may be accomplished and that existing dangers may not be perpetuated. (1909, c. 637, s. 1; 1923, c. 149, s. 4; C. S. 6081.)

Editor's Note.—Although the general subject matter of this section remains unaltered, its substance and provisions have been so altered by the amendment of 1923 as to leave no basis of comparison between the old and the new sections. For the provisions of the old section therefore, that section should be consulted.

Nonsuit Held Proper.—These actions to recover for personal injuries and for wrongful death resulting from a fire in defendants' building, the third floor of which was rented for sleeping quarters, were founded on this section, upon allegations that defendants failed to have two exits from the sleeping quarters in case of fire. All the evidence tended to show that the building was constructed prior to 1913, and there was no evidence that the insurance commissioner ever deemed practical that the building should be provided with any additional ways of egress in order that the dangers existing should be terminated. It was held that defendants' motion to nonsuit was properly allowed, since plaintiffs fail to bring themselves within the statute relied upon. Woods v. Hall, 214 N. C. 16, 197 S. E. 557.

§ 69-9. Places of public amusement, how constructed.—Every theater, opera house, or other like place of public amusement shall have as many doors for egress therefrom as may be necessary and can be made consistently with the proper strength of the building; all such doors shall be hung so as to open outwardly, or both outwardly and inwardly; and the seats therein shall be arranged in rows properly spaced, with aisles of adequate width, so as to afford easy egress therefrom. All scenery shall be made as secure against becoming inflamed as reasonably practical, and also all reasonably practical arrangements shall be made for the constant supply of water and other means for extinguishment of fires, and they shall be kept constantly effective during the presence of an audience. The insurance commissioner may require all theaters to be equipped with a front curtain of asbestos or other fireproof material, to be furnished by owners of the building, and this curtain shall be raised and lowered not less than twice before each performance, in order to guarantee its being in perfect working order. (1909, c. 637, s. 2; C. S. 6082.)

§ 69-10. Doors in certain buildings to open outwardly.—In all public schoolhouses and other buildings, and also all theaters, assembly rooms, halls, churches, factories with more than ten employees, and all other buildings or places of public resort where people are accustomed to assemble (excepting schoolhouses and churches of one room on the ground floor) which shall hereafter be erected, together with all those heretofore erected and which are still in use as such buildings or places of resort, the doors for ingress and egress shall be so hung as to open outwardly from the audience rooms, halls, or workshops of such buildings or places, or the doors may be hung on double hinges, so as to open with equal ease outwardly or inwardly. And it is further provided that, in order to safeguard the public from the dangers of fire and contingencies arising and resulting therefrom in places of this kind, and the owner or owners from unnecessary confusion and expense, plans for all such theaters, opera houses, moving picture shows, and other like places of amusement to be hereafter erected shall be submitted to and approved, as to the safety of the building from fire and the occupants in case of fire, by the insurance commissioner before work is begun on the building. This requirement shall apply also where any building standing or part thereof is to be changed to use as a theater, opera house, moving picture show or other like place of amusement. (1909, c. 637, s. 3; 1923, c. 149, s. 1; C. S. 6083.)

Editor's Note.—The number of employees which would bring certain buildings enumerated near the beginning of the section within the operation of this section was reduced from twenty to ten, by the amendment of 1923. The provision, in the latter part of the section, that the plans of buildings to be erected shall be submitted to and approved by the insurance commissioner before work is begun, is also new with the amendment of 1923.

§ 69-11. Fire-escapes to be provided.—All factories, manufacturing establishments or workshops of three or more stories in height, in which ten or more people are employed above the first floor thereof, shall be provided with one or (if the proper officials shall deem necessary) more outside fire-escapes, not less than six feet in length and three feet in width, properly and safely constructed, guarded by iron railings not less than three feet in length and taking in at least one door and one window or two windows at each story and connected with the interior by easily accessible and unobstructed openings; and the fire escapes shall connect by iron stairs not less than twenty-four inches wide, the steps to be not less than six inches tread, placed at not more than an angle of forty-five degrees slant, and protected by a well secured hand-rail on both sides, with a twelve-inch wide drop ladder from the lowest platform reaching to the ground. Each story of all factories, manufacturing establishments or workshops of three or more stories in height shall be amply supplied with means for extinguishing fires. All the main doors, both inside and outside, in factories, except fire doors, shall open outwardly, when the proper official shall so direct, and no outside or inside door of any building wherein operatives are employed shall be locked, bolted, or otherwise fastened during the hours of labor so as to prevent egress. (1909, c. 637, s. 4; 1923, c. 149, s. 2; C. S. 6084.)

Editor's Note.—The number of employees which would

bring certain buildings enumerated near the beginning of the section within the operation of this section was reduced from thirty to ten, by the amendment of 1923.

§ 69-12. Ways of escape provided.—Every building now or hereafter used, in whole or in part, as a public building, public or private institution, schoolhouse, church, theater, public hall, place of assembly or place of public resort, and every building in which twenty or more persons are employed, allowed or accustomed to assemble or accommodated above the second story in a factory, workshop, office building or mercantile or other establishment, when the owner or agent of the owner of the buildings is notified in writing by the insurance commissioner or one of his deputies, shall be provided with proper ways of egress or other means of escape from fire sufficient for the use of all persons accommodated, assembled, employed, lodging or residing in such building or buildings, and such ways of egress and means of escape shall be kept free from obstructions, in good repair, and ready for use. Every room above the second story in any such building in which twenty or more persons are employed shall be provided with more than one way of egress by stairways on the inside or outside of the building. All doors in any building subject to the provisions of this article shall open outwardly, if the insurance commissioner or one of his deputies shall so direct in writing. (1909, c. 637, s. 5; 1923, c. 149, s. 3; 1927, c. 55, s. 1; C. S. 6085.)

Editor's Note.—By the amendment of 1923, buildings where people are "allowed or accustomed to assemble or accommodated," and by the amendment of 1927, office buildings where people are employed, are brought within the operation of this section.

§ 69-13. Enforcement by insurance commissioner.—The insurance commissioner is charged with the execution of this article, and he or the chief of the fire department is vested with all privileges, duties, and obligations placed upon them in this chapter, in regard to the inspection of buildings, for the purpose of enforcing the provisions of this article in regard to the buildings and requirements herein. Any owner or occupant of premises failing to comply with the provisions of this article, in accordance with the orders of the authorities above specified, shall be guilty of a misdemeanor and punished by a fine not less than ten dollars nor more than fifty dollars for each day's neglect. If any owner or lessee of any building referred to in this article shall deem himself aggrieved by any ruling or order of any chief of fire department or local inspector, he may within twenty-four hours appeal to the insurance commissioner, and the cause of complaint shall at once be investigated by the direction of the commissioner, and unless by his authority the order or ruling is revoked it shall remain in full force and effect and be forthwith complied with by the owner or lessee. (1909, c. 637, s. 6; C. S. 6086.)

Art. 3. State Volunteer Fire Department.

§ 69-14. Purpose of article.—The purpose of this article shall be the creation of a state volunteer fire department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the state of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this article. (1939, c. 364, s. 1.)

§ 69-15. Personnel. — The personnel of the North Carolina state volunteer fire department shall consist of all active members of the organized fire departments, who are members of the North Carolina state firemen's association, of municipalities whereof the governing bodies shall subscribe to and endorse this article. (1939, c. 364, s. 2.)

§ 69-16. Organization. — The North Carolina state fire marshal shall be chief of the state volunteer fire department; regular municipal fire chiefs shall be assistant chiefs; assistant chiefs shall be deputy chiefs; battalion chiefs, captains; lieutenants and privates shall hold the same positions that they occupy in their municipal companies. When engaged in rendering assistance at the scene of any emergency, the ranking officer of the first department arriving at the scene of the emergency shall have complete charge of all operations until the arrival of a superior officer. All subordinate officers and men shall act under the direction of such ranking officer. Whenever present at the scene of an emergency, the chief shall have full and complete control and authority over operations of all members of the department. (1939, c. 364, s. 3.)

§ 69-17. Acceptance by municipalities. — Any municipality having an organized fire department and desiring to participate in the establishment of the state volunteer fire department, may do so by a resolution of the governing body accepting and endorsing the provisions of this article: Provided, that acceptance shall not be compulsory. (1939, c. 364, s. 4.)

§ 69-18. Withdrawal.—Any municipality which has accepted the provisions of this article may withdraw its fire departments from membership in the state volunteer fire department by resolution of the governing body thereof. Notice of such withdrawal shall be given to the state fire marshal and withdrawal shall not become effective until sixty (60) days after his receipt thereof. (1939, c. 364, s. 5.)

§ 69-19. Dispatching firemen and apparatus from municipalities. — Municipalities endorsing this article shall retain full and complete control and authority in sending or permitting firemen and apparatus to go beyond the limits of the municipality. The governing bodies of such municipalities shall designate and authorize a person, and at least two alternates, who shall have authority to grant or deny permission to firemen and apparatus to leave the municipality in all cases where request is made for assistance beyond its corporate limits, and the municipality shall, through the office of its municipal fire chief, furnish to the office of the state insurance commissioner, and to the secretary of the North Carolina state firemen's association, a list of the persons so authorized by the municipality. The secretary of the state firemen's association shall furnish to all municipalities and counties accepting this article a list of all such persons so designated

in all municipalities within the state. (1939, c. 364, s. 6.)

§ 69-20. No authority in state volunteer fire department to render assistance to non-accepting counties.—The state volunteer fire department shall not have authority to render assistance in any emergency occurring within a county which has not accepted the terms and conditions of this article by resolution of the board of county commissioners: Provided, that nothing in this article shall be construed to prevent any municipality from voluntarily permitting its fire department to render assistance in any emergency, notwithstanding that it may arise in a county which has failed to accept this article. (1939, c. 364, s. 7.)

§ 69-21. Acceptance by counties.—Any county desiring to accept the benefits of this article may do so by resolution of the board of county commissioners. The board may make the necessary appropriation therefor and levy annually taxes for payment of the same as a special purpose, in addition to any tax allowed by any special statute for the purposes enumerated in § 153-9, and in addition to the rate allowed by the constitution. Any such county may thereupon make agreements and enter into contracts with respect to payment for services rendered by the state volunteer fire department within its boundaries in the following manner:

The county may contract with any municipality which has accepted the terms of this article, whether within or without said county, to pay to such municipality an annual fee as a consideration for the municipality providing equipment and carrying compensation insurance which will enable it to respond to calls from within the county so contracting, and to pay an additional sum per truck for each mile traveled from the station house to the scene of the emergency, and to pay an additional sum per truck per hour or fraction thereof for the use of its water or chemical pumping equipment. Said sums shall be paid to the city within thirty (30) days after such services have been performed: Provided, that nothing in this section shall be construed to prevent the county and municipality from adopting a different schedule of fees in cases where those provided above shall be considered excessive or inadequate: Provided, that if the emergency shall occur within the limits of another city or town, such city or town and not the county wherein it lies shall be responsible for the payments and shall assume all liabilities as provided in this section. (1939, c. 364, s. 8.)

§ 69-22. Municipalities not to be left unprotected.—At no time shall the entire personnel or equipment of any municipal fire department be absent from the municipality in response to a call to another municipality, or other place lying at a distance exceeding two miles from the corporate limits, but there shall remain within the municipal limits such personnel and equipment as in the judgment of the local fire chief might provide sufficient protection during the absence of the remainder. (1939, c. 364, s. 9.)

§ 69-23. Rights and privileges of firemen; liability of municipality.—When responding to a call and while working at a fire or other emergency outside the limits of the municipality by which they are regularly employed or in volunteer fire service, all members of the state volunteer fire department shall have the same authority, rights, privileges and immunities which are afforded them while responding to calls within their home municipality. In permitting its fire department or equipment to attend an emergency or answer a call beyond the municipal limits, whether under the terms of this article or otherwise, a municipality shall be deemed in exercise of a governmental function, and shall hold the privileges and immunities attendant upon the exercise of such functions within its corporate limits. (1939, c. 364, s. 10).

§ 69-24. Relief in case of injury or death.—In case of injury or death of any member of the state volunteer fire department arising out of and in the course of the performance of his duties while such member is assisting at any emergency arising beyond the limits of the municipality with which he is connected, or while going to or returning from the scene of such emergency, such fireman shall be entitled to compensation under the terms of the North Carolina Workmen's Compensation Act, and the municipality with which he is connected shall be liable for the compensation provided under that Act. (1939, c. 364, s. 11.)

§ 69-25. Sums from contingent fund of state made available for administration of article.—In order to assist in carrying out the purposes of this article the governor may, from time to time, make provisions for assistance to the North Carolina state firemen's association in a sum not to exceed two thousand five hundred dollars ($2,500.00), in any one year, out of the contingent fund appropriated in the General Appropriation Act. One-half of the amount so provided shall, in each instance, go to the state firemen's relief fund, and one-half to the expenses of the said association incurred in carrying out the provisions of this article. (1939, c. 364, s. 12.)

Chapter 70. Indian Antiquities.

§ 70-1. Private landowners urged to refrain from destruction.—Private owners of lands containing Indian relics, artifacts, mounds or burial grounds are urged to refrain from the excavation or destruction thereof and to forbid such conduct by others, without the cooperation of the director of the state museum and the secretary of the North Carolina Historical Commission or without the assistance or supervision of some person designated by either as qualified to make scientific archaeological explorations. (1935, c. 198, s. 1.)

§ 70-2. Possessors of relics urged to commit them to custody of state agencies.—All persons having in their possession collections of Indian relics, artifacts, and antiquities which are in danger of being lost, destroyed or scattered are urged to commit them to the custody of the North Carolina State Museum, the North Carolina Historical Commission, or some other public agency or institution within the State which is qualified to preserve and exhibit them for their historic, scientific and educational value to the people of the State. (1935, c. 198, s. 2.)

§ 70-3. Preservation of relics on public lands.—It shall be the duty of any person in charge of any construction or excavation on any lands owned by the State, by any public agency or institution, by any county, or by any municipal corporation, to report promptly to and preserve for the director of the state museum or the secretary of the North Carolina Historical Commission any Indian relic, artifact, mound, or burial ground discovered in the course of such construction or excavation. (1935, c. 198, s. 3.)

§ 70-4. Destruction or sale of relic from public lands made misdemeanor.—Any person who shall excavate, disturb, remove, destroy or sell any Indian relic or artifact, or any of the contents of any mound or burial ground, on or from any lands owned by the State, by any public agency or institution, by any county, or by any municipal corporation, except with the written approval of the director of the state museum or the secretary of the North Carolina Historical Commission, shall be guilty of a misdemeanor. (1935, c. 198, s. 4.)

Chapter 71. Indians.

§ 71-1. Cherokee Indians of Robeson County; rights and privileges.—The persons residing in Robeson, Richmond, and Sampson counties, who have heretofore been known as "Croatan Indians" or "Indians of Robeson County," together with their descendants, shall hereafter be known and designated as "Cherokee Indians of Robeson County," and by that name shall be entitled to all the rights and privileges heretofore or hereafter conferred, by any law or laws of the state of North Carolina, upon the indians heretofore known as the "Croatan Indians" or "Indians of Robeson County." In all laws enacted by the General Assembly of North Carolina relating to said indians subsequent to the enactment of said chapter fifty-one of the Laws of eighteen hundred and eighty-five, the words "Croatan Indians" and "Indians of Robeson County" are stricken out and the words "Cherokee Indians of Robeson County" inserted in lieu thereof. (Rev., s. 4168; 1885, c. 51, s. 2; 1911, c. 215; P. L. 1911, c. 263; 1913, c. 123; C. S. 6257.)

Cross Reference.—See annotations to § 116-85.

§ 71-2. Separate privileges in schools and institutions.—Such Cherokee indians of Robeson county and the indians of Person county, defined in the chapter Education, § 115-66, shall be entitled to the following rights and privileges:

1. Separate schools, with the educational privileges provided in the chapter Education.

2. Suitable accommodations in the state hospital for the insane at Raleigh, as provided in the chapter Hospitals for the Insane, in the article entitled Organization and Management.

3. The sheriffs, jailers, or other proper authorities of Robeson and Person counties shall provide in the common jails of said counties, and in the homes for the aged and infirm thereof, separate cells, wards, or apartments for such indians in all cases where it shall be necessary under the laws of this state to commit any of said indians to such jails or county homes. (1911, c. 215, s. 6; 1913, c. 123; P. L. 1913, c. 22; C. S. 6258.)

Cross References.—See annotations to § 116-85. For separate schools in certain counties, see § 115-66; for care of insane, see § 122-5.

§ 71-3. Chapter not applicable to certain bands of Cherokees.—Neither this chapter nor any

other act relating to said "Cherokee Indians of Robeson County" shall be construed so as to impose on said indians any powers, privileges, rights, or immunities, or any limitations on their power to contract, heretofore enacted with reference to the eastern band of Cherokee indians residing in Cherokee, Graham, Swain, Jackson, and other adjoining counties in North Carolina, or any other band or tribe of Cherokee indians other than those now residing, or who have since the Revolutionary War resided, in Robeson county, nor shall said "Cherokee Indians of Robeson County," as herein designated, be subject to the limitations provided in the chapter Contracts Requiring Writing, in § 22-3, entitled Contracts with Cherokee Indians. (1913, c. 123, s. 5; C. S. 6259.)

Chapter 72. Inns, Hotels and Restaurants.

Art. 1. Innkeepers.

§ 72-1. Must furnish accommodations.—Every innkeeper shall at all times provide suitable food, rooms, beds and bedding for strangers and travelers whom he may accept as guests in his inn or hotel. (Rev., s. 1909; 1903, c. 563; C. S. 2249.)

Cross References.—As to innkeeper's lien on baggage, see §§ 44-30 to 44-32. As to obtaining entertainment at hotels and boarding houses without paying therefor, see § 14-110. For distinctions between "boarder" and "guest," see notes under the following section.

What Constitutes an Inn Generally.—A public inn or hotel is a public house of entertainment for all who choose to visit it, and where all transient persons who may choose to come will be received as guests, for compensation; and it does not lose its character as such by reason of its being located at a summer resort or a watering place, or by taking some as boarders by a special contract or for a definite time. Holstein v. Phillips, 146 N. C. 366, 59 S. E. 1037.

Sleeping Car Not an Inn.—Though a "sleeping car" is a place for the reception of travelers, it is not an "inn." Garrett v. Southern R. Co., 172 N. C. 737, 90 S. E. 903.

Boarding House.—A boarding house is as well known and as distinguishable from every other house in every city, village, and the country as an inn or tavern. It is a house where the business of keeping boarders generally is carried on, and which is held out by the owner or

keeper as a place where boarders are kept. State v. McRae, 170 N. C. 712, 713, 86 S. E. 1039.

Distinction Between Inn and Boarding House.—It is the publicly holding a place out as one where all transient persons who may choose to come will be received as guests for compensation that is the principal distinction between a hotel and a boarding house. Holstein v. Phillips, 146 N. C. 366, 370, 59 S. E. 1037.

When Guest Can Be Ejected.—Guests of a hotel, and travelers or other persons entering it with the bona fide intent of becoming guests, can not be lawfully prevented from going in, or be put out, by force, after entrance, provided they are able to pay the charges and tender the money necessary for that purpose, if requested by the landlord, unless they be persons of bad or suspicious character, or of vulgar habits, or so objectionable to the patrons of the house, on account of the race to which they belong, that it would injure the business to admit them to all portions of the house, or unless they attempt to take advantage of the freedom of the hotel to injure the landlord's chances of profit derived either from his inn or any other business incidental to or connected with its management and constituting a part of the provision for the wants or pleasure of his patrons. State v. Steele, 106 N. C. 766, 782, 11 S. E. 478.

Same—Obedience to Rules.—A guest's right of occupancy of a hotel is dependent upon proper behavior and decent conduct and obedience to reasonable rules and regulations of the proprietors; for a breach of such implied conditions they may be summarily removed. Hutchins v. Durham, 118 N. C. 457, 24 S. E. 723.

Same—Remedy.—Guests at a hotel can not maintain ejectment if evicted, but can only sue for damages if wrongfully turned out. Hutchins v. Durham, 118 N. C. 457, 24 S. E. 723.

One Not a Guest Is a Licensee.—One who is in a hotel for social purposes, at the invitation of one of its guests, is a licensee, at the will of its management, and may be forbidden the premises for improper conduct. Money v. Travelers Hotel Co., 174 N. C. 508, 93 S. E. 964.

Same—Can Be Expelled.—When persons, unobjectionable on account of character or race, enter a hotel not as guests, but intent on pleasure or profit, to be derived from intercourse with its inmates, they are there not of right, but under an implied license that the landlord may revoke at any time, because barring the limitation imposed by holding out inducements to the public to seek accommodation at his inn, the proprietor occupies it as his dwelling house, from which he may expel all who have not acquired rights growing out of the relation of guests, and must drive out all who, by their bad conduct, create a nuisance and prove an annoyance to his patrons. State v. Steele, 106 N. C. 766, 782, 11 S. E. 478.

Same—Same—Force Allowable.—The broad rule laid down by Wharton (1 Cr. L., sec. 625), is that the proprietor of a public house has a right to request a person who visits it, not as a guest or on business with guests, to depart, and if he refuse, the innkeeper has a right to lay his hands gently on him and lead him out, and if resistance be made, to employ sufficient force to put him out. For so doing, he can justify his conduct on a prosecution for assault and battery. State v. Steele, 106 N. C. 766, 784, 11 S. E. 478.

Other Rights of Innkeeper.—An innkeeper has, unquestionably, the right to establish a news stand or a barber shop in his hotel, and to exclude persons who come for the purpose of vending newspapers or books, or of soliciting employment as barbers, and, in order to render his business more lucrative, he may establish a laundry or a livery stable in connection with his hotel, or an innkeeper may contract with the proprietor of a livery stable in the vicinity to secure for the latter, as far as he legitimately can, the patronage of his guests in that line for a per centum of the proceeds or profits derived by such owner of vehicles and horses from dealing with the patrons of the public house. After concluding such contracts, the innkeeper may make, and, after personal notice to violators, enforce a rule excluding from his hotel the agents and representatives of other livery stables who enter to solicit the patronage of his guests. State v. Steele, 106 N. C. 766, 783, 11 S. E. 478.

§ 72-2. Liability for loss of baggage.—Innkeepers shall not be liable for loss, damage or destruction of the baggage or property of their guests except in case such loss, damage, or destruction results from the failure of the innkeeper to exercise ordinary, proper and reasonable care in the custody of such baggage and property; and in case of such loss, damage or destruction resulting from the negligence and want of care of the said innkeeper he shall be liable to the owner of the said baggage and property to an amount not exceeding one hundred dollars. Any guest may, however, at any time before a loss, damage or destruction of his property, notify the innkeeper in writing that his property exceeds in value the said sum of one hundred dollars, and shall upon demand of the innkeeper furnish him a list or schedule of the same, with the value thereof, in which case the innkeeper shall be liable for the loss, damage or destruction of said property because of any negligence on his part for the full value of the same. Proof of the loss of any such baggage, except in case of damage or destruction by fire, shall be prima facie evidence of the negligence of said hotel or innkeeper. (Rev., s. 1910; 1903, c. 563, s. 2; C. S. 2250.)

What Constitutes Boarding House Keeper.—The keeper of a boarding house is one who reserves the right to select and choose his patrons and takes them in only by special arrangement, and usually for a definite time. Holstein v. Phillips, 146 N. C. 366, 370, 59 S. E. 1037.

Same—Not an Innkeeper.—One who entertains strangers only occasionally, although he receives compensation for it, is not an innkeeper. State v. Mathews, 19 N. C. 424.

Boarder and Guest Distinguished.—In 16 A. and E. Enc. (2 Ed.), it is said: "The essential difference between a boarder and a guest at an inn lies in the character in which the party comes—that is, whether he is a transient person or not, and, accordingly, one who stops at an inn as a transient or a guest, with all the rights, privileges, and liberties incident to that station. On the other hand, one who seeks accommodation with a view to permanency, as to make the place his home for the time being, is not a guest, but a boarder. The length of his stay, however, is not of itself ordinarily decisive, for he will continue to be a guest as long as he remains in the transitory condition of that relation." Holstein v. Phillips, 146 N. C. 366, 371, 59 S. E. 1037.

Liability Extends to Guest.—When one is received at a public inn or hotel and entertained as a guest, without any prearrangement as to terms or time, but on the implied invitation held out to the public generally, he is a transient only—a guest and not a boarder—and entitled to recover of the defendant innkeeper as such. Holstein v. Phillips, 146 N. C. 366, 59 S. E. 1037.

Same—Common Law Liability.—The decisions of this State are to the effect that, in the absence of statutory regulation, the keeper of a public inn, or hotel, which is the modern and more frequently used term, is responsible to his guest for the safety of the latter's goods, chattels, and money, when placed infra hospitum and which he has with him for the purposes of his journey. The proprietor is held to be an insurer to the extent that he must make good to the guest all loss or damage arising from any cause except the act of God or the public enemy, or the fault of the guest himself or his agents or servants. Quinton v. Courtney, 2 N. C. 40; Neal v. Wilcox, 49 N. C. 146; Holstein v. Phillips, 146 N. C. 366, 369, 59 S. E. 1037.

The exacting requirement of the common law, established in a ruder time, from reasons of public policy, in many instances and under modern conditions may operate with great harshness, and the matter has been very generally made the subject of legislation by which the landlord's obligations have been limited, both in kind and amount. Holstein v. Phillips, 146 N. C. 366, 369, 59 S. E. 1037.

Ordinary Care Now Required.—Even at a public inn or hotel, one who holds the position as a regular boarder or lodger can only hold the proprietor to the exercise of ordinary care on the part of himself and his employees. Holstein v. Phillips, 146 N. C. 366, 370, 59 S. E. 1037.

Liability for Personal Injuries.—The innkeeper is not insurer of his guest's personal safety, but his liability does extend to injuries received by the guest from being placed in an unsafe room. This is a matter peculiarly within the innkeeper's knowledge and entirely beyond the control of the guest. In that particular he is peculiarly within the innkeeper's power and protection. Ten Broeck v. Wells, 47 Fed. 679; Patrick v. Springs, 154 N. C. 270, 272, 70 S. E. 395.

Same—Negligence of Guest.—The guest must use reason-

able care on his part to protect himself, and if he is himself negligent and could have avoided the injury by due care, he cannot recover. Patrick v. Springs, 154 N. C. 270, 273, 70 S. E. 395.

§ 72-3. Safekeeping of valuables. — It is the duty of innkeepers, upon the request of any guest, to receive from said guest and safely keep money, jewelry and valuables to an amount not exceeding five hundred dollars; and no innkeeper shall be required to receive and take care of any money, jewelry or other valuables to a greater amount than five hundred dollars: Provided, the receipt given by said innkeeper to said guest shall have plainly printed upon it a copy of this section. No innkeeper shall be liable for the loss, damage or destruction of any money or jewels not so deposited. (Rev., s. 1911; 1903, c. 563, s. 3; C. S. 2251.)

§ 72-4. Loss by fire.—No innkeeper shall be liable for loss, damage or destruction of any baggage or property caused by fire not resulting from the negligence of the innkeeper or by any other force over which the innkeeper had no control. Nothing herein contained shall enlarge the limit of the amount to which the innkeeper shall be liable as provided in preceding sections. (Rev., s. 1912; 1903, c. 563, s. 4; C. S. 2252.)

§ 72-5. Negligence of guest.—Any innkeeper against whom claim is made for loss sustained by a guest may show that such loss resulted from the negligence of such guest or of his failure to comply with the reasonable and proper regulations of the inn. (Rev., s. 1914; 1903, c. 563, s. 7; C. S. 2253.)

Cross References.—As to liability for personal injuries and effect of negligence of guest, see notes under § 72-2; as to innkeeper's lien on baggage, see §§ 44-30 to 44-32.

§ 72-6. Copies of this article to be posted.—Every innkeeper shall keep posted in every room of his house occupied by guests, and in the office, a printed copy of this article and of all regulations relating to the conduct of guests. This chapter shall not apply to innkeepers, or their guests, where the innkeeper fails to keep such notices posted. (Rev., s. 1913; 1903, c. 563, ss. 5, 6; C. S. 2254.)

Effect of Noncompliance with Section.—Where the provision of this section is not complied with the principle of the common law obtains and the keeper is liable as at common law. Holstein v. Phillips, 146 N. C. 366, 369, 59 S. E. 1037.

§ 72-7. Admittance of dogs to bedrooms.—It shall be unlawful for any innkeeper or guest owning, keeping, or who has in his care a dog or dogs, to permit such a dog or dogs admittance to any bedroom or rooms used for sleeping purposes in any inn or hotel.

Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall pay a fine not to exceed fifty dollars or be imprisoned not more than thirty days. (1927, c. 67.)

Cross Reference.—As to special provisions for "Seeing-Eye" dogs, see § 67-29.

Art. 2. Sanitary Inspection and Conduct.

§ 72-8. Annual inspection and certificate by state board of health.—For the purpose of carrying out the provisions of this article the state board of health is authorized and required to inspect, through its officers or agents, without cost to the hotels or hospitals, all hotels and restaurants, hospitals and sanitariums, public and private, in the state once a year. If upon inspection of any hotel or restaurant, hospital or sanitarium, it shall be found that this article has been fully complied with, the secretary of the state board of health shall issue a certificate to that effect to the person operating the same, and such certificate shall be kept posted in plain view in some conspicuous place in said hotel or restaurant, hospital or sanitarium. (1917, c. 66, s. 23; 1923, c. 173; C. S. 2277.)

Editor's Note.—This section, originally passed in 1917, was repealed by Public Laws 1921, Chapter 186, sec. 22. However in 1923 this section was amended and reinstated in the Code, Public Laws, 1923, Chapter 173. The effect of the amendment was to include hospitals and sanitariums, public and private, under the provision for inspection by the State Board of Health.

§ 72-9. Definitions; "hotel"; "transient guest"; "restaurant".—A "hotel" within the meaning of this article is any inn or public lodging-house where transient guests are lodged for pay. The term "transient guest" within the meaning of this article shall mean one who puts up for less than one week at a time at such hotel. The term "restaurant" as used in this article shall include lunch counters, cafes and all other establishments whatsoever where lunches, meals or food in any form are prepared for and/or served to the public for immediate consumption. Nothing in this article shall be construed as affecting private boarding houses where the majority of the patrons receive boarding accommodations for periods of a week or longer at a time. (1921, c. 186, s. 1; 1935, c. 169; C. S. 2283(a).)

Editor's Note.—This section was so changed by the amendment that a comparison of the old with the new is necessary to determine the full extent.

§ 72-10. Charges for rooms; posting.—Every transient hotel shall keep posted in a conspicuous place in the office a list of its charges for rooms, with or without meals, in accordance with the plan or plans on which the hotel is operated, giving the exact transient rate, and shall also keep posted in each room the rate for that room, with or without meals, in accordance with its plan as stated above, giving the transient rate per day and week, and the rate for each person in the room. (1921, c. 186, s. 2; C. S. 2283(b).)

§ 72-11. Water-closets, bathrooms, and washbowls.—In all cities, towns, or villages where a system of water-works and sewerage is maintained for public use, every hotel therein accessible to water main and sewer main shall be equipped with suitable water-closets for the accommodation of its guests, which water-closets shall be connected and tapped by proper plumbing with such water and sewerage systems, and there shall be some adequate means of flushing said water-closets with the water in such manner as to prevent sewer gas from arising therefrom. The water-closets and bathrooms must be sufficiently lighted to permit the reading of ordinary newspaper type (18) inches from the normal eye. The washbowls of the main wash-room of such hotel must be connected and tapped and equipped in similar manner, both as to method and time; all such equip-

ment to be paid for by the owner. (1921, c. 186, s. 3; C. S. 2283(c).)

§ 72-12. Receptacles holding water screened. "Standing water" defined.—The proprietor of every hotel and restaurant shall keep all cisterns, tanks, and other receptacles containing standing water screened or otherwise so covered as to prevent the entrance of flies, mosquitoes, and other disease-carrying insects. The term "standing water" as used in this article shall mean water that remains for ten days or more in a cistern, tank, or other receptacle. (1921, c. 186, s. 4; C. S. 2283(d).)

§ 72-13. Water to be analyzed. Discontinuance of use.—A sample of water used in every hotel and restaurant, except in cases where the water is derived from some public water supply, shall be sent by the proprietor to the state laboratory of hygiene for analysis twice each year, with a certificate that it is the water used in such hotel or restaurant, and if the sample is found by said laboratory to be unfit for the use that is made of the water in the hotel or restaurant, the further use of such water shall be discontinued until permission is granted by the state board of health to resume the use of such water. (1921, c. 186, s. 5; C. S. 2283(e).)

§ 72-14. Door and window screens. Mosquito bar for beds. Fly paper and fly traps.—The proprietor or keeper of every hotel or restaurant shall keep screened the doors, windows, and all openings of the kitchen and dining-room with suitable mesh-wire gauze from the first of April to the first of December. Every hotel shall have all bedroom windows screened, or else provide each bed with a mosquito bar for the use of its patrons for protection against flies, mosquitoes and other insects, and it shall be the duty of the proprietor or keeper of every hotel and restaurant to use such other means, as fly-paper, fly-traps, etc., as may be necessary to keep the restaurant, kitchen, and dining-room reasonably free from flies. (1921, c. 186, s. 6; C. S. 2283(f).)

§ 72-15. Minimum floor and air space. Beds.—In every sleeping room the minimum floor area shall be sixty (60) square feet per bed, and under no circumstances shall there be provided less than five hundred (500) cubic feet of air space per bed. There shall always be space in each room, and the arrangement of each room shall be such that there may be a space of two feet between any beds in the room. All beds shall be so arranged that the air shall circulate freely under each. In no hotel shall beds or bunks in the same room or apartment be placed one above another: Provided, that this section shall not apply in cases of emergency. (1921, c. 186, s. 7; C. S. 2283(g).)

§ 72-16. Lighting of rooms. Window space. Blinds or shades.—Each room in every hotel hereafter constructed shall be well lighted, with outside window space not less than one-eighth (⅛) the floor space. Each window in every hotel now existing or hereafter constructed shall be provided with either blinds having hinges and shutters or slats freely movable and in good working order, or with a movable shade which effectively excludes the light when drawn. (1921, c. 186, s. 8; C. S. 2283(h).)

§ 72-17. Pillow-slips and sheets; clean sets.—All hotels shall hereafter provide each bed, bunk, cot, or other sleeping place for the use of guests with pillow-slips, under and top sheets to be of sufficient width to cover the mattress thereof, and to be at least ninety (90) inches long. All pillow-slips and sheets, after being used by one guest, must be washed and ironed before used by another guest, a clean set being furnished each succeeding guest. (1921, c. 186, s. 9; C. S. 2283(i).)

§ 72-18. Beds and furnishings to be kept clean and free from vermin.—All beds, bedclothing, mattresses, and pillows shall always be kept clean and free from vermin. (1921, c. 186, s. 10; C. S. 2283(j).)

§ 72-19. Rooms to be disinfected and aired.—Every room, after being occupied by any one known or suspected to be suffering from tuberculosis, diphtheria, or any contagious disease, must be thoroughly disinfected as prescribed by the state board of health before further occupancy; and every room, after being occupied by any one known or suspected to be suffering from measles or whooping-cough, must be thoroughly aired for twenty-four (24) hours before subsequent occupancy. (1921, c. 186, s. 11; C. S. 2283(k).)

§ 72-20. Towels.—All hotels shall furnish each guest with a clean towel; and the use of the roller or other towels used in common is prohibited in all hotels and restaurants. (1921, c. 186, s. 12; C. S. 2283(l).)

§ 72-21. Refrigerators, ice boxes, and cold storage rooms. Kitchens.—The refrigerator, ice boxes, and cold-storage rooms of all hotels or restaurants must be kept free from foul and unpleasant odors, mold, and slime. The kitchen must be well lighted and ventilated, the floor clean, and the side walls and ceilings free from cobwebs and accumulated dirt. (1921, c. 186, s. 13; C. S. 2283(m).)

§ 72-22. Tableware and kitchen utensils. Reservice of food. — All dishes, tableware, and kitchen utensils must be thoroughly washed and rinsed with clean water after using; food served to customers when part of same has been used must not again be served to other customers. (1921, c. 186, s. 14; C. S. 2283(n).)

§ 72-23. Protection and removal of garbage.—All garbage must be kept covered and protected from flies, in barrels or galvanized iron cans, and removed at least twice a week. (1921, c. 186, s. 15; C. S. 2283(o).)

§ 72-24. Requirements for lodging-houses. — Every lodging-house accepting transient guests shall at all times be kept free from filth and rubbish in or on the premises belonging to or connected with the same. All water-closets, washbasins, baths, windows, fixtures, fittings, and painted surface shall at all times be kept clean and in good repair. The floors, walls, and ceilings of all rooms, passages, and stairways must at all times be clean and in good repair. (1921, c. 186, s. 16; C. S. 2283(p).)

§ 72-25. Rules prescribed by state board of

health. Inspections. Rating. — For the purpose of carrying out the provisions of this article the state board of health is authorized and required to prepare reasonable rules and regulations, and an official score card for showing numerically the rating of hotels and restaurants that come within the meaning of this article. The state board of health, through its officers or agents, shall inspect all hotels and restaurants coming within the meaning of this article at least once a year, and give to every hotel and restaurant inspected a rating in accordance with the aforementioned score card. It shall be the duty of the inspector to leave with the management of said hotel or restaurant at the time of inspection a copy of his report. The said board shall publish at various times the ratings given to the various hotels and restaurants that have been inspected by its officers or agents, and shall furnish to each hotel and restaurant a certificate with the rating given to the hotel stated thereon. The proprietor or manager of the hotel or restaurant, upon the receipt of the aforesaid certificate, shall post it in a conspicuous place where it may be easily observed by guests, and shall remove and destroy the said certificate one year after the date written thereon, or sooner when called upon to do so by an officer or agent of the state board of health. (1921, c. 186, s. 17; C. S. 2283(q).)

§ 72-26. Annual inspections. Certificates.—No inspection of any hotel or restaurant shall be required oftener than once a year, unless there is a change of proprietors, or unless it shall appear to the state board of health that additional inspections are advisable, or upon complaint from two or more persons setting forth facts indicating that such hotel or restaurant is in an unsanitary condition and not maintained in accordance with the requirements of this article: Provided, however, upon request on the part of the management or proprietor a reinspection may be had within a period of thirty (30) days. When more than one inspection of a hotel or restaurant is made within any one year, the state board of health shall issue a new certificate of inspection, and upon the receipt of the new certificate the proprietor or manager of the hotel or restaurant shall remove and destroy the certificate previously issued and replace it with the later certificate. (1921, c. 186, s. 18; C. S. 2283(r).)

Editor's Note.—This section would seem to supersede sec. 72-8 which was repealed by the 1921 act. But see note to sec. 72-8.

§ 72-27. Authority of inspectors. Privacy of guests.—The inspectors, officers, or agents of the state board of health are empowered and authorized to enter any hotel or restaurant at all reasonable hours to make such inspection; and it is the duty of every person in the management or control of such hotel or restaurant to afford free access to every part of the hotel or restaurant and render all aid and assistance necessary to enable the inspector to make a full, thorough, and complete examination thereof; but no inspector shall violate the privacy of any guest without his or her consent. (1921, c. 186, s. 19; C. S. 2283(s).)

§ 72-28. Acts and omissions constituting misdemeanor; punishment.—Any owner, manager, agent, or person in charge of a hotel or restaurant, or any other person who shall willfully obstruct, hinder, or interfere with any officer or agent of the state board of health in the proper discharge of his duty, or who shall willfully fail or neglect to comply with any of the provisions of this article, or who shall maintain or operate a hotel or restaurant which, under the requirements and provisions of this article, shall be found to have a rating of less than 70 shall be guilty of a misdemeanor, and upon conviction fined not less than $10 nor more than $50 for each offense, and each day that he shall fail to comply with this article or to maintain his hotel or restaurant with a rating of more than 70 points shall be a separate offense. (1921, c. 186, s. 20; C. S. 2283(t).)

§ 72-29. Inspector to swear out warrants.—It shall be the duty of the inspector, in case he shall have knowledge of any violation of this article, to swear out a warrant against the person offending. (1921, c. 186, s. 21; C. S. 2283(u).)

Art. 3. Immoral Practices of Guests of Hotels and Lodging-houses.

§ 72-30. Registration to be in true name; addresses; peace officers.—No person shall write, or cause to be written, or if in charge of a register knowingly permit to be written, in any register in any lodging-house or hotel any other or different name or designation than the true name or names in ordinary use of the person registering or causing himself to be registered therein. Any person occupying any room or rooms in any lodging-house or hotel shall register or cause himself to be registered where registration is required by such lodging-house or hotel. Any person registering or causing himself to be registered at any lodging-house or hotel, shall write, or cause to be written, in the register of such lodging-house or hotel the correct address of the person registering, or causing himself to be registered. Any person violating any provision of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding two hundred dollars ($200). This section shall not apply to any peace officer of this state who shall privately give his true name to the clerk or proprietor of such hotel or lodging-house. (1921, c. 111; C. S. 2283(v).)

Art. 4. Licensing and Regulation of Tourist Camps and Homes, Cabin Camps, Road Houses and Public Dance Halls.

§ 72-31. License required.—Every person, firm or corporation engaged in the business of operating outside the corporate limits of any city or town in this state a tourist camp, cabin camp, tourist home, road house, public dance hall, or any other similar establishment by whatever name called, where travelers, transient guests, or other persons are or may be lodged for pay or compensation, shall, before engaging in such business, apply for and obtain from the board of county commissioners of the county in which such business is to be carried on a license for the privilege of engaging in such business and shall pay for such license an annual tax in the amount of two dollars ($2.00). (1939, c. 188, s. 1.)

Editor's Note.—For comment on this enactment, see 17 N. C. L. Rev. 335.

§ 72-32. Exemptions.—This article shall not apply to hotels and inns within the definition of § 72-9, nor to persons who incidental to their principal business or occupation accept from time to time seasonal boarders in their private residences: Provided, however, this shall not be construed to exempt from the provisions of this article residences maintained in connection with a store or other establishment operated for the sale of articles of merchandise. (1939, c. 188, s. 2.)

§ 72-33. Application to county commissioners for license. — Every person, firm or corporation making application for license to engage in the business described in § 72-31 shall make application to the board of county commissioners in the county in which such business is to be engaged in and the application shall contain:

(a) The name and residence of the applicant and the length of the residence within the state of North Carolina.

(b) The address and place for which such license is desired.

(c) The name of the owner of the premises upon which the business licensed is to be carried on.

(d) That the applicant intends to carry on the business authorized by the license for himself or under his immediate supervision and direction.

(e) That such applicant is of good moral character and has never been convicted of a felony involving moral turpitude, or adjudged guilty of violating either the state or federal prohibition laws within the last two years prior to the filing of the application. (1939, c. 188, s. 3.)

§ 72-34. Verification of application; disqualifications for license.—The application prescribed in § 72-33 must be verified by the affidavit of the petitioner made before a notary public or other person duly authorized by law to administer oaths. If it appears from the statement of the applicant, or otherwise, that such applicant has been convicted of a felony involving moral turpitude or adjudged guilty of violating either state or federal prohibition laws within the last two years prior to the filing of the application, or within two years from the completion of sentence thereon, the license herein provided for shall not be granted, unless it shall appear to the satisfaction of the board of county commissioners that the licensed premises will be operated in a lawful manner; in which case they may, in their discretion, issue such license. Before any such license shall be issued, the governing body of the county shall be satisfied that the statements required by § 72-33 are true. Every establishment named in this article shall be subject to inspection by the state board of health and the county health authorities in the county in which such business is carried on. (1939, c. 188, s. 4.)

§ 72-35. List of employees furnished to sheriff upon request.—At any time upon request of the sheriff of the county in which such business is carried on, the operator of every establishment named in this article shall furnish said sheriff with a list of all employees who are employed by him in connection with said business; and, in every instance when such an operator goes out of business or there is a change of ownership or management thereof, such operator shall immediately file with the clerk of the board of county commissioners of the county in which such business is carried on a notice to this effect, giving the name and address of the purchaser or the new owner or manager thereof. (1939, c. 188, s. 5.)

§ 72-36. Registration of guest.—Any person or persons occupying any room or rooms in a tourist camp, cabin camp, tourist home, road house, or any other similar establishment by whatever name called, shall register or cause himself to be registered before occupying the same, and if traveling by motor vehicle shall register at the same time the automobile license tag of such motor vehicle and the name of the manufacturer of such motor vehicle; and no person shall write or cause to be written, or, if in charge of a register, knowingly permit to be written in any register in any of the establishments herein named, any other or different name or designation than the true name or names in ordinary use of the person registering or causing himself to be registered therein, or the true name of the manufacturer of such motor vehicle or the correct license plate and number thereof. Every person to whom a license is issued under the provisions of this article shall provide a permanent register for the purposes set forth herein. (1939, c. 188, s. 6.)

§ 72-37. False registration and use for immoral purposes made misdemeanor.—Any man or woman found occupying the same room in any establishment within the meaning of this article for any immoral purpose, or any man or woman falsely registering as or otherwise representing themselves to be husband and wife in any such establishment shall, upon conviction thereof, be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 7.)

§ 72-38. Operator knowingly permitting violations, guilty of misdemeanor.—Any person being the operator or keeper of any establishment within the meaning of this article who shall knowingly permit any man or woman to occupy any room in any establishment within the meaning of this article for any immoral purposes, or who shall knowingly permit any man or woman to falsely register as husband and wife in such an establishment, shall, upon conviction thereof, be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 8.)

Tourist Camp as Nuisance.—Under § 19-2 the operation of a tourist camp in a disorderly manner may be enjoined or it may be abated as a nuisance against public morals. Carpenter v. Boyles, 213 N. C. 432, 196 S. E. 850.

§ 72-39. Inducing female to enter tourist camps, etc., for immoral purpose made misdemeanor. — Any person who shall knowingly persuade, induce or entice, or cause to be persuaded, induced or enticed, any woman or girl to enter any establishment within the meaning of this article for the purpose of prostitution or debauchery, or for any other immoral purpose, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 9.)

§ 72-40. Revocation of operator's license.—In addition to the penalty herein prescribed for a violation of this article, the court, before whom

such person is tried and where a conviction is had, shall have the power to revoke the license to operate the establishment or establishments licensed under this article, and whenever any person, firm or corporation has been so convicted, the court, if it shall appear that said premises were being operated in violation of the law with the knowledge, consent or approval of the owner thereof, shall have the authority to prohibit the issuance of any similar license for said premises to any person for a term of six months after the revocation of said license. (1939, c. 188, s. 10.)

§ 72-41. Tax imposed declared additional.—The tax imposed by this article shall be in addition to all other licenses and taxes levied by law upon the business taxed hereunder. (1939, c. 188, s. 11.)

§ 72-42. Time of payment of license; expiration date.—Licenses issued under this article shall be due and payable in advance annually on or before the first day of June of each year, or at the date of engaging in such business, and shall expire on the thirty-first day of May of each year, and shall be for the full amount of the tax prescribed, regardless of the date such business is begun. Upon the expiration of the license herein required, it shall be unlawful for any person, firm or corporation to continue such business until a new license is applied for and obtained for the privilege of engaging in such business, as in this article required. (1939, c. 188, s. 12.)

§ 72-43. Operation without license made misdemeanor.—It shall be unlawful for any person, firm or corporation to engage in such business without first obtaining a license therefor. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 13.)

§ 72-44. Violations of article made misdemeanor.—Unless another penalty is in this article or by the laws of this State provided, any person violating any of the provision of this article shall, upon conviction thereof, be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 14.)

§ 72-45. Application of article to municipalities. — The governing body of any city or town shall have the authority to make any or all of the provisions of this article applicable to any business as defined herein which may be located in the limits of any such city or town. (1939, c. 188, s. 15.)

Local Modification. — Bladen, Caswell, Graham, Hyde, Moore: 1939, c. 188, s. 18; Guilford: 1939, c. 188, s. 16.

Art. 5. Sanitation of Establishments Providing Food and Lodging.

§ 72-46. State board of health to regulate sanitary conditions of hotels, cafes, etc.—For the better protection of the public health, the state board of health is hereby authorized, empowered, and directed to prepare and enforce rules and regulations governing the sanitation of hotels, cafes, restaurants, tourist homes, tourist camps, summer camps, lunch and drink stands, sandwich manufacturing establishments, and all other establishments where food is prepared, handled, and served to the public at wholesale or retail for pay, or where transient guests are served food or provided with lodging for pay. The state board of health is also authorized, empowered, and directed to prepare a system of grading all such places, and no such establishment shall operate which receives a grade less than C. (1941, c. 309, s. 1.)

§ 72-47. Inspections; report and grade card. —The officers, sanitarians or agents of the State board of health are hereby empowered and authorized to enter any hotel, cafe, restaurant, tourist home, tourist camp, summer camp, lunch and drink stand, sandwich manufacturing establishment, and all other establishments where food is prepared, handled or served to the public at wholesale or retail for pay, or where transient guests are served food or provided lodging for pay, for the purpose of making inspections, and it is hereby made the duty of every person responsible for the management or control of such hotel, cafe, restaurant, tourist home, tourist camp, summer camp, lunch and drink stand, sandwich manufacturing establishment, or other establishment to afford free access to every part of such establishment, and to render all aid and assistance necessary to enable the sanitarians or agents of the state board of health to make a full, thorough, and complete examination thereof, but the privacy of no person shall be violated without his or her consent. It shall be the duty of the sanitarian or agent of the state board of health to leave with the management, or person in charge at the time of the inspection, a copy of his inspection report and a grade card showing the grade of such place, and it shall be the duty of the management, or person in charge, to post said card in a conspicuous place where it may be readily observed by the public. Such grade card shall not be removed by anyone, except an authorized sanitarian or agent of the state board of health, or upon his instruction. (1941, c. 309, s. 2.)

§ 72-48. Violation of article a misdemeanor. —Any owner, manager, agent, or person in charge of a hotel, cafe, restaurant, tourist home, tourist camp, summer camp, lunch and drink stand, sandwich manufacturing establishment, or any other establishment where food is prepared, handled, or served to the public at wholesale or retail for pay, or where transient guests are served food or provided with lodging for pay, or any other person who shall willfully obstruct, hinder, or interfere with a sanitarian, agent, or officer of the state board of health in the proper discharge of his duty, or who shall be found guilty of violating any of the other provisions of this article, or any of the rules and regulations that may be provided under this article, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten ($10.00) dollars, nor more than fifty ($50.00) dollars, or imprisoned for not more than thirty days, and each day that he shall fail to comply with this article, or operate a place with a rating of less than a grade of C shall be a separate offense. (1941, c. 309, s. 3.)

Chapter 73. Mills.

Art. 1. Public Mills.

Art. 2. Condemnation for Mill by Owner of One Bank of Stream.

Art. 3. Condemnation for Races, Waterways, etc., by Owner of Mill or Millsite.

Art. 4. Recovery of Damages for Erection of Mill.

Art. 1. Public Mills.

§ 73-1. Public mills defined. — Every water grist-mill, steam mill, or wind-mill, that grinds for toll, is a public mill. (Rev., s. 2119; Code, s. 1846; R. C., c. 71, s. 1; 1777, c. 122, s. 1; C. S. 2531.)

Cited in Hyatt v. Myers, 73 N. C. 232, 240; Branch v. Wilmington, etc., R. Co., 77 N. C. 347, 349.

§ 73-2. Miller to grind according to turn; tolls regulated.—All millers of public mills shall grind according to turn, and shall well and sufficiently grind the grain brought to their mills, if the water will permit, and shall take no more toll for grinding than one-eighth part of the indian corn and wheat, and one-fourteenth part for chopping grain of any kind; and every miller and keeper of a mill making default therein shall, for each offense, forfeit and pay five dollars to the party injured: Provided, that the owner may grind his own grain at any time. (Rev., s. 2120; Code, s. 1847; R. C., c. 71, s. 6; 1777, c. 122, s. 10; 1793, c. 402; 1905, c. 694; 1907, c. 367; C. S. 2532.)

Local Modification.—Bertie, Hertford, Hyde: 1933, c. 150; Chowan: 1937, c. 4; Cleveland: 1933, c. 158; Franklin, Northampton: 1929, c. 129; Lenoir: 1929, c. 139; Pamlico, Robeson: 1929, c. 311; Pender: 1933, c. 298; Sampson: 1937, c. 164.

§ 73-3. Measures to be kept; tolls by weight or measure.—All millers shall keep in their mills the following measures, namely, a half-bushel and peck of full measure, and also proper toll-dishes for each measure; but the toll allowed by law may be taken by weight or measure at the option of the miller and customer. (Rev., s. 2121; Code, s. 1848; 1885, c. 202; R. C., c. 71, s. 7; 1777, c. 122, s. 11; C. S. 2533.)

§ 73-4. Keeping false toll-dishes misdemeanor.—If any owner, by himself or servant, keeping any mill, shall keep any false toll-dishes, he shall be guilty of a misdemeanor. (Rev., s. 3679; Code, s. 1848; R. C., c. 71, s. 7; 1777, c. 122, s. 11; C. S. 2534.)

"False Toll Dishes" Defined.—The words "false toll dish," as used in the statute, mean a toll dish measuring more than one-eighth of a half bushel. State v. Perry, 50 N. C. 252. The measure kept need not be averred in the indictment. Id.

Sufficiency of Evidence.—An indictment for keeping false toll dishes was sufficiently supported by proving measures ot one-seventh and one-sixth of a half bushel were kept. State v. Perry, 50 N. C. 252.

But an indictment for keeping a false toll dish is not sustained by proof that the mill owner took one-sixth part of each half bushel with a half gallon toll dish. State v. Nixon, 50 N. C. 257.

Art. 2. Condemnation for Mill by Owner of One Bank of Stream.

§ 73-5. Special proceedings; parties; summons.—Any person wishing to build a water mill, who has land on only one side of a stream, shall issue a summons returnable to the superior court of the county in which the land sought to be condemned, or some part of it, lies, against the persons in possession and the owners of the land on the opposite side of the stream, and against such others as have an interest in the controversy, and the procedure shall be as is provided in other special proceedings, except so far as the same may be modified by this chapter. (Rev., s. 2122; Code, s. 1849; 1868-9, c. 158, s. 1; C. S. 2535.)

Cross Reference.—For full treatment of eminent domain proceedings, see §§ 40-1 et seq.

Corporation That Erects Mills Generally.—The Legislature, in providing for the condemnation of land for the purpose of erecting mills thereon, classifies a corporation that erects mills generally as one of those private corporations which enjoys a prerogative franchise because of some powers or duties, which it is to perform for the public, and to that extent is quasi public. Bass v. Roanoke Nav., etc., Co., 111 N. C. 439, 454, 16 S. E. 402.

Withdrawal of Verbal Consent to Maintain Dam.—The plaintiff built a mill, and, with the verbal consent of the defendant, constructed a dam across a stream upon land of the latter after the mill had been in operation for several years, the defendant withdrew his consent to the further use of the land for this purpose, and notified the plaintiff to level the dam, which he failed to do. Thereupon the defendant caused the obstruction to be removed. In an action by the plaintiff for damages, it was held that the plaintiff should have taken a conveyance of the easement, or pursued the remedy pointed out for the condemnation of land for mill purposes. Kivett v. McKeithan, 90 N. C. 106.

Cited in Benbow v. Robbins, 71 N. C. 338; Gwaltney v. Scottish Carolina Timber, etc., Co., 111 N. C. 547, 550, 564, 16 S. E. 692.

§ 73-6. Commissioners to be appointed.—If no just cause is shown against the building of such mill, the court shall appoint three freeholders, one of whom shall be chosen by the plaintiff, another by the defendants, and the third by the court, or if the plaintiff or defendants refuse or fail, or unreasonably delay to name a commissioner, the court shall name one in lieu of such delinquent party. These commissioners may be changed from time to time by permission of the court for just cause shown. (Rev., s. 2123; Code, s. 1850; 1868-9, c. 158, s. 2; C. S. 2536.)

Right of Appeal.—Defendants have a right to appeal from an interlocutory order of the court appointing freeholders to view, lay off and value land for a mill site. Minor v. Harris, 61 N. C. 322.

§ 73-7. Meeting to be appointed and commissioners notified; witnesses examined.—The third commissioner shall cause the others to be notified of the time and place of meeting, and shall preside at their meetings. They may, if necessary, summon and examine witnesses, who shall be sworn by the presiding commissioner. Any commissioner named by or for either of the parties who, without just cause, fails to attend any meeting notified by the president, shall forfeit and pay to the opposite party fifty dollars; and if the president, in like manner, unreasonably delays to notify the other commissioners of a meeting, or fails to attend one that is appointed, he shall forfeit and pay to the plaintiff fifty dollars, and to the defendant a like sum. (Rev., s. 2124; Code, s. 1851; 1868-9, c. 158, s. 3; C. S. 2537.)

§ 73-8. Oath and duty of commissioners.—The commissioners shall be sworn by some officer qualified to administer an oath to act impartially between the parties, and to perform the duties herein imposed on them honestly and to the best of their ability. They shall view the premises where the mill is proposed to be built, and shall lay off and value a portion of the land of the plaintiff, not to exceed one acre in area, and an equal area of land of the defendants opposite thereto, and report their proceedings to the court within a reasonable time, not exceeding sixty days. (Rev., s. 2125; Code, s. 1852; 1868-9, c. 158, s. 4; C. S. 2538.)

§ 73-9. Contents of commissioners' report.—The report of the commissioners shall set forth:

1. The location, quantities and value of the several areas laid off by them.

2. Whether either of them includes houses, gardens, orchards or other immediate conveniences.

3. Whether the proposed mill will overflow another mill or create a nuisance in the neighborhood.

4. Any other matter upon which they have been directed by the court to report, or which they may think necessary to the doing of full justice between the parties. (Rev., s. 2126; Code, s. 1853; 1868-9, c. 158, s. 5; C. S. 2539.)

§ 73-10. When building not to be allowed.—If the area laid off on the land of either party take away houses, gardens, orchards, or other immediate conveniences; or if the mill proposed will overflow another mill, or will create a nuisance in the neighborhood, the court shall not allow the proposed mill to be built. (Rev., s. 2127; Code, s. 1854; 1868-9, c. 158, s. 6; C. S. 2540.)

Cross Reference.—As to restrictions on condemnation of dwelling houses, gardens and burial grounds, see § 40-10.

In General.—The court is forbidden to confirm a report which takes away houses, etc., even though erected before the proceedings are commenced. Burgess v. Clark, 35 N. C. 109.

Denial of Injunction.—An injunction will not be granted to restrain the erection of a dam when money damages will suffice. Burnett v. Nicholson, 72 N. C. 334.

§ 73-11. Power of court on return of report.—If the report is in favor of building the proposed mill, and is confirmed, then the court may, in its discretion, allow either the plaintiff or defendant to erect such mill at the place proposed, and shall order the costs, and the value of the opposite area, to be paid by the party to whom such leave is granted; and upon such payment, the party to whom such leave is granted shall be vested with title in fee to the opposite area. Such payment may be made into court for the use of the parties entitled thereto. (Rev., s. 2128; Code, s. 1855; 1868-9, c. 158, s. 7; C. S. 2541.)

§ 73-12. Time for beginning and building mill; to be kept up.— The person to whom leave is granted shall, within one year, begin to build such water mill, and shall finish the same within three years; and thereafter keep it up for the use and ease of its customers, or such as shall be customers to it; otherwise, the said land shall return to the person from whom it was taken, or to such other person as shall have his right, unless the time for finishing the mill, for reasons approved by the court, be enlarged. (Rev., s. 2129; Code, s. 1856; 1868-9, c. 158, s. 8; C. S. 2542.)

§ 73-13. Rebuilding mill after destruction.—If a water mill belonging to a minor, a person of unsound mind, or imprisoned, falls, burns, or is otherwise destroyed, such person and his heirs shall have three years to rebuild and repair the same, and any person under any disability aforesaid shall have three years from the removal of the disability. (Rev., s. 2130; Code, s. 1857; 1903, c. 74, ss. 1, 2; 1868-9, c. 158, s. 9; C. S. 2543.)

Art. 3. Condemnation for Races, Waterways, etc., by Owner of Mill or Millsite.

§ 73-14. Special proceedings; summons.—Any person who has land on one or both sides of a stream and wishes to build a water mill, or has a water-mill already built and may find it necessary for the better operation of said mill or the building of the said mill to convey water either to or from his mill by ditch, waterway, drain, mill-race or tail-race, or in any other manner, over the lands of any other person, or erect a dam to pond said water over the lands of any other person, or raise any dam already built, may make application by petition in writing to the clerk of the superior court of the county in which the said lands to be affected, or a greater part thereof, are situated, for the right to so convey the said water or pond the same by the erection of a dam or the raising of any dam already built; and the procedure shall be as in other special proceedings. (Rev., s. 2131; 1905, c. 534, s. 1a, k; C. S. 2544.)

§ 73-15. Contents of petition. — The petition shall specify the lands to be affected, the name of the owner of said lands, and the character of the ditch, race, waterway or drain or pond intended to be made, and said owner or owners shall be made parties defendant. The petition shall state the distance desired to be condemned on each side of the ditch, waterway or drain to be constructed or erected, and not more than thirty feet from each bank can be condemned. (Rev., s. 2132; 1905, c. 534, s. 1b; C. S. 2545.)

§ 73-16. Commissioners to be appointed.—Upon the hearing of the petition, if the prayer thereof be granted, the clerk shall appoint three disinterested persons qualified to act as jurors, and not connected either by blood or marriage with the parties, appraisers to assess the damage, if any, that will accrue to the said lands by the contemplated work, and shall issue a notice to them to meet upon the premises on a day specified, not to exceed ten days from the date of said notice. (Rev., s. 2133; 1905, c. 534, s. 1c; C. S. 2546.)

§ 73-17. Oath and duty of commissioners.—The appraisers having met, shall take an oath before some officer qualified to administer oaths to faithfully perform their duty and to do impartial justice in the case, and shall then examine all the lands in any way to be affected by the said work and assess the damage thereto and make report thereof under their hands and seals to the clerk from whom the notice issued, who shall have power to confirm the same. (Rev., s. 2134; 1905, c. 534, s. 1d; C. S. 2547.)

§ 73-18. Assessment of damages.—In determining the amount of such compensation to be paid to the owners of the said lands and assessing the damages thereto by reason of the erection or construction of such waterway, ditch, drain or dam, they shall make an allowance or deduction on account of any benefits which the parties in interest may derive from the construction or erection of such waterway, ditch, drain or dam, and shall ascertain the damages, as near as may be, to the extent it may damage each acre of land so appropriated or occupied by the said mill-owner. The damage assessed by the appraisers under this article shall include all damages that the owners shall thereafter suffer or be entitled to by reason of the construction of the said waterways, races, ditches or dams. (Rev., s. 2135; 1905, c. 534, s. 1e, m; C. S. 2548.)

§ 73-19. When commissioners' report not to be affirmed.—If the area laid off on the lands of either party take away houses, gardens, orchards or immediate conveniences, or if the mill proposed or erected will overflow another mill of pond water within two hundred feet of another mill, or will overflow or pond water within two hundred feet of the millsite or premises of a person who has the right under this chapter, or by the authority of law, to rebuild a mill after its destruction, or if the mill create a nuisance in the neighborhood, the court shall not allow the report of the appraisers to be affirmed. (Rev., s. 2136; 1905, c. 534, s. 1g; C. S. 2549.)

§ 73-20. When petitioner may enter on lands.—After the return of the appraisers and the confirmation thereof the petitioner shall have full right and power to enter upon said lands and make such ditches, waterways, drains, races or other necessary works and construct such dams: Provided, he has first paid or tendered the damage assessed as above to the owner of such lands or his known or recognized agent in this state. If the owner is a nonresident and has no known agent in this state, the amount so assessed shall be paid by the petitioner into the office of the clerk of the superior court of the county for the use of such owner: Provided further, that the mill-owner shall not be compelled to pay said damages so assessed unless he shall enter upon such lands and make ditches, drains or other works or erect such dam. (Rev., s. 2137; 1905, c. 534, s. 11; C. S. 2550.)

§ 73-21. Owner of mills and millsites protected.—No other person shall have the right to erect or maintain any dam, ditch, waterway, drain or race that will overflow or pond water within two hundred feet of the millsite or premises of any person or body corporate who shall have erected a mill, dam, ditch, drain or race under the provisions of this chapter, or of any millsite owned by any person who has the right under this chapter, or by the authority of law, to rebuild a mill after its destruction. When any person violates the provisions of this section the owner of said mill or millsite shall have a right of action against said person to tear down said dam or other works so built or erected to the extent herein forbidden and to abate the same as prescribed by law for the abatement of nuisances. (Rev., s. 2138; 1905, c. 534, s. 1h; C. S. 2551.)

§ 73-22. Report to be registered.—The petitioner, or any other person interested, may have the said assessment registered upon the certificate of the clerk, and shall pay the register the usual legal fees for registering such instruments in his office. (Rev., s. 2139; 1905, c. 534, s. 1i; C. S. 2552.)

§ 73-23. Fees of appraisers.—Each appraiser shall be entitled to a fee of one dollar for each day actually employed in making said assessment, to be paid by the petitioner. (Rev., s. 2140; 1905, c. 534, s. 1j; C. S. 2553.)

§ 73-24. Obstructing mill races or dams a misdemeanor.—Any person who shall obstruct any drain, ditch or dam constructed under this article shall be guilty of a misdemeanor. (Rev., 3381; 1905, c. 534, s. 1l; C. S. 2554.)

Art. 4. Recovery of Damages for Erection of Mill.

§ 73-25. Action in superior court; procedure.—Any person conceiving himself injured by the erection of any grist-mill, or mill for other useful purposes, may issue his summons returnable before the judge of the superior court of the county where the damaged land or any part thereof lies, against the persons authorized to be made parties defendant. In his complaint he shall set forth in what respect and to what extent he is injured, together with such other matters as may be necessary to entitle him to the relief demanded. The court shall then proceed to hear and determine all the questions of law and issues of fact arising on the pleadings as in other civil actions. (Rev.,

s. 2141; Code, s. 1858; 1876-7, c. 197, s. 1; C. S. 2555.)

Exclusiveness of Remedy.—Ordinarily, in cases to which this section applies, the remedy given must be pursued. Kinsland v. Kinsland, 186 N. C. 760, 120 S. E. 358.

Section Does Not Apply to Trespass.—The remedy under this section does not apply to an action for damages for a trespass committed on the plaintiff's land. Henley v. Wilson, 77 N. C. 216.

Sufficiency of Description.—A petition for damages, caused by the erection of a mill upon the stream below, which described it as a "grist-mill" without calling it a public mill, or a grist-mill grinding for toll, was sufficient. Little v. Stanback, 63 N. C. 285.

Proper Issue.—In an action for damages resulting from ponding water upon plaintiff's land, caused by the erection of defendant's milldam, an issue involving the amount of annual damage done thereby is the proper one to be submitted to the jury. Hester v. Broach, 84 N. C. 252.

Procedure to Assess Damages.—In a petition for damages for ponding water back, where, in the county court the plaintiff's right to relief is denied, the proper course is to impanel a jury to try the allegations made in bar of such right, and if such allegations are found for the plaintiff, the proper course is then to order a jury on the premises to assess the damages, but in all cases where there is an appeal to the superior court, the facts are to be ascertained by a jury at bar, but in that court, those issues pertaining to the question of relief, and those issues as to that of damages, are to be separately submitted. Jones v. Clarke, 52 N. C. 418.

Easement Limited to Mill Purposes.—Where the lower proprietor has acquired an easement in the lands of the upper proprietor to pond water back thereon from a dam erected on his own land to operate a public mill, the exercise of this right under the easement does not affect the title to the submerged land of the upper proprietor or subject the upper proprietor to an action for damages that will start the running of the statute of limitations, nor will this use of the water ponded on the land of the upper proprietor by the lower proprietor for fishing with hook and seine ripen into his exclusive use for these purposes. Thomas v. Morris, 190 N. C. 244, 129 S. E. 623.

Liability for Defect in Bridge.—Where water was thrown, by the erection of a mill dam, upon the highway, and the former proprietor of the mill had built bridges over the water, which, during his ownership, he repaired, and which were also repaired by the present proprietor, who did no other work on the roads, it was held that the present proprietor was answerable in damages to an individual who sustained an injury by reason of a defect in one of the bridges. Mulholland v. Brownrigg, 9 N. C. 349.

Proof of Ownership.—In an action for overflowing the plaintiff's land, he need not prove his title, though it be set forth in the declaration, for possession alone is sufficient to support this action against a wrongdoer. Yeargain v. Johnston, 1 N. C. 180, cited in notes in 41 L. R. A. 749; 59 L. R. A. 901.

Plaintiff Entitled to Nominal Damage.—Instructions to a jury, that if a plaintiff sustains no injury from the ponding of water upon his mill wheel, still he is entitled to nominal damages, are correct. Little v. Stanback, 63 N. C. 285, cited in note in 59 L. R. A. 819.

A motion for a new trial for failure of the court to instruct the jury to return at least nominal damages, because some overflow was admitted, it appearing that no such instruction was asked, that the admission was qualified and the testimony conflicting, and that there was evidence to show that no damage was actually done, was properly refused in the discretion of the court. McGee v. Fox, 107 N. C. 766, 12 S. E. 369.

Same—Injury Unnecessary.—In an action for damages for the maintenance of a dam across a stream, the plaintiff is entitled to recover nominal damages, without showing an injury capable of being estimated, or one that is perceptible in the sense that it is attended with some actual damage; for the mere fact of ponding back the water on plaintiff's premises is sufficient to entitle him to nominal damages. Chaffin v. Fries Mfg. Co., 135 N. C. 95, 47 S. E. 226, rehearing denied in 136 N. C. 364, 48 S. E. 770.

If the water be ponded back on the land of another by the erection of a milldam, he is entitled, in the remedy by petition, to nominal damages, whether there be actual damage or not. Wright v. Stowe, 49 N. C. 516.

Measure of Damages.—The measure of damages for backing water on land by means of a dam is the difference in the value of the land before and after the injury complained of. Borden v. Carolina Power, etc., Co., 174 N. C. 72, 93 S. E. 442.

Permanent Damages.—In an action for backing water on plaintiff's land by means of a dam, the plaintiff is entitled to permanent damages, past, present, and prospective. Borden v. Carolina Power, etc., Co., 174 N. C. 72, 93 S. E. 424.

Damages to Health.—Damages may be given for injury to health as well as to land by overflowing. Gillet v. Jones, 18 N. C. 339. See also, Waddy v. Johnson, 27 N. C. 333.

Exemplary Damages.—In an action for overflowing plaintiff's land by the erection of a milldam, where a recovery has been had before, and the nuisance was not abated, plaintiff can recover sufficient exemplary damages to compel an abatement of the nuisance. Carruthers v. Tillman, 2 N. C. 501, cited in 59 L. R. A. 881.

Damage Only When Stream is Swollen.—Where the erection of a mill on a stream causes the water to overflow the land of a proprietor above only when the stream is swollen, that circumstance will not excuse such party from damages altogether, but will only diminish the quantum of such damages. Pugh v. Wheeler, 19 N. C. 50, cited in notes in 30 L. R. A. 667; 41 L. R. A. 749; 59 L. R. A. 819, 877.

Decrease of Custom.—Where, in suit for damages for ponding water, it appeared that plaintiff sustained injury to his mill by reason of defendant's erecting another mill and dam lower down on the same stream, the measure of damages was the amount of the damages actually sustained by plaintiff up to the time of trial; and, in estimating the same, the decrease of custom (in the matter of toll) could not be considered. Burnett v. Nicholson, 86 N. C. 99, cited in note in 59 L. R. A. 896.

Counterclaim Inadmissible.—In an action for damages for ponding water back on plaintiffs' land, it was no error for the judge to charge that defendants could not set up as offset and counterclaim any benefit which plaintiff had received thereby, and add that the jury should, upon all the evidence, ascertain if plaintiff had sustained any damage. McGee v. Fox, 107 N. C. 766, 12 S. E. 369.

Action May Be Brought at Any Time.—Ponding a stream so as to throw the water over the land of a proprietor above, which the water did not before cover, gives him a good cause of action at any time when he may wish to use his land, unless he has granted the easement, either actually, or by presumption of law from the length of time he has permitted the easement to be enjoyed. Pugh v. Wheeler, 19 N. C. 50.

Easement Not Granted by Payment of Judgment.—The payment of a judgment for ponding water by a milldam does not amount to the purchase by defendant of an easement to pond back water on plaintiff's land. Candler v. Asheville Elect. Co., 135 N. C. 12, 47 S. E. 114.

§ 73-26. When dams, etc., abated as nuisances.—When damages are recovered in final judgment in such civil actions, and execution issues and is returned unsatisfied, and the plaintiff is not able to collect the same either because of the insolvency of the defendant or by reason of the exemptions allowed to defendant, the judge shall, on the facts being made to appear before him by affidavit or other evidence, order that the dam, or portion of the dam, or other cause creating the injury, shall be abated as a nuisance, and he shall have power to make all necessary orders to effect this purpose. (Rev., s. 2142; Code, s. 1859; 1876-7, c. 197, s. 3; C. S. 2556.)

When Applicable.—This section applies where water is ponded upon the plaintiff's land by a dam constructed on the property of another or where a trespass of like character is committed, because at common law an action could be brought each day so long as the trespass continued. But the statute does not apply and was never intended to apply to an actual entry upon the complainant's premises and the construction thereon of a dam for the purpose of ponding water and retaining possession. Kinsland v. Kinsland, 188 N. C. 810, 811, 125 S. E. 625.

Denial of Injunction.—An injunction will not be granted to restrain the erection of a dam whereby the mill wheel of the plaintiff is flooded so as to become useless. Burnett v. Nicholson, 72 N. C. 334.

For such an injury damages will adequately compensate, and should the annual damage exceed twenty dollars the plaintiff is remitted to his common-law action, and can compel an abatement of the nuisance. Burnett v. Nicholson, 72 N. C. 334.

Where the owner of land adjoining an old mill site sought to enjoin the erection of a new mill, and it was ascertained by a verdict, that the mill, though injurious to the health of

the plaintiff's family, was advantageous to the public, relief was refused; especially as the old mill was erected before the plaintiff purchased. Eason v. Perkins, 17 N. C. 38.

When Injunction Granted.—In the case of the erection of a milldam, a court of equity will not interfere by injunction, unless it be shown that it will be a public nuisance, or, if it will be a private nuisance only to an individual, unless it manifestly appears, that so great a difference will exist between the injury to the individual and the public convenience as will bear no comparison, or that the erection of the dam will be followed by irreparable mischief. Bradsher v. Lea, 38 N. C. 301.

Existence of Another Remedy.—On application for an injunction to restrain the defendant from building a new mill, on the ground that the construction of the dam would injure the land of the plaintiff and the health of his family, testimony being heard, the court held that it is not every slight or doubtful injury that will justify the use of the extraordinary power of injunction to restrain a man from using his property as his interests may demand, especially as, if the injury apprehended should result, the complainant may resort to law for damages. Wilder v. Strickland, 55 N. C. 386, cited in note in 59 L. R. A. 851.

When Demand and Allegation of Insolvency Unnecessary.—The demand for damages in the complaint for ponding water upon and injuring the lands of the upper proprietor required by this section, is not necessary when the relief sought is to enjoin the maintenance of a dam on the plaintiff's own land by the defendant's trespass thereon, and the abatement of the nuisance thus caused, and the trespass being continuing, the allegation of defendant's insolvency is not necessary. Kinsland v. Kinsland, 188 N. C. 810, 125 S. E. 625.

Cited in Hester v. Broach, 84 N. C. 252.

§ 73-27. Judgment for annual sum as damages.—A judgment giving to the plaintiff an annual sum by way of damages shall be binding between the parties for five years from the issuing of the summons, if the mill is kept up during that time, unless the damages are increased by raising the water or otherwise.

In all cases where the final judgment of the court assesses the yearly damage of the plaintiff as high as twenty dollars, nothing contained in this chapter shall be construed to prevent the plaintiff, his heirs or assigns, from suing as heretofore, and in such case the final judgment aforesaid shall be binding only for the year's damage preceding the issuing of the summons. (Rev., ss. 2143, 2144; Code, ss. 1860, 1861; 1868-9, c. 158, ss. 12, 14; C. S. 2557.)

Assessment Cannot Be Beyond Preceding Year.—In proceedings under the statute for ponding water on plaintiff's land, the jury have no right to go back further than one year in assessing damages, but if they do, the error may be corrected by the court only giving judgment for one year preceding the issuing of the summons. Goodson v. Mullen, 92 N. C. 207.

Judgment May Be for Sum in Gross.—Where, in an action for damages to land by ponding water on it, the jury found that the land was damaged eighty dollars per year, it was not erroneous for the court to give judgment for a sum in gross, and not for each year's damages. Goodson v. Mullen, 92 N. C. 207, 211.

Recurring Causes of Action.—Case for nuisance in erecting a mill will lie for every fresh continuance after action brought; heavy damages are not usual in the first verdict, but in a second action the damages should be high to compel an abatement of the nuisance. —— v. Deberry, 2 N. C. 248, cited in note in 59 L. R. A. 836.

Conclusiveness of Damages.—In a proceeding to recover damages for ponding water by a milldam, the verdict of the jury and the judgment of the court thereon are conclusive as to the assessment of damages, up to the time when such judgment was rendered. An application for relief from damages, assessed for a period subsequent to the time of the judgment, can only be heard if the dam is taken away or lowered. Beatty v. Conner, 34 N. C. 341.

Judgment Not Res Judicata.—An action to abate a dam and for damages to land caused by the ponding back of water was submitted to arbitrators to find whether plaintiffs were entitled to damages, and, if so, distinguishing in finding the same between those from permanent injuries and annual damages for five years from a certain date. The arbitrators assessed "the permanent damage of the plaintiffs to this date to their lands" at a certain sum, and also awarded a certain annual damage for each of the five years. Judgment was entered on the award, the judgment providing that the execution should be subject to the provisions of section 73-26. The judgment was not res judicata of plaintiff's right to recover damages after the termination of the five-year period for all except a fresh injury, since the judgment contemplated the removal of the dam at the end of the five years. Candler v. Asheville Elect. Co., 135 N. C. 12, 47 S. E. 114.

§ 73-28. Final judgment; costs and execution.—If the final judgment of the court is that the plaintiff has sustained no damage, he shall pay the costs of his proceeding; but if the final judgment is in favor of the plaintiff, he shall have execution against the defendant for one year's damage, preceding the issuing of the summons, and for all costs: Provided, that if the damage adjudged does not amount to five dollars, the plaintiff shall recover no more costs than damages. And if the defendant does not annually pay the plaintiff, his heirs or assigns, before it falls due, the sum adjudged as the damages for that year, the plaintiff may sue out execution for the amount of the last year's damage, or any part thereof which may remain unpaid. (Rev., s. 2145; Code, s. 1862; 1868-9, c. 158, s. 15; C. S. 2558.)

Chapter 74. Mines and Quarries.

Art. 1. Operation of Mines and Quarries.

Art. 2. Inspection of Mines and Quarries.

Art. 1. Operation of Mines and Quarries.

§ 74-1. Lessor not held partner of lessee.—No lessor of property, real or personal, for mining purposes, although the lessor may receive an uncertain sum of the proceeds or net profits, or any other consideration, which, though uncertain at first, may afterwards become certain, shall be held as a partner of the lessee; nor shall any of the legal or equitable relations or liabilities of copartners exist between them, unless it is so stipulated in the contract between the lessor and lessee. (Rev., s. 4930; Code, s. 3292; R. C., c. 72; 1830, c. 46; C. S. 6896.)

Cross Reference.—For provision making this article applicable to quarries, see § 74-24.

§ 74-2. Minors under sixteen not to be employed.—No minor under sixteen years of age shall be allowed to work in any mine, and in all cases of minors applying for work the agent of such mine shall see that the provisions of this section are not violated; and the inspector may, when doubt exists as to the age of any person found working in any mine, examine under oath such person and his parents, or other witnesses, as to his age. (Rev., s. 4931; 1897, c. 251, s. 7; 1919, c. 100, s. 6; C. S. 6897.)

§ 74-3. Operator to furnish timber. — The owner, agent, or operator of every coal mine shall keep a supply of timber constantly on hand, and shall deliver the same to the working place of the miner, and no miner shall be held responsible for accident which may occur in the mine where the provisions of this section have not been complied with by the owner, agent, or operator thereof, resulting directly or indirectly from the failure to deliver such timber. (Rev., s. 4932; 1897, c. 251, s. 8; C. S. 6898.)

§ 74-4. Unused mines to be fenced.—All underground entrances to any place not in actual course of working or extension shall be properly fenced across the whole width of such entrance so as to prevent persons from inadvertently entering the same. (Rev., s. 4933; 1897, c. 251, s. 5; C. S. 6899.)

§ 74-5. Means of ingress and egress provided.—No owner or agent of any coal mine worked by shaft shall permit any person to work therein unless there are, to every seam of coal worked in such mine, at least two separate outlets, separated by natural strata of not less than one hundred feet in breadth, by which shafts or outlets distinct means of ingress and egress are always available to the persons employed in the mine; but it is not necessary for the two outlets to belong to the same mine if the persons employed therein have safe, ready, and available means of ingress or egress by not less than two openings. This section shall not apply to opening a new mine while being worked for the purpose of making communications between the two outlets, so long as not more than twenty persons are employed at one time in such mine; neither shall it apply to any mine or part of a mine in which the second outlet has been rendered unavailable by reason of the final robbing of pillars previous to abandonment, as long as not more than twenty persons are employed therein at any one time. The cage or cages and other means of egress shall at all times be available for the persons employed when there is no second outlet. The escapement shafts shall be fitted with safe and available appliances, which shall always be kept in a safe condition, by which the persons employed in the mine may readily escape in case an accident occurs; and in no case shall an air shaft with a ventilating furnace at the bottom be construed to be an escapement shaft within the meaning of this section. To all other coal mines, whether slopes or drifts, two such openings or outlets must be provided within twelve months after shipments of coal have commenced from such mine; and in case such outlets are not provided as herein stipulated, it shall not be lawful for the agent or owner of such slope or drift to permit more than ten persons to work therein at any one time. (Rev., s. 4934; 1897, c. 251, s. 4; C. S. 6900.)

§ 74-6. Hoisting engines; how operated.—No owner or agent of any mine operated by a shaft or slope shall place in charge of any engine used for lowering into or hoisting out of mines persons employed therein any but experienced, competent, and sober engineers, and no engineers in charge of such engine shall allow any persons except as may be deputed for such purposes by the owner or agent to interfere with it or any part of the machinery, and no person shall interfere or in any way intimidate the engineer in the discharge of his duties, and in no case shall more than six men ride on any cage or car at one time, and no person shall ride upon a loaded cage or car in any shaft or slope. (Rev., s. 4935; 1897, c. 251, s. 6; 1911, c. 183; C. S. 6901.)

§ 74-7. Ventilation. — The owner or agent of any coal mine, whether shaft, slope, or drift, shall provide and maintain for every such mine an amount of ventilation of not less than one hundred cubic feet per minute per person employed in such mine, which shall be circulated and distributed throughout the mine in such a manner as to di-

lute, render harmless and expel the poisonous and noxious gases from every working place in the mine. No working place shall be driven more than sixty feet in advance of a break-through or airway, and all break-throughs or airways, except those last made near the working places of the mine, shall be closed up by brattice trap-doors, or otherwise, so that the currents of air in circulation in the mine may spread to the interior of the mine when the persons employed in such mine are at work. All mines governed by this chapter shall be provided with artificial means of producing ventilation, such as forcing or suction fans, exhaust steam furnaces, or other contrivances of such capacity and power as to produce and maintain an abundant supply of air, and all mines generating fire damp shall be kept free from standing gas. (Rev., s. 4936; 1897, c. 251, s. 5; C. S. 6902.)

§ 74-8. Daily examinations; safety lamps.—Every working place shall be examined every morning with a safety lamp by a competent person before any workmen are allowed to enter the mine. All safety lamps used in examining mines, or for working therein, shall be the property of the operator of the mine, and a competent person shall be appointed, who shall examine every safety lamp before it is taken into the workings for use, and ascertain it to be clean, safe, and securely locked, and safety lamps shall not be used until they have been so examined and found safe and clean and securely locked, unless permission be first given by the mine foreman to have the lamps used unlocked. No one except the duly authorized person shall have in his possession a key, or any other contrivance, for the purpose of unlocking any safety lamp in any mine where locked lamps are used. No matches or any other apparatus for striking lights shall be taken into any mine, or parts thereof, except under the direction of the mine foreman. (Rev., s. 4937; 1897, c. 251, ss. 5, 6; C. S. 6903.)

§ 74-9. Report of ventilation.—The mine foreman shall measure the ventilation at least once a week, at the inlet and outlet, and also at or near the face of all the entries, and the measurement of air so made shall be noted on blanks furnished by the inspector; and on the first day of each month the mine boss of each mine shall sign one of such blanks, properly filled with the actual measurement, and present the same to the inspector. (Rev., s. 4938; 1897, c. 251, s. 6; C. S. 6904.)

§ 74-10. Notice of opening or changing mines given.—The owner, agent, or manager of any mine shall give notice to the inspector in the following cases: 1. When any working is commenced for the purpose of opening a new shaft, slope, or mine, to which this chapter applies. 2. When any mine is abandoned, or the working thereof discontinued. 3. When the working of any mine is recommenced after an abandonment or discontinuance for a period exceeding three months. 4. When a squeeze or crush, or any other cause or change, may seem to affect the safety of persons employed in the mine, or when fire occurs. (Rev., s. 4939; 1897, c. 251, s. 7; C. S. 6905.)

§ 74-11. Notice of accidents given.—The owner, agent, or manager of every mine shall, within twenty-four hours next after any accident or explosion, whereby loss of life or personal injury may have been occasioned, send notice, in writing, by mail or otherwise, to the inspector, and shall specify in such notice the character and cause of the accident, and the name or names of the persons killed and injured, with the extent and nature of the injuries sustained. When any personal injury of which notice is required to be sent under this section results in the death of the person injured, notice in writing shall be sent to the inspector within twenty-four hours after such death comes to the knowledge of the owner, agent, or manager; and when loss of life occurs in any mine by explosion, or accident, or results from personal injuries so received, the owner, agent, or manager of such mine shall notify the coroner of the county in which such mine is situated, and the coroner shall hold an inquest upon the body of the person whose death has been thus caused, and inquire carefully into the cause thereof, and return a copy of the finding of the jury and all the testimony to the inspector. (Rev., s. 4940; 1897, c. 251, s. 6; C. S. 6906.)

§ 74-12. Report to inspector.—The owner, lessee, or agent in charge of any mine or quarry, or who is engaged in mining or quarrying or producing any mineral whatsoever in this state, shall, on or before the thirtieth day of January in every year, send to the office of the inspector upon blanks to be furnished by him a correct return, specifying with respect to the preceding calendar year the quantity of coal, iron ore, fire-clay, limestone, or other mineral product of such mine or quarry, and the number of persons ordinarily employed in or about such mine or quarry below and above ground, distinguishing the persons and labor below ground and above ground: Provided, that nothing in this section shall require the owner, lessor or agent in charge of any quarry who does not employ more than ten persons to work in any one quarry at the same time, to file or make any of the reports required under this section. (Rev., s. 4941; 1897, c. 251, s. 3; 1939, c. 223, s. 2; C. S. 6907.)

Editor's Note.—Prior to the 1939 amendment the report was required to be made on or before the thirtieth of November.

§ 74-13. Liability for injuries.—For any injury to person or property occasioned by any wilful violation of this chapter, or any wilful failure to comply with its provisions, by any owner, agent, or manager of the mine, a right of action shall accrue to the party injured for any damage he may sustain thereby; and in any case of loss of life by reason of such wilful neglect or failure a right of action shall accrue to the personal representative of the deceased, as in other actions for wrongful death. (Rev., s. 4942; 1897, c. 251, s. 6; C. S. 6908.)

§ 74-14. Punishment for violation.—If any person shall knowingly violate any of the provisions of the law relating to mines or shall do anything whereby the life or health of persons or the security of any mine and machinery is endangered, or if any miner or other person employed in any mine governed by the statutes shall intentionally or wilfully neglect or refuse to securely prop the

roof of any working place under his control, or neglect or refuse to obey any orders given by the superintendent of a mine in relation to the security of a mine in the part thereof where he is at work and for fifteen feet back of his working place, or if any miner, workman, or other person shall knowingly injure any water-gauge, barometer, air-course, or brattice, or shall obstruct or throw open any airways, or shall handle or disturb any part of the machinery of the hoisting engine or signaling apparatus or wire connected therewith, or air pipes or fittings, or open a door of the mine and not have the same closed again, whereby danger is produced either to the mine or those that work therein, or shall enter any part of the mine against caution, or shall disobey any order given in pursuance of law, or shall do any wilful act whereby the lives and health of the persons working in the mine or the security of the mine or the machinery thereof is endangered, or if the person having charge of a mine whenever loss of life occurs by accident connected with the machinery of such mine or by explosion shall neglect or refuse to give notice thereof forthwith by mail or otherwise to the inspector and to the coroner of the county in which such mine is situated, or if any such coroner shall neglect or refuse to hold an inquest upon the body of the person whose death has been thus caused, and return a copy of his findings and a copy of all the testimony to the inspector, he shall be guilty of a misdemeanor, and upon conviction fined not more than fifty dollars or imprisoned in the county jail not more than thirty days, or both. (Rev., s. 3797; 1897, c. 251, s. 8; C. S. 6909.)

Art. 2. Inspection of Mines and Quarries.

§ 74-15. Commissioner of labor to inspect mines and quarries.—The Commissioner of Labor, acting through the director of the division of standards and inspection of the Department of Labor, shall perform the duties of mine inspector as provided in this chapter. (Rev., s. 4943; 1897, c. 251, s. 1; 1931, c. 312; C. S. 6910.)

Cross Reference.—For provision making this article applicable to quarries, see § 74-24.

§ 74-16. Inspector to examine mines.—It shall be the duty of the inspector to examine all the mines in the state as often as possible to see that all the provisions and requirements of this chapter are strictly observed and carried out; he shall particularly examine the works and machinery belonging to any mine, examine into the state and condition of the mines as to ventilation, circulation, and condition of air, drainage, and general security. (Rev., s. 4944; 1897, c. 251, s. 2; C. S. 6911.)

§ 74-17. May enter to make examinations. — For the purpose of making the inspection and examinations provided for in this chapter, the inspector shall have the right to enter any mine at all reasonable times, by night or by day, but in such manner as shall not unnecessarily obstruct the working of the mine; and the owner or agent of such mine is hereby required to furnish the means necessary for such entry and inspection; the inspection and examination herein provided for shall extend to fire-clay, iron ore, and other mines as well as coal mines. (Rev., s. 4945; 1897, c. 251, s. 2; C. S. 6912.)

§ 74-18. Death by accident investigated. — Upon receiving notice of any death resulting from accident it shall be the duty of the inspector to go himself, or send a representative, at once to the mine in which the death occurred and inquire into the cause of the same, and to make a written report fully setting forth the condition of that part of the mine where such death occurred and the cause which led to the same; which report shall be filed by the inspector in his office as a matter of record and for future reference. (Rev., s. 4946; 1897, c. 251, s. 6; C. S. 6913.)

§ 74-19. Record of examinations. — He shall make a record of all examinations of mines, showing the date when examination is made, the condition in which the mines are found, the extent to which the laws relating to mines and mining are observed or violated, the progress made in the improvements and security of life and health sought to be secured by the provisions of this chapter, number of accidents, injuries received, or deaths in or about the mines, the number of mines in the state, the number of persons employed in or about each mine, together with all such other facts and information of public interest, concerning the condition of mines, development and progress of mining in the state as he may think useful and proper, which record shall be filed in the office of the inspector, and as much thereof as may be of public interest to be included in his annual report. (Rev., s. 4947; 1897, c. 251, s. 2; C. S. 6914.)

§ 74-20. Papers to be preserved.—He shall keep in his office and carefully preserve all maps, surveys, and other reports and papers required by law to be filed with him, and so arrange and preserve the same as shall make them a permanent record of ready, convenient, and connected reference. (Rev., s. 4948; 1897, c. 251, s. 3; C. S. 6915.)

§ 74-21. Inspector to enforce law; counsel furnished.—In case of any controversy or disagreement between the inspector and the owner or operator of any mine or the persons working therein, or in case of conditions or emergencies requiring counsel, the inspector may call on the governor for such assistance and counsel as may be necessary. If the inspector finds any of the provisions of this chapter violated or not complied with by any owner, lessee, or agent in charge, unless the same is within a reasonable time rectified, and the provisions of this chapter fully complied with, he shall institute an action in the name of the state to compel the compliance therewith. The inspector shall exercise a sound discretion in the enforcement of this chapter. (Rev., s. 4949; 1897, c. 251, s. 2; C. S. 6916.)

§ 74-22. Operation enjoined when law violated. —On application of the inspector, after suit brought as directed in § 74-21, any court of competent jurisdiction may enjoin or restrain the owner or agent from working or operating such mine until it is made to conform to the provisions

of this chapter; and such remedy shall be cumulative, and shall not take the place of or affect any other proceedings against such owner or agent authorized by law for the matter complained of in such action. (Rev., s. 4950; 1897, c. 251, s. 7; C. S. 6917.)

§ 74-23. Report to governor. — The inspector shall annually make report to the governor of all his proceedings, the condition and operation of the different mines of the state, and the number of mines and the number of persons employed in or about such mines, the amount of coal, iron ore, limestone, fire-clay, or other mineral mined in this state; and he shall enumerate all accidents in or about the mines, and the manner in which they occurred, and give all such other information as he thinks useful and proper, and make such suggestions as he deems important relative to mines and mining, and any legislation that may be necessary on the subject for the better preservation of the life and health of those engaged in such industry. (Rev., s. 4951; 1897, c. 251, s. 3; C. S. 6918.)

§ 74-24. Articles one and two made applicable to quarries.—For the purpose of providing for the safety of workers in quarries in North Carolina, the provisions of articles one and two of this chapter, relating to the operation and inspection of mines are hereby made applicable to quarries in so far as such provisions are suitable to the operation and inspection of quarries. (1939, c. 223, s. 1.)

Art. 3. Waterways Obtained.

§ 74-25. Water and drainage rights obtained.— Any person or body corporate engaged or about to engage in mining, who may find it necessary for the furtherance of his operations to convey water either to or from his mine or mines over the lands of any other person or persons, may make application by petition in writing to the clerk of the superior court of the county in which the lands to be affected or the greater part are situate, for the right so to convey such water. The owner of the lands to be affected shall be made a party defendant, and the proceeding shall be conducted as other special proceedings. (Rev., s. 4953; Code, ss. 3293, 3294, 3300; 1871-2, c. 158, ss. 1, 3; C. S. 6920.)

Cross Reference.—As to reports not required of small quarries, see § 74-12.

§ 74-26. The petition, what to contain. — The petition shall specify the lands to be affected, the name of the owner of such lands, and the character of the ditch or drain intended to be made. (Rev., s. 4954; Code, s. 3294; 1871-2, c. 158, s. 3; C. S 6921.)

§ 74-27. Appraisers; appointment and duties.— Upon the hearing of the petition, if the prayer thereof be granted, the clerk shall appoint three disinterested persons, qualified to act as jurors, and not connected either by blood or marriage with the parties, appraisers to assess the damage, if any, that will accrue to the lands by the contemplated work, and shall issue a notice to them to meet upon the premises at a day specified, not to exceed ten days from the date of such notice. The appraisers having met, shall take an oath before some officer qualified to administer oaths to faithfully perform their duty and to do impartial justice in the case, and shall then examine all the lands in any way to be affected by such work, and assess the damage thereto, and make report thereof under their hands and seals to the clerk from whom the notice issued. (Rev., s. 4955; Code, ss. 3295, 3296, 3299; 1871-2, c. 158, ss. 4, 5, 9; C. S. 6922.)

§ 74-28. Confirmation of report; payment of damages; rights of petitioner. — After the filing of the report and confirmation thereof by the clerk, who shall have power to confirm or, for good cause, set aside the same, the petitioner shall have full right and power to enter upon such lands and make such ditches, drains, or other necessary work: Provided, he has first paid or tendered the damages, assessed as above, to the owner of such lands or his known and recognized agent, if he be a resident of this state, or have such agent in this state. If the owner be a nonresident and have no known agent in this state, the amount so assessed shall be paid by the petitioner into the office of the clerk of the superior court of the county for the use of such owner. (Rev., s. 4957; Code, s. 3298; 1871-2, c. 158, s. 12; C. S. 6923.)

§ 74-29. Registration of report.—The petitioner, or any other person interested, may have the report of the appraisers registered upon the certificate of the clerk and shall pay the register a fee of twenty-five cents therefor. (Rev., s. 4957; Code, s. 3298; 1871-2, c. 158, s. 8; C. S. 6924.)

§ 74-30. Obstructing mining drains. — If any person shall obstruct any drain or ditch constructed under the provisions of this chapter, he shall be guilty of a misdemeanor. (Rev., s. 3380; Code, s. 3301; 1871-2, c. 158, s. 12; C. S. 6925.)

§ 74-31. Disposition of waste.—In getting out and washing the products of kaolin and mica mines, the persons engaged in such business shall have the right to allow the waste, water, and sediment to run off into the natural courses and streams. (1917, c. 123; 1937, c. 378; C. S. 6926.)

Editor's Note.—The 1937 amendment, which made this section applicable to mica mines, provides: "This act shall not affect pending litigation."

Art. 4. Adjustment of Conflicting Claims.

§ 74-32. Liability for damage for trespass. — If any owner or person in possession of any mine or mining claim shall enter upon, either on the surface or underground, any mine or mining claim, the property of another, and shall mine or carry away any valuable mineral therefrom, he shall be liable to the owner of the mine so trespassed upon for double the value of all such mineral mined or carried away and for all other damages; and the value of the mineral mined or carried away shall be presumed to be the amount of the gross value ascertained by an average assay of the excavated material or vein or ledge from which it was taken. If such trespass is wrongfully and wilfully made, punitive damages may be allowed. (1913, c. 51, s. 1; C. S. 6927.)

Action by Cotenant.—Where tenants in common, under the erroneous impression that they owned the fee, removed valuable minerals from the property, upon suit by the other tenant in common for damages under this section and admission by the defendants of the cotenancy, removal and

value, plaintiff was entitled to judgment on the pleadings, though not to the damages provided in this section. Jones v. McBee, 222 N. C. 152, 22 S. E. (2d) 226.

Cited in Carolina Mineral Co. v. Young, 211 N. C. 387, 190 S. E. 520.

§ 74-33. Persons entitled to bring suit.—The owner of a mine in this state, or any person in possession under a lease or other contract, may maintain an action to recover damages to such property arising from the operation of any adjacent mine by the owner thereof or other person in possession and working the same under lease or contract, and also to prevent the continuance of the operation of the adjacent mine in such a manner as to injure or endanger the safety of the complainant's mine. (1913, c. 51, s. 1; C. S. 6928.)

§ 74-34. Application and order for survey.—The person entitled to bring an action, as provided in § 74-33, may apply to any judge of the superior court having jurisdiction to grant injunctions and restraining orders, and obtain an order of survey in the following manner: He shall file an affidavit giving the names of the parties and the location as near as may be, of the mine complained of; the location of the plaintiff's mine, and that he has reason to believe that the defendant, or his agents or employees, are or have been trespassing upon his mine, or working the defendant's mine in such a manner as to damage or endanger the plaintiff's property. Upon the filing of the affidavit, the judge shall cause a notice to be issued to the defendant or his agents, stating the time and place and before whom the application will be heard, and requiring them to appear, in not less than ten nor more than twenty days from the date thereof, and show cause why an order of survey should not be granted. Upon the hearing, and for good cause shown, the judge shall grant an order directed to some competent disinterested surveyor or mining engineer, or both, as the case may be, who shall proceed to make the necessary examination and surveys, as directed by the court, and report their action to the court. The persons selected by the judge to make the survey and examination shall be residents of the state, and, before entering upon the discharge of their duty, shall take and subscribe an oath that they will fairly and impartially survey the mines described in the petition. In all other respects, except as stated above, the surveyors appointed by the judge shall proceed as in surveys in disputed boundaries. (1913, c. 51, s. 2; C. S. 6929.)

§ 74-35. Free access to mine for survey.—Upon the order made for the survey in the manner, at the time, and by the persons mentioned in the order, which shall include a representative of the party making the application, who shall not be one of the surveyors, there shall be given free access to the mine for the purpose of survey, and any interference with the persons acting under the order of survey shall be contempt of court and punished accordingly. If the persons named in the order of survey so require, they, with their instruments, shall be carefully lowered and raised in and out of the mine with the cage, bucket, or skip ordinarily used in the shafts of the mine; and they may demand of the owner of the mine, or his manager or agent, that they be so raised and lowered at a speed agreeable to them and not to endanger their comfort and safety or to injure the accuracy of their instruments. The owner of the mine, his managers or agents, shall be liable in damages to the persons making the examination for any injury to them or to their instruments, caused by the careless and negligent operation of any bucket, cage, or skip at such a high rate of speed as to injure the persons or their instruments while being lowered or raised in the mine. (1913, c. 51, s. 2; C. S. 6930.)

§ 74-36. Costs of the survey.—The costs of the order and survey shall be paid by the person making the application; but if he shall maintain an action and recover damages for the injury done or threatened prior to such survey and examination, the costs of the order and survey shall be taxed against the defendant as other costs in the action. The party obtaining the survey shall be liable for any unnecessary injury done to the property examined and surveyed in making the survey. (1913, c. 51, s. 2; C. S. 6931.)

Chapter 75. Monopolies and Trusts.

§ 75-1. Combinations in restraint of trade illegal.—Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the state of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any

such combination or conspiracy, shall be guilty of a misdemeanor, and upon conviction thereof such person shall be fined or imprisoned, or both, in the discretion of the court, whether such person entered into such contract individually or as an agent representing a corporation, and such corporation shall be fined in the discretion of the court not less than one thousand dollars. (1913, c. 41, s. 1; C. S. 2559.)

History of Chapter.—See Shute v. Shute, 176 N. C. 462, 465, 97 S. E. 392.

Monopoly Defined.—"A monopoly consists in the ownership or control of so large a part of the market supply or output of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolist control over prices." State v. Atlantic Ice, etc., Co., 210 N. C. 742, 747, 188 S. E. 412, quoting Black's Law Dictionary (3d Ed.), p. 1202.

In the modern and wider sense monopoly denotes a combination, organization, or entity so extensive and unified that its tendency is to suppress competition, to acquire a dominance in the market, and to secure the power to control prices to the public harm with respect to any commodity which people are under a practical compulsion to buy. State v. Atlantic Ice, etc., Co., 210 N. C. 742, 747, 188 S. E. 412, citing Massachusetts v. Dyer, 243 Mass. 472, 138 N. E. 296.

Agreement Not to Compete May Be Forbidden.—Persons and corporations cannot be ordered to compete, but they properly can be forbidden to give directions, or make agreements, not to compete. State v. Craft, 168 N. C. 208, 213, 83 S. E. 772.

Agreement Not to Sell to Particular Individual.—A complaint alleging that defendants conspired and agreed not to sell plaintiff ice, and that as a result thereof plaintiff's business was ruined, fails to state a cause of action, this and the following sections not being applicable. Lineberger v. Colonial Ice Co., 220 N. C. 444, 17 S. E. (2d) 502.

Reduction of Prices to Consuming Public No Defense. — Plaintiff, a carrier by truck, instituted this action against certain railroad companies, to recover damages to his business, which he alleged resulted from an unlawful conspiracy between defendants to reduce transportation rates in order to eliminate plaintiff as a competitor, with the purpose of raising rates after competition had been removed. Defendants alleged that the reduction in rates resulted in lower prices to the consuming public on the products on which the rates had been reduced. Held: The matter alleged does not constitute a defense to the action, since the express policy of the state is against both the raising and lowering of prices by unlawful means for an unlawful purpose, and since the law is interested in preserving competition rather than obtaining for the public temporary benefits from price wars in which competition is extinguished. Patterson v. Southern Ry. Co., 214 N. C. 38, 198 S. E. 364.

A general averment without allegation of specific facts is insufficient to constitute a cause of action, under this and following sections. State v. Standard Oil Co., 205 N. C. 123, 124, 170 S. E. 134.

Stated in Bennett v. Southern Ry. Co., 211 N. C. 474, 191 S. E. 240.

Cited in Patterson v. Southern Ry. Co., 219 N. C. 23, 12 S. E. (2d) 652.

§ 75-2. Any restraint in violation of common law included.—Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of § 75-1. (1913, c. 41, s. 2; C. S. 2560.)

Cross Reference.—As to difference between "partial restraint" and "general restraint," see annotations to § 75-5.

Distinction between Common Law and Modern Rules.—Originally at common law, agreements in restraint of trade were held void as being against public policy. The position, however, has been more and more modified by the decisions of the courts until it has come to be the very generally accepted principle that agreements in partial restraint of trade will be upheld when they are "founded on valuable considerations, are reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest." Mar-Hof Co. v. Rosenbacker, 176 N. C. 330, 331, 97 S. E. 169. The distinction may now be made between "general restraint" and "partial restraint." Morehead Sea Food Co. v. Way & Co., 169 N. C. 679, 86 S. E. 603.

§ 75-3. Burden of proof as to reasonableness on defendant.— All contracts, combinations in the form of trust, and conspiracies in restraint of trade or commerce prohibited in §§ 75-1 and 75-2 are hereby declared to be unreasonable and illegal, unless the persons entering into such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce can show affirmatively upon an indictment or civil action for violation of §§ 75-1 and 75-2 that such contract, combination in the form of trust, conspiracy in restraint of trade or commerce does not injure the business of any competitor, or prevent any one from becoming a competitor because his or its business will be unfairly injured by reason of such contract, combination in the form of trust, or conspiracy in restraint of trade or commerce. (1913, c. 41, s. 3; C. S. 2561.)

§ 75-4. Contracts to be in writing.—No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the state of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory: Provided, nothing herein shall be construed to legalize any contract or agreement not to enter into business in the state of North Carolina, or at any point in the state of North Carolina, which contract is now illegal, or which contract is made illegal by any other section of this chapter. (1913, c. 41, s. 4; C. S. 2562.)

§ 75-5. Particular acts defined.—In addition to the matters and things hereinbefore declared to be illegal, the following acts are declared to be unlawful, that is, for any person, firm, corporation, or association directly or indirectly to do or to have any contract, express or knowingly implied, to do any of the acts or things specified in any of the subsections of this section.

1. To agree or conspire with any other person, firm, corporation or association to put down or keep down the price of any article produced in this state by the labor of others, which article the person, firm, corporation or association intends, plans or desires to buy.

2. To make a sale of any goods, wares, merchandise, articles or things of value whatsoever in North Carolina, whether directly or indirectly, or through any agent or employee, upon the condition that the purchaser thereof shall not deal in the goods, wares, merchandise, articles or things of value of a competitor or rival in the business of the person, firm, corporation or association making such sales.

3. To willfully destroy or injure, or undertake to destroy or injure, the business of any opponent or business rival in the state of North Carolina with the purpose or intention of attempting to fix the price of anything of value when the competition is removed.

4. To directly or indirectly buy or sell within the state, through himself or itself, or through any agent of any kind or as agent or principal, or together with or through any allied, subsidiary or dependent person, firm, corporation or association, any article or thing of value which is sold

or bought, in the state to injure or destroy or undertake to injure or destroy the business of any rival or opponent, by lowering the price of any article or thing of value sold, so low, or by raising the price of any article or thing of value bought, so high as to leave an unreasonable or inadequate profit for a time, with the purpose of increasing the profit on the business when such rival or opponent is driven out of business, or his or its business is injured.

5. To deal in any thing of value within the state of North Carolina, to give away or sell, at a place where there is competition, such thing of value at a price lower than is charged by such person, firm, corporation or association for the same thing at another place, where there is not good and sufficient reason, on account of transportation or the expense of doing business, for charging less at the one place than at the other, with the view of injuring the business of another.

6. To engage in buying or selling any thing of value in North Carolina, to make or have any agreement or understanding, express or implied, with any other person, firm, corporation or association, not to buy or sell such things of value within certain territorial limits within the state, with intention of preventing competition in selling or to fix the price or prevent competition in buying of such things of value within these limits: Provided, nothing herein shall be construed to prevent an agent from representing more than one principal; but nothing in this proviso shall be construed to authorize two or more principals to employ a common agent for the purpose of suppressing competition or lowering prices: Provided, further, that nothing herein shall be construed to prevent a person, firm or corporation from selling his or its business and good will to a competitor, and agreeing in writing not to enter the business in competition with the purchaser in a limited territory, as is now allowed under the common law: Provided, such agreement shall not violate the principles of the common law against trusts and shall not violate the provisions of this chapter. (1913, c. 41, s. 5; C. S. 2563.)

Restrictive Stipulations in Sale.—Transactions involving the sale and disposition of a business trade or profession between individuals with stipulations restrictive of competition on the part of the vendor do not, as a rule, tend to unduly harm the public and are ordinarily sustained to the extent required to afford reasonable protection to the vendee in the enjoyment of property or proprietary rights he has bought and paid for, and to enable a vendor to dispose of his property at its full and fair value. Mar-Hof Co. v. Rosenbacker, 176 N. C. 330, 97 S. E. 169.

Test as to Reasonableness.—A valid contract in partial restraint of trade, while primarily for the advantage of the purchaser of a business, inures to the benefit of the seller by enhancing the value of the good-will and enabling him to obtain a better price for the sale of his business, the test as to territory being whether the restraint agreed upon is such as to afford a fair protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interest of the public; and such will not be held to be unreasonable when they do not affect the public and go no further than to remove the danger to the purchaser of competition with the seller. Morehead Sea Food Co. v. Way & Co., 169 N. C. 679, 86 S. E. 603.

Contract Not to Engage in Competing Business.—A provision of an agreement for the sale of a partner's interest that he would not again engage in the mercantile business in a certain town or near enough thereto to interfere with plaintiff's business was not in violation of this section. Wooten v. Harris, 153 N. C. 43, 68 S. E. 898.

An exchange of the defendant's fish business for stock in the plaintiff company, with an agreement not to engage in similar business for ten years within 100 miles is valid, and not in violation of this section. Morehead Sea Food Co. v. Way, & Co., 169 N. C. 679, 86 S. E. 603.

Reasonableness of Agreement to Raise Price Immaterial.—An agreement among dealers in a necessary article of food, to raise its price, is an indictable offense at the common law, and evidence that dealers controlling a large part of the supply of milk in a town having by agreement raised its price, testimony is irrelevant that a dealer not a party to the agreement had also raised the price of his milk to his customers, or whether the agreement was reasonable or necessary for the article to yield a profit in its sale. State v. Craft, 168 N. C. 208, 83 S. E. 772.

Same—Intent Immaterial. — The intent of milk dealers combining to raise the price of milk is immaterial. State v. Craft, 168 N. C. 208, 83 S. E. 772.

Illegal Division of Territory.—Under a contract dividing a county into separate territory, within which each of the respective parties was not to interfere with the business of the other in operating cotton gins, etc., the plaintiff sold the defendant a cotton ginning plant, the latter agreeing to remove the plant and not to again operate one there, the intent of the agreement was a division of territory, with the object to eliminate competition therein, and the agreement will not be enforced. Shute v. Shute, 176 N. C. 462, 97 S. E. 392.

Exclusive Sale for Specified Period.—A contract made in good faith between a vendor and purchaser of a certain particular make or character of a manufactured product that restricts the former from selling articles of the same make or kind to other dealers within the town wherein the purchaser conducts his mercantile business, and which requires the expenditure of large sums of money and much time in advertising the goods and popularizing them on the local market, does not come within the intent and meaning of this chapter; and in vendor's action for the purchase price the seller may recover damages as a counterclaim for breach of the seller's contract in that respect. Mar-Hof Co. v. Rosenbacker, 176 N. C. 330, 97 S. E. 169.

An agreement that a retailer should handle a certain product upon condition that he should not sell like products of other manufacturers within the same price range is held prohibited by this section, and unenforceable in our courts, and does not fall within subsection (6), permitting, in the absence of an intent to stifle competition, a contract granting the seller an exclusive agency for a product within a certain territory. Florsheim Shoe Co. v. Leader Dept. Store, 212 N. C. 75, 193 S. E. 9.

Contract to Sell at Label Price.—A contract of sale of merchandise for resale by the buyer, which stipulates that the buyer will not sell the merchandise except at label prices and will not sell or permit the sale of any other similar merchandise, is violative of this section. Standard Fashion Co. v. Grant, 165 N. C. 453, 81 S. E. 606.

A contract for sale of cafe and good will for a period of five years does not affect the interest of the public or fall within the terms of subsection 6 of this section. Hill v. Davenport, 195 N. C. 271, 141 S. E. 752.

Discrimination Not Allowed.—Where a public-service corporation has acquired the exclusive right to furnish hydro-electric power and light to municipalities, and to other public-service corporations, for distribution to consumers, including subsidiary companies that it controls, it may not discriminate among its patrons under the same or substantially similar conditions as to the rate charged, or select its customers. North Carolina Public Serv. Co. v. Southern Power Co., 179 N. C. 18, 101 S. E. 593.

Attempt to Drive Competitor out of Business.—An indictment charging that the employees of a rival company in the sale of lawful commodities had combined together to break up their competitor's business by systematically following its salesmen from house to house and place to place and to so abuse, vilify, and harass them as to deter them in their lawful business and to break up their sales; that they falsely represented that their rival company was composed of a set of thieves and liars, endeavoring to cheat and defraud the people, etc., charges a conspiracy indictable at common law. State v. Dalton, 168 N. C. 204, 83 S. E. 693.

Grant of Municipal Franchise.—A private sale of public utilities by the city authorities to an electrical power plant with a grant of a municipal franchise does not create or tend towards a monopoly. Allen v. Reidsville, 178 N. C. 513, 101 S. E. 267.

Ordinance Restricting Sale of Commodity.—A municipal ordinance prohibiting the sale of milk within the city without a permit, is not invalid as tending to create a monopoly although the permit "may be suspended or revoked at any time for cause." State v. Kirkpatrick, 179 N. C. 747, 103 S. E. 65.

Contract in Violation of Section Unenforceable.—A contract made in violation of the terms of this section will not be enforced. Standard Fashion Co. v. Grant, 165 N. C. 453, 81 S. E. 606; Shute v. Shute, 176 N. C. 462, 465, 97 S. E. 392.

Threats to Retaliate unless Competition Withdrawn.—Threats by one ice company that it would sell ice in the town of a second ice company, if that company continued to supply ice to a rival of the first company are not prohibited by this section. Smith v. Morganton Ice Co., 159 N. C. 151, 74 S. E. 961.

The refusal by wholesalers of ice to sell a retailer on the same terms as those offered to other retailers in the city is not a violation of this section, it not appearing that the parties were business competitors. Rice v. Ashville Ice, etc., Co., 204 N. C. 768, 169 S. E. 707.

The violation of this section is made criminal by § 75-6, and as ordinarily the violation of a criminal statute may not be enjoined, individuals who apprehend injury by such violation are afforded a remedy by indictment and prosecution under § 1-5. Carolina Motor Service v. Atlantic Coast Line R. Co., 210 N. C. 36, 185 S. E. 479, 104 A. L. R. 1165.

The provisions of the monopoly statutes apply to railroads just as they do to individuals and other corporations. Bennett v. Southern Ry. Co., 211 N. C. 474, 482, 191 S. E. 240.

Subdivision three sufficiently defines the offense therein prohibited and is constitutional. State v. Atlantic Ice, etc., Co., 210 N. C. 742, 188 S. E. 412.

Coal Dealers Held to Be Competent Witnesses.—Where in the prosecution for violation of subdivision three of this section the State was allowed to introduce the testimony of coal dealers in the same city as to the cost of handling coal, the opinion testimony being based upon complicated and detailed facts relating to costs of buying, shipping, trucking, handling, shrinkage, labor, repairs, etc., the witnesses having had years of experience in operating their respective businesses in the city, it was held that the witnesses were experts and their opinion testimony was competent and was properly received in evidence. State v. Atlantic Ice, etc., Co., 210 N. C. 742, 188 S. E. 412.

Proper Instruction as to Injuring or Destroying Competitors.—In a prosecution for violating this section relating to monopolies, an instruction that a person violates this section if he lowers the price of the product in question for the purpose of injuring or destroying competitors, and then, after competition is removed, he sells at a higher price to the detriment of the public, was held without error. State v. Atlantic Ice, etc., Co., 210 N. C. 742, 188 S. E. 412.

"Willful" Defined.—That willful means the wrongful doing of an act without justification or excuse, was held a correct definition. State v. Atlantic Ice, etc., Co., 210 N. C. 742, 188 S. E. 412.

Combination of Railroads to Eliminate Motor Truck Competition.—A combination of railroads for the purpose of reducing rates on gasoline transportation within a certain area with the intent to eliminate motor truck competition and with the further purpose of raising and fixing a higher rate on the same commodity after the elimination of competition is a violation of this section. Bennett v. Southern Ry. Co., 211 N. C. 474, 191 S. E. 240.

Cited in Brown v. Norfolk So. R. Co., 208 N. C. 423, 181 S. E. 279; Lewis v. Archbell, 199 N. C. 205, 154 S. E. 11.

§ 75-6. Violation a misdemeanor; punishment. —Any corporation, either as agent or principal, violating any of the provisions of § 75-5 shall be guilty of a misdemeanor, and such corporation shall upon conviction be fined not less than one thousand dollars for each and every offense, and any person, whether acting for himself or as officer of any corporation or as agent of any corporation or person violating any of the provisions of this chapter shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1913, c. 41, s. 5; C. S. 2564.)

Cross Reference.—See annotations under § 75-5.

Applied in State v. Atlantic Ice, etc., Co., 210 N. C. 742, 188 S. E. 412.

Cited in Bennett v. Southern Ry. Co., 211 N. C. 474, 191 S. E. 240.

§ 75-7. Persons encouraging violation guilty. —Any person, being either within or without the state, who encourages or wilfully allows or permits any agent or associates in business in this state to violate any of the provisions of this chapter shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in § 75-6. (1913, c. 41, s. 6; C. S. 2565.)

§ 75-8. Continuous violations separate offenses. —Where the things prohibited in this chapter are continuous, then in such event, after the first violation of any of the provisions hereof, each week that the violation of such provision shall continue shall be a separate offense. (1913, c. 41, s. 7; C. S. 2566.)

Quoted in State v. Atlantic Ice, etc., Co., 210 N. C. 742, 188 S. E. 412.

§ 75-9. Duty of attorney-general to investigate. —The attorney-general of the state of North Carolina shall have power, and it shall be his duty, to investigate, from time to time, the affairs of all corporations doing business in this state, which are or may be embraced within the meaning of the statutes of this state defining and denouncing trusts and combinations against trade and commerce, or which he shall be of opinion are so embraced, and all other corporations in North Carolina doing business in violation of law; and all other corporations of every character engaged in this state in the business of transporting property or passengers, or transmitting messages, and all other public-service corporations of any kind or nature whatever which are doing business in the state for hire. Such investigation shall be with a view of ascertaining whether the law or any rule of the Utilities Commission or Commission of Banks is being or has been violated by any such corporation, officers or agents or employees thereof, and if so, in what respect, with the purpose of acquiring such information as may be necessary to enable him to prosecute any such corporation, its agents, officers and employees for crime, or prosecute civil actions against them if he discovers they are liable and should be prosecuted. (1913, c. 41, s. 8; 1931, c. 243, s. 5; 1933, c. 134, s. 8; 1941, c. 97, s. 5; C. S. 2567.)

§ 75-10. Power to compel examination. — In performing the duty required in § 75-9, the attorney-general shall have power, at any and all times, to require the officers, agents or employees of any such corporation, and all other persons having knowledge with respect to the matters and affairs of such corporations, to submit themselves to examination by him, and produce for his inspection any of the books and papers of any such corporations, or which are in any way connected with the business thereof; and the attorney-general is hereby given the right to administer oath to any person whom he may desire to examine. He shall also, if it may become necessary, have a right to apply to any judge of the supreme or superior court, after five days notice of such application, for an order on any such person or corporation he may desire to examine to appear and subject himself or itself to such examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such judge. (1913, c. 41, s. 9; C. S. 2568.)

§ 75-11. Person examined exempt from prose-

cution.—No person examined, as provided in § 75-10 shall be subject to indictment, prosecution, punishment or penalty by reason or on account of anything disclosed by him upon such examination, and full immunity from prosecution and punishment by reason or on account of anything so disclosed is hereby extended to all persons so examined. (1913, c. 41, s. 9; C. S. 2569.)

§ 75-12. Refusal to furnish information; false swearing.—Any corporation unlawfully refusing or willfully neglecting to furnish the information required by this chapter, when it is demanded as herein provided, shall be guilty of a misdemeanor and fined not less than one thousand dollars: Provided, that if any corporation shall in writing notify the attorney-general that it objects to the time or place designated by him for the examination or inspection provided for in this chapter, it shall be his duty to apply to a judge of the supreme or superior court, who shall fix an appropriate time and place for such examination or inspection, and such corporation shall, in such event, be guilty under this section only in the event of its failure, refusal or neglect to appear at the time and place so fixed by the judge and furnish the information required by this chapter. False swearing by any person examined under the provisions of this chapter shall constitute perjury, and the person guilty of it shall be punishable as in other cases of perjury. (1913, c. 41, s. 10; C. S. 2570.)

§ 75-13. Criminal prosecution; solicitors to assist; expenses.—The attorney-general in carrying out the provisions of this chapter shall have a right to send bills of indictment before any grand jury in any county in which it is alleged this chapter has been violated or in any adjoining county, and may take charge of and prosecute all cases coming within the purview of this chapter, and shall have the power to call to his assistance in the performance of any of these duties of his office which he may assign to them any of the solicitors in the state, who shall, upon being required to do so by the attorney-general, send bills of indictment and assist him in the performance of the duties of his office. (1913, c. 41, s. 13; C. S. 2571.)

§ 75-14. Action to obtain mandatory order.—If it shall become necessary to do so, the attorney-general may prosecute civil actions in the name of the state on relation of the attorney-general to obtain a mandatory order to carry out the provisions of this chapter, and the venue shall be in any county as selected by the attorney-general. (1913, c. 41, s. 11; C. S. 2572.)

§ 75-15. Actions prosecuted by Attorney-General.—It shall be the duty of the attorney-general, upon his ascertaining that the laws have been violated by any trust or public-service corporation, so as to render it liable to prosecution in a civil action, to prosecute such action in the name of the state, or any officer or department thereof, as provided by law, or in the name of the state on relation of the attorney-general, and to prosecute all officers or agents or employees of such corporations, whenever in his opinion the interests of the public require it. (1913, c. 41, s. 12; C. S. 2573.)

§ 75-16. Civil action by person injured; treble damages.—If the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed by a jury in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict. (1913, c. 41, s. 14; C. S. 2574.)

Causal Relation Between Violation and Injury Must Be Shown.—Section 75-5 condemns a contract of sale only when such sale is made "upon the condition" that the purchaser shall not deal in the goods or merchandise of a competitor of the seller, and in order for a party to recover damages for a breach of the statute under the provisions of this section, he must show a violation of the statute and a causal relation between the violation and injury to his business. Lewis v. Archbell, 199 N. C. 205, 154 S. E. 11. See Bennett v. Southern Ry. Co., 211 N. C. 474, 191 S. E. 240.

Who May Bring Action.—The contention that an action for the violation of this chapter resulting in injury to a party's business can only be brought by the attorney general is contrary to the provisions of this section. Bennett v. Southern Ry. Co., 211 N. C. 474, 191 S. E. 240.

Chapter 76. Navigation.

Art. 1. Cape Fear River.

Art. 1. Cape Fear River.

§ 76-1. Board of commissioners of navigation and pilotage. — A board of commissioners of navigation and pilotage for the Cape Fear river and bar, to consist of five members, at least four of whom shall be residents of New Hanover County, and none of whom shall be licensed pilots, is hereby created. The members of the board shall be appointed by the governor and their terms of office shall begin on the fifteenth day of April of the year in which they are appointed and continue for four years and until their successors shall be appointed and qualified. They shall be and are hereby declared to be commissioners for a special purpose, within the purview of section seven, article fourteen, of the constitution of North Carolina. It shall be the duty of the governor to appoint, on or before the fifth day of April, one thousand nine hundred and twenty-one, and on or before the fifth day of April of every fourth year thereafter, the members of said board of commissioners. A majority of the board shall constitute a quorum and may act in all cases. The board shall have power to fill vacancies in its membership as they occur during their term, to appoint a clerk to record in a book, rules, orders and proceedings of the board, and the board shall have authority in all matters that may concern the navigation of waters from seven miles above Negro-head Point downwards, and out of the bar and inlets. They shall annually, on the first Monday in May, appoint a harbor master for the port of Wilmington. (1921, c. 79, s. 1; C. S. 6943(a).

Editor's Note.—The cases discussed below were decided under section C. S. 6943, now repealed. However, these cases seem applicable to the present law as the provisions of former section 6943 are substantially set forth in the instant section.

Constitutionality.—This article is constitutional as it is an exercise of the State's right to regulate pilotage, and should be construed liberally as a part of the maritime law. It does not create a monopoly or grant special priviliges, but only regulates for the protection of the public. St. George v. Hardie, 147 N. C. 88, 60 S. E. 920.

The Legislature may confer upon a local board of commissioners of navigation and pilotage authority to mark out cruising grounds for pilot boats. Morse v. Heide, 152 N. C. 625, 68 S. E. 173.

Time of Appointment.—The time of making the appointment of commissioners is merely directory, and if appointment is made after the fifth day of April, but before the fifteenth day of April, it is valid. St. George v. Hardie, 147 N. C. 88, 60 S. E. 920.

§ 76-2. Rules to regulate pilotage service.—The board shall from time to time make and establish such rules and regulations respecting the qualifications, arrangements, and station of pilots as to them shall seem most advisable, and shall impose such reasonable fines, forfeitures and penalties as may be prescribed for the purpose of enforcing the execution of such rules and regulations. The board shall also have power and authority to prescribe, reduce, and limit the number of pilots necessary to maintain an efficient pilotage service for the Cape Fear River and bar, as in its discretion may be necessary: Provided, that the present number of eleven pilots now actively engaged in the service shall not be reduced except for cause or by resignation, disability, or death. When, in the opinion of a majority of the board, the best interests of the port of Wilmington, the state of North Carolina, and the pilotage service shall require it, the board shall have power and authority to organize all pilots licensed by it into a mutual association, under such reasonable rules and regulations as the board may prescribe; any licensed pilot refusing to become a member of such association shall be subject to suspension,

or to have his license revoked, at the discretion of the board. (1921, c. 79, s. 2; 1927, c. 158, s. 1; C. S. 6943(b).)

Editor's Note.—The amendment of 1927 inserted the second sentence.

Reasonable Regulations.—A rule and regulation of the board to the effect that pilots shall not cruise beyond certain territory and that no pilot, except under certain unusual circumstances, shall be entitled to his fee for such services if they be tendered beyond the cruising ground they had laid off, is valid and reasonable. Morse v. Heide, 152 N. C. 625, 68 S. E. 173.

§ 76-3. Examination and licensing of pilots. — The board, or a majority of them, may from time to time examine, or cause to be examined, such persons as may offer themselves to be pilots for the Cape Fear river and bar, and shall give to such as are approved commissions under their hands and the seal of the board, to act as pilots for the river and bar; and the number of pilots so commissioned, not exceeding fifteen at any one time, shall be left to the discretion of the board, but the limitation as to number herein shall not deprive the board of the power to issue license to any person who is a duly licensed pilot at the time of the passage of this article. (1921, c. 79, s. 3; 1927, c. 158, s. 2; C. S. 6943(c).)

Editor's Note.—The 1927 amendment substituted the word "may" for the word "shall" near the first part of this section.

Limiting Number of Pilots.—The limiting of the number of pilots, and providing for examinations and qualifications, is a valid exercise of the police powers and is not such a grant of special privileges to certain persons as is provided against by the Constitution. St. George v. Hardie, 147 N. C. 88, 60 S. E. 920.

§ 76-4. Appointment and regulation of pilots' apprentices.—The board, when it deems necessary for the best interests of the port, is hereby authorized to appoint in its discretion apprentices, and to make and enforce reasonable rules and regulations relating to apprentices. No apprentice shall be required to serve for a longer period than three years in order to obtain a license to pilot vessels of a draught of not exceeding fifteen feet, and one year thereafter for a license to pilot vessels of a draught of more than fifteen feet. No one shall be entered as an apprentice who is of the age of more than twenty-five years. (1921, c. 79, s. 4; 1927, c. 158, s. 3; C. S. 6943(d).)

Editor's Note.—The words "appoint in its discretion apprentices, and to" appearing in lines 3 and 4 were inserted by the 1927 amendment.

§ 76-5. Classes of licenses issued. — The board shall have authority to issue two classes of licenses as follows:

(1) A license to pilot vessels whose draught of water does not exceed eighteen feet, to such applicants above the age of twenty-one years who have served as apprentices for such length of time as is required by the rules and regulations of the board to entitle such applicant to such license;

(2) An unlimited or full license to those who have served at least one year under a license of the first class: Provided, that the board shall have power to appoint pilots without reference to apprenticeship record as in its judgment the service may require. (1921, c. 79, s. 5; 1927, c. 158, s. 4; C. S. 6943(e).)

Editor's Note.—The word "eighteen" was substituted for "fifteen" in subsection one and the proviso at the end of subsection two was added by the 1927 amendment.

§ 76-6. Renewal of license; license fee. — All licenses shall be renewed annually upon payment of a fee of five dollars ($5): Provided, the holder of such license shall have, during the year preceding the date for such renewal, complied with the provisions of this article and the reasonable rules and regulations prescribed by the board under authority hereof. (1921, c. 79, s. 6; C. S. 6943(f).)

§ 76-7. Expenses of the board. — Each pilot, or the association of pilots, when organized as in this article provided, shall pay over to the board under such reasonable rules as the board shall prescribe two per cent (2%) of each and every pilotage fee received, for the purpose of providing funds to defray the necessary expenses of the board. In the event that the total of the sums so paid over in any one year shall exceed the expenses of the board, the excess, upon being duly ascertained, shall be paid over to the fund for the benefit of widows and orphans of the deceased pilots, as said fund is now constituted and provided for by law. (1921, c. 79, s. 7; C. S. 6943(g).)

§ 76-8. Pilots to give bond. — Every person before being commissioned as a pilot shall give bond for the faithful performance of his duties, with two or more sureties, payable to the state of North Carolina in the sum of five hundred dollars ($500); the board may, from time to time, and as often as it may deem necessary, enlarge the penalty of the bond, or require new or additional bonds to be given in a sum or sums not to exceed in all, one thousand dollars ($1,000). Every bond taken of a pilot shall be filed with and preserved by the board, in trust for every person, firm, or corporation, who shall be injured by the neglect or misconduct of such pilots, and any person, firm, or corporation, so injured may severally bring suit for the damage by each one sustained. (1921, c. 79, s. 8; C. S. 6943(h).)

§ 76-9. Permission to run as pilots on steamers; other ports.—The board shall have power to grant permission in writing to any pilot in good standing and authorized to pilot vessels, to run regularly as pilots on steamers running between the port of Wilmington and other ports of the United States, under such rules and regulations as the board shall prescribe. (1921, c. 79, s. 9; C. S. 6943(i).)

§ 76-10. Cancellation of licenses. — The board shall have the power to call in and cancel the license of any pilot who has refused or neglected, except in case of sickness, his duty as a pilot for a period of six months in succession, and any pilot who has been absent from the state for a longer period than six months in succession shall, upon his return, surrender his license to the board, or the board may declare the same void, except when such absence has been under permission from the board as provided in § 76-9. (1921, c. 79, s. 10; C. S. 6943(j).)

§ 76-11. Jurisdiction over disputes as to pilotage. — Each member of the board shall have

power and authority to hear and determine any matter of dispute between any pilot and any master of a vessel, or between pilots themselves, respecting the pilotage of any vessel and any one of them may issue a warrant against any pilot for the recovery of any demand which one pilot may have against another, relative to pilotage, and for the recovery of any forfeiture or penalty provided by law, relating to pilotage on Cape Fear river and bar, or provided by any by-law or rule or regulation enacted by the board by virtue of any such law, which warrant the sheriff or any constable in New Hanover or Brunswick counties, shall execute together with any other process authorized by this article. On any warrant issued as herein provided any one of said commissioners may give judgment for any sum not exceeding five hundred dollars ($500), and may issue execution thereon, in like manner as is provided for the issuing of execution on judgments rendered by justices of the peace, which writ of execution shall be executed agreeably to the law regulating the levy and sale under executions issuing from courts of justices of the peace. Any member of the board shall have authority to issue summons for witnesses and to administer oaths, and hearings before any member of the board of any matters as provided in this section shall conform as nearly as may be to procedure provided by law in courts of justices of the peace. From any judgment rendered by any member of the board, either party shall have the right of appeal to the superior court of New Hanover or Brunswick counties, in like manner as is provided for appeals on judgments of justices of the peace. (1921, c. 79, s. 11; C. S. 6943(k).)

Editor's Note.—For dictum questioning the validity of the provisions of this section allowing members of the board to hear and determine disputes between pilots and masters of vessels, etc., see St. George v. Hardie, 147 N. C. 88, 60 S. E. 920.

§ 76-12. Retirement of pilots from active service. — The board shall have and is hereby given authority in its discretion, and under such reasonable rules and regulations as it may prescribe, to retire from active service any pilot who shall become physically or mentally unfit to perform his duties as pilot, and to provide for such pilot or pilots so retired such compensation as the board shall deem proper: Provided, however, that no pilot shall be retired, except with his consent, for physical or mental disability, unless and until such pilot shall have first been examined by the public health officers or county physicians of New Hanover or Brunswick counties, and such public health officers or physicians shall have certified, either separately or jointly, to the board the fact of such physical or mental disability. (1921, c. 79, s. 12; C. S. 6943(l).)

§ 76-13. When employment compulsory; rates of pilotage. — All vessels, coastwise or foreign, over sixty (60) gross tons, shall on and after the first day of May, one thousand nine hundred and twenty-one, take a state licensed pilot from sea to Southport, and from Southport to sea, and the rates of pilotage shall be the rates given in column number one below, designated "From sea to Southport, or vice versa;" the employment of pilots from Southport to Wilmington and from Wilmington to Southport is optional, but any vessel taking a pilot from Southport to Wilmington, or from Wilmington to Southport, shall employ only a state licensed pilot, and the rate of pilotage shall be the rates in column number two below, designated "From Southport to Wilmington, or vice versa."

Column No. 1
From
Sea to Southport,
or Vice Versa

Feet and under	Rate
6	$ 11.00
7	13.00
8	15.00
9	16.00
10	21.00
11	26.00
12	29.00
12–6	30.00
13	32.00
13–6	34.00
14	39.00
14–6	43.00
15	45.00
15–6	47.00
16	50.00
16–6	54.00
17	57.00
17–6	61.00
18	65.00
18–6	67.00
19	71.00
19–6	75.00
20	78.00
20–6	83.00
21	87.00
21–6	94.00
22	100.00
22–6	106.00
23	112.00
23–6	116.00
24	120.00
24–6	124.00
25	128.00
25–6	131.00
26	135.00
26–6	139.00
27	143.00
27–6	146.00
28	150.00
28–6	154.00
29	158.00
29–6	161.00
30	165.00

Column No. 2
From
Southport to Wilmington,
or Vice Versa

Feet and under	Rate
6	$ 6.00
7	8.00
8	9.00
9	10.00
10	13.00
11	15.00
12	17.00
12–6	18.00
13	19.00

Feet and under	Rate
13-6	$20.00
14	23.00
14-6	26.00
15	27.00
15-6	28.00
16	30.00
16-6	33.00
17	35.00
17-6	37.00
18	38.00
18-6	40.00
19	44.00
19-6	45.00
20	47.00
20-6	50.00
21	53.00
21-6	56.00
22	60.00
22-6	64.00
23	68.00
23-6	70.00
24	72.00
24-6	74.00
25	76.00
25-6	79.00
26	81.00
26-6	83.00
27	85.00
27-6	88.00
28	90.00
28-6	92.00
29	94.00
29-6	97.00
30	99.00

Vessels calling at the port solely for the purpose of obtaining bunker coal shall pay one-half the fees hereinbefore prescribed. (1921, c. 79, s. 13; 1927, c. 158, s. 5; C. S. 6943(m).)

Editor's Note.—A majority of the pilotage rates as fixed by this section were changed by the 1927 amendment, most of them having been raised.

Pilot Entitled to Pilotage.— The first pilot speaking a vessel shall be entitled to the pilotage fees over the bar to Southport and out to sea again, provided said pilot shall be ready and willing to serve as a pilot, etc. St. George v. Hardie, 147 N. C. 88, 92, 60 S. E. 920.

A barge of over sixty gross tons having a United States licensed pilot on board is subject to pilotage, tender and refusal under this section upon entering North Carolina waters. Craig v. Gulf Barge, etc., Co., 201 N. C. 250, 159 S. E. 424.

§ 76-14. Pay for detention of pilots. — Every master of a vessel who shall detain a pilot at the time appointed so that he cannot proceed to sea, though wind and weather permit, shall pay such pilot ten dollars ($10) per day during the time of his actual detention, the pilot to have due notice from the master or agent of said vessel. (1921, c. 79, s. 14; C. S. 6943(n).)

§ 76-15. Vessels not liable for pilotage. — Any vessel coming into Southport from sea without the assistance of a pilot, the wind and weather being such that such assistance or service could have been reasonably given, shall not be liable for pilotage inward from sea, and shall be at liberty to depart without payment of any pilotage, unless the services of a pilot be secured. (1921, c. 79, s. 15; C. S. 6943(o).)

Validity.—This section is valid, when construed with the other sections of said chapter, being an incentive to render pilots vigilant. St. George v. Hardie, 147 N. C. 88, 60 S. E. 920.

§ 76-16. First pilot to speak vessel to get fees. —The first pilot speaking a vessel from a regularly numbered and licensed boat of this board shall be entitled to the pilotage fees over the bar to Southport, and out to sea again: Provided, said pilot shall be ready and willing to serve as pilot when the vessel is ready to depart, due notice having been given by the master or agent to said pilot. (1921, c. 79, s. 16; C. S. 6943(p).)

§ 76-17. Vessels entering for harborage exempt.—Any vessel coming in from sea for harbor shall not be required to take a pilot either from sea inward or back to sea. (1921, c. 79, s. 17; C. S. 6943(q).)

§ 76-18. Harbor master of Wilmington; duties. —The harbor master appointed for the port of Wilmington shall hold his office for one year next ensuing and until his successor is appointed. The harbor master shall have power and is required:

1. To keep the channel-way of the Cape Fear river and the track of vessels clear; to berth vessels at appropriate wharves or docks; to change the berth of any vessel at request of the owner of the wharf or dock; to move such vessels to some other wharf or to a safe anchorage in the stream; and he is further authorized and required to determine in all cases how far and in what instances it is the duty of masters and others having charge of vessels, flats, rafts, or crafts to accommodate each other in their respective berths and situations.

2. To arrest any person violating this chapter, and to immediately bring such offender before some justice of the peace of the county in which such offense may be committed, for trial.

3. Whenever in his judgment it shall be necessary, to cast loose from any wharf or dock any raft, flat, vessel, or other craft by untying or cutting the lines by which it is made fast, if the owner after notice refuses to remove such vessel.

4. Whenever any of the public docks of the city of Wilmington are obstructed by any vessels, flats, barges, logs, hulks, trash, or garbage, and the owner thereof cannot be found or fails to remove the same from said docks, to take the most speedy method to clear the docks.

5. To appoint in writing some competent person to act in his place and stead during his temporary absence, or at such times as he is unable to attend to the duties of his office, and such person shall, while acting for such harbor master, have all the power and authority conferred upon and vested in the harbor master by law.

6. To collect from all vessels arriving in the port of Wilmington the following fees and no others, to wit: If over one hundred tons and under three hundred tons, three dollars; if over three hundred tons and under five hundred tons, five dollars; if over five hundred tons and under seven hundred tons, seven dollars; if over seven hundred tons, ten dollars. (Rev., s. 4958; Code, s. 3482; 1903, c. 662; 1905, c. 321; C. S. 6960.)

§ 76-19. Port wardens of Wilmington; election; oath.—There shall be three competent persons at the port of Wilmington, to be known as port wardens. The persons so elected shall at once take

and subscribe before the clerk of the superior court of New Hanover county the following oath:

I, A. B., do solemnly and sincerely swear that I will faithfully, honestly, and impartially execute and discharge the duty of port warden for the port of Wilmington, by duly appraising and estimating the damage sustained on any vessel or goods arriving in or stranded within the bounds of said port, and will make a true and fair estimate and report of and regarding the seaworthiness of any vessel by me surveyed. (Rev., s. 4959; 1889, c. 437; 1905, c. 321; C. S. 6961.)

§ 76-20. Port wardens of Wilmington; duties; fees.—The port wardens of Wilmington shall, on request made by the master, owner, freighter, or supercargo of any vessel arriving in said port, or stranded within the bounds thereof, survey and make report of her situation and condition, and the causes thereof, and whether she should be repaired or condemned; inspect the conditions of vessels which may arrive in distress or may have suffered by gales of wind or otherwise at sea; the situation and condition of goods, wares, and merchandise which may arrive in said vessels or may have received damage at sea, and report thereon and the probable causes thereof; inspect the storage of cargoes of vessels arriving as aforesaid, or having received damage as aforesaid, before the same shall be discharged, except where vessels may be stranded, in which cases their cargoes may be inspected after the same are removed, and report thereon, whether faulty or not, in which report shall be stated the probable cause of the damage; make surveys of goods, wares, and merchandise, and the cargoes of vessels damaged as aforesaid, and make and report estimates of the amount of the damage sustained as aforesaid; and make and report, if required, surveys of vessels outward bound, and report whether they are seaworthy or not, and fit for the voyage intended. All goods which shall be sold by reason of their having received damage as aforesaid, and shall have been surveyed or inspected by the said port wardens, shall be sold under their inspection and direction; and the said port wardens shall respectively receive for their services: For a survey at the town of Wilmington, the sum of ten dollars; for a survey at the Flats, the sum of twelve dollars; and for a survey at Fort Johnson, the sum of fifteen dollars, to be paid by the party at whose request the same is made, and recovered before any court of competent jurisdiction. (Rev., s. 4960; 1889, c. 437, ss. 2, 3; C. S. 6962.)

§ 76-21. Repairing boats in street docks at Wilmington forbidden. — If any person shall, for the purpose of repair, put any flat, steamboat, or other craft, in any of the street docks of the city of Wilmington, or shall, for the purpose of repair, ground any such flat, steamboat, or other craft in any of the public docks of such city on the east side of the Cape Fear river between Church street dock and Red Cross street dock, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3554; 1903, c. 662, s. 2; C. S. 6963.)

§ 76-22. Obstructing docks by flats and barges at Wilmington forbidden.—The owner of any rafts, flats, vessels, or other craft lying alongside any wharf or wharves or before the entrance of any public dock, his or their agents or servants, shall, upon notice from the harbor master, immediately remove the same, and upon his or their refusal so to do, it shall be the duty of the harbor master, and he is hereby authorized and directed, after notice as aforesaid to the owner or owners thereof, their agents or servants, forthwith to cause all such rafts, flats, vessels, or other craft to be removed at the cost and expense of such owner or owners or their agent or agents, and the owner shall be guilty of a misdemeanor (Rev., s. 3549; 1903, c. 662, s. 3; C. S. 6964.)

§ 76-23. Obstructing harbor master of Wilmington forbidden. — If any person shall hinder, delay, obstruct, or in any manner wilfully interfere with the harbor master of Wilmington in the discharge of his duty he shall be guilty of a misdemeanor, and be fined not more than fifty dollars or imprisoned not more than thirty days. (Rev., s. 3552; 1903, c. 662, s. 8; C. S. 6965.)

§ 76-24. Encumbering docks at Wilmington forbidden.—If any person shall encumber any of the public docks of the city of Wilmington with logs, hulks, flats, or barges, trash or garbage, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined ten dollars, and if the encumbrance be not removed immediately upon notice from the harbor master, he shall be fined ten dollars for each and every day thereafter such nuisance shall remain. (Rev., s. 3547; 1903, c. 662, s. 9; C. S. 6966.)

Art. 2. Beaufort Harbor.

§ 76-25. Commissioners of navigation; election. — The commissioners of navigation for Old Topsail inlet and Beaufort harbor shall be composed of three persons, to be elected as follows: The board of commissioners of Carteret county shall elect one, the commissioners of the town of Beaufort shall elect one, and the commissioners of the town of Morehead City shall elect one. They shall be elected at the regular meeting of such boards in June, one thousand nine hundred and five, and every two years thereafter, and shall qualify by taking the oath required by law before the clerk of the superior court or some justice of the peace of Carteret county, and enter upon the discharge of their duties on the first Monday in July following their election. (Rev., s. 4964; 1899, c. 9, ss. 1, 2; C. S. 6967.)

§ 76-26. Authority of commissioners. — They shall have authority in all matters that may concern the navigation of the harbor, Old Topsail inlet, and all the waters of the sound and rivers within ten miles of the town of Beaufort, and in the construction of wharves, and when there is no harbor master, the commissioners aforesaid shall decide all disputes about the moving of vessels and other matters which properly fall within the department of harbor master. (Rev., s. 4965; Code, s. 3528; 1868-9, c. 208, s. 3; C. S. 6968.)

§ 76-27. Harbor master for Beaufort. — The said commissioners immediately after their election shall appoint a harbor master for the port of Beaufort, who shall hold his office for the

term of one year, unless sooner removed by the commissioners for neglect of duty. He shall be entitled to receive of the master of each vessel that shall enter said port, and for other services, such fees as the commissioners may prescribe. (Rev., s. 4966; Code, s. 3529; 1868-9, c. 208, s. 4; C. S. 6969.)

§ 76-28. Pilots; how appointed and licensed. — Such commissioners shall elect the pilots for said inlet and harbor, and may make such rules and regulations for their government as the commissioners may deem right and proper, not inconsistent with the constitution and laws of this state or of the United States: Provided, that all persons who may be licensed as pilots shall have had at least two years practical experience as apprentices under some regular licensed pilot of Beaufort Harbor and Old Topsail Inlet, and shall secure two pilots in good standing to endorse in writing each application for license. Application for pilot licenses or branches shall be made to the commissioners in writing, giving the name, age, and occupation of applicants for two years next preceding the date of application. The commissioners shall examine all applicants for pilot's licenses, and may also examine other persons as to qualification of applicants to perform the duties of pilot, and may in their discretion reject any applicant whom they may deem incompetent. (Rev., s. 4967; 1899, c. 9, ss. 3, 4, 5; 1921, c. 74, s. 6; C. S. 6970.)

§ 76-29. Fees for issuing pilot's license. — The said commissioners shall give to every pilot elected by them a license or branch under their hands and seals, which shall be and remain in force for one year unless, for good cause to said commissioners appearing, the same shall be sooner revoked by them. They shall charge for each license or branch, fifteen dollars, which they may retain for their expenses and services. (Rev., s. 4968; 1899, c. 9, s. 6; 1921, c. 74, s. 5; C. S. 6971.)

§ 76-30. Expiration of pilot's license; reinstatement.—Each pilot shall forfeit his branch after fifteen days expiration of the same; however, such pilot may be reinstated by securing two pilots in good standing to sign his branch. (1915, c. 142, s. 3; C. S. 6972.)

§ 76-31. Pilot boats to be numbered. — Each and every pilot vessel in Carteret county shall be numbered; and any pilot piloting a vessel or barge in or out of the territory as set out in this article, without a number, shall be guilty of a misdemeanor and be subject to a fine of not more than fifty dollars or imprisoned not more than thirty days, or both, in the discretion of the court. The commissioners of navigation of Beaufort harbor shall make provision for numbering of pilot vessels as required by this section. All said fines collected under this article to be applied to the public school fund of Carteret County (1915, c. 142, ss. 2, 3; C. S. 6973.)

§ 76-32. Rates of pilotage. — The pilotage for Old Topsail inlet and Beaufort harbor shall be as follows: For vessels drawing eight feet and under, two dollars and fifty cents per foot; ten feet and over eight, three dollars per foot; twelve feet and over ten, four dollars per foot; all over twelve feet, four dollars and fifty cents per foot. The above fees to be collectible in Beaufort harbor from Middle marsh to Lewis thoroughfare, and from the Neuse river side of the inland waterway through the said waterway and out of Beaufort inlet. For every vessel piloted without these bounds an additional charge of fifty cents per foot may be charged. The commissioners shall have the rates of pilotage printed or written on every license or branch issued by them, and every pilot shall exhibit his license to the master of every vessel he has in charge, when demanded by said master. The rates of pilotage as set out in this section shall apply to all vessels entering or leaving "Old Topsail Inlet" and "Beaufort Harbor." (Rev., s. 4969; 1899, c. 9, ss. 7, 8; 1901, c. 639; 1909, c. 250, s. 1; 1915, c. 142, s. 1; 1921, c. 74, ss. 1-3; C. S. 6974.)

§ 76-33. Vessels required to take pilots.—All vessels, coastwise or foreign, over sixty gross tons shall take a state-licensed pilot from sea to Pier One, Morehead City, North Carolina, and from Pier One, Morehead City, North Carolina, to sea, and the rates of pilotage shall be the rates as are set out in § 76-32. (1921, c. 74, s. 4; C. S. 6974(a).)

§ 76-34. Vessel under sixty tons not liable for pilotage.—No pilot, acting under the authority of the commissioners of navigation for Old Topsail inlet, shall be entitled to pilotage for any vessel under sixty tons burden, unless such vessel shall have given a signal for a pilot, or otherwise shall have required the assistance of a pilot. (Rev., s. 4970; Code, s. 3523; R. C., c. 85, s. 33; 1801, c. 600, s. 3; 1806, c. 711, s. 1; C. S. 6975.)

Art. 3. Bogue Inlet.

§ 76-35. Commissioners of navigation for Bogue inlet.—The board of commissioners of the county of Onslow shall appoint five commissioners of navigation for Bogue inlet and its waters. When vacancies occur in said board, by refusal to act, by resignation, or otherwise, the remaining members of such board shall fill the same until the same be supplied by the appointing board, which is directed to be done at the first meeting after the vacancy occurs. And the said board shall have the same powers and authority as to pilots and pilotage as the commissioners for Old Topsail inlet and Beaufort harbor. (Rev., s. 4971; Code, s. 3515; R. C., c. 85, s. 25; 1783, c. 194; 1784, c. 208, s. 2; 1879, c. 216, s. 4; C. S. 6976.)

§ 76-36. Rates of pilotage.—The branch pilots for Bogue inlet shall be entitled to receive of the commander of such vessel as they may have charge of the following pilotage, namely: For bringing any vessel into the said inlet, drawing less than seven feet, from the outside of the bar to the anchorage before the town, or the customary place in Hill's channel, one dollar per foot; for a vessel drawing more than seven feet, one dollar and fifty cents per foot; and the same fees for pilotage outward as inward. (Rev., s. 4972; Code, s. 3535; 1889, c. 121; C. S. 6977.)

Art. 4. Hatteras and Ocracoke.

§ 76-37. Board of commissioners of navigation; organization; oath; pilots' licenses. — John W. Rolinson, R. R. Quidley, George L. Styron, Wil-

liam Balance, and Charles L. Odine shall constitute a board of commissioners of navigation for the port of Hatteras inlet, of the county of Dare; William E. Howard, Christopher O. Neal, Sr., and Gilbert O. Neal, of the county of Hyde; D. R. Roberts and J. W. Gilgo, of the county of Carteret, shall constitute a board of navigation for the port of Ocracoke inlet, whose duty it shall be to meet at Hatteras and Ocracoke respectively three times in each year, or a majority of the respective board, after giving at least twenty days notice of each meeting, and when any person is desirous of becoming a pilot at Hatteras or Ocracoke inlets, over the Swashes through Pamlico and Albemarle sounds, he shall be examined by said board, and when found competent to take charge of any ship or vessel as a pilot the board shall issue to him a branch and take the bond authorized by law, and no person shall be authorized to act as a bar or swash pilot unless he shall have a branch from said boards. The said boards shall have their offices at Hatteras and Ocracoke respectively, in which shall be filed the bonds of the pilots, and every pilot receiving a branch from said boards shall pay to the board from which he receives such branch two dollars and fifty cents, of which sum the commissioners of Ocracoke who live in Carteret county shall receive ten cents per mile traveling to and from the meeting of said board, and the residue shall be divided between all the members of said board, and the commissioners shall belong to each board respectively. When a vacancy shall occur in either board by death, resignation, or refusal to act, a majority thereof of each board shall appoint some suitable person thereto, whose residence shall be at the same place where the vacancy occured; said commissioners shall keep a regular journal of their proceedings, and before entering on the duties of their office they shall take and subscribe before any justice of the peace of the counties of Dare, Carteret, or Hyde the following oath:

I do solemnly swear that I will truly and faithfully and impartially examine every person who shall apply to me for a branch, to the best of my ability: So help me, God.

The branch shall expire in three years from the date thereof. (Rev., s. 4961; Code, s. 3512; R. C., c. 85, s. 24; 1871-2, c. 134; 1879, c. 216; 1897, c. 211; C. S. 6978.)

§ 76-38. Rates of pilotage.—Branch pilots of Ocracoke or Hatteras shall be entitled to receive of the commander of such vessel as they may have in charge the following pilotage, namely: For every vessel of sixty and not over one hundred and forty tons burden, from the other side of the bar, at any place within the limits of the pilot ground, to Beacon Island road, or Wallace's channel, ten cents for each ton, and the further sum of two and a half cents for each ton over one hundred and forty, and two dollars for each vessel over either of the swashes (that is, over said swashes either to or from Beacon Island road, or Wallace's channel, or over any shoal lying intermediate between either of said swashes and Beacon Island road or Wallace's channel); for every ship or vessel from the mouth of the swash to either of the ports of New Bern or Washington, one dollar per foot, and for every ship or vessel from the same place to the port of Edenton, twelve dollars; and to the port of Elizabeth City, ten dollars; and the same allowance down as up, and outward as inward. (Rev., s. 4962; Code, s. 3524; R. C., c. 85, s. 34; 1794, c. 426; 1806, c. 711; 1846, c. 49, ss. 1, 2, 3; C. S. 6979.)

§ 76-39. Who may be pilots for Hatteras or Ocracoke inlet.—The said boards shall not issue or grant any branch to pilot vessels through Hatteras inlet to any person who does not reside in Hatteras precinct, which precinct extends from Cape Hatteras lighthouse to Hatteras inlet. And the said boards shall not issue or grant a branch to pilot vessels through or over Ocracoke inlet to any person who does not reside upon the island of Ocracoke or in the precinct of Portsmouth. (Rev., s. 4963; Code, s. 3514; 1856-7, c. 29; 1879, c. 216, s. 3; C. S. 6980.)

Art. 5. General Provisions.

§ 76-40. Obstructing navigable waters; removing beacons; penalty; pilot's liability.—If any person shall cast or throw from any vessel, into the navigable water of Carteret or Onslow counties, of Tar or Pamlico rivers, or into the navigable waters of the Cape Fear, or any other river in the state, or into any channel of navigable water elsewhere than in a river, any ballast, stone, shells, earth, trash, or other substance likely to be injurious to the navigation of such waters, rivers, or channel; or if any person shall wilfully pull down any beacon, stake, or other mark, erected or placed by virtue of any by-law, order, or regulation passed or ordained by any commissioners of navigation, he shall be guilty of a misdemeanor and shall forfeit and pay two hundred dollars, to be recovered for the use of the commissioners in whose waters the offense was committed. If any pilot shall knowingly suffer any such unlawful act to be done, and shall not within ten days thereafter give to the said commissioners, or one of them, information thereof, such pilot shall likewise be guilty of a misdemeanor; and, besides the usual punishment of such offense, on conviction, shall be forever incapable of acting as a pilot in the state. (Rev., s. 3560; Code, ss. 3537, 3538; R. C., c. 85, ss. 40, 41; 1833, c. 146; 1784, c. 206, s. 11; R. S., c. 88, ss. 23, 24, 45; 1811, c. 839; 1842, c. 65, s. 4; 1846, c. 60, s. 3; C. S. 6981.)

Cited in State v. Eason, 114 N. C. 787, 796, 19 S. E. 88.

§ 76-41. Obstructing waters of Currituck sound.—It shall be unlawful for any person to obstruct navigation in the waters of Currituck sound and tributaries, and all persons, corporations, companies, or clubs, who have heretofore placed or caused to be placed any hedging across the mouth of a bay, creek, strait, or lead of water in Currituck sound or tributaries, made of iron, wire, or wood or other material, for the purpose of preventing the free passage of boats or vessels of any size or class, or to stop the public use of such bay, creek, strait, or lead of water, are required to forthwith remove the same. Any person, corporation, or club violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars nor less than ten dollars,

or imprisoned not more than thirty days, at the discretion of the court. (Rev., s. 3553; 1897, c. 277; C. S. 6982.)

§ 76-42. Lumbermen to remove obstructions in Albemarle sound. — If any lumberman shall fail to remove all obstructions placed by him in the waters of Albemarle sound and its tributaries, as soon as practicable, after they have ceased to use them for the purpose for which they were placed in said waters, from all places where the water is not less than two feet deep, and also from all landing places on both sides, for the space of sixty feet from the shore outward, he shall be guilty of a misdemeanor, and fined not less than one dollar nor more than fifty dollars, at the discretion of the court. (Rev., s. 3551; Code, s. 3303; 1880, c. 37, ss. 1, 2; C. S. 6983.)

§ 76-43. Anchoring in range of lighthouses.—If the master of any vessel shall anchor on the range line of any range of lights established by the United States lighthouse board, unless such anchorage is unavoidable, he shall be guilty of a misdemeanor, and punished by a fine not to exceed fifty dollars. (Rev., s. 3550; Code, s. 3086; 1883, c. 165, s. 2; C. S. 6984.)

§ 76-44. Vessels on inland waterways exempt from pilot laws; proviso as to steam vessels.—All vessels, barges, schooners, or other craft passing through the inland waterway of this state, when bound to a port or ports in this or any other state, be and the same are hereby exempt from the operations of the pilot laws of North Carolina and are not compelled to take a state licensed pilot: Provided, that steam vessels not having a United States licensed pilot for the waters navigated on board shall be subject to the state pilot laws. (1917, c. 33, s. 2; C. S. 6985.)

Under the Federal Law.—Vessels passing through the inland waterways of the State are exempt from the pilot laws by the State statutes, subject to the proviso of this section; and, under the Federal Statutes, whether a vessel has a gross tonnage of more than fifteen tons should be determined by the method prescribed by the Federal statutes requiring a pilot; and in an action for damages alleged to have been caused by defendant's negligence in a collision, it is reversible error for the trial judge to direct an affirmative answer to the issue of contributory negligence in navigating without a pilot upon plaintiff's assertion that his vessel would carry thirty tons. Harris v. Slater, 187 N. C. 163, 121 S. E. 437.

§ 76-45. Bond of pilot. — Every person, before he obtains a commission or a branch to be a pilot, shall give bond with two sufficient sureties payable to the state of North Carolina, in the sum of five hundred dollars, with condition for the due and faithful discharge of his duties, and the duties of his apprentices; and the body appointing such pilot may, from time to time, and as often as they may deem it necessary, enlarge the penalty of the bond, or require new and additional bonds to be given; and every bond taken of a pilot shall be filed with, and preserved by, the said body appointing such pilot in trust for every person that shall be injured by the neglect or misconduct of such pilot, or his apprentices; who may severally bring suit thereon for the damage by each one sustained. (Rev., s. 307; Code, s. 3487; R. C., c. 85, s. 6; 1784, c. 207, s. 3; C. S. 6986.)

Cross References.—As to pilots' bonds generally, see § 76-8. As to action on official bond, see § 109-34.

§ 76-46. Pilots to have spyglasses.—Every pilot, within such convenient time as the commissioners may direct, who has control over the waters within which he acts, shall furnish himself with a good telescope or spyglass, under the penalty of fifty dollars, to be paid to the commissioners. (Rev., s. 4973; Code, s. 3517; R. C., c. 85, s. 27; 1790, c. 320, s. 3; C. S. 6987.)

§ 76-47. Acting as pilot without license.—If any person shall act as a pilot, who is not qualified and licensed in the manner prescribed in this chapter, he shall be guilty of a misdemeanor and upon conviction shall be fined not more than $50.00 and not less than $25.00, or imprisoned not more than thirty days at the discretion of the court: Provided, that should there be no licensed pilot in attendance, any person may conduct into port any vessel in danger from stress of weather or in a leaky condition. (Rev., s. 4974; Code, s. 3519; R. C., c. 85, s. 29; 1783, c. 194, s. 3; 1784, c. 208, s. 4; 1933, c. 325; C. S. 6988.)

Editor's Note.—Public Laws of 1933, c. 325, struck out the former provision and inserted the present reading in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 76-48. Penalty on pilot neglecting to go to vessel having signal set.—When any pilot shall see any vessel on the coast, having a signal for a pilot, or shall hear a gun of distress fired off the coast, and shall neglect or refuse to go to the assistance of such vessel, such pilot shall forfeit and pay one hundred dollars, to be recovered in the name of the state, one-half to the use of the informer and the other half to the master of the vessel, unless such pilot is then actually in charge of another vessel. (Rev., s. 4975; Code, s. 3521; R. C., c. 85, s. 31; 1784, c. 207, s. 10; 1790, c. 320, s. 2; 1783, c. 194, s. 6; C. S. 6989.)

§ 76-49. Pilots may be removed.—Unless otherwise provided in the first article of this chapter for the Cape Fear river, whenever any pilot appointed, as authorized in this chapter, shall, on trial, be found incompetent, or shall be guilty of improper conduct by intoxication or otherwise, or of any misbehavior in his office, or shall absent himself from the state for a period of six months, the pilot so offending may be removed from his office by the board of commissioners under whose authority he is acting, by a notice to him in writing; and if after such removal he shall attempt to take charge of any vessel, he shall forfeit and pay two hundred dollars for the use of said board. And it shall be the duty of the board to put up a written notice of the removal, in the public places within the port, or publish it in some convenient newspaper. But no pilot for the navigation of Hatteras inlet shall be required to surrender or forfeit his branch by reason of absence from the state for a period of less than six months. (Rev., s. 4976; Code, ss. 3518, 3490; 1869-70, c. 235, s. 7; 1881, c. 261, s. 2; R. C., c. 85, s. 28; R. S., c. 88, ss. 7, 31, 35; 1784, c. 207, s. 4; 1819, c. 1025, s. 4; 1800, c. 565; 1876-7, c. 22; 1881, c. 261, s. 1; C. S. 6990.)

Entitled to Fees Until Removed.—A duly licensed pilot may recover charges for his services, and while his failure to have his boat registered and numbered will cause a forfeiture of his license, the lawful pilotage charges for the service of such boat is recoverable by him until the commissioners of navigation and pilotage have acted thereon and

revoked his license. Davis v. Heide & Co., 161 N. C. 476, 77 S. E. 691.

§ 76-50. Pilots refused, entitled to pay. — If a branch pilot shall go off to any vessel bound in, and offer to pilot her over the bar, the master or commander of such vessel, if he refuses to take such pilot, shall pay to such pilot, if not previously furnished with one, the same sum as is allowed by law for conducting such vessel in, to be recovered before a justice of the peace, if the sum be within his jurisdiction: Provided, that the first pilot, and no other, who shall speak such vessel so bound in shall be entitled to the pay provided for in this section. (Rev., s. 4978; Code, s. 3522; R. C., c. 85, s. 32; 1871-2, c. 117; C. S. 6991.)

§ 76-51. Pay of pilots when detained by vessel. —Every master of a vessel who shall detain a pilot at the time appointed, so that he cannot proceed to sea, though wind and weather should permit, shall pay to such pilot three dollars per day during the time of his actual detention. (Rev., s. 4979; Code, s. 3495; 1858-9, c. 23, s. 7; C. S. 6992.)

§ 76-52. Rates of pilotage annexed to commission.—The commissioners of navigation for the several ports of this state shall annex to the branch or commission, by them given to each pilot, a copy of the fees to which such pilot is entitled. (Rev., s. 4980; Code, ss. 3497, 3536; R. C., c. 85, ss. 9, 38; 1784, c. 208, s. 4; 1796, c. 470, s. 5; C. S. 6993.)

§ 76-53. Harbor masters; how appointed.—The several boards of commissioners of navigation may appoint a harbor master for their respective ports. They shall appoint a clerk to keep books, in which shall be recorded all their proceedings. (Rev., s. 4981; Code, s. 3525; R. C., c. 85, s. 35; C. S. 6994.)

§ 76-54. Commissioners of navigation may hold another office.—A commissioner of navigation and pilotage shall be deemed a commissioner for a special purpose within the meaning of section seven of article fourteen of the constitution of North Carolina, so as not to be prohibited from holding at the same time with his commissionership another office under the national or state governments. (Ex. Sess. 1913, c. 76; C. S. 6995.)

§ 76-55. Commissioners of navigation to designate place for trash.—The several boards of commissioners established by this chapter may, subject to such regulations as the United States may make, designate the places whereat, within the waters under their several and respective control, may be cast and thrown ballast, trash, stone, and like matter. (Rev., s. 4982; Code, s. 3537; R. C., c. 85, s. 40; R. S., c. 88, ss. 23, 24, 45; 1833, c. 146, ss. 1, 2, 3; 1846, c. 60, s. 3; C. S. 6996.)

Cited in State v. Eason, 114 N. C. 787, 796, 19 S. E. 88.

§ 76-56. Harbor master; how appointed where no board of navigation.—Where no board of navigation exists the governing body of any incorporated town, situated on any navigable water course, shall have power to appoint a harbor master for the port, who shall have the same power and authority in their respective ports as the harbor master of Wilmington is by this chapter given for that port, and shall receive like fees and no others. (Rev., s. 4983; C. S. 6997.)

§ 76-57. Rafts to exercise care in passing buoys, etc., penalty.—If any person having charge of any raft passing any buoy, beacon, or day-mark, shall not exercise due diligence in keeping clear of it, or, if unavoidably fouling it, shall not exercise due diligence in clearing it, without dragging from its position such buoy, beacon, or day-mark, he shall be guilty of a misdemeanor, and punished by fine not to exceed fifty dollars. (Rev., s. 3545; Code, s. 3087; 1883, c. 165, s. 3; C. S. 6998.)

§ 76-58. Interfering with buoys, beacons, and day-marks.—If any person shall moor any kind of vessel, or any raft or any part of a raft, to any buoy, beacon, or day-mark placed in the waters of North Carolina by the authority of the United States lighthouse board, or shall in any manner hang on with any vessel or raft, or part of a raft, to any such buoy, beacon, or day-mark, or shall wilfully remove, damage, or destroy any such buoy, beacon, or day-mark, or shall cut down, remove, damage, or destroy any beacon erected on land in this state by the authority of the said United States lighthouse board, or through unavoidable accident run down, drag from its position, or in any way injure any buoy, beacon, or day-mark, as aforesaid, and shall fail to give notice as soon as practicable of having done so, to the lighthouse inspector of the district in which said buoy, beacon, or day-mark may be located, or to the collector of the port, or, if in charge of a pilot, to the collector of the port from which he comes, he shall for every such offense be guilty of a misdemeanor and shall be punished by a fine not to exceed two hundred dollars, or imprisoned not to exceed three months, or both, at the discretion of the court. (Rev., s. 3546; Code, s. 3085; 1858-9, c. 58, ss. 2, 3; 1883, c. 165, s. 1; C. S. 6999.)

Chapter 77. Rivers and Creeks.

Art. 1. Commissioners for Opening and Clearing Streams.

Art. 2. Obstructions in Streams.

Art. 1. Commissioners for Opening and Clearing Streams.

§ 77-1. County Commissioners to appoint commissioners.—Where any inland river or stream runs through the county, or is a line of their county, the boards of commissioners of the several counties may appoint commissioners to view such river or stream, and make out a scale of the expense of labor with which the opening and clearing thereof will be attended; and if the same is deemed within the ability of the county, and to be expedient, they may appoint and authorize the commissioners to proceed in the most expeditious manner in opening and clearing the same. (Rev., s. 5297; Code, s. 3706; 1887, c. 370; C. S. 7363.)

Cross Reference.—As to building bridges, see §§ 136-68 et seq.

§ 77-2. Flats and appurtenances procured. — The board of county commissioners appointing the commissioners may direct them to purchase or hire a flat with a windlass and the appurtenances necessary to remove loose rock and other things, which may by such means be more easily removed, and allow the same to be paid for out of the county funds. (Rev., s. 5299; Code, s. 3708; R. C., c. 100, s. 3; 1785, c. 242, s. 2; C. S. 7365.)

§ 77-3. Laid off in districts; passage for fish.— The board of county commissioners may appoint commissioners to examine and lay off the rivers and creeks in their county; and where the stream is a boundary between two counties, may lay off the same on their side; in doing so they shall allow three-fourths for the owners of the streams for erecting slopes, dams and stands; and one-fourth part, including the deepest part, they shall leave open for the passage of fish, marking and designating the same in the best manner they can; and if mills are built across such stream, and slopes may be necessary, the commissioners shall lay off such slopes, and determine the length of time they shall be kept open; and such commissioners shall return to their respective boards of county commissioners a plan of such slopes, dams, and other parts of streams viewed and surveyed. (Rev., s. 5301; Code, s. 3710; R. C., c. 100, s. 5; 1787, c. 272, s. 1; C. S. 7367.)

Cross References.—As to obstructing passage of fish in streams, see §§ 113-251, 113-252 and 113-299. As to erecting artificial islands or lumps in public waters, see § 14-133. As to injuries to dams and water channels of mills and factories, see § 14-142. See annotations to § 77-4.

Cited in Hutton v. Webb, 124 N. C. 749, 757, 33 S. E. 169; Gwaltney v. Scottish Carolina Timber, etc., Co., 111 N. C. 447, 550, 566, 16 S. E. 692.

§ 77-4. Gates and slopes on milldams.—The commissioners appointed by the board of county commissioners to examine and lay off the rivers and creeks within the county, or where the stream is a boundary between counties, shall have power to lay off gates, with slopes attached thereto, upon any milldam built across such stream, of such dimensions and construction as shall be sufficient for the convenient passage of floating logs and other timber, in cases where it may be deemed necessary by the said board of county commissioners; and they shall return to the board of county commissioners appointing them a plan of such gates, slopes, and dams in writing. (Rev., s. 5302; Code, s. 3712; 1858-9, c. 26, s. 1; C. S. 7368.)

Only Applicable to Floatable Streams.—It would seem that these sections were passed entirely with reference to floatable streams because without condemnation the Commissioners would have no right to enter upon and clean out beds of streams which were not natural highways. Commissioners v. Catawba Lumber Co., 116 N. C. 731, 744, 21 S. E. 941.

Dams Built under Permit.—Authority over streams, conferred upon county commissioners while it stands and is unimpeached by allegations of fraud or other illegal conduct, is a bar to the remedy by injunction. Therefore, a defendant will not be restrained from erecting a dam across a steam, when he is proceeding under the permit and direction of the commissioners. McLaughlin v. Hope Mfg. Co., 103 N. C. 100, 9 S. E. 307.

Cited in Gwaltney v. Scottish Carolina Timber, etc., Co., 111 N. C. 547, 550, 566, 16 S. E. 692.

§ 77-5. Owner to maintain gate and slope.— Upon the confirmation of the report made by the commissioners, and notice thereof given to the owner or keeper of said mill, it shall be his duty forthwith to construct, and thereafter to keep and maintain, at his expense, such gate and slope, for the use of persons floating logs and other timber as aforesaid, so long as said dam shall be kept up, or until otherwise ordered by the board of county commissioners. (Rev., s. 5303; Code, s. 3713; 1858-9, c. 26, s. 2; C. S. 7369.)

§ 77-6. Gates and slopes discontinued. — The commissioners appointed as aforesaid, at any time that they may deem such gate and slope no longer necessary, may report the fact to their respective boards of county commissioners, and said boards of county commissioners may order the same to be discontinued. (Rev., s. 5304; Code, s. 3714; 1858-9, c. 26, s. 3; C. E. 7370.)

§ 77-7. Failure of owner of dam to keep gates, etc.—If any owner or keeper of a mill, whose dam is across any stream, shall fail to build a gate and slope therein, or thereafter to keep and maintain the same as required by commissioners to lay off rivers and creeks, he shall be guilty of a misdemeanor. (Rev., s. 3383; Code, s. 3715; 1858-9, c. 26, s. 4; C. S. 7371.)

§ 77-8. Repairing breaks. — Wherever any stream of water which is used to propel machinery shall be by freshet or otherwise diverted from its usual channel so as to impair its power as used by any person, such person shall have power to repair the banks of such stream at the place where the break occurs, so as to cause the stream to return to its former channel. (Rev., s. 5305; Code, s. 3716; 1879, c. 53, s. 1; C. S. 7372.)

§ 77-9. Entry upon lands of another to make repairs.—In case the break occurs on the lands of a different person from the one utilizing the stream, the person utilizing the stream shall have power to enter upon the lands of such other person to repair the same, and in case such person objects, the clerk of the superior court of the county in which the break occurs shall, upon application of the party utilizing the stream, appoint three disinterested freeholders, neither of whom shall be related to either party, who after being duly sworn shall lay off a road if necessary by which said person may pass over the lands of such other person to the break and repair said break from time to time as often as may be necessary, so as to cause the stream to

return to its original channel, and assess any damage which may thereby be occasioned: Provided, the party upon whose land the work is proposed to be done shall have five days notice in writing served on him or left at his place of residence: Provided further, that it shall be the duty of said commissioners to assess the damages of any one on whose land the road shall be laid off to be paid by the applicant for said road: Provided, also, that either party shall have the right of appeal to the superior court. (Rev., s. 5306; Code, s. 3717; 1879, c. 53, s. 2; C. S. 7373.)

§ 77-10. Draws in bridges. — Whenever the navigation of any river or creek which, in the strict construction of law, might not be considered a navigable stream, shall be obstructed by any bridge across said stream, it shall be lawful for any person owning any boat plying on said stream to make a draw in such bridge sufficient for the passage of such boat; and the party owning such boat shall construct and maintain such draw at his own expense, and shall use the same in such manner as to delay travel as little as possible. (Rev., s. 5307; Code, s. 3719; 1879, c. 279, ss. 1, 2; C. S. 7374.)

Cited in Staton v. Wimberly, 122 N. C. 107, 29 S. E. 63.

§ 77-11. Public landings.—The board of county commissioners may establish public landings on any navigable stream or watercourse in the county upon petition in writing. Unless it shall appear to the board that the person owning the lands sought to be used for a public landing shall have had twenty days' notice of the intention to file such petition, the same shall be filed in the office of the clerk of the board until the succeeding meeting of the board, and notice thereof shall be posted during the same period at the court house door. At said meeting of the board, the allegations of the petition shall be heard, and if sufficient reason be shown, the board shall order the establishment of the public landing.

The board is authorized to enter upon any land and locate a public landing after service of notice on the landowner that a landing is to be established under the authority of this section. If the board and landowner cannot agree on the damages, if any, the board shall, on the expiration of sixty days from the completion of the landing, cause to be summoned three disinterested freeholders of the county, who shall go upon the land and assess the damages and benefits according to the general law. All damages assessed shall be a county charge. In assessing damages, the jury shall take into consideration any special benefits accruing to the landowner, and if such benefits exceed the damages, the amount of such excess of benefits shall be assessed against the landowner and constitute a lien on the land adjoining the landing, and shall be collected in the same manner as county taxes. The board shall order how the costs shall be paid.

No suit shall be instituted by a landowner for damages for the location of the landing earlier than sixty days, nor later than six months, after the completion of the landing. Either party may appeal to the Superior Court for the assessment of damages and benefits, where the matter shall be heard de novo by the court and jury. No cost shall be awarded against the county upon appeals when the recovery awarded on appeal is not more favorable to the appellant than the award of the referees. All places heretofore established as public landings shall remain such. (Rev., ss. 2684, 2685, 5308; Code, ss. 2038, 2040, 2982; R. C. c. 60, s. 1; c. 101, ss. 2, 4; 1784, c. 206, s. 4; 1789, c. 303; 1790, c. 331, s. 3; 1793, c. 386; 1813, c. 862, s. 1; 1822, c. 1139, s. 2; 1869, c. 20, s. 8, sub-sec. 29; 1872-3, c. 189, s. 3; 1879, c. 82, s. 9; 1917, c. 284, s. 33; 1919, c. 68; C. S. 3667, 3762, 3763, 7375.)

Art. 2. Obstructions in Streams.

§ 77-12. Obstructing passage of boats.—If any person shall obstruct the free passage of boats along any river or creek, by felling trees, or by any other means whatever, he shall be guilty of a misdemeanor. (Rev., s. 3561; Code, s. 3711; R. C., 100, s. 6; 1796, c. 460, s. 2; C. S. 7376.)

Cross Reference.—See annotations under following section.
Cited in Hutton v. Webb, 124 N. C. 749, 757, 33 S. E. 169.

§ 77-13. Obstructing streams a misdemeanor.—If any person shall wilfully fell any tree, or wilfully put any obstruction, except for the purposes of utilizing water as a motive power, in any branch, creek, or other natural passage for water, whereby the natural flow of water through such passage is lessened or retarded, and whereby the navigation of such stream by any raft or flat may be impeded, delayed, or prevented, the person so offending shall be guilty of a misdemeanor, and fined not to exceed fifty dollars, or imprisoned not to exceed thirty days. Nothing in this section shall prevent the erection of fish-dams or hedges which do not extend across more than two-thirds of the width of any stream where erected, but if extending over more than two-thirds of the width of any stream, the said penalties shall attach. (Rev., s. 3559; Code, s. 1123; 1872-3, c. 107, ss. 1, 2; C. S. 7377.)

Motive Power Defined.—Water used in "sluicing" is not used as a "motive power" within the meaning of this section. The section has obvious reference to the use of the energies of water dammed, as a moving force, and not to the operation of the current in motion. State v. Duplin Canal Co., 91 N. C. 637.

Applicable Only to Navigable Streams.—The word "and" between the words "retarded" and "whereby" replaced "or" by judicial construction. The Supreme Court saying "But it cannot be supposed that an intelligent Legislature meant that every obstruction of a stream, no matter how insignificant, private, or removed from public access or use, shall be indictable and subject the offender to fine and imprisonment." State v. Pool, 74 N. C. 402.

Applicable Though Stream is Private Property.—The bed of a lake or water course may be private property, but if the waters are navigable in their natural state the public have an easement of navigation in them, which easement the owner of the soil cannot obstruct. State v. Narrows Island Club, 100 N. C. 477, 5 S. E. 411.

When Malice Must Be Shown. — In an action wherein actual damages were claimed, with punitive damages, for damming a navigable stream, made a misdemeanor by this section, it was held that to recover punitive damages it was insufficient to show merely that the stream was obstructed to plaintiff's damage, it being necessary to prove, in such cases, malice, fraud, wanton or willful disregard of the plaintiff's rights, or other circumstances of recklessness or aggravation. Warren v. Coharie Lumber Co., 154 N. C. 34, 69 S. E. 685.

Indictment. — The indictment under this section must charge that the obstruction was not "for the purpose of utilizing." Such a charge is not necessary in an indictment for obstructing waters, at common law. State v. Narrows Island Club, 100 N. C. 477, 5 S. E. 411.

Same—Compared with Common Law Rule.—At common law it was an offense to obstruct any navigable stream, but

by this section, unless the act is willful and not for the purpose of utilizing the water as a motive power the offense is not indictable. State v. Narrows Island Club, 100 N. C. 477, 5 S. E. 411; State v. Baum, 128 N. C. 600, 38 S. E. 900.

Railroad Bridges.—A railroad bridge built over a navigable stream if obstructing passage of vessels is a nuisance, and tearing a portion of it down so that vessels may pass is not indictable. State v. Parrott, 71 N. C. 311.

Cited in Gwaltney v. Scottish Carolina Timber, etc., Co., 111 N. C. 547, 550, 571, 16 S. E. 692.

Chapter 78. Securities Law.

§ 78-1. Title.—This chapter may be cited and shall be known as the "Securities Law" of the State of North Carolina. (1925, c. 190, s. 1; 1927, c. 149, s. 1; 1943, c. 104, s. 1.)

I. GENERALLY.

Editor's Note.—An article discussing the history of blue sky laws and summarizing the various statutes will be found in 3 N. C. Law Rev. 150 et seq. The North Carolina cases are also discussed.

The Act of 1927 repealed the law of 1925 and substituted the following provisions therefor. See Durham Citizens Hotel Corp. v. Dennis, 195 N. C. 420, 422, 142 S. E. 578.

The 1943 amendment substituted the words "Securities Law" for the words "Capital Issues Law."

The annotations set forth here include cases decided under the present statutes—placed under the analysis line "I. Generally."—and cases decided under §§ 6363 to 6375, Consolidated Statutes, prior to their repeal by Public Laws 1925, c. 190 and Public Laws 1927, c. 149, s. 26—placed under appropriate analysis lines. Said §§ 6363 to 6375 pertained to similar subject matter and it is believed the decisions construing those provisions will be of value in considering the present chapter.

This Regulation Is within Police Power.—The regulation of the sale of securities for the protection of the public is within the police power of the state. State v. Allen, 216 N. C. 621, 5 S. E. (2d) 844.

Application of Chapter.—This chapter applies where money is invested in stock, securities, profit-sharing agreements, etc., with the purpose of securing an income from the employment of the money, and a contract whereby the owner of a copyright system gives the exclusive right to another to operate the system in certain counties, and in return is to receive a percentage of the gross receipts from the operation of the system, with further provision for a division of net profits from sales or contracts written by either party, does not contemplate the placing of money in a way to secure an income from its employment, but the earning of a portion of the gross receipts in return for individual services, and the agreement is not a profit-sharing scheme or investment contract within the intent and meaning of the statute. State v. Heath, 199 N. C. 135, 153 S. E. 855.

II. NOTE TO SECTION 6363, CONSOLIDATED STATUTES.

Constitutionality.—It is within the police powers of a state to pass a statute for the protection of its citizens against the sale to them of worthless shares of stock in speculative companies in the exercise of a reserved power in the state from that granted to the general government, and does not contravene either the State or Federal Constitution. State v. Fidelity, etc., Co., 191 N. C. 634, 132 S. E. 792.

The purpose is to protect the general public from "wild cat" organizers, promoters and their agents, whether foreign or domestic, preying upon an unsuspecting and confiding public by selling "blue-sky stock," without obtaining license and giving bond. Id.

"The laws of Massachusetts on the subject have been copied with few exceptions throughout the country. This class of legislation has come to be known as the 'Blue Sky Laws.' The object, of course, of the 'Blue Sky Laws' is not only to keep worthless stock off the market but to make actual values and par values correspond. Thus, if the par value of a share of stock is one hundred dollars, the part of the assets of the corporation represented by a share of stock must be worth one hundred dollars." 1 N. C. Law Rev. 27.

Scope of Section.—It is an "investment company" offering to the public an investment in lands and fig orchards in Georgia. It is also offering the "obligation of said corporation" to cultivate said land, and giving its contract to make title in compliance with certain terms; and, lastly, it is offering for sale, such "evidences of property." Under all three of these provisions it is within the scope of this section. State v. Agey, 171 N. C. 831, 833, 88 S. E. 726.

Limitations of Suit.—Contracts of indemnity against loss, or surety bonds, for the faithful performance of a building contract are regarded in the nature of contracts of insurance coming under the provisions of this section and any conflicting restriction in such contract as to the time of bringing an action to recover damages for the breach of the contract is void. Guilford Lumber Mfg. Co. v. Johnson, 177 N. C. 44, 45, 97 S. E. 732.

Process and Service.—This section does not require service of process upon the insurance commissioner, in cases of bonding companies, although license is issued by the insurance commissioner; service on local agent is sufficient. Pardue v. Absher, 174 N. C. 676, 678, 94 S. E. 414.

Agent's Liability for Violation.—The failure or refusal of the corporation to comply with the requirements of our statutes to obtain license makes the defendant, its agent, guilty of the offense charged. State v. Agey, 171 N. C. 831, 88 S. E. 726.

One who sells certificates of shares of stock in a corporation upon a commission basis without having obtained a license to do so, comes within the inhibition of this statute, though the sale may have been effected by another acting through such solicitor without compensation. Burlington Hotel Corp. v. Bell, 192 N. C. 620, 621, 135 S. E. 616.

Enforcement of Contract.—Where a subscription contract for purchase of shares of stock in a corporation was procured by one who has not obtained a license from the In-

surance Commissioner, the contract is not enforcible against such subscriber. Burlington Hotel Corp. v. Bell, 192 N. C. 620, 621, 135 S. E. 616.

Contracts To Be Executed Out of State.—Where a foreign corporation has issued a bond indemnifying a North Carolina concern against loss under a contract with an agency, located in another State, established to collect moneys, etc., for insurance premiums, which bond was delivered to the agent to be sent to the indemnified here for approval and acceptance, the contract of indemnity is to be construed and enforced in accordance with our own laws. Dixie Fire Ins. Co. v. American Bonding Co., 162 N. C. 384, 385, 78 S. E. 430.

Domestic Corporations.—This section applies to sales of stock in a domestic corporation as well as a foreign one, irrespective of whether the same was either fraudulently procured or falls within the intent and meaning of the "Blue-Sky" law. Burlington Hotel Corp. v. Bell, 192 N. C. 620, 135 S. E. 616.

Notes given for the purchase of shares of stock in a corporation being organized are not void for noncompliance with the provisions of sections 6363 and 6367, when the shares were not put upon the market by agents, or commissions paid to anyone for procuring subscriptions thereto. Burlington Hotel Corporation v. Bell, 192 N. C. 620, 135 S. E. 616, cited and distinguished. Durham Citizens Hotel Corp. v. Dennis, 195 N. C. 420, 142 S. E. 578.

Cited in Hotel Corporation v. Dixon, 196 N. C. 265, 145 S. E. 244.

III. NOTE TO SECTION 6367, CONSOLIDATED STATUTES.

Fraudulent Representations.—If the agent selling the stock represents to the plaintiff that certain parties would devote their time to the business, and that the statute has been complied with, and that the stock would not be sold below a certain price, such representation if false within the knowledge of the defendant constitutes actionable fraud. McNair v. Southern States Finance Co., 191 N. C. 710, 133 S. E. 85.

Knowledge of the Plaintiff.—When plaintiff did not know, and was not in a position to know of the falsity of the representations as made to him the parties will not be considered in pari delicto. McNair v. Southern States Finance Co., 191 N. C. 710, 133 S. E. 85.

Recovery of Damages.—A purchaser of shares of stock may recover damages upon the false representations of the seller that all of the provisions of the Blue-Sky Law, this section, had been complied with, with the burden of proof on the purchaser, the plaintiff in the action, to show his damages arising therefrom. McNair v. Southern Finance Co., 191 N. C. 710, 711, 133 S. E. 85.

Domestic Corporations.—This law was at first applied only to foreign corporations but by chapter 121, Public Laws 1919, it was made to apply as well to domestic corporations. The law appears in toto in 6363-6375, and the provision which in itself is known as the "Blue-Sky" law, is section 6367. 3 N. C. Law Rev. 151.

The requirements of this section as to soliciting the purchase of shares of stock in a certain corporation in accordance with certain conditions, applies by statutory amendment of 1919, not only to corporations formed in other states, but also to domestic corporations. Seminole Phosphate Co. v. Johnson, 188 N. C. 419, 124 S. E. 859. See also Burlington Hotel Corp. v. Bell, 192 N. C. 620, 135 S. E. 616.

Notes Given for Stock.—Where a negotiable note is given for shares of stock in a corporation, solicited in violation of the Blue-Sky Law, the note is voidable against a holder who has acquired it with notice of the illegality or fraud in the procurement of the instrument. Planters Bank, etc., Co. v. Felton, 188 N. C. 384, 124 S. E. 849.

IV. NOTE TO SECTION 6372, CONSOLIDATED STATUTES.

Liability for Principal's Act.—The State has a right to require evidence of good faith, of assets, and of responsibility from nonresident parties offering to sell to our people "investments" or "evidences of property" on contracts. An agent of a company who fails to do this, in defiance of our laws, is properly found guilty. State v. Agey, 171 N. C. 831, 836, 88 S. E. 726.

§ 78-2. Definitions.—

(a) The term "person" shall mean and include a natural person, firm, partnership, association, syndicate, joint-stock company, unincorporated company or organization, trust, incorporated or unincorporated, and any corporation organized under the laws of the District of Columbia, or of any state or territory of the United States, or of any foreign government. As used herein, the term "trust" shall be deemed to include a common law trust, but shall not include a trust created or appointed under or by virtue of a last will and testament or by a court of law or equity.

(b) The term "securities" or "security" shall include any note, stock certificate, stock, treasury stock, bond, debenture, whiskey warehouse receipt, evidence of indebtedness, transferable certificate of interest or participation, certificate of interest in a profit-sharing agreement, any instrument representing any interest or right in or under any oil, gas or mining lease, fee or title, or rights or interests in land from which petroleum or minerals are, or are intended to be produced, certificate of interest in an oil, gas or mining lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in or title to property or profits or any contract or agreement in the promotion of a plan or scheme whereby one party undertakes to purchase the increase or production of the other party from the article or thing sold under the plan or scheme, or whereby one party is to receive the profits arising from the increase or production of the article or thing sold under the plan or scheme, or any other instrument commonly known as security.

(c) The term "sale" shall include any agreement whereby a person transfers or agrees to transfer either the ownership of or an interest in a security. Any security given or delivered with or as a bonus on account of any purchase of securities, or of any other thing shall be deemed to constitute a part of the subject of such purchase and to have been sold for value. "Sale," or "sell" shall also include an attempt to sell, an option of a purchase or sale, a solicitation of a sale, a subscription, or an offer to sell, either directly or by agent, or by a circular letter, advertisement, or otherwise; but nothing herein shall limit or diminish the full meaning of the term "sell" or "sale" as used by or accepted in courts of law or equity: Provided, that a privilege pertaining to a security giving the holder the privilege to convert such security into another security of the same issuer shall not be deemed a sale, or offer to sell, or option of sale of such other security within the meaning of this definition and such privilege shall not be construed as affecting the status of the security to which such privilege pertains with respect to exemption or registration under the provisions of this chapter, but when such privilege of conversion shall be exercised such conversion shall be subject to the limitations hereinafter provided in subsection (8) of § 78-4; and provided further, that the issue or transfer of a right pertaining to a security entitling the holder to subscribe to another security of the same issuer, when such right is issued or transferred with the security to which it pertains, shall not be deemed a sale or offer to sell or option of sale of such other security within the meaning of this definition, and such right shall not be construed as affecting the status of the security to which such right pertains with respect to exemption or registration under the pro-

visions of this chapter; but the sale of such other security upon the exercise of such right shall be subject to the provisions of this chapter.

(d) The term "issuer" shall include every person who proposes to issue or who issues or who has issued or shall hereafter issue any security (sold or to be sold, offered or to be offered for sale).

(e) The term "intangible assets" shall mean and include patents, formulae, good will, promotions, trade brands, franchises, evidences of indebtedness or corporate securities, titles or rights in and to intangible property, and all other like assets.

(f) "Tangible assets" shall mean all assets other intangible assets, as above defined.

(g) "Mortgage" shall be deemed to include a deed of trust to secure a debt. (1925, c. 190, s. 2; 1927, c. 149, s. 2; 1933, c. 432; 1943, c. 104, ss. 2, 3.)

Editor's Note.—The enforcement and administration of this chapter was formerly intrusted both under Public Laws 1925, c. 190, s. 2, and Public Laws 1927, c. 149, s. 2, to a member of the corporation commission to be designated by the governor. With the abolition of the corporation commission and the creation of the office of utilities commissioner, the administration of the chapter was transferred to that officer. See Public Laws 1933, c. 134, s. 8. However, Public Laws 1937, c. 194, provided for the transfer of the powers, duties, functions, and authority of the utilities commissioner with reference to the Capital Issues Law to the secretary of state, who now administers this chapter.

The 1943 amendment inserted in subsection (b) the words "whiskey warehouse receipt." It also inserted in said subsection the words "any instrument representing any interest or right in or under any oil, gas or mining lease, fee or title, or rights or interests in land from which petroleum or minerals are, or are intended to be produced."

Value of Property Does Not Affect Definition as a Security.—In a prosecution for violation of the Capital Issues Law the fact that the property sold is of little value is irrelevant to the question of whether the property is a security as defined by the statute. State v. Allen, 216 N. C. 621, 5 S. E. (2d) 844.

Certificate of Interest in Oil, etc., Lease.—An oil lease which by its terms amounted to a conveyance of real estate is not a certificate of interest in an oil, gas or mining lease or any other security as that term is defined in this section. State v. Allen, 216 N. C. 621, 5 S. E. (2d) 844.

§ 78-3. Exempted securities.—Except as hereinafter provided, the provisions of this chapter shall not apply to any security which, at the time of sale thereof, is within any of the following classes of securities:

(a) Any security issued or guaranteed by the United States or by any territory or insular possession thereof, or by the District of Columbia, or by any state or municipal corporation or political subdivision or agency thereof.

(b) Any security issued or guaranteed by any foreign government, or by any state, province or political subdivision thereof, having the power of taxation or assessment, with which the United States is maintaining diplomatic relations and which security is recognized at the time it is offered for sale in this State as a valid obligation for its face value by such foreign government, or by the State, province or political subdivision thereof issuing same.

(c) Any security issued by a national bank, or by any Federal Land Bank, or joint-stock land bank, or national farm loan association under the provisions of the Federal Farm Loan Act of July seventeen, nineteen hundred and sixteen, or any amendments thereof, or by the War Finance Corporation, or by any corporation created or acting as an instrumentality of the government of the United States pursuant to authority granted by the Congress of the United States, provided, that such corporation is subject to supervision or regulation by the government of the United States.

(d) Any security issued or guaranteed as to principal, interest or dividend, by a corporation, domestic, or foreign, owning or operating a railroad, or any other public service utility: Provided, that such corporation is subject to regulation or supervision, either as to its rates and charges or as to the issue of its own securities by a public commission, board or officer, or by any governmental, legislative or regulatory body of this State, or of the United States, or of any State, territory or insular possession thereof, or of the District of Columbia, or of the Dominion of Canada, or any province thereof; also equipment securities based on chattel mortgages, leases or agreements for conditional sale of cars, motive power or other rolling stock or equipment mortgaged, leased or sold to or furnished for the use of or upon a railroad or other public service utility corporation, or equipment securities where the ownership or title of such equipment is pledged or retained in accordance with the provisions of the laws of the United States, or of any State, or of the Dominion of Canada, to secure the payment of such equipment securities; also bonds, notes or other evidences of indebtedness issued by a holding corporation and secured by collateral consisting of any of the securities herein above in this clause (d) described: Provided, that such collateral securities equal in fair value at least one hundred and twenty-five (125%) per cent of the par value of the bonds, notes or other evidences of indebtedness, so secured.

(e) Securities appearing in any list of securities dealt in or any organized stock exchange having an established meeting place in a city of over five hundred thousand population according to the last preceding United States census and providing facilities for the use of its members in the purchase and sale of securities listed by such exchange and on which exchange actual transactions have accrued during each of the preceding twenty years in the purchase and sale of United States bonds, or other bonds of any of the classes exempted herein from the provisions of this chapter, and which require financial statements to be submitted at the time of listing and annually thereafter; or on any other recognized and responsible stock exchange which has been previously investigated and approved by the secretary of state and which securities have been so listed pursuant to official authorization by such exchange, and also all securities senior to any securities so listed, or represented by subscription rights which have been so listed; or evidences of indebtedness guaranteed by companies any stock of which is so listed, if the company whose securities are guaranteed is a subsidiary of the guaranteeing company and controlled by lease or ownership of stock, such securities to be exempt only so long as such listing shall remain in effect: Provided, however, that the secretary of state upon 10 days' notice and hearing may at any time withdraw his approval of any such stock exchange; and provided further, that the secretary of state may at any time withdraw his

approval of any security so listed on any stock exchange in a city of five hundred thousand population as above defined, or any other approved stock exchange, and thereafter such security shall not be entitled to the benefit of this exemption, except upon further order of the secretary of state.

(f) Any security issued by, and representing an interest in, or a direct contract obligation of a bank, trust company or savings institution, which bank, trust company or savings institution is incorporated under the laws of, and subject to the examination, supervision and control of the United States, or of any state or territory of the United States, or of any insular possession thereof: Provided, this section shall not apply to any security based upon mortgages on real estate nor to saving institutions and trust companies not approved by the commissioner of banks of the State of North Carolina.

(g) Negotiable promissory notes or commercial paper if such issue of negotiable notes or commercial paper mature in not more than fifteen months from the date of issue and shall be issued within three months after date of sale.

(h) Securities issued by building and loan associations incorporated under the laws of the State of North Carolina.

(i) Securities issued by insurance companies in North Carolina, subject to State supervision.

(j) Securities issued by any corporation organized not for pecuniary profit or organized exclusively for educational, benevolent, fraternal, charitable or reformatory purposes.

(k) Securities evidencing indebtedness due under any contract made in pursuance to the provisions of any statute of any State of the United States providing for the acquisition of personal property under conditional sale contract.

(l) Bonds or notes secured by lien on vessels shown by policies of marine insurance taken out in responsible companies to be of value, after deducting any and all other indebtedness secured by prior lien, of not less than one hundred and twenty-five (125%) per cent of the par amount of such bonds or notes.

(m) Any security other than common stock outstanding and in the hands of the public for a period of not less than five years upon which no default in payment of principal, interest or dividend exists and upon which no such default has occurred for a continuous immediately preceding period of five years.

(n) Any security which, under the laws of this State, is a legal investment for savings banks of trust funds.

(o) Securities issued by a domestic corporation, partnership, association, company, syndicate or trust owning a property, business or industry which has been in continuous operation for not less than three years prior thereto, and which has shown during a period of not less than two years nor more than five years prior to the close of its last fiscal year preceding the offering of such securities average annual net earnings, after deducting all prior charges, not including the charges or prior securities to be retired out of the proceeds of such sale, as follows:

(1) In the case of interest bearing securities, not less than one and one-half times the annual interest charges thereon and upon all other outstanding interest-bearing obligations of equal rank.

(2) In the case of preferred stock not less than one and one-half times the annual dividend requirements on the total of the proposed issue of such preferred stock and on all other outstanding stock of equal rank.

(3) In the case of common stock with par value not less than six per cent upon all outstanding common stock of equal rank, or in the case of common stock without par value, not less than six per cent upon the amount charged to capital by reason of the issuance thereof: Provided, the tangible assets of such corporation, partnership, association, company, syndicate, or trust (not including any intangible assets), together with the proceeds of the sale of such securities accruing to the issuer, shall equal or exceed:

(1) In the case of evidence of indebtedness, one hundred twenty-five per centum of the par value of such evidence of indebtedness, and all other obligations of equal rank then outstanding and not to be retired out of the proceeds of the sale of such evidence of indebtedness.

(2) In the case of preferred stock one hundred twenty-five per centum of the par value of the aggregate amount of all outstanding preferred stock of equal and prior rank and the stock then offered for sale, after the deduction from such assets of all indebtedness which will be existing and of the par value of all stock of senior rank which will be outstanding after the application of the proceeds of the preferred stock offered for sale.

(3) In the case of common stock one hundred per centum of the aggregate of all outstanding stock of equal rank and the stock then offered for sale, reckoned at the price at which such stock is offered for sale or sold after the deduction from such assets of all indebtedness which will be existing and of the par value of all stock of senior rank which will be outstanding after the application of the proceeds of the common stock offered for sale: Provided, however, that in the case of preferred or common stock, without par value, computation hereunder shall be made upon the basis of the amount charged to capital by reason of the issuance thereof, instead of upon the basis of par value. (1925, c. 190, s. 3; 1927, c. 149, s. 3; 1931, c. 243, s. 5.)

See Editor's Note under preceding section.

§ 78-4. Transactions exempted from operation of this chapter.—Except as hereinafter provided, the provisions of this chapter shall not apply to the sale or the offering for sale of any security in any of the following transactions, viz.:

(1) At any judicial, executor's, administrator's, or guardian's sale, or at any sale by a receiver or trustee in insolvency or bankruptcy.

(2) By or for the account of any pledgeholder or mortgagee selling or offering for sale, in the ordinary course of business, to liquidate a bona fide debt, a security pledged in good faith as security for such debt.

(3) In an isolated transaction in which any security is sold or offered for sale by the owner thereof, or by his representative for the owner's account in the usual and ordinary course of business and not for the direct or indirect promotion of any scheme or enterprise within the purview of this chapter, and when such sale or offer for sale

is not made in the course of repeated and successive transactions of a like character by such owner or on his account by the representative of such owner, and neither such owner nor his representative is the maker or issuer or underwriter of such security.

(4) The sale of, or offer to sell such security to any bank, savings institution, trust company, insurance company, or to any corporation.

(5) The distribution by a corporation of capital stock, bonds or other securities to its stockholders or other security holders as a stock dividend or other distribution out of earnings or surplus; or the issue of securities by a corporation to security holders or creditors of such corporation in the process of a bona fide reorganization of such corporation made in good faith either in exchange for either or both the securities of such security holders or claims of such creditors, or partly for cash and partly in exchange for the securities or claims of such security holders or creditors; or the issue of increased capital stock of a corporation sold or distributed by it entirely among its own stockholders, when no commission or other remuneration is paid or given directly or indirectly in connection with the sale or distribution of such increased capital stock.

(6) The transfer or exchange by or on account of one corporation to another corporation or to its stockholders of their or its own securities in connection with a proposed consolidation or merger of such corporations, or in connection with the change of par value of stock to non par value stock or the exchange of outstanding shares for a greater or smaller number of shares; the transfer or exchange by or on the account of one corporation of its own securities to the holders of the securities of another corporation, partnership, trust, person, firm or association, in any plan of distribution or exchange providing for the assumption or acquisition by the issuing corporation of the securities for which its own securities are issued or are to be issued, where the plan of distribution or exchange is contained in a registration statement which has been filed for more than twenty days with the securities and exchange commission of the United States government or like agency of the United States government, charged with the registration of securities.

(7) Subscriptions for shares or sales or negotiations for sales of shares of the capital stock in domestic corporations, when no expense is incurred, and no commission, compensation or remuneration is paid or given for, or in connection with, the sale or disposition of such securities.

(8) The issue and delivery of any security in exchange for any other security of the same issuer pursuant to a right of conversion entitling the holder of the security exchanged to make such conversion: Provided, that the security exchanged has been registered by notification under the law or was when sold exempt from the provisions of the law and that the security received in exchange if sold at the conversion price would at the time of such conversion fall within the class of securities entitled to registration by notification under the law. Upon such conversion the par value of the security surrendered in such exchange shall be deemed the price at which the securities received in such exchange are sold.

(9) Subscriptions for shares of the capital stock of a corporation prior to the incorporation thereof, when no expense is incurred, and no commission, compensation or remuneration is paid or given for, or in connection with, the sale or disposition of such securities.

(10) The sale of securities to a registered dealer.

(11) Bonds or notes secured by mortgage upon real estate where the entire mortgage together with all of the bonds or notes secured thereby are sold to a single purchaser at a single sale. (1925, c. 190, s. 4; 1927, c. 149, s. 4; 1935, cc. 90, 154.)

Editor's Note.—The amendment of 1935 added the second sentence of subsection 6 of this section.

§ 78-5. Burden of proof as to such transactions.—It shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment or proceeding laid or brought under this chapter in either a court of law or equity, or before the secretary of state, in either a civil or a criminal action or suit. The sale, unless the transaction is exempted from the operation of this chapter, of any security not exempt from the provisions of this chapter as hereinbefore provided and not admitted to the record and recorded as hereinafter provided, shall be prima facie evidence of the violation of this chapter and the burden of proof of any such exemption shall be upon the party claiming the benefit thereof. (1925, c. 190, s. 5; 1927, c. 149, s. 5.)

§ 78-6. Registration of securities.—No securities except of a class exempt under any of the provisions of § 78-3 or unless sold in any transaction exempt under any of the provisions of § 78-4 shall be sold within this State unless such securities shall have been registered by notification or by qualification as hereinafter defined. Registration of stock shall be deemed to include the registration of rights to subscribe to such stock if the notice under § 78-7 or the application under § 78-8 for registration of such stock includes a statement that such rights are to be issued. (1925, c. 190, s. 6; 1927, c. 149, s. 6.)

§ 78-7. Advertisement of securities.—It shall be unlawful hereafter:

(1) To advertise in this State, through or by means of any prospectus, circular, price list, letter, order blank, newspaper, periodical or otherwise, or

(2) To circulate or publish any newspaper, periodical or either written or printed matter in which any advertisement in this section specified shall appear, or

(3) To circulate any prospectus, price list, order blanks, or other matter for the purpose of inducing or securing any subscriptions to or sale of any security or securities not exempted under any of the provisions of § 78-3, and not sold or to be sold in one of the transactions exempted under the provisions of § 78-4 and except as provided in § 78-8, unless and until the requirements of § 78-6 have been fully complied with and such advertising matter has been filed and approved by the secretary of state. (1925, c. 190, s. 7; 1927, c. 149, s. 7.)

§ 78-8. Registration by notification.—The following classes of securities shall be entitled to registration by notification in the manner provided in this section:

(1) Securities issued by a corporation, partnership, association, company, syndicate or trust owning a property, business or industry which has been in continuous operation not less than three years, and which has shown during a period of not less than two years, nor more than five years, next prior to the close of its last fiscal year preceding the offering of such securities, average annual net earnings, after deducting all prior charges not including the charges upon securities to be retired out of the proceeds of sale, as follows:

(a) In the case of interest bearing securities, not less than one and one-half times the annual interest charge thereon and upon all other outstanding interest bearing obligations of equal rank.

(b) In the case of preferred stock, not less than one and one-half times the annual dividend requirements on such preferred stock and on all other outstanding stock of equal rank.

(c) In the case of common stock not less than five per centum upon all outstanding common stock of equal rank, together with the amount of common stock then offered for sale reckoned upon the price at which such stock is then offered for sale or sold. The ownership by a corporation, partnership, association, company, syndicate or trust or more than 50 per cent of the outstanding voting stock of a corporation shall be construed as the proportionate ownership of the property, business or industry of such corporation, and shall permit the inclusion of the earnings of such corporation, applicable to the payment of dividends upon the stock so owned in the earnings of the corporation, partnership, association, company, syndicate, or trust issuing the securities sought to be registered by notification.

(2) Any bond or notes secured by a first mortgage upon agricultural lands used and valuable for agricultural purposes (not including oil, gas or mining property or leases), or upon city, town or village real estate situated in any State or territory of the United States or in the District of Columbia or in the Dominion of Canada as follows:

(a) When the mortgage is a first mortgage upon such agricultural lands, used and valuable for agricultural purposes, and when the aggregate face value of such bonds or notes, not including interest notes, or coupons secured thereby, does not exceed 60 per centum of the then fair market value of said lands plus 60 per centum of the insured value of any improvements thereon; or,

(b) When the mortgage is a first mortgage upon city, town or village real estate and when the aggregate face value of such bonds or notes, not including interest notes or coupons, secured by such real estate or leaseholds does not exceed 60 per centum of the then fair market value of said mortgaged real estate or leaseholds, respectively, including any improvements appurtenant thereto, and when said mortgaged property is used principally to produce through rental a net annual income, after deducting operating expenses and taxes, or has a fair rental value, after deducting operating expenses and taxes, at least equal to the annual interest, plus not less than 3 per centum of the principal of said mortgage indebtedness.

(3) Bonds or notes secured by first lien on collateral pledged as security for such bonds or notes with a bank or trust company as trustee, which bank or trust company is incorporated under the laws of and subject to examination and supervision by the United States or by a state of the United States, which collateral shall consist of (a) a principal amount of first mortgage bonds or notes conforming to the requirements of any one or more of the provisions of subsection (2) of this section and/or (b) a principal amount of obligations secured as hereinafter in this subsection provided, and/or (c) a principal amount of obligations of the United States, and/or (d) cash, equal to not less than 100 per cent of the aggregate principal amount of all bonds or notes secured thereby. The portion of such collateral referred to in clause (b) shall consist of obligations secured by a first lien on a principal amount of first mortgage bonds or notes conforming to the requirements of subsection (2) of this section, and/or a principal amount of obligations of the United States and/or cash equal to not less than 100 per cent of the aggregate principal amount of such obligations so secured thereby, and all such pledged securities including cash so securing such obligations shall have been deposited with a bank or trust company as trustee, which bank or trust company is incorporated under the laws of and subject to examination and supervision by the United States or by a state of the United States.

Securities entitled to registration by notification shall be registered by the filing by the issuer or by any registered dealer interested in the sale thereof in the office of the secretary of state of a statement with respect to such securities containing the following:

(a) Name of issuer.

(b) A brief description of the security including amount of the issue.

(c) Amount of securities to be offered in the State.

(d) A brief statement of the facts which show that the security falls within one of the classes in this section defined.

(e) The price at which the securities are to be offered for sale.

In the case of securities falling within the class defined by subsection (1), if the circular to be used for the public offering is not filed with the statement, then a copy of such circular shall be filed in the office of the secretary of state within two days thereafter, or within such further time as the secretary of state shall allow.

In the case of securities falling within the classes defined by subsections (2) and (3) the circular to be used for the public offering shall be filed with the statement.

The filing of such statement in the office of the secretary of state and the payment of the fee hereinafter provided shall constitute the registration of such security. Upon such registration, such securities equal to the amount so registered by notification may be sold in this State by any registered dealer by giving notice in the manner hereinafter provided in § 78-19, subject, however, to the further order of the secretary of state as hereinafter provided.

If, at any time, in the opinion of the secretary of state, the information contained in the statement or circular filed is misleading, incorrect, inadequate, or incomplete, or the sale or offering for sale of the security may work or tend to work a fraud or, in the opinion of the secretary of state, be contrary to good business practices, the secretary of state may require from the person filing such statement such further information as may, in his judgment, be necessary to establish the classification of such security as claimed in said statement, or to enable the secretary of state to ascertain whether the sale of such security would be fraudulent, or would result in fraud, and the secretary of state may also suspend the right to sell such security pending further investigation by entering an order specifying the grounds for such action, and by notifying personally by mail, telephone or telegraph the person filing such statement and every registered dealer who shall have notified the secretary of state of an intention to sell such security. The refusal to furnish information required by the secretary of state, within a reasonable time to be fixed by the secretary of state, may be a proper ground for the entry of such order of suspension. Upon the entry of any such order of suspension no further sales of such security shall be made until the further order of the secretary of state, unless the person to be affected by such order shall file with the secretary of state a bond in a penalty to be fixed by him in some solvent surety company licensed in the State of North Carolina, to pay all such damages as might be sustained by any purchaser of such security, which bond shall be made payable to the State of North Carolina and sued upon by any person damaged by such sale.

In the event of the entry of such order of suspension the secretary of state shall upon request give a prompt hearing to the parties interested. If no hearing is requested within a period of twenty (20) days from the entry of such order, or if upon such hearing the secretary of state shall determine that any such security does not fall within a class entitled to registration under this section, or that the sale thereof would be fraudulent or would result in fraud or the continued sale of the same, is in his opinion contrary to good business practices, he shall enter a final order prohibiting sales of such security, with his findings with respect thereto: Provided, that if the finding with respect to such security is that it is not entitled to registration under this section, the applicant may apply for registration by qualification by complying with the requirements of § 78-9. Appeals from such final order may be taken as hereinafter provided. If, however, upon such hearing, the secretary of state shall find that the security is entitled to registration under this section, and that its sale will neither be fraudulent nor result in fraud, or that the continued sale thereof is not contrary to good business practices, he shall forthwith enter an order revoking such order of suspension and such security shall be restored to its status as a security registered under this section, as of the date of such order of suspension.

At the time of filing the statement, as hereinbefore prescribed in this section, the applicant shall pay to the secretary of state a filing fee of ten dollars and a fee of one-twentieth of one per cent of the aggregate par value of the securities to be sold in this State for which the applicant is seeking registration, but in no case shall such latter fee be less than twenty-five dollars, and not exceeding one hundred and fifty dollars. In the case of stock having no par value, the price at which such stock is to be offered to the public, shall be deemed to be the par value of such stock. (1927, c. 149, s. 8.)

§ 78-9. Registration by qualification.—All securities required by this chapter to be registered before being sold in this State, and not entitled to registration by notification, shall be registered only by qualification in the manner provided by this section.

The secretary of state shall receive and act upon applications to have securities registered by qualification and may prescribe forms on which he may require such applications to be submitted. Applications shall be in writing and shall be duly signed by the applicant and sworn to by a proper person, and filed in the office of the secretary of state and may be made either by the issuer of the securities for which registration is applied or by any registered dealer desiring to sell the same within this State.

The secretary of state may require the applicant to submit to the secretary of state the following information respecting the issuer and such other information as he may, in his judgment, deem necessary to enable him to ascertain whether such securities shall be registered pursuant to the provisions of this section.

(a) The names and addresses of directors, trustees and officers, if the issuer be a corporation or association or trust organized or existing under the common law (as hereinbefore defined), of all partners, if the issuer be a partnership, and of the issuer if the issuer be an individual.

(b) The location of the issuer's principal business office and of its principal office in this State, if any, and if not, the name of its process officer within this State.

(c) The purposes of incorporation, (if incorporated) and the general character of the business actually to be transacted by the issuer, and the purpose of the proposed issue.

(d) A statement of the capitalization of the issuer; a balance sheet showing the amount and general character of its assets and liabilities on a day not more than sixty (60) days prior to the date of filing such balance sheet; a detailed statement of the plan upon which the issuer proposes to transact business; a copy of the security for the registration of which application is made; and a copy of all circulars, prospectuses, advertisements or other descriptions of such securities then prepared by or for such issuer, and/or by or for such applicant (if the applicant shall not be the issuer) to be used for distribution or publication in this State.

(e) A statement of the amount of the issuer's income, expenses, and fixed charges during the last fiscal year, or if in actual business less than one year, then for such time as the issuer has been in actual business.

(f) A statement showing the price at which such security is proposed to be sold, together with the maximum amount of commission or other form of remuneration to be paid in cash or otherwise, di-

rectly or indirectly, for or in connection with the sale, or offering for sale, of such securities.

(g) A detailed statement showing the items of cash, property, services, patents, good will and any other consideration for which such securities have been or are to be issued in payment.

(h) The amount of capital stock which is to be set aside and disposed of as promotion stock, and a statement of all stock issued from time to time as promotion stock.

(i) If the issuer is a corporation, there shall be filed with the application a certified copy of its articles of incorporation with all amendments and of its existing by-laws, if not already on file in the office of the secretary of state of this State. If the issuer is a trustee there shall be filed with the application a copy of all instruments by which the trust is created or declared and in which it is accepted and acknowledged. If the issuer is a partnership or an unincorporated association, or joint stock company, or any other form of organization whatsoever, there shall be filed with the application a copy of its articles of partnership or association and all other papers pertaining to its organization, if not already on file in the office of the secretary of state of this State.

All of the statements, exhibits, and documents of every kind required by the secretary of state under this section, except properly certified public documents, shall be verified in such manner and form as may be required by the secretary of state.

With respect to securities required to be registered by qualification under the provisions of this section, the secretary of state may by order duly entered fix the maximum amount of commission or other form of remuneration to be paid in cash or otherwise directly or indirectly, for or in connection with the sale or offering for sale of such securities which shall in no case exceed ten per cent of the actual sale price of the security.

At the time of filing the information, as hereinbefore prescribed in this section, the applicant shall pay to the secretary of state a filing fee of twenty-five dollars and, upon the entry of an order for the registration of the securities, shall pay to the secretary of state a fee of one-tenth of one per cent of the aggregate par value of the securities to be sold in this State, for which the applicant is seeking registration, but in no case shall such latter fee be less than twenty-five dollars, and not exceeding two hundred and fifty dollars. In case of stock having no par value the price at which such stock is to be offered to the public shall be deemed to be the par value of such stock. (1927, c. 149, s. 9.)

§ 78-10. Consideration of application by secretary of state.—

(1) As soon as practicable after the filing of an application, under § 78-9, the secretary of state shall examine the application, statements and documents so filed; and if he deems it advisable, may make or cause to be made such inspection, examination, audit and investigation of the business and affairs of the issuer as he may deem necessary or advisable, which said inspection, examinations, audit and investigation, shall be at the expense of the applicant. As a part of the aforesaid inspection, examination, audit and investigation, the secretary of state may, if he deems it necessary or advisable, cause an appraisal to be made of the property or assets of the issuer or parts thereof. Appraisals herein provided for may be made by three disinterested appraisers, and the secretary of state is authorized to nominate and appoint such appraisers, who shall be paid not more than twenty-five dollars per day and their actual expenses while so employed, which compensation and expenses shall be paid by the applicant. The secretary of state may require a bond sufficient to cover the expense of any such inspection, examination, audit or investigation as may be deemed necessary by the secretary of state in connection with the application before, or after the granting of such application for registration.

(2) The secretary of state shall make a complete report of the inspection, investigation, examination, etc., of the business and affairs of the applicant above provided for, which record shall include a copy of the appraisal aforesaid, provided such an appraisal be made. (1925, c. 190, s. 10; 1927, c. 149, s. 10.)

§ 78-11. Hearing before secretary of state.—The secretary of state shall, within fifteen days after the filing of the report of such investigation, give the applicant a hearing, if he so desires.

(1) If the secretary of state shall act favorably upon the application, he shall issue an order, directing that such securities be admitted to record in the register of qualified securities, hereinafter provided for. The secretary of state shall keep a permanent record of all proceedings, findings, judgments and orders. In granting to an applicant the privilege of offering securities to the public in the State of North Carolina the secretary of state may impose such reasonable conditions, either precedent or concurrent thereto, as in his judgment may be necessary or advisable. If the statement containing information as to securities, as provided for in § 78-9, shall disclose that any such securities or any securities senior thereto shall have been or shall be intended to be issued for any patent right, copyright, trademark, process, lease, formulae or good will, or for promotion fees or expenses or for other intangible assets, the amount and nature thereof shall be fully set forth and the secretary of state may require that such securities so issued in payment of such patent right, copyright, trade-mark, process, lease, formulae or good will, or for promotion fees or expenses, or for other intangible assets shall be delivered in escrow to the secretary of state or other depository satisfactory to the secretary of state under an escrow agreement that the owners of such securities shall not be entitled to withdraw such securities from escrow until all other stockholders who have paid for their stock in cash shall have been paid a dividend, or dividends aggregating not less than six per cent for three years, shown to the satisfaction of said secretary of state to have been actually earned on the investment in any common stock so held, and in case of dissolution or insolvency during the time such securities are held in escrow, that the owners of such securities shall not participate in the assets until after the owners of all other securities shall have been paid in full: Provided, that during the period such securities shall be held in escrow, the secretary of state shall have the right to vote such stock in person, or by proxy as he shall deem advisable.

(2) If, however, the secretary of state shall, in any case, believe from all the evidence:

(a) That the sale of such securities would work a fraud, deception or imposition upon the purchaser thereof; or

(b) That the articles of incorporation or association, declaration of trust, charter, constitution, by-laws, or other organization papers of the issuer are unfair, unjust, inequitable, illegal or oppressive; or

(c) That the issuers or guarantors of such securities are insolvent, or are in failing circumstances, or are not trustworthy; or

(d) That the issuer's plan of business is unfair, inequitable, dishonest or fraudulent; or

(e) That the issuer's literature or advertising is misleading or calculated to deceive purchasers or investors; or

(f) That the securities offered or to be offered; issued or to be issued in payment for property or assets, either tangible or intangible, are so in excess of the reasonable value thereof as to indicate fraud or bad faith; or

(g) That the enterprise or business of either the issuers or of the applicant, is unlawful or against public policy; or

(h) That the sale of such securities is a mere scheme of either the issuer or the applicant to dispose of worthless securities of no real intrinsic value, at the expense of the purchasers of said securities; or

(i) That the sale of such securities is contrary to good business practices.

Then the secretary of state shall refuse to admit said securities to record in the register of qualified securities, or if such securities are admitted to record, such action may at any time thereafter be revoked by the secretary of state for any of the reasons set out in this section, subsection two, and it shall thereafter be unlawful to sell such securities in this State or to circulate any advertisement thereof.

In any case the secretary of state either before granting or after granting any application for registration by qualification under § 78-9, shall have the right to require of the applicant a bond, the form whereof shall be prescribed and the surety approved by the secretary of state, penalty whereof shall be fixed by the secretary of state at not more than twenty per centum of the sales price of the securities issued or proposed or authorized to be issued. The said bond shall be with surety and payable to the State of North Carolina, conditioned that the facts set forth in the application for such permit and in all other documents required by this chapter to be filed with the secretary of state are true, and that the provisions of this chapter shall be strictly complied with, and that all moneys from the sale of such securities will be used for the proper purpose or purposes as set forth in the security sold and in the papers filed with the secretary of state; and that the contract of the promoter as set forth in the securities issued will be complied with and also that all statements set forth in all literature or advertising matter used or circulated in connection with the sale, or offer of sale, of such securities shall be the truth; and that the contract of the promoter shall be fulfilled. Except when the surety offered is a surety company authorized to do business in this State, it shall be the duty of the secretary of state to satisfy himself that such surety is amply solvent before accepting the same.

Any person who shall be induced to purchase any securities covered by such bond by reason of any misrepresentation of any material fact concerning such securities, contained in said application or other documents submitted in connection therewith or furnished to the secretary of state, upon its request or any other written or printed matter issued or used by the person making such sale or its, or his, agents in making such sale, or shall have suffered loss by reason of the fact that moneys paid by him to the said seller of such securities or the seller's agent, have not been applied to the proper purpose set forth in the security sold or the papers filed with the secretary of state, or that the seller has failed or refused to comply with his contract, as set forth in the security issued, shall have the right to bring suit upon the bond above provided for, and such bond shall be security for such person for his losses; but such person shall not be entitled to recover more than the money paid, or the actual value of the property given, or the labor performed, in exchange for such securities, with legal interest from the date of payment or the performance of the services or the transfer of property. One or more recoveries upon such bond shall not vitiate the same, but it shall remain in full force and effect, but no recoveries upon such bond shall ever exceed the full amount of same, and upon suits being commenced in excess of the amount of same, the secretary of state may require a new bond, and, if the same is not given within thirty days the secretary of state may revoke the registration herein provided for: Provided, however, that any suit or action instituted under this section shall be commenced within one year from the date of any such sale. During the thirty days after notice to file a new bond, the securities shall not be sold or offered for sale. (1925, c. 190, s. 11; 1927, c. 149, s. 11.)

§ 78-12. No representation to be made of endorsement.—No person, dealer, or agent shall represent any securities sold under the provisions of this chapter as being endorsed or recommended by the state of North Carolina or any officer thereof, nor shall he make any mention whatever of their being recorded or admitted to record in the state of North Carolina. (1925, c. 190, s. 12; 1927, c. 149, s. 12.)

§ 78-13. Register of qualified securities.—The secretary of state shall keep and maintain a permanent register of qualified securities and shall enter therein the names and amounts of all securities the privilege of offering which to the public in the State of North Carolina has been granted by the secretary of state, and the date thereof, and such other data as the secretary of state may deem proper. All securities admitted to record and recorded in such register shall be deemed, for the purpose of this chapter, to have been fully qualified for sale in the State of North Carolina and thereafter any person may lawfully sell or offer for sale any part of such issue as recorded; subject, however, to the provisions of this chapter. Such register shall be open to inspection

by the public. (1925, c. 190, s. 13; 1927, c. 149, s. 13.)

§ 78-14. Report to secretary of state.—Every issuer whose securities have been admitted to record and recorded as herein provided, may be required during the offering of such securities to file within thirty days after the close of business on December thirty-first, March thirty-first, June thirtieth, and September thirtieth, of each year, and at such other times as may be required by the secretary of state, a statement, verified under oath by some person having actual knowledge of the facts therein stated, setting forth, in such form as may be prescribed by the secretary of state, the financial condition, the amount of assets and liabilities, of such issuer on the above dates and such other information as said secretary of state may require. It shall be unlawful for any issuer subject to the provisions of this chapter, who refuses or fails to comply with the provisions of this section, or for his agent or agents, to thereafter sell such securities in this State. (1925, c. 190, s. 14; 1927, c. 149, s. 14.)

§ 78-15. Examination and examiners. — The records and the business affairs of every company or person, whose securities have been admitted to record in the register of qualified securities shall be subject to examination and inspection by the secretary of state or upon his direction by his assistants, accountants, or examiners, at any time said secretary of state may deem it advisable; and such company or person shall pay a fee for each of such examinations of not to exceed twenty-five dollars ($25) for each day or fraction thereof, plus the actual traveling and hotel expenses of said secretary of state, his assistant, accountant or examiner, that he is absent from the capital of the State for the purpose of making such examination. (1925, c. 190, s. 15; 1927, c. 149, s. 15.)

§ 78-16. Complaints, investigations, findings of facts.—The secretary of state may, upon his own initiative or upon the complaint of any reasonable person, hold such public hearings or make or have made such special inspection, examination or investigation as he may deem necessary, in connection with the promotion, sale or disposal in this State of any security or securities, to determine whether the same constitutes a violation of law; and the said secretary of state, his assistant or deputy shall have power and authority:

(1) To issue subpœnas and process compelling the attendance of any person and the production of any paper, records or books relating to any matter of which the secretary of state has jurisdiction under this article, and

(2) To administer an oath to any person whose testimony may be required on such inspection, examination, or investigation. Upon the conclusion of any such hearing, inspection, examination or investigation the secretary of state may make findings of fact concerning the matter or matters investigated. Such findings of facts shall be admissible in evidence in any suit or action, at law or in equity, instituted under any of the laws of this State, and shall be prima facie evidence of the truth of the matters therein found by said secretary of state, and,

(3) To maintain by injunction or other remedy any action in any court of competent jurisdiction in this State for the purpose of enforcing this chapter, or making investigations. (1925, c. 190, s. 16; 1927, c. 149, s. 16.)

§ 78-17. Certain information and records open to inspection by public.—All information received by the secretary of state shall be kept open to public inspection at all reasonable hours, and the secretary of state shall supply to the public upon request copies of any papers on record with the secretary of state at charges equaling the cost of typing same; and the secretary of state shall have power and authority to place in a separate file, not open to the public except on his special order, any information which he deems in justice to the person filing the same should not be made public. An exemplification of the record under the hand of the secretary of state, or of his deputy, shall be good and sufficient evidence of any record made or entered by the secretary of state. A certificate under the hand of the department of state or his deputy or assistant and the seal of the department of state showing that the securities in question have not been recorded in the register of qualified securities, shall constitute prima facie evidence that such securities have not been qualified for sale pursuant to the provisions of this chapter, and shall be admissible in evidence in any proceeding, either civil or criminal, instituted under any of the laws or statutes of this State. (1925, c. 190, s. 17; 1927, c. 149, s. 17.)

§ 78-18. Appeal.—Any interested person being dissatisfied with any findings, rulings, or judgments of the secretary of state if final and made after a formal hearing elsewhere provided for in this chapter, may, within thirty days after the making and issuance thereof, appeal to the superior court. Any interested person aggrieved by any other order or the failure of the secretary of state to make an order under any of the provisions of this chapter shall, if a hearing is not otherwise provided for, upon written request to the secretary of state and within thirty days after the filing of such request, be entitled to a hearing. The secretary of state shall rule upon the subject matter of such hearing, and any interested person may, within thirty days after the making and issuance of his ruling or order, appeal to the superior court. In all cases of appeals from the secretary of state to the superior court, the record made before such secretary shall thereupon be certified to the superior court of the county in which such interested person may reside, or any county adjoining thereto in the discretion of said secretary of state and thereafter the parties may plead and such procedure may be had as in other causes within the jurisdiction of said superior court, and after the issues shall have been determined by the court or jury, as the case may be, such judgment shall be rendered by the court as the findings may require. Appeals may be taken from the decision of the superior court to the supreme court by either party in the same manner as is provided by law in other civil cases, but the secretary of state may appeal without bond. Pending any such appeal, the said findings, rulings, orders and judgments of the secretary of state shall be prima facie evidence that they are just and reasonable and that the facts found are true, and shall remain in full force and effect, if no such suit be brought within said thirty days, said findings,

ruling, order or judgment shall become final and binding. (1925, c. 190, s. 18; 1927, c. 149, s. 18.)

Cross Reference.—See Editor's Note under § 78-2.

§ 78-19. Dealers and salesmen; registration.—No dealer or salesman shall carry on business in the State of North Carolina as such dealer or salesman, or sell securities, including any securities exempted under the provisions of § 78-3, unless he has been registered as dealer or salesman in the office of the secretary of state pursuant to the provisions of this section. Every applicant for registration shall file in the office of the secretary of state, pursuant to the provisions of this section, an application in writing, duly signed and sworn to, in such form as the secretary of state may prescribe, giving particulars concerning the business reputation of the applicant. The secretary of state, in his discretion, may require that the applicant shall have been a bona fide resident of the State of North Carolina for a term not to exceed two years prior to the filing of the application. The names and addresses of all persons approved for registration as dealers or salesmen shall be recorded in a register of dealers and salesmen kept in the office of the secretary of state, which shall be open to public inspection. Every registration under this section shall expire on the thirty-first day of March in each year, but the same may be renewed. The fee for such registration and for each annual renewal thereof shall be fifty dollars in the case of dealers, and ten dollars in the case of salesmen. Registration may be refused or a registration granted may be cancelled by the secretary of state if, after reasonable notice and a hearing, the secretary of state determines that such applicant or dealer or salesman so registered (1) has violated any provision of this chapter or any regulation made hereunder; or (2) has made a material false statement in the application for registration; or (3) has been guilty of a fraudulent act in connection with any sale of securities in the State of North Carolina, or has been or is engaged in making fictitious or pretended sales or purchases of any such securities or has been engaged in any practice or transaction or course of business relating to the purchase or sale of securities which is fraudulent or in violation of law; or (4) has demonstrated his unworthiness to transact the business of dealer or salesman. It shall be sufficient cause for refusal or cancellation of registration in the case of a partnership, corporation or unincorporated association or trust estate, if any member of the partnership, or any officer or director of the corporation, association or trust estate has been guilty of any act or omission which would be cause for refusing or cancelling the registration of an individual dealer or salesman. The word "dealer" as used in this section shall include every person other than a salesman, who in the State of North Carolina engages, either for all or part of his time, directly or through an agent, in the business of offering for sale, selling or otherwise dealing in securities, including securities exempted under the provisions of § 78-3, or of purchasing or otherwise acquiring such securities from another person with the purpose of reselling them or of offering them for sale to the public for a commission or at a profit, or who deals in futures on market quotations of prices or values of any securities, or accepts margins on prices or values of said securities. The word "salesman," as used in this section shall include every person employed, appointed or authorized by another person to sell securities in any manner in the State of North Carolina. No person shall be registered as a salesman except upon the application of the person on whose behalf such salesman is to act. It shall be unlawful for any person required to register under the provisions of this section to sell any security to any person in the State of North Carolina without having registered, or after such registration has expired or been cancelled and not renewed.

Provided, however, that employees of a company, or of a company directly controlling such company, or the general agent of a domestic corporation, securities of which are exempted under the provisions of § 78-3, may sell or solicit or negotiate for the sale or purchase of any such securities of such company in the territory served by such company or in which it operates without being considered as salesmen or dealers within the meaning of this chapter and without being required to register under its provision.

The partners of a partnership and the executive officers of a corporation or other association registered as a dealer may act as salesmen during such time as such partnership, corporation or association is so registered without further registration as salesmen. Changes in registration occasioned by changes in the personnel of a partnership or in the principals, copartners, officers or directors of any dealer may be made from time to time by written application setting forth the facts with reference to such change.

Every registered dealer who intends to offer any security of any issue, registered or to be registered, shall notify the secretary of state in writing of his intention so to do. The notice shall contain the name of the dealer and shall state the name of the security to be offered for sale, and whenever a dealer shall have prepared such notice and shall have forwarded the same by registered mail, postage prepaid, and properly addressed to the secretary of state, such dealer, as to the contents of such notice and filing thereof, shall be deemed to have complied with the requirements of this paragraph. Any issuer of a security required to be registered under the provisions of this chapter, selling such securities except in exempt transactions as defined in § 78-4, shall be deemed a dealer within the meaning of this section and required to comply with all the provisions hereof. (1925, c. 190, s. 19; 1927, c. 149, s. 19.)

Cross Reference.—See Editor's Note under § 78-2.

§ 78-20. Assistants, clerks, etc., employment of.—It shall be the duty of the secretary of state to administer and enforce the provisions of this chapter, and he may appoint such clerks and other assistants as may from time to time be needed. (1925, c. 190, s. 20; 1927, c. 149, s. 20.)

Cross Reference.—See Editor's Note under § 78-2.

§ 78-21. Fee paid into State Treasury; expenses of administration.—All fees herein provided for shall be collected by the secretary of state and shall be paid over to the State Treasurer to go into the general fund; as well as all fees, per diems, expenses, etc., of appraisers, assistants, and in-

vestigators as herein provided, and all other expenses and fees required by this chapter. (1925, c. 190, s. 21; 1927, c. 149, s. 21.)

§ 78-22. Remedies. — Every sale or contract for sale made in violation of any of the provisions of this chapter shall be voidable at the election of the purchaser and the person making such sale or contract for sale and every director, officer or agent of or for such seller, if such director, officer or agent shall have participated or aided in any way in making such sale shall be jointly and severally liable to such purchaser in an action at law in any court of competent jurisdiction upon tender to the seller of the securities sold or of the contract made for the full amount paid by such purchaser: Provided, that no action shall be brought for the recovery of the purchase price after two years from the date of such sale or contract for sale: and provided further, that no purchaser otherwise entitled shall claim or have the benefit of this section who shall have refused or failed within sixty days to accept the voluntary offer of the seller to take back the security in question and to refund the full amount paid by such purchaser and court costs, together with interest on such amount for the period from the date of payment by such purchaser down to the date of repayment, such interest to be computed.

(a) In case such securities consist of interest-bearing obligations at the same rate as provided in such obligations; and

(b) In case such securities consist of other than interest bearing obligations at the rate of six per centum per annum; less, in every case, the amount of any income from said securities that may have been received by such purchaser. (1925, c. 190, s. 22; 1927, c. 149, s. 22.)

§ 78-23. Violation of chapter; punishment. — (a) Whoever for the purpose of procuring the registration of any security by notification under this chapter, shall knowingly make or cause to be made any false representation of a material fact to the secretary of state shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the State prison for not less than one year or more than five years or fined in any sum not more than one thousand dollars ($1,000), or both.

(b) Whoever shall sell or cause to be sold, or offer to sell or cause to be offered for sale, any security in this State, which is not exempt under any of the provisions of § 78-3, unless sold in any transaction exempt under any of the provisions of § 78-4, and which such securities so sold, or caused to be sold or so offered for sale or caused to be offered for sale shall not have been registered as provided in this chapter, shall be guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for a period of not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(c) Whoever shall, for the purpose of selling any security in this State, fraudulently represent to the purchaser or prospective purchaser thereof the amount of dividends, interest or earnings which such security will yield, shall be deemed guilty of a violation of the provisions of this chapter and upon conviction thereof shall be imprisoned in the State prison for not less than one year nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(d) Whoever, for the purpose of securing the registration by qualification of any securities under this chapter, shall make any false representation concerning any material fact submitted to the secretary of state shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(e) Whoever, for the purpose of procuring the registration by qualification of any security under this chapter, shall suppress or withhold any information from the secretary of state which he possesses and which if submitted by him to the secretary of state would render such security incompetent to be registered by qualification under and pursuant to the terms of this chapter, shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(f) Whoever sells or causes to be sold, or offers for sale or causes to be offered for sale, any security in this State after having been notified by the secretary of state that the registration of such securities has been cancelled, shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(g) Whoever sells or causes to be sold, or offers for sale or causes to be offered for sale, any security in this State after being notified by the commissioner to stop the sale of such security pending the investigation provided for in § 78-8, or pending the filing of the bond which may be required under § 78-11, shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(h) Whoever sells or causes to be sold, or offers for sale or causes to be offered for sale, any security in this State embraced and referred to in § 78-19, without first having registered under and pursuant to the terms of said section, shall be deemed guilty of a violation of said section, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(i) Whoever sells or causes to be sold, or offers for sale or causes to be offered for sale, any security in this State after his registration as provided in § 78-19, has been cancelled by the secretary of state as provided by § 78-19, shall be deemed guilty of a violation of said § 78-19, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(j) Whoever for the purpose of procuring the registration of any dealer or agent under this

chapter, shall knowingly make or cause to be made any false representations of a material fact to the secretary of state shall be guilty of a felony and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum of not more than one thousand dollars ($1,000), or both.

(k) Whoever engages in this State in the making of fictitious or pretended sales or purchases, or who causes the making of fictitious or pretended sales or purchases, or who engages in the offer of fictitious or pretended sales or purchases of any securities within the meaning of this chapter, the actual delivery of which securities are not to follow such sales, shall be deemed guilty of a violation of the terms of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than five thousand dollars ($5,000), or both.

(l) Whoever, without first having become registered under and pursuant to the terms of § 78-19, shall assist or attempt to assist, by recommendation or by personal solicitation, any salesman or agent in this State in the sale or disposition of any securities required to be registered under the provisions of this chapter to any purchaser or purchasers, except in transactions exempt under § 78-4, and who shall in consideration of such assistance or an effort to assist receive compensation in any form or gratuity from such dealer or agent, or anyone upon their behalf, or who shall render such assistance or make such effort upon the promise of such dealer or agent, express or implied, that he shall receive in consideration therefor compensation in any form or a gratuity for such assistance or effort to assist, shall be deemed guilty of a violation of this chapter, and upon conviction thereof shall be imprisoned in the State prison for not less than one, nor more than five years, or fined in any sum not more than one thousand dollars ($1,000), or both.

(m) It is hereby expressly provided that the offenses herein created and the penalties herein imposed are to be deemed cumulative to the offenses and penalties heretofore created and now existing in the criminal code of this State, and that the conviction of any person for the violation of any offense created by this chapter shall not be deemed to have placed such person in jeopardy of trial and conviction for the violation of any offense heretofore created and now existing in the criminal code of this State. (1925, c. 190, s. 23; 1927, c. 149, s. 23.)

Cross Reference.—See Editor's Note under § 78-2.

Statute Strictly Construed.—The penal provision of this chapter making the sale of securities in violation thereof a felony, must be strictly construed and the terms of the statute cannot be extended beyond the plain implication of words used. State v. Allen, 216 N. C. 621, 5 S. E. (2d) 844.

Applied in State v. Pelley, 221 N. C. 487, 20 S. E. (2d) 850.

§ 78-24. Foreign corporations to name process officer within State.—In all cases of application by a foreign corporation, partnership, association or trust company for registration of securities by qualification or as a dealer in securities, such corporation, partnership, association or trust company shall name a process officer within the State of North Carolina, approved by the commissioner upon whom service of any process of any court in this State shall be of the same effect as if served upon said corporation, partnership, association or trust company. (1927, c. 149, s. 24.)

Chapter 79. Strays.

Sec.
79-1. Notice to owner of stray, or to register of deeds.
79-2. Owner may reclaim.
79-3. When and how strays sold.
79-4. Failure to comply with stray law misdemeanor.

§ 79-1. Notice to owner of stray, or to register of deeds.—Any person who shall take up any stray horse, mare, colt, mule, ass or jennet, neat cattle, hog or sheep, shall within ten days after taking up such stray inform the owner, if to him known, if not, he shall inform the register of deeds of the supposed age, marks, brands and color of the stray, and that the same was taken up at his plantation or place of abode; whereupon the register of deeds shall record such information in a book kept by him for that purpose, for which service the taker-up of the stray shall pay a fee of twenty-five cents, except for hogs and sheep, for which the fee shall be ten cents. The register of deeds shall at once publish a notice of the taking up of such stray, by posting the same at the courthouse door, and if the cost does not exceed two dollars, then in some newspaper published in the county. Such notices shall be published for thirty days, and shall contain a full and complete description of the stray and of all marks or brands on the same, and when and where the same was taken up. The fees for publishing such notices shall be paid by the party taking up the stray. (Rev., s. 2833; Code, s. 3768; 1874-5, c. 258, s. 2; C. S. 3951.)

Cross Reference.—As to license to look for strays upon the lands of another, see § 14-134.

§ 79-2. Owner may reclaim.—When any stray has been taken up, the owner may at any time before a sale reclaim such stray by proving his ownership and paying to the party capturing the same the actual costs paid the register of deeds as provided in § 79-1, together with the actual costs of keeping such stray, as fixed by the county commissioners. The board of commissioners of the several counties shall fix a scale of costs for keeping strays. (Rev., s. 28-34; C. S. 3952.)

§ 79-3. When and how strays sold. — If the owner of any stray shall fail to claim the same within thirty days after the publication of the notice required by law, the person taking up the stray shall cause the stray to be appraised by the

nearest magistrate and two freeholders, none of whom shall receive any fees for such services. Such appraisement shall give a full and accurate description of such stray and shall by the magistrate be returned to the register of deeds, and by him recorded in his book for strays; and the register of deeds shall issue an order to the sheriff directing him to sell such stray, and the sheriff shall sell such stray at public auction after ten days public advertisement as for sales of personal property under execution; and out of the proceeds he shall pay the cost of publishing the notices as to strays, the costs of keeping and the cost of sale, and shall pay the surplus to the county treasurer for the benefit of the public school fund of the county. The county board of education shall, at any time within twelve months after such funds have been paid to the county treasurer, upon due proof of ownership, issue an order commanding the county treasurer to pay to the owner of the stray the net amount paid the county treasurer as the proceeds of the sale of the stray. (Rev., s. 2835; C. S. 3953.)

§ 79-4. Failure to comply with stray law misdemeanor.—If any person shall fail to comply with any of the requirements of law as to strays, he shall be guilty of a misdemeanor and upon conviction be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. (Rev., s. 3306; C. S. 3954.)

Cross Reference.—As to fences and stock law, see §§ 68-1 et seq.

Chapter 80. Trademarks, Brands, etc.

Art. 1. Trademarks.

§ 80-1. Adoption and filing for registry. — It shall be lawful for any person to adopt for his protection and file for registry, as in this chapter provided, any label, trademark, term or design that has been used or is intended to be used for the purpose of designating, making known or distinguishing any goods, wares, merchandise or products of labor that have been or may be wholly or partly made, manufactured, produced, prepared, packed or put on sale by any such person, or to or upon which any work or labor has been applied or expended by any such person, or by any member of any corporation, or association or union of workingmen, that has adopted and filed for registry any such label, trademark, term or design, or announcing or indicating that the same have been made in whole or in part by any such person or corporation, or association or union of workingmen, or by any member thereof.

The word "person" as used in this article includes associations or unions of workingmen, whether incorporated or unincorporated. Any duly authorized officer or agent of any such association or union may act in its behalf in securing for the association or union the benefits and protection of this article. (Rev., s. 3012; 1903, c. 271; 1941, c. 255, s. 1; C. S. 3971.)

Editor's Note.—The 1941 amendment inserted the words "or association or union of workingmen" in the first paragraph and added the second paragraph. It is deemed expedient at this point to quote at length from the opinion of the court delivered by Mr. Justice Bynum in Blackwell v. Wright, 73 N. C. 310, 312. The learned Justice lays down the theory upon which is based the law dealing with trademarks, brands, etc. His theory is, in part, as follows: "Every manufacturer has the unquestionable right to distinguish the goods that he manufactures and sells by a peculiar mark or device, so that they may be known as his in the market, and he may thus secure the profits which their superior reputation as his may be the means of gaining. If, therefore, the inventor or manufacturer adopts a label, symbol or trademark to distinguish the article he thus manufactures and sells, no other person has the right to adopt his label or trademark, or one so like his as to induce the public to suppose the article to which it is affixed is the manufacture of the inventor. This rule is grounded upon a two-fold reason: 1st, that the public may be protected from being imposed upon by a spurious or inferior article, as an imitation or counterfeit almost always is; and 2nd, that the inventor may have the exclusive benefit of the reputation which his skill has given to the article made by him. When one, therefore, adopts a symbol or device, and affixes it to the goods he thus manufactures and puts upon the market, the law will throw its protection around the trade-mark thus affixed, as his property and a thing of value. And it would seem to be immaterial whether an infringing trade-mark is adopted by fraud or mistake, for the injury is the same. When an article, not of his manufacture, is sold with the mark or device affixed, which he has adopted to distinguish his own goods, a damage results to him. His label indicates to his customers that the article is made or sold by him, or by his authority, and he will be protected against any who attempt to pirate upon the good will of his friends or customers by using such sign without his authority." American Trade-Mark Cases, 142, 72, 87.

Name of Town or Locality.—It seems, that the name of a town or locality cannot be exclusively appropriated as a trade-mark. Tob. Co. v. McElwee, 94 N. C. 425.

Use of Surname.—As a rule, a trade mark cannot be taken in a surname, and any one named Bingham could start a school called the "Bingham School," in the absence of proof of intent to injure, or fraudulently attract the benefit of the good name and reputation acquired by a previously existing "Bingham School." Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 S. Ct. 625, 35 L. Ed. 247; 2 Beach Inj., sec. 762. And certainly there could be no confusion between a Bingham School at Asheville and a school even of the identically same name at Mebane, N. C. Investor Pub. Co. v. Robinson, 82 Fed. 56; Bingham School v. Gray, 122 N. C. 699, 707, 30 S. E. 304.

It is beyond the scope of the powers of the State Legislature to establish a monopoly in a family name or to confer a patent right in its use. Bingham School v. Gray, 122 N. C. 699, 709, 30 S. E. 304, 41 L. R. A. 243.

But one may, by contract, conclude himself from the use of his own name in a given business, and the agreement will be enforced by the courts. Zagier v. Zagier, 167 N. C. 616, 83 S. E. 913.

§ 80-2. Property rights protected by filing for registry.—Whenever any person shall adopt and file for registry any label, trademark, term or design pursuant to the provisions of this chapter, the property, privileges, rights, remedies and interests in and to any such label, trademark, term or design, and in and to the use of same, provided or given by this chapter to, or otherwise conferred upon or enjoyed by, the person filing the same for the registry, shall be fully and completely secured, preserved and protected as the property of those entitled to the same before any such label, trademark, term or design has been actually applied to any goods, wares, merchandise, or product of labor, and put upon the market for sale or otherwise, and before any use or appropriation of any such label, trademark, term or design has been made in connection with any such goods, wares, merchandise or product of labor, as well as after the same has been used or applied to designate, make known or distinguish any such goods, wares, merchandise, or product of labor and they have been put upon the market. (Rev., s. 3013; 1903, c. 271, s. 2; C. S. 3972.)

§ 80-3. Filing to be with secretary of state; contents of affidavits; fees.—Any person who has heretofore adopted and used, or shall hereafter adopt and use any label, trademark, term or design, as in this chapter provided, may file the same for registry in the office of the secretary of state, by leaving two copies, facsimiles or counterparts thereof, with the said secretary, and filing therewith a statement in the form of an affidavit, subscribed and sworn to by any such person, or by any officer, agent or attorney, if a corporation or association or union of workingmen, specifying the person by whom any such label, trademark, term or design is filed, and the class or character of the goods, wares, merchandise or products of labor to which the same has been or is intended to be appropriated or applied, and that the person so filing the same has the right to the use of the said label, trademark, term or design, and that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as may be calculated to deceive, without the permission or authority of the person filing the same, and that the copies, facsimiles or counterparts filed therewith are true and correct copies, facsimiles or counterparts of the genuine label, trademark, term or design of the person filing the same; and there shall be paid for such registry a fee of five dollars to the secretary of state for the use of the state, and the same recording fees required by law for recording certificate of organization of corporations. (Rev., s. 3014; 1903, c. 271, s. 3; 1935, c. 60; 1941, c. 255, s. 2; C. S. 3973.)

Editor's Note.—The amendment of 1935 increased the registry fee from one to five dollars. The 1941 amendment inserted after the word "corporation" in the eleventh line the words, "or association or union of workingmen."

§ 80-4. Registration; certified copies evidence; fees.—The secretary of state, upon the filing of any such label, trademark, term or design that is not in conflict with § 80-6, shall register the same, and shall deliver to the person filing the same as many certified copies thereof, with his certificate of such registry, as any such person may request, and for every such copy and certificate there shall be paid to the secretary of state, for the use of the state, a fee of one dollar; and any such certified copy and certificate shall be admissible in evidence and competent and sufficient proof of the adoption, filing and registry of any such label, trademark, term or design, by any such person in any action or judicial proceeding in any of the courts of this state, and of due compliance with the provisions of this chapter. (Rev., s. 3015; 1903, c. 271, s. 4; C. S. 3974.)

§ 80-5. Transfer of trademarks.—The right to use any registered label, trademark, term or design shall be granted only by an instrument in writing, duly filed in the office of the secretary of state. The fees for recording or filing such transfer and issuing copies thereof shall be the same as for filing such label, trademark, term or design. (Rev., s. 3016; C. S. 3975.)

§ 80-6. Similar trademarks refused registration.—It shall not be lawful for the secretary of state to register for any person any label, trademark, term or design that is in the identical form of any other label, trademark, term or design theretofore filed by any other person, or that bears any such near resemblance thereto as may be calculated to deceive, or that would be liable to be mistaken therefor. (Rev., s. 3017; 1903, c. 271, s. 5; C. S. 3976.)

§ 80-7. Fraudulent registration; penalty. — Any person who shall file or procure the filing and registry of any label, trademark, term or design in the office of the secretary of state under the provisions of this chapter, by making any false or fraudulent representations or declarations, with fraudulent intent, shall be liable to pay any damages sustained in consequence of any such registry, to be recoverd by or in behalf of the party injured thereby. (Rev., s. 3018; 1903, c. 271, s. 5; C. S. 3977.)

§ 80-8. Use of counterfit trademarks unlawful.—Whenever any person has adopted and filed for registry any label, trademark, term or design, as provided by law, and the same shall have been registered pursuant to law, it shall be unlawful for any other person to manufacture, use, sell, offer for sale, or in any way utter or circulate any counterfeit or imitation of any such label, trademark, term or design, or have in possession, with intent that the same shall be sold or disposed of, any goods, wares, merchandise, or product of labor to which or on which any counterfeit or imitation of any such label, trademark, term or design is attached, affixed, printed, stamped, impressed or displayed, or to sell or dispose of, or offer to sell or dispose of, or have in possession with intent that the same shall be sold or disposed of, any goods, wares, merchandise, or product of labor contained in any box, case, can or package to which or on which any such counterfeit or imitation is attached, affixed, printed, stamped, impressed or displayed. (Rev., s. 3019; 1903, c. 271, s. 6; C. S. 3978.)

When Injunction Granted.—If it appears that the trademark alleged to be imitation, though resembling the complainant's in some respects, would not probably deceive the ordinary mass of purchasers, an injunction will not be granted. An imitation is colorable, and will be enjoined, which requires a careful inspection to distinguish its mark and appearance from that of the manufacture imitated. Blackwell v. Wright, 73 N. C. 310, 313.

§ 80-9. Unauthorized use unlawful; use under license.—Whenever any person has adopted and registered any label, trademark, term or design, as provided by law, it shall be unlawful for any other person to make any use, sale, offer for sale or display of the genuine label, trademark, term or design of any such person filing the same, or to have any such genuine label, trademark, term or design in possession with intent that the same shall be used, sold, offered for sale, or displayed, or that the same shall be applied, attached or displayed in any manner whatever to or on any goods, wares or merchandise, or to sell, offer to sell, or dispose of, or have in possession with intent that the same shall be sold or disposed of, any goods, wares or merchandise in any box, case, can or package to or on which any such genuine label, trademark, term or design of any such person is attached, affixed, or displayed, or to make any use whatever of any such genuine label, trademark, term or design, without first obtaining in every such case the license of the person adopting, filing and registering the same; and any such license may be revoked and terminated at any time upon notice, and thereafter any use thereof shall be unlawful. (Rev., s. 3020; 1903, c. 271, s. 7; C. S. 3979.)

When Relief Granted.—Before the owner of a trade-mark can call upon the courts for relief, he must show not only that he has a clear legal right to the trade-mark, but that there has been a plain violation of it; and where a violation is alleged, the true inquiry is, whether the mark of the defendant is so assimilated to that of the plaintiff as to deceive purchasers. And it will make no difference whether the party designed to mislead the public or whether the symbol adopted was calculated to deceive. Blackwell v. Wright, 73 N. C. 310, 313.

§ 80-10. Remedies; damages; destruction of counterfeits. — Any person who has registered any label, trademark, term or design under the provisions of this chapter shall have a right of action against any person for the unauthorized use of such label, trademark, term or design, and the courts shall by appropriate remedies prevent the unauthorized or unlawful use, manufacture or display of any label, trademark, term or design, or the imitation or counterfeit thereof, or the sale, disposal or display of any articles of property on which any counterfeit or imitation of any registered label, trademark, term or design, or on which any genuine label, trademark, term or design may be used or displayed without proper authority; and shall further secure and protect all persons in all rights of property and interest which they may have in any label, trademark, term or design registered under this chapter; and the court shall award to the plaintiff any and all damages resulting from any such wrongful use of any such label, trademark, term

or design; and any counterfeit or imitation of any labels, trademarks, terms or designs, and any die, engraving, mould or mechanical device or the manufacture of the same in the possession or under the control of the defendant, shall be delivered up to an officer of the court, to be destroyed, and any such genuine labels, trademarks, terms or designs in the possession or under the control of any such defendant shall be delivered to the plaintiff: Provided, however, no restraining order or injunction granted to any association or union of workingmen to prevent violations of this article shall have the effect of impounding or preventing the free flow into the channels of commerce of any goods, wares, merchandise or products already manufactured or in the process of manufacture to which any label, trademark, term or design has been affixed at the time of the institution of the action in which the injunctive relief is sought, unless the owner or manufacturer of said goods, wares, merchandise or products has permitted the affixing of such label, trademark, term or design with the actual knowledge that it was being used or affixed in violation of the provisions of this article. (Rev., s. 3021; 1903, c. 271, s. 8; 1941, c. 255, s. 3; C. S. 3980.)

Editor's Note.—The 1941 amendment added the proviso at the end of this section.

§ 80-11. Concurrent action for penalty.—In addition to any other rights, remedies or penalties provided by this chapter, and as concurrent therewith, any person who shall violate any of the provisions of this chapter shall be liable to a penalty of two hundred dollars, to be recovered by any person who has filed any such label, trademark, term or design. (Rev., s. 3022; 1903, c. 271, s. 9; C. S. 3981.)

§ 80-12. Use of private marks or labels to defraud; punishment.—If any person shall knowingly and willfully forge or counterfeit, or cause or procure to be forged or counterfeited, the private marks, tokens, stamps or labels of any mechanic, manufacturer or other person, being a resident of the United States, with intent to deceive and defraud the purchasers, mechanics, or manufacturers of any goods, wares or merchandise whatsoever, upon conviction thereof he shall be punished by a fine of not less than fifty dollars and not exceeding one thousand dollars, or by imprisonment of not less than thirty days or more than five years, or both fine and imprisonment, at the discretion of the court. (Rev., s. 3852; Code, s. 1038; 1870-1, c. 253, s. 1; C. S. 3982.)

§ 80-13. Selling goods with forged marks or labels, misdemeanor.—If any person shall vend any goods, wares or merchandise having thereon any forged or counterfeited marks, tokens, stamps or labels purporting to be the marks, tokens, stamps or labels of any person being a resident of the United States, knowing the same at the time of the purchase thereof by him to be forged or counterfeited, he shall be guilty of a misdemeanor, and punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one hundred dollars, or by both fine and imprisonment, at the discretion of the court. (Rev., s. 3850; Code, s. 1039; 1870-1, c. 253, s. 2; C. S. 3983.)

§ 80-14. Misbranding sacks to defraud, misdemeanor.—If any person shall knowingly use the mark or brand of any other person on any sack, or shall knowingly impress on any sack the mark or brand of another person, with intent to defraud or for the purpose of enhancing the value of his own property, the person so offending shall be guilty of a misdemeanor. (Rev., s. 3851; Code, s. 1040; 1874-5, c. 225; 1943, c. 543; C. S. 3984.)

Editor's Note.—The 1943 amendment struck out the words "and punished as if convicted of larceny" formerly appearing at the end of this section.

Art. 2. Timber Marks.

§ 80-15. Timber dealers may adopt.—Any person dealing in timber in any form shall be known as a timber dealer and as such may adopt a trademark, in the manner and with the effect in this article provided. (Rev., s. 3023; 1903, c. 261, s. 1; C. S. 3985.)

§ 80-16. How adopted, registered and published. — Every such dealer desiring to adopt a trademark may do so by the execution of a writing in form and effect as follows:

Notice is hereby given that I (or we, etc., as the case may be) have adopted the following trademark, to be used in my (or our, etc.) business as timber dealer (or dealers), to wit: (Here insert the words, letters, figures, etc., constituting the trademark, or if it be any device other than words, letters or figures, insert a facsimile thereof).

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

A..... B.....

Such writing shall be acknowledged or proved for record in the same manner as deeds are acknowledged or proved, and shall be registered in the office of the register of deeds of the county in which the principal office or place of business of such timber dealer may be, in a book to be kept for that purpose marked Registry of Timber Marks, also in office of secretary of state, and a copy thereof shall be published at least once in each week for four successive weeks in some newspaper printed in such county, or if there be no such newspaper printed therein, then in some newspaper of general circulation in such county. (Rev., s. 3024; 1889, c. 142; 1903, c. 261, s. 2; C. S. 3986.)

§ 80-17. Property in and use of trademarks.—Every trademark so adopted shall, from the date thereof, be the exclusive property of the person adopting the same. The proprietor of such trademark shall, in using the same, cause it to be plainly stamped, branded or otherwise impressed upon each piece of timber upon which the same is placed. (Rev., s. 3025; 1889, c. 142; 1903, c. 261, ss. 3, 4; C. S. 3987.)

§ 80-18. Effect of branding timber purchased.—When timber is purchased by the proprietor of any such trademark, and the said trademark is placed thereon as hereinbefore provided, such timber shall thenceforth be deemed the property of such purchaser, without any other or further delivery thereof, and such timber shall thereafter be at the risk of the purchaser, unless otherwise provided by contract in writing between the parties. (Rev., s. 3026; 1889, c. 142; 1903, c. 261, s. 6; C. S. 3988.)

§ 80-19. Trademark on timber evidence of ownership.—In any action, suit or contest in which the title to any timber, upon which any trademark has been placed as aforesaid, shall come in question, it shall be presumed that such timber was the property of the proprietor of such trademark, in the absence of satisfactory proof to the contrary. (Rev., s. 3027; 1903, c. 261, s. 7; C. S. 3989.)

§ 80-20. Fraudulent use of timber trademark, misdemeanor. — If any person shall use or attempt to use any timber trademark without the written consent of the proprietor thereof, or falsely and fraudulently place any trademark on timber not the property of the owner of such trademark without his written consent, or intentionally and without lawful authority remove, deface or destroy any timber trademark or the imprint thereof on any timber or intentionally put any such timber in such a position or place so remote from the stream from which it was taken or on which it was afloat as to render it inconvenient or unnecessarily expensive to replace the same in such stream, he shall be guilty of a misdemeanor. (Rev., s. 3854; 1903, c. 261, ss. 3-5; C. S. 3990.)

§ 80-21. Larceny of branded timber.—If any person shall knowingly and unlawfully buy, sell, take and carry away, secrete, destroy or convert to his own use, any timber upon which a trademark is stamped, branded or otherwise impressed, or shall knowingly and unlawfully buy, sell, take and carry away, secrete, destroy or convert to his own use, any timber upon which a trademark has been intentionally and without lawful authority removed, defaced or destroyed, he shall be deemed guilty of larceny thereof and punished as in other cases of larceny. (Rev., s. 3853; 1903, c. 261, s. 5; C. S. 3991.)

§ 80-22. Altering timber trademark crime. — If any person shall willfully change, alter, erase or destroy any registered timber mark or brand put or cut upon any logs, timber, lumber or boards, except by the consent of the owner thereof, with intent to steal the said logs or timber, he shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days, or both. (Rev., s. 3855; 1889, c. 142, s. 3; 1903, c. 41; 1943, c. 543; C. S. 3992.)

Editor's Note.—The 1943 amendment struck out the words "if the same shall have been done with a felonious intent, such person shall be guilty of larceny and punished as for that offense."

§ 80-23. Possession of branded logs without consent, misdemeanor. — If any person shall knowingly and willfully take up or have in his possession any log, timber, lumber or board upon which a registered timber mark or brand has been put or cut, except by the consent of the owner thereof, he shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars or imprisoned not more than thirty days, or both. (Rev., s. 3856; 1889, c. 142, s. 4; 1903, c. 42; C. S. 3993.)

Art. 3. Mineral Waters and Beverages.

§ 80-24. Description of name, labels, or marks filed and published.—Any person, partnership or corporation engaged in manufacturing, bottling, selling or dealing in mineral, soda or aerated waters, beers, lager-beer, milk or other beverages, in kegs, boxes, trays, crates, bottles, syphons, barrels, casks, or other vessels, with his name or other marks or devices printed, impressed, or otherwise produced thereon, or upon labels pasted thereon, shall file with the clerk of the superior court of the county in which his principal office or place of business (or in case of a foreign corporation, its principal office or place of business or agency) is located, a description of the names, marks, or devices so used by him, and cause such description to be printed twice a week for two successive weeks in some daily newspaper published in said county, if there be a daily newspaper published therein, and if not, then in some newspaper published in said county once a week for two successive weeks. The description of the names, marks or devices, before being filed as aforesaid, shall be signed by the person filing the same, or in case of a partnership, by a partner, or in case of a corporation, by one of its officers or managers, and shall be acknowledged by the person signing the same as his act, or as the act of said partnership or corporation, before an officer competent to take acknowledgment of deeds. The publication hereby required need only be a brief description, sufficient for identification, of such names or marks, and need not contain a certified copy of the acknowledgment. The provisions of this article shall apply to all vessels enumerated above upon which said names or marks shall appear as aforesaid, whether or not any of the same shall be in existence at the time of said filing and publication. (1907, c. 901, s. 1; C. S. 3994.)

§ 80-25. Clerk to record description. — The several clerks of the superior courts mentioned in the preceding section shall record in some book of record in their custody all such descriptions filed with them, and also copies of the said advertisement in the newspaper, certified to by the publishers thereof, and shall furnish copies thereof, duly certified by them in the usual manner, to any person who may apply therefor, and shall receive for the recording of such copies a fee of fifty cents. Such certified copies shall be evidence that the provisions of the preceding section have been complied with, and shall be prima facie evidence of the title of the person, named therein, to the vessels upon which his name, marks, labels or devices appear as described in said description. (1907, c. 901, s. 2; C. S. 3995.)

§ 80-26. Refilling vessels and defacing marks forbidden; punishment.—After any person has filed and published his description of such names, marks or devices, in accordance with the preceding provisions of this article, it shall be unlawful for any persons to fill in any way the vessels upon which such names or other marks are printed, impressed or otherwise produced, with any water or beverage enumerated in this article, or to deface, remove or conceal such names or other marks, thereon, with intent to convert the same to his use, or to have on sale, offer for sale, traffic in, handle in the course of business, transport, or to take or collect from

ash or garbage receptacles or from public or private premises, or to keep in stock, store or dispose of or deal or traffic in same, or any parts thereof, without the written consent of the person whose name or other marks are upon such vessels, or to willfully break, destroy or otherwise injure any of the articles mentioned in this section. Any person who shall do any of the acts declared to be unlawful by this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished for the first offense by imprisonment of not less than ten days or more than one year, or by a fine of three dollars for each of such kegs, casks or barrels, and one dollar for each of such boxes, trays, crates, bottles, syphons, or any other vessels so unlawfully used; and for the second and subsequent offense by imprisonment for not less than twenty days or more than one year, or by a fine of not less than two dollars or more than five dollars for each vessel unlawfully used, or by both such fine and imprisonment, at the discretion of the court before whom such offense is tried: Provided, this section shall not apply to such vessels as the bottler charges his customers for at the time of sale of the goods. (1907, c. 901, s. 3; C. S. 3996.)

§ 80-27. Possession of vessels as evidence of offense.—If any person shall be found to be in possession of any of the vessels mentioned above in this article, or any parts thereof, and the persons whose names, marks or devices have been placed thereon, as above provided, have complied with the provisions of this article, and the persons so found in possession thereof shall be charged with any of the offenses mentioned in the preceding section, then such possession shall be prima facie evidence that such person is guilty of the offenses so charged: Provided, this section shall not apply to bottlers who receive such vessels in the course of business and mixed and exchanged in shipment, when such bottler within a reasonable time notifies the owners thereof of the location thereof. (1907, c. 901, s. 4; C. S. 3998.)

§ 80-28. Search warrants.—If the owner of any vessel mentioned in § 80-24 who has complied with the provisions thereof, or the officer, agent or employee of such owner, shall make an affidavit before a justice of the peace asserting that he has reason to believe and does believe that any person is in actual or constructive possession of, or is making use of, any article above mentioned or any part thereof, or in any way declared to be unlawful by § 80-26, the justice may issue his search warrant to any sheriff, constable or other officer of the law to whom such warrant may be directed, and cause the premises designated in the warrant to be searched; and if article above mentioned or any part thereof shall be found upon the premises so designated, the officer executing such search warrant shall thereupon report the same, under his oath, to the justice, who shall thereupon, upon said report and upon the oath of any person or persons charging any violations of § 80-26, issue his warrant for the arrest of the person against whom the charge is made, and cause him, together with such articles, to be brought before him for trial. (1907, c. 901, s. 5; C. S. 3999.)

§ 80-29. Concurrent jurisdiction of superior courts and justices of the peace.—The justices of the peace in the counties of this state shall have concurrent jurisdiction with the superior courts of their respective counties in the case of persons arrested for violation of the above provisions of this article, and such justices of the peace shall proceed to hear and determine such cases when the parties arrested are brought before them, in all cases where the punishment fixed in this article is such as to give the justices jurisdiction under the constitution and laws of this state. And if such person shall be found to be guilty of the violation of any of the provisions of this article, the court trying such person and imposing the punishment herein prescribed shall also award possession to the owner of all the property involved in such violation. (1907, c. 901, s. 6; C. S. 4000.)

§ 80-30. Accepting deposit not deemed sale.—The requiring, taking or accepting of any deposit for any purpose upon any vessel above enumerated shall not be deemed to constitute a sale of such property, either optional, conditional or otherwise, in any proceedings under this article. (1907, c. 901, s. 7; C. S. 4001.)

§ 80-31. When refiling description not required.—Any person, partnership, or corporation that has heretofore filed and published a description of his name, marks or devices for the purposes mentioned in § 80-1, in accordance with the law existing at the time of such filing and publication, shall not be required to again file such description, but shall be entitled to all the benefits of this article as fully as if he had complied with all the provisions thereof. (1907, c. 901, s. 8; C. S. 4002.)

§ 80-32. Application of the article.—The provisions of this article do not apply to any person using the vessels enumerated above for the beverages placed therein by the owners, or who after consumption of the contents is in possession of the same, while awaiting the return to the owners, nor shall the provisions of this article apply to any garbage man collecting the same in the regular course of his business: Provided, this article shall not apply to beer and mineral water bottles shipped into this state from other states. (1907, c. 901, s. 9; C. S. 4003.)

Art. 4. Farm Names.

§ 80-33. Registration of farm names authorized.—Any owner of a farm in the state of North Carolina may have the name of his farm, together with a description of his lands to which said name applies, recorded in a register kept for that purpose in the office of the register of deeds of the county in which the farm is located, and the register of deeds shall furnish to such landowner a proper certificate setting forth the name and description of the lands. (1915, c. 108, s. 1; C. S. 4004.)

Local Modification.—Sampson, Stokes, Surry: C. S. 4011.

§ 80-34. After registry, similar name not registered.—When any name has been recorded as the name of any farm in such county, the name, or one so nearly like it as to produce confusion, shall not be recorded as the name of any other farm in the same county. (1915, c. 108, s. 1; C. S. 4005.)

§ 80-35. Distinctive name required.—No name shall be registered as the name of a farm where such proposed name or one so nearly like it as to produce confusion has been so used in connection with another farm in the same county as to become generally known prior to March 5, 1915, unless the name used has also prior to March 5, 1915, become well known as the name of the farm proposed to be registered; and in this event two or more farms in the same county may be registered with the same name with some prefix or suffix added to distinguish them. (1915, c. 108, s. 2; C. S. 4006.)

§ 80-36. Application for registry; publication and hearing.—Before a name shall be registered the clerk shall have publication made at least once a week for four weeks in some secular newspaper published in the county, if one is so published, and if one is not so published, then one having a general circulation in the county, giving the name of the applicant, the proposed name of registration and a sufficient description to identify the farm and the time of the return; and if the owner or clerk knows of another farm in the county of the same or very similar name, a summons shall be served on the owner thereof at least ten days before the return day. On the return day any person, firm or corporation may file claim to the name, and the clerk may pass upon the claim and award the name to any party, with the right to appeal by the aggrieved party to the superior court within ten days, as in other cases, and on such appeal the judge shall decide the matters unless a jury be demanded by some party. (1915, c. 108, s. 2; C. S. 4007.)

§ 80-37. Fees for registration. — Any person having the name of his farm recorded as provided in this article shall first pay to the register of deeds a fee of one dollar, which fee shall be paid to the county treasurer as other fees are to be paid to the county treasurer by such register of deeds: Provided, that in counties where the fee system obtains, the fees herein mentioned shall go to the register of deeds of such counties. (1915, c. 108, s. 3; C. S. 4008.)

§ 80-38. When transfer of farm carries name.—When any owner of a farm, the name of which has been recorded as provided in this article, transfers by deed or otherwise the whole of such farm, such transfer may include the registered name thereof; but if the owner shall transfer only a portion of such farm, then, in that event, the registered name thereof shall not be transferred to the purchaser unless so stated in the deed or conveyance. (1915, c. 108, s. 4; C. S. 4009.)

§ 80-39. Cancellation of registry; fee.—When any owner of a registered farm desires to cancel the registered name thereof, he shall state on the margin of the record of the register of such name the following: "This name is canceled and I hereby release all rights thereunder," which shall be signed by the person cancelling such name, and attested by the register of deeds. For such latter service the register of deeds shall charge a fee of twenty-five cents, which shall be paid to the county treasurer as other fees are paid to the county treasurer by him. (1915, c. 108, s. 5; C. S. 4010.)

Art. 5. Stamping of Gold and Silver Articles.

§ 80-40. Marking gold articles regulated.—It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of gold or any alloy of gold, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any mark indicating or designed to indicate that the gold, or alloy or gold, therein is of a greater degree of fineness than its actual fineness, unless the actual fineness, in the case of flat-ware and watch-cases, is not less by more than three one-thousandths parts, and in the case of all other articles is not less by more than one-half karat than the fineness indicated, according to the standards and subject to the qualifications hereinafter set forth.

In any test for ascertaining the fineness of gold or alloy in the articles, according to the required standards, the part of the gold or alloy taken for the test, analysis or assay shall be a part not containing or having attached thereto any solder or alloy of inferior fineness used for brazing or uniting the parts of the articles. In addition to the foregoing tests and standards, the actual fineness of the entire quantity of gold and of its alloys contained in any article mentioned in this section (except watch-cases), including all solder or alloy of inferior metal used for brazing or uniting the parts (all such gold, alloys, and solder being assayed as one piece), shall not be less by more than one karat than the fineness indicated by the mark used as above indicated. Violation of this section is a misdemeanor, punishable as provided in this article. (1907, c. 331, s. 1; C. S. 4012.)

§ 80-41. Marking silver articles regulated.—It shall be unlawful to make for sale or sell or offer to sell or dispose of or have in possession with intent to sell or dispose of—

1. Any article of merchandise made in whole or in part of silver or any alloy of silver, and having marked, stamped, branded or engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the words "sterling silver" or "sterling" or any colorable imitation thereof, unless nine hundred and twenty-five one-thousandths of the component parts of the metal appearing or purporting to be silver, of which the article is manufactured, are pure silver, subject to the qualifications hereinafter set forth: Provided, that in the case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standard.

2. Any article of merchandise made in whole or in part of silver or of any alloy of silver, and having marked, stamped, branded, engraved or imprinted thereon, or upon any card, tag or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the words "coin" or "coin silver," or any color-

able imitation thereof, unless nine hundred one-thousandths of the component parts of the metal appearing or purporting to be silver, of which the article is manufactured, are pure silver, subject to the qualifications hereinafter set forth: Provided, that in the case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standards.

3. Any article of merchandise made in whole or in part of silver or of any alloy of silver, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any mark or word (other than the word "sterling" or the word "coin") indicating, or designed to indicate, that the silver or alloy of silver in the article is of a greater degree of fineness than its actual fineness, unless the actual fineness is not less by more than four one-thousandths parts than the actual fineness indicated by the use of such mark or word, subject to the qualifications hereinafter set forth.

In any test for ascertaining the fineness of the articles mentioned in this section, according to the foregoing standards, the part taken for test, analysis or assay shall be a part not containing or having attached thereto any solder or alloy of inferior metal used for brazing or uniting the parts of such article. In addition to the foregoing test and standards, the actual fineness of the entire quantity of metal purporting to be silver contained in any article mentioned in this section, including all solder or alloy of inferior fineness used for brazing or uniting the parts (all such silver, alloy or solder being assayed as one piece), shall not be less by more than ten one-thousandths parts than the fineness indicated according to the foregoing standards, by the mark employed as above indicated. Violation of this section is a misdemeanor, punishable as provided in this article. (1907, c. 331, s. 2; C. S. 4013.)

§ 80-42. Marking articles of gold plate regulated.—It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto a plate, plating, covering or sheet of gold, or of any alloy of gold, which article is known in the market as "rolled gold plate," "gold plate," "gold-filled," or "gold electroplate," or by any similar designation, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any word or mark usually employed to indicate the fineness of gold, unless such word be accompanied by other words plainly indicating that such article or some part thereof is made of rolled gold plate, or gold plate, or gold electroplate, or is gold-filled, as the case may be. Violation of this section is a misdemeanor, punishable as provided in this article. (1907, c. 331, s. 3; C. S. 4014.)

§ 80-43. Marking articles of silver plate regulated.—It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto, a plate, plating, covering or sheet of silver or of any alloy of silver, which article is known in the market as "silver plate" or "silver electroplate," or by any similar designation, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the word "sterling" or the word "coin," either alone or in conjunction with any other words or marks. Violation of this section is a misdemeanor, punishable as provided in this article. (1907, c. 331, s. 4; C. S. 4015.)

§ 80-44. Violation of article misdemeanor.—Every person, firm, corporation or association guilty of a violation of any one of the preceding sections of this article, and every officer, manager, director or managing agent of any such person, firm, corporation or association directly participating in such violation or consenting thereto, shall be guilty of a misdemeanor and punished by fine or imprisonment, or both, at the discretion of the court: Provided, that if the person charged with violation of this article shall prove that the article concerning which the charge was made was manufactured prior to the thirteenth day of June, one thousand nine hundred and seven, then the charge shall be dismissed. (1907, c. 331, s. 5; C. S. 4016.)

Art. 6. Cattle Brands.

§ 80-45. Owners of stock to register brand or marks.—Every person who has any horses, cattle, hogs or sheep may have an earmark or brand different from the earmark or brand of all other persons, which he shall record with the clerk of the board of commissioners of the county where his horses, cattle, hogs or sheep are; and he may brand all horses eighteen months old and upwards with the said brand, and earmark all his hogs and sheep six months old and upwards with the said earmark; and earmark or brand all his cattle twelve months old and upwards; and if any dispute shall arise about any earmark or brand, the same shall be decided by the record thereof. (Rev., s. 3028; Code, s. 2317; R. C., c. 17, s. 1; C. S. 4017.)

Art. 7. Recording of Cattle Brands and Marks with Commissioner of Agriculture.

§ 80-46. "Stock growers" and "live stock" defined.—Every person, firm, association or corporation, who owns, raises, buys or sells cattle in this State, is deemed a stock grower, and all cattle are deemed live stock, within the meaning of this article. (1935, c. 232, s. 1.)

§ 80-47. Stock growers limited to single mark or brand; registration not required; law compulsory upon registration.—Every stock grower in this State must use one, and only one, mark or brand for said stock grower's cattle, which mark or brand shall be placed in some conspicuous place on said cattle, which place must be designated in the application for the recording of said mark or

brand hereinafter provided for in this article: Provided, however, nothing in this section nor in any subsequent section of this article shall be construed to be compulsory upon any stock grower in this State to apply for or register his mark or brand of cattle; but when a stock grower does so, then this article and all provisions thereof shall be binding and compulsory upon said stock grower. (1935, c. 232, s. 2.)

§ 80-48. Commissioner of agriculture named recorder.—The commissioner of agriculture of the State of North Carolina is hereby declared to be the state recorder of marks and brands of cattle growers in this State. (1935, c. 232, s. 3.)

§ 80-49. Recording with commissioner. — All brands or marks shall be recorded with the state recorder. (1935, c. 232, s. 4.)

§ 80-50. Application; effect of recording; fee; no duplication allowed.—Any stock grower in the State of North Carolina, who desires to avail himself of the provisions of this article, shall make and sign an application, furnished by the state recorder, setting forth a facsimile and description of the brand or mark which said stock grower desires to use, and shall file the same with the state recorder, who shall record the same in a book kept by him for that purpose, and from and after the filing of the same, the stock grower filing the same shall have exclusive right to use said brand or mark within the State; and shall pay the state recorder a fee of one dollar; Provided, that the state recorder shall not file or record such mark or brand if the same has been heretofore recorded by him in favor of some other grower. (1935, c. 232, s. 5.)

§ 80-51. Certified copy of mark or brand; registration; fees and disposition thereof.—Upon the recording of any such brand or mark with the state recorder, as herein provided, the owner thereof may procure from the state recorder a certified copy thereof, paying therefor the sum of fifty cents, and may cause the same to be recorded in the office of the register of deeds in the county where said stock grower resides, and shall pay said register of deeds a fee of fifty cents for recording same. It shall be unlawful for any register of deeds to record any such mark or brand, unless the same is certified to him by the state recorder. Application blanks and a book for recording said marks and brands shall be furnished each register of deeds of the county applying for same, and shall be paid for by the state recorder, if he has sufficient funds derived from the recording fees, and if not, then by the county so applying for same. All fees received by the state recorder shall be used in the administration of this article, and any surplus paid into the general fund of the agriculture department. In order to put the provisions of this article in force the commissioner of agriculture is hereby authorized to use any fund in his department not otherwise appropriated. (1935, c. 232, s. 6.)

§ 80-52. Certified copy prima facie evidence of ownership.—In all civil or criminal suits in any court in this State a duly certified copy, under the seal of the department of agriculture, of any brand or mark, duly recorded under the provisions of this article, shall be prima facie evidence of the ownership of the animal of said cattle grower. (1935, c. 232, s. 7.)

§ 80-53. Records to be kept by those engaged in slaughtering.—Any person, firm or corporation engaged in the business of slaughtering cattle shall keep at its place of business a book in which must be kept the name or names of the persons from whom any marked or branded cattle are purchased and the date of purchase and his address, and the mark or brand of such cattle. Said book must be kept ready at all times for the inspection of any person who desires to examine the same. (1935, c. 232, s. 8.)

§ 80-54. Purchaser of branded cattle to keep record of purchases.—Any person purchasing any marked or branded cattle, the mark or brand of which has been duly recorded under the provisions of this article, shall keep the name and address of the person from whom said cattle are purchased, a description of the mark or brand and the date of the purchase, and exhibit same to any person desiring to examine same. (1935, c. 232, s. 9.)

§ 80-55. Defacing marks or brands made misdemeanor. — No stock grower or other person in this State must change, conceal, deface, disfigure or obliterate any brand or mark previously branded, impressed or marked on any head of cattle, or put his or any other brand or mark upon or over any part of any brand or mark previously branded or marked upon any head of cattle, and no person shall make or use any counterfeit of any mark or brand of any other person. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. (1935, c. 232, s. 10.)

§ 80-56. Violation of article made misdemeanor. —Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1935, c. 232, s. 11.)

Chapter 81. Weights and Measures.

Art. 1. Uniform Weights and Measures.

§ 81-1. Office of superintendent of weights and measures.—In order to protect the purchasers of any commodity and to provide one standard of measure of length and surface throughout the State, which must be in conformity with the standard of measure of length, surface, weight and capacity established by Congress, the office of Superintendent of Weights and Measures for the State of North Carolina is hereby established as hereinafter provided. (1927, c. 261, s. 1.)

§ 81-2. Administration of article. — The provisions of this article shall be administered by the State Department of Agriculture through a suitable person to be selected by the Commissioner of Agriculture and known as the Superintendent of Weights and Measures. In administering the provisions of this article, the rules

and codes of specifications and tolerances as adopted by the National Conference of Weights and Measures and recommended by the United States Bureau of Standards and approved by the North Carolina Department of Agriculture are hereby adopted; however, the Department of Agriculture is empowered to make such rules and regulations as may be necessary to make effective the purposes and provisions of this article and to fix and prescribe reasonable charges and fees for examining, testing, adjusting and certifying the correct, or incorrect, equipment used in the buying or selling of any commodity or thing, or for hire or award, or in the computation of any charge for services rendered on the basis of weight or measure, or in the determination of weight and measure when a charge is made for such determination. Such rules and regulations and fees and charges shall be published thirty days before such rules, regulations, fees and charges become effective. (1927, c. 261, s. 2; 1931, c. 150; 1943, c. 762, s. 1.)

Editor's Note.—The Act of 1931 amended this section by adding the provision as to rules adopted by the National Conference of Weights and Measures.

The 1943 amendment inserted in the second sentence the words "and approved by the North Carolina Department of Agriculture."

§ 81-3. Employment of superintendent of weights and measures. — The Commissioner of Agriculture shall have authority to employ a superintendent of weights and measures and necessary assistants, local inspectors and such other employees as may be necessary in carrying out the provisions of this article, and fix and regulate their duties.

The person named as superintendent of weights and measures shall give bond to the State of North Carolina in the sum of ten thousand dollars to guarantee the faithful performance of his duties, the expense of said bond to be paid by the State to be approved as other bonds for the State officers. The superintendent of weights and measures shall, to safeguard the interests of the buyer and seller, require bond from other employees authorized under the first paragraph of this section in the amounts of not less than one thousand dollars for each employee designated as a local inspector or sealer of weights and measures. (1927, c. 261, ss. 3, 4.)

§ 81-4. Salaries and expenses. — All salaries and necessary expenses shall be provided as now provided for the other departments and agencies of the State government. (1927, c. 261, s. 5; 1931, c. 150.)

Editor's Note.—Prior to the 1931 Amendment this section provided for the payment of salaries, etc., from the fees collected under this article.

§ 81-5. Standard of work for local standard keepers.—When any town or county wishes to appoint a local standard keeper or inspector or sealer of weights and measures the appointment and regulation of his work must be in keeping with the rules and regulations of the State Department of Agriculture and his work subject to supervision of the State Superintendent of Weights and Measures. (1927, c. 261, s. 6.)

§ 81-6. Receipts for fees; approved standards to be marked.—The State Superintendent of Weights and Measures, or his deputies, or inspectors on his direction, shall, after examining any standards of weights or measures or other apparatus used for determining the weight or measure of anything, issue to the owner of such measuring device or apparatus a receipt for any fees collected and, when such measuring device or apparatus is found to be accurate, stamp upon, or tag, the measuring instrument with the letters "N.C." and two figures representing the year in which the inspection was made. (1927, c. 261, s. 7.)

§ 81-7. Standard equipment.—There shall be issued to each deputy inspector, or local sealer of weights and measures, such standard equipment as may be necessary. (1927, c. 261, s. 8.)

§ 81-8. Standards of weights and measures. —The weights and measures received from the United States under joint resolution of Congress, approved June fourteenth, one thousand eight hundred and twenty-six, and July twenty-seventh, one thousand eight hundred and sixty-six, and such new weights and measures as shall be received from the United States as standards of weights and measures in addition thereto, or in renewal thereof, and such as shall be supplied by the State in conformity therewith and certified by the National Bureau of Standards shall be the State standards of weights and measures, and in addition thereto there shall be supplied from time to time such copies of these as may be deemed necessary. The Superintendent of Weights and Measures shall take charge of the standards adopted by this article as the standards of the State and cause them to be kept in a fire proof building belonging to the State, from which they shall not be removed except for repairs or for certification, and he shall take all other necessary precautions for their safe keeping. He shall maintain the State standards in good order and shall submit them at least once in ten years to the National Bureau of Standards for certification. He shall keep complete record of the standards, balances and other apparatus belonging to the State and take a receipt for same from his successor in office. He shall annually, on the first day of July, make to the Commissioner of Agriculture a report of all work done in his office. (1927, c. 261, s. 9; 1943, c. 543.)

Editor's Note.—The 1943 amendment substituted "July" for "December" in the last sentence of this section.

§ 81-9. Supervision of devices offered for.— The State Superintendent of Weights and Measures shall have and keep a general supervision of the weights and measures and weighing or measuring devices offered for sale, sold, or in use in the State. He, or his deputies, or inspectors at his direction, shall, upon written request of any citizen, firm, or corporation, or educational institution in the State, test or calibrate weights, measures and weighing or measuring devices used as standards in the State. (1927, c. 261, s. 10.)

§ 81-10. Authority of deputy or local inspector. — Each deputy or local inspector shall have the power, and it shall be his duty, under the direction of the State Superintendent of

Weights and Measures, to inspect, test, try and ascertain if they are correct all weights and measures and weighing and measuring devices kept, offered, or exposed for sale, sold, or used or employed within the State by any proprietor, agent, lessee, or employee in proving the size, quantity, extent, area, or measurement of quantities, things produced, or articles for distribution or consumption, purchased or offered or submitted by any person or persons for sale, hire, or award, and he shall have the power, and shall, from time to time, weigh or measure and inspect packages or amounts of commodities of whatsoever kind kept for the purpose of sale, offered, or exposed for sale, or sold, or in the process of delivery, in order to determine whether the same contain the amount represented, or whether they be kept, offered or exposed for sale, or sold in a manner in accordance with law. He may, for the purpose above mentioned and in the general performance of his duties, enter and go into, or open, and without formal warrant, any stand, place, building, or premises, or stop any vendor, peddler, junk dealer, coal wagon, ice wagon, delivery wagon, or any person whomsoever and require him, if necessary, to proceed to some place which the sealer may specify for the purpose of making the proper test. (1927, c. 261, s. 11.)

§ 81-11. Condemnation and destruction of incorrect weights, measures or devices.—The deputy or local inspector shall condemn, seize, and may destroy incorrect weights and measures or weighing and measuring devices, which in his best judgment are not susceptible of satisfactory repair, but such as are incorrect and yet in his best judgment may be repaired, he shall mark or tag as "Condemned for Repairs" in a manner prescribed by the State Superintendent of Weights and Measures. The owners or users of any weights, measures or weighing or measuring devices of which such disposition is made shall have the same repaired and corrected within ten days and they may neither use nor dispose of same in any way, but shall hold the same at the disposal of the sealer. Any weights, measures, or weighing or measuring devices which have been condemned for repairs and have not been repaired as required shall be confiscated by the sealer. (1927, c. 261, s. 12.)

§ 81-12. Seizure of false weights and measures.—The Superintendent of Weights and Measures, his deputies and inspectors are hereby made special policemen and are authorized and empowered to arrest without formal warrant, any violator of the statutes in relation to weights and measures and to seize as use for evidence without formal warrant any false or unsealed weights, measures, or weighing or measuring devices or package or amount of commodity found to be used, retained, or offered or exposed for sale, or sold in violation of law. (1927, c. 261, s. 13.)

§ 81-13. Obstruction to officers misdemeanor.—Any person who shall hinder or obstruct in any way the Superintendent of Weights and Measures, his deputies or inspectors, in the performance of his official duties shall be guilty of a misdemeanor and, upon conviction in any court of competent jurisdiction, shall be punished by a fine of not less than ten dollars or more than two hundred dollars, or by imprisonment in the county jail for not more than three months, or by both fine and imprisonment. (1927, c. 261, s. 14.)

§ 81-14. Impersonation of superintendent of weights and measures or deputies misdemeanor.—Any person who shall impersonate in any way the Superintendent of Weights and Measures, his deputies or inspectors, by the use of his seal or counterfeit of his seal or otherwise, shall be guilty of a misdemeanor and upon conviction therefor in any court of competent jurisdiction, shall be punished by a fine of not less than one hundred dollars or more than five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment. (1927, c. 261, s. 15.)

§ 81-14.1. Weighing livestock sold at public livestock market; weight certificates.—Whenever livestock is offered or exposed for sale, or sold by weight at a public livestock market, the livestock shall be weighed by a public weigh master and each individual sale shall be accompanied with a weight certificate in duplicate on which shall be expressed in ink or other indelible substance, the name and address of seller, the kind, number and weight of livestock being offered for sale, or sold, the time of day and date of weighing and the name of weigh master. The information expressed on said certificate shall be announced or otherwise made known immediately preceding the sale, if said sale be by auction. (1943, c. 762, s. 1.)

§ 81-15. Weights of goods sold in packages to be stated on package.—It shall be unlawful to keep for the purpose of sale, or expose for sale, or sell any commodity in package form unless the net quantity of the contents are plainly or conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: Provided, however, that reasonable variations or tolerances shall be permitted and that these reasonable variations or tolerances, and also exemptions as to small packages shall be established by rules and regulations made by and published with other rules and regulations approved by the Department of Agriculture. (1927, c. 261, s. 16.)

§ 81-16. Sales when no claim of weight or measure made.—Nothing in this article shall be construed to prohibit the sale by farmers, dealers or merchants, of fruits and vegetables when sold by the piece, head or bunch, and there is no claim made as to its weight or measure. (1927, c. 261, s. 17.)

§ 81-17. Net weight basis of sales by weight.—Whenever any commodity is sold on a basis of weight, it shall be unlawful to employ any other weight in such sale than the net weight of the commodity and all contracts concerning goods sold on a basis of weight shall be understood and construed accordingly. Whenever the weight of a commodity is mentioned in this article, it shall be understood and construed to mean the net weight of the commodity. (1927, c. 261, s. 18.)

§ 81-18. Acts and omissions declared misdemeanor.—Any person who, by himself, or his servant or agent, or as the servant or agent of any other person, shall offer, or expose for sale, sell,

use in the buying or selling of any commodity or thing or for hire or award, or in the computation of any charge for services rendered on the basis of weight or measure, or in the determination of weight or measure, when a charge is made for such determination, or retain in his possession a false weight or measure or weighing or measuring device or any weight or measure or weighing or measuring device which has not been sealed by the State Superintendent, or his deputy, or inspectors, or by a sealer or deputy sealer of weights and measures within one year, or shall dispose of any condemned weight, measure, or weighing or measuring device contrary to law, or remove the tag placed thereon by the State Superintendent, or his deputy, or inspectors, or who shall sell or offer or expose for sale less than the quantity he represents on any commodity, thing, or service, or shall take or attempt to take more than the quantity he represents, when as the buyer, he furnishes the weight, measure, or weighing or measuring device by means of which the amount of any commodity, thing, or service is determined; or who shall keep for the purpose of sale, offer or expose for sale, or sell any commodity in a manner contrary to law; or who shall violate any provisions of this article for which a specific penalty has not been provided; or who shall sell or offer for sale, or use or have in his possession for the purpose of selling or using any device or instrument to be used to, or calculated to, falsify any weight or measure, shall be guilty of a misdemeanor, and shall be punished by fine of not less than ten dollars or more than two hundred dollars, or by imprisonment for not more than three months, or by both such fine and imprisonment, upon a first conviction in any court of competent jurisdiction; and upon a second or subsequent conviction in any court of competent jurisdiction he shall be punished by a fine of not less than fifty dollars or more than five hundred dollars, or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. (1927, c. 261, s. 19.)

§ 81-19. "Person" construed.—The word "person" as used in this article shall be construed to impart both the plural and singular as the case demands and shall include corporations, companies, societies and associations. (1927, c. 261, s. 20.)

§ 81-20. "Weights, measures, weighing or measuring devices" construed.—The words "weights, measures, or (and) weighing or (and) measuring devices" as used in this article, shall be construed to include all weights, scales, beams, measures of every kind, instruments, mechanical devices for weighing or measuring any other appliances and accessories connected with any or all such instruments. The words "sale or sell" as used in this act shall be construed to include barter and exchange. (1927, c. 261, s. 21.)

§ 81-21. Transfer of division of weights and measures to department of revenue. — The governor of North Carolina is hereby authorized by executive order to transfer the superintendent of weights and measures, as set up by this article, to the department of revenue.

In the case of the transfer of the superintendent of weights and measures as set forth in this section, the governor, together with the commissioner of revenue, is hereby authorized and empowered to promulgate and enforce such rules and regulations as he or they may deem necessary or advisable to effectuate this article, and all appointive and elective authority now vested in the commissioner of agriculture by this article pertaining to weights and measures, is hereby transferred to the governor of North Carolina; and the governor is specifically authorized and empowered to appoint a superintendent of weights and measures to serve at the will of the governor. (1933, c. 523, ss. 1, 2.)

§ 81-22. Certain measures regulated. — Whenever any commodity now named in § 81-24, shall be quoted or sold by the bushel, the bushel shall consist of the number of pounds stated in said section; and whenever quoted or sold in subdivisions of the bushel, the number of pounds shall consist of the fractional part of the number of pounds as set forth therein for the bushel; and when sold by the barrel shall consist of the number of pounds constituting 3.281 bushels. (1933, c. 523, s. 3.)

Art. 2. Establishment and Use of Standards.

§ 81-23. Standard weights and measures, exception; penalty.—The standard weight of the following seeds and other articles named shall be as stated in this section, viz:

Alfalfa shall be 60 lbs. per bu.; apples, dried, shall be 24 lbs. per bu.; apple seed shall be 40 lbs. per bu.; barley shall be 48 lbs. per bu.; beans, castor, shall be 46 lbs. per bu.; beans, dry, shall be 60 lbs. per bu.; beans, green in pod, shall be 30 lbs. per bu.; beans, soy, shall be 60 lbs. per bu.; beef, net, shall be 200 lbs. per bbl.; beets shall be 50 lbs. per bu.; blackberries shall be 48 lbs. per bu.; blackberries, dried, shall be 28 lbs. per bu.; bran shall be 20 lbs. per bu.; broomcorn shall be 44 lbs. per bu.; buckwheat shall be 50 lbs. per bu.; cabbage shall be 50 lbs. per bu.; canary seed shall be 60 lbs. per bu.; carrots shall be 50 lbs. per bu.; cherries, with stems, shall be 56 lbs. per bu.; cherries, without stems, shall be 64 lbs. per bu.; clover seed, red and white, shall be 60 lbs. per bu.; clover, burr, shall be 8 lbs. per bu.; clover, German, shall be 60 lbs. per bu.; clover, Japan, Lespedeza, shall be, in hull 25 lbs. per bu.; corn, shelled, shall be 56 lbs. per bu.; corn, Kaffir, shall be 50 lbs. per bu.; corn, pop, shall be 70 lbs. per bu.; cotton seed shall be 30 lbs. per bu.; cotton seed, Sea Island, shall be 44 lbs. per bu.; cucumbers shall be 48 lbs. per bu.; fish shall be 100 lbs. per ½ bbl.; flax seed shall be 56 lbs. per bu.; grapes, with stems, shall be 48 lbs. per bu.; grapes, without stems, shall be 60 lbs. per bu.; gooseberries shall be 48 lbs. per bu.; grass seed, Bermuda, shall be 14 lbs. per bu.; grass seed, blue, shall be 14 lbs. per bu.; grass seed, Hungarian, shall be 48 lbs. per bu.; grass seed, Johnson, shall be 25 lbs. per bu.; grass seed, Italian rye, shall be 20 lbs. per bu.; grass seed, orchard, shall be 14 lbs. per bu.; grass seed, tall meadow and tall fescue, 24 lbs. per bu.; grass seed, all meadow and fescue except tall, 14 lbs. per bu.; grass seed, perennial rye, shall be 14 lbs. per bu.; grass seed, timothy, shall be 45 lbs. per bu.; grass seed, velvet, shall be 7 lbs. per bu.; grass, red top, shall be 14 lbs. per bu.; hemp seed shall be 44 lbs.

per bu.; hominy shall be 62 lbs. per bu.; horseradish shall be 50 lbs. per bu.; liquids shall be 42 gals. per bbl.; meal, corn, whether bolted or unbolted, 48 lbs. per bu.; melon, cantaloupe, shall be 50 lbs. per bu.; millet shall be 50 lbs. per bu.; mustard shall be 58 lbs. per bu.; nuts, chestnuts, shall be 50 lbs. per bu.; nuts, hickory, without hulls, shall be 50 lbs. per bu.; nuts, walnuts without hulls, shall be 50 lbs. per bu.; oats, seed, shall be 32 lbs. per bu.; onions, button sets, shall be 32 lbs.; onions, top buttons, shall be 28 lbs. per bu.; onions, matured, shall be 57 lbs. per bu.; osage orange seed shall be 33 lbs. per bu.; peaches, matured, shall be 50 lbs. per bu.; peaches, dried, shall be 25 lbs. per bu.; peanuts shall be 22 lbs. per bu.; peach seed shall be 50 lbs. per bu.; peanuts, Spanish, shall be 30 lbs. per bu.; parsnips shall be 50 lbs. per bu.; pears, matured, shall be 56 lbs. per bu.; pears, dried, shall be 26 lbs. per bu.; peas, dry, shall be 60 lbs. per bu; peas, green, shall be, in hull 30 lbs. per bu.; pieplant shall be 50 lbs. per bu.; plums shall be 64 lbs. per bu.; pork, net, shall be 200 lbs. per bbl.; potatoes, Irish, shall be 56 lbs. per bu.; potatoes, sweet, green, shall be 56 lbs. per bu.; and the dry weight 47 lbs. per bu.; quinces, matured, shall be 48 lbs. per bu.; raspberries shall be 48 lbs. per bu.; rice, rough, shall be 44 lbs. per bu.; rye seed shall be 56 lbs. per bu.; sage shall be 4 lbs. per bu.; salads, mustard, spinach, turnips, kale 10 lbs. per bu.; salt shall be 50 lbs. per bu.; sorghum seed shall be 50 lbs. per bu.; sorghum molasses shall be 12 lbs. per gal.; strawberries shall be 48 lbs. per bu.; sunflower seed shall be 24 lbs. per bu.; teosinte shall be 59 lbs. per bu.; tomatoes shall be 56 lbs. per bu.; turnips shall be 50 lbs. per bu.; wheat shall be 60 lbs. per bu.; cement shall be 80 lbs. per bu.; charcoal shall be 22 lbs. per bu.; coal, stone, shall be 80 lbs. per bu.; coke shall be 40 lbs. per bu.; hair, plastering, shall be 8 lbs. per bu.; land plaster shall be 100 lbs. per bu.; lime, unslaked, shall be 80 lbs. per bu.; lime, slaked, shall be 40 lbs. per bu.

It shall be unlawful to purchase or sell, or barter or exchange, any article named in this section on any other basis than as stated herein: Provided, however, that any and/or all such articles may be sold by weight, avoirdupois standard.

If any person shall take any greater weight than is specified for any of the items named herein, he shall forfeit and pay the sum of twenty dollars for each separate case to any person who may sue for same. (Code, ss. 3849, 3850; 1885, c. 26; Rev. 3066; 1905, c. 126; 1909, cc. 555, s. 1, 835; 1915, c. 230, s. 1; 1917, c. 34; Ex. Sess. 1921, c. 87; 1931, c. 76; 1937, c. 354.)

Editor's Note.—The Act of 1931 amended this section as follows: "The standard weight of green sweet potatoes shall be fifty-six (56) pounds per bushel, and the dry weight forty-seven (47) pounds per bushel."

The 1937 amendment struck out the clauses relating to the weight of corn in ear, and substituted "gallon" for "bushel" in the clause relating to the weight of sorghum molasses. It also substituted the next to the last paragraph for the one formerly appearing in this section.

§ 81-24. Congressional standards adopted.—No trader or other person shall buy or sell, or otherwise use in trading, any other weights and measures than are made and used according to the standard prescribed by the congress of the United States: Provided, that this chapter shall not prevent the citizens of the state from buying and selling grain by measure as may be agreed upon between the parties. (Rev., s. 3063; Code, s. 3837; R. C., c. 117, s. 1; 1741, c. 32, s. 2; 1866, c. 125; C. S. 8061.)

Cited in Nance v. Sou. Ry., 149 N. C. 366, 63 S. E. 116.

§ 81-25. Area of acre.—The measure of an acre of land shall be equal to a rectangle of sixteen poles or perches in length and ten in breadth, and shall contain one hundred and sixty square perches or poles, or four thousand eight hundred and forty square yards, six hundred and forty such acres being contained in a square mile. (Rev., s. 3065; Code, s. 3843; R. C., c. 117, s. 7; 33 Edw. I, c. 6; C. S. 8062.)

Art. 3. County Standard.

§§ 81-26 to 81-35: Repealed by Session Laws 1943, c. 543.

Art. 4. Public Weigh Masters.

§ 81-36. Definitions.—Any person, either for himself or as a servant or agent of any other person, firm, or corporation, or who is elected by popular vote, who shall weigh, or measure, or count, or who shall ascertain from, or record the indications or readings of, a weighing, or measuring, or recording, device or apparatus for any other person, firm or corporation, and declare the weight, or measure, or count, or reading or recording to be the true weight, or measure, or count, or reading, or recording of any commodity, thing, article, or product upon which the purchase, or sale, or exchange, is based, and make a charge for, or collect pay, a fee, or any other compensation for such act and shall issue a certificate of weight, or measure, or count, in accordance with the provisions of this article, shall be licensed and shall be known as a public weigh master in the state of North Carolina. (1939, c. 285, s. 1.)

For comment on this enactment, see 17 N. C. Law Rev. 338.

§ 81-37. Application for license permit.—Any person desiring to be a public weigh master in this state shall apply for and obtain license permit from the state of North Carolina through the state superintendent of weights and measures by filing formal application as follows:

"I, ..., a citizen of the United States, residing at ....., county of ....., have familiarized myself with the law and with full knowledge of the provisions contained therein relative to licensing of public weigh master, do hereby file application for license permit to be issued accordingly.

I certify that I am of sound mind and am physically fit to perform the duties imposed upon a public weigh master and that I will, if licensed, abide by and enforce all laws, rules and regulations relating to the public weigh master Act to the best of my knowledge and ability.

I, ..., ...,) Being a citizen of this State
Name address) and of good moral character, not related to the applicant by blood or marriage, do hereby certify that the statement of applicant is true to the best of my knowledge and belief and that my endorsement is without fear or embarrassment." (1939, c. 285, s. 2.)

§ 81-38. Forms of certificates of weight, etc., to be approved by state superintendent of weights and measures.—It shall be the duty of every public weigh master licensed by this article to issue a certificate of weight, measure, count, reading, or recording on forms approved by the state superintendent of weights and measures, and to enforce the provisions of this article, together with rules and regulations relating thereto. Said public weigh master shall not receive compensation from the state for the duties so performed. (1939, ch. 285, s. 3.)

§ 81-39. Official seal of public weigh masters.—It shall be the duty of every public weigh master so licensed by this article, to obtain from the state department of weights and measures an official seal, which seal shall have inscribed thereon the following words: "North Carolina Public Weigh Master" and such other design and/or legend as the state superintendent of weights and measures may deem appropriate. The seal shall be stamped or impressed upon each and every weight, measure, numerical count, reading or recording certificate issued by such public weigh master, and when so applied the certificate shall be recognized and accepted as a declaration of the official, true, and accurate and undisputed weight, measure, count, reading or recording of the commodity, product, or article weighed, or measured, or counted within the tolerance allowed by the "Uniform Weights and Measures Act" of this state: Provided, however, that the weighers of tobacco in "Leaf Tobacco Warehouses" may use, in lieu of said seal, a signature, which signature shall also appear, in ink or other indelible substance on the Weigh Master's Formal Application, and again, posted in a conspicuous and accessible place in the tobacco warehouse where he is acting as weigh master. (1939, c. 285, s. 4; 1941, c. 317, s. 1.)

Editor's Note.—The 1941 amendment directed that a colon be substituted for the period at the end of the section and the proviso added.

§ 81-40. Violations of provisions by weigh masters made misdemeanor. — Any public weigh master who shall refuse to issue a certificate as prescribed by this article, or who shall issue a certificate giving a false weight, or measure, or count, or reading, or recording, or who shall misrepresent the weight, or measure, or count, or reading or recording of the quantity of any commodity, produce or article to any person, firm or corporation, or who shall otherwise violate any of the provisions of this article shall be guilty of misdemeanor and upon conviction thereof shall be punished by a fine of not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00), or by imprisonment for not more than three months, or by both such fine and imprisonment in the discretion of the court, and, in addition thereto, his license shall be revoked and he shall forfeit his seal which, when so forfeited, shall be turned over to the state superintendent of weights and measures or his agents. (1939, c. 285, s. 5.)

§ 81-41. Requesting weigh waster to falsify weights; impersonation of weigh master; alteration of certificate, etc.—Any person, firm, or corporation who shall request a public weigh master to weigh, measure, count, read, or record any commodity, product or article falsely or incorrectly, or who shall request a false or inaccurate certificate of weight, measure, count, reading or recording, or any person issuing a certificate of weight, or measure, or count, or reading, or recording within the meaning of this article, who is not a public weigh master as provided for by this article, or who shall act as, or for, or in any way impersonate, a public weigh master, or who shall erase, change, or alter any certificate issued by a public weigh master, or who shall make incorrect the certificate by increasing or decreasing the weight or measure or count of the commodity, product or article certified to for the purpose of deception, or who shall violate any provision of this article for which a special penalty has not been provided, shall be guilty of misdemeanor and upon conviction thereof shall be punished by a fine of not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00), or by imprisonment for not more than three months, or by both such fine and imprisonment in the discretion of the court. (1939, c. 285, s. 6.)

§ 81-42. Certificates of weigh masters presumed accurate and correct. — When a public weigh master certificate is used in the sale, or purchase, or barter, or exchange of any commodity, produce, or article, the certified weight, or measure, or count or reading or recording shall be deemed to be the true, accurate and undisputed weight, or measure, or count, or reading or recording at time said commodity, produce, or article is put into the natural channels of trade, which is, at the time of sale or purchase or barter or exchange: Provided, however, that reasonable variations, or tolerances shall be permitted as established by rules and regulations as provided for by Uniform Weights and Measures Act. (1939, c. 285, s. 7; 1941, c. 317, s. 2.)

Editor's Note.—The 1941 amendment struck out from the end of the section the words: "And provided, further, that there is no written contract or agreement to the contrary."

§ 81-43. Duty of custodian of product during time intervening between weighing and issuance of certificate.—If any commodity, product or article is to be offered for sale, or sold and is weighed or measured or counted by any public weigh master and a certificate issued prior to sale, or acceptance of such commodity, product or article by the purchaser, his agent, or consignee or, if any commodity product or article is offered for sale, sold, and/or delivered pending the weighing or measuring or counting of such commodity, product, or article by a public weigh master and the issuance of a certificate, the person, firm or corporation in whose custody said commodity, product or article is, shall keep, protect and prevent any increase or decrease in weight, measure or count, in the interim so that the declaration of weight, or measure, or count shall be true in accordance with § 81-42. The term "interim" as used in this section shall be construed to mean the time intervening between the weighing and issuance of certificate and the sale or purchase; and the time intervening between the sale or purchase and the presentation of such commodity, product, or article to the public weigh master for weighing, or measuring or counting, and the issuance of certificate. Any loss sustained in the

weight or measure or count of any commodity, produce, or article while in custody shall be borne by the person, firm or corporation in whose custody said commodity, produce, or article is. (1939, c. 285, s. 8.)

§ 81-44. Complaints to weigh master or state superintendent of weights and measures. — When doubt or difference arises as to the correctness of the weight, or measure, or count, or reading, or recording of any amount or part of any commodity, product, or article for which a certificate of weight, measure, count, reading or recording, has been issued by a public weigh master, the owner, agent or consignee shall make complaint before moving said commodity, produce, or article from city, town or community where weight certificate was issued, to the public weigh master issuing said certificate or to the state superintendent of weights and measures setting forth cause or causes for such doubt and/or difference, and have said amount, or part of the amount, or any commodity, product, or article reweighed, or remeasured, or recounted by the weigh master issuing the certificate or by the state superintendent of weights and measures or his agents: Provided, the commodity, produce or article is kept and protected as is required during the interim period provided for in § 81-43. If, on reweighing, remeasuring or recounting, a difference in original weight, or measure or count, is sustained the difference thus sustained shall be that, and that only, which is in excess of tolerance allowed by § 81-42, and any desired adjustment as a result of such difference shall be made accordingly, and the cost of reweighing or remeasuring or recounting shall be borne by the public weigh master responsible for the issuance of such faulty certificate; otherwise, the cost shall be borne by the complainant. (1939, c. 285, s. 9; 1941, c. 317, s. 3.)

Editor's Note.—The 1941 amendment inserted the provisions referring to §§ 81-42 and 81-43 and made other changes.

§ 81-45. Approval by state superintendent of weights and measures of devices used. — It shall be unlawful for any public weigh master to use any weights or measures, or weighing or measuring or reading or recording device, which has not been tested and/or approved by the state superintendent of weights and measures, or his assistant or deputy or inspector in accordance with the "Uniform Weights and Measures Act" and/or the rules and regulations governing same. (1939, c. 285, s. 10.)

§ 81-46. Annual license for public weigh masters.—Public weigh masters shall be licensed for a period of one year beginning on the first day of July and ending on the thirtieth day of June, next, and a fee of five dollars ($5.00) shall be paid by each person so licensed to the state superintendent of weights and measures at time of filing application, as set forth in § 81-37, which fee shall be deposited with the state treasurer of North Carolina by the said state superintendent of weights and measures, and shall be kept in a separate and distinct fund designated as a special uniform weights and measures fund by said treasurer, and shall be disbursed by him under the terms of the Executive Budget Act: Provided, that a similar fee, as provided in this section, shall be required of all renewals of license as a public weigh master, which fee shall also be turned into the treasurer of the state by the state superintendent of weights and measures, to be expended in the manner herein set out. (1939, c. 285, s. 11; 1943, c. 543.)

Editor's Note.—The 1943 amendment struck out the words "from the date of issuance thereof" in the second and third lines, and inserted in lieu thereof the words "beginning on the first day of July and ending on the thirtieth day of June, next."

§ 81-47. Use of fees collected.—All monies collected by this article shall be used exclusively for the enforcement of this and the Uniform Weights and Measures Act. (1939, c. 285, s. 12.)

§ 81-48. Seal obtained from state superintendent of weights and measures. — Each public weigh master licensed under this article shall obtain from the state superintendent of weights and measures the seal, as provided for by this article, and pay the sum of two dollars and fifty cents ($2.50), which sum shall be for the use of said seal, and no additional charges shall be made as long as the public weigh master is licensed in accordance with the provisions of this article. Monies collected under this section shall be deposited with the state treasurer of North Carolina and expended for the purposes of this article under the terms of the Executive Budget Act. The state superintendent of weights and measures shall issue to the public weigh master the said seal upon receipt of said sum. All seals as issued to the public weigh masters shall be paid for out of the special uniform weights and measures fund. (1939, c. 285, s. 13.)

§ 81-49. Seal declared property of state.—The seal herein provided for shall be the property of the state of North Carolina and shall be forfeited and returned to the state superintendent of weights and measures upon termination of the performance of duties herein described as being the duties of a public weigh master. Failure or refusal of a person licensed as a public weigh master under this article to return, turn over, or surrender the official seal furnished by the state superintendent of weights and measures upon expiration of term of license or for malfeasance in office, shall be a misdemeanor and any person convicted thereof shall forfeit the amount paid for use of such seal and shall be punished by a fine of not less than ten dollars ($10.00) nor more than two hundred dollars ($200.00), or by imprisonment for not more than three months, or both such fine and imprisonment, in the discretion of the court. (1939, c. 285, s. 14.)

Art. 5. Scale Mechanics.

§ 81-50. Cotton weighing.—If any weigher or purchaser of cotton shall make any deduction from the weight of any bag, bale, or package of lint cotton, for or on account of the draft, turn, or break of the scales, steelyards, or other implement used in weighing the same, or for any other cause except as herein allowed, the person so offending shall be guilty of a misdemeanor, and fined three hundred dollars or imprisoned, in the discretion of the court: Provided, however, that deductions may be made by the weigher for water, dirt, or other foreign substances on such bag, bale

or package of cotton, or for other just cause; but, if such deductions are made, the nature of such deductions shall be indicated upon the principal weight ticket which shall also show the gross weight of the cotton, the amount deducted as tare, and the net weight of said cotton. (Rev., s. 3816; Code, s. 1007; 1874-5, c. 58, ss. 1, 3; 1943, c. 762, s 2; C. S. 5085.)

Editor's Note.—The 1943 amendment rewrote the proviso.

§ 81-51: Repealed by Session Laws 1943, c. 543.

§ 81-52. Purpose of act.—The purpose and intent of this act shall be:

(a) To protect the owners and/or users of scales in this state against the practices of the unscrupulous, incompetent and fraudulent, "self-named" "scale mechanic."

(b) To provide honest, efficient and competent scale service.

(c) To protect the honest, efficient and competent "scale mechanic" in the practice of his profession. (1941, c. 237, s. 1.)

Editor's Note.—For comment on this act, see 19 N. C. L. Rev. 447.

§ 81-53. Definition of "scale mechanic;" act not applicable to certain apprentices or helpers.—Any person who is skilled in installing, adjusting, maintaining and repairing scales and/or weighing devices and who acts as such for hire or award and who is registered, shall be known as a "scale mechanic," provided, conditions as hereinafter stipulated are complied with; and provided further that the provisions of this act shall not apply to an apprentice or helper when working with a registered "scale mechanic." (1941, c. 237, s. 2.)

§ 81-54. Prerequisites for "scale mechanic."—A "scale mechanic," as defined in § 81-53 shall have the following prerequisites:

(a) A thorough working knowledge of scale mechanics.

(b) Be endorsed by three reputable citizens of this state, not related to "scale mechanic" by blood or marriage, for whom said "scale mechanic" has rendered satisfactory scale repair service.

(c) Shall furnish the state superintendent of weights and measures satisfactory proof of his ability to comply with the provisions of this act and any and all rules and/or regulations promulgated in accordance therewith.

(d) Shall apply for, and be registered as such, with the state superintendent of weights and measures. (1941, c. 237, s. 3.)

§ 81-55. Requirements for registration.—In order to be registered a "scale mechanic" must:

(a) Give satisfactory proof of prerequisites a, b and c as set forth in § 81-54, to the state superintendent of weights and measures.

(b) Have sufficient tools and test weights or equipment as may be necessary to render satisfactory scale service and be able to test counter scales up to thirty pounds and platform scales up to twenty-five per cent of capacity.

(c) Conform and/or comply with such rules and regulations as provided for by § 81-57. (1941, c. 237, s. 4.)

§ 81-56. Issuance of certificate of registration; annual renewal.—Upon compliance with the provisions of § 81-55, the state superintendent of weights and measures is authorized to issue a certificate of registration to such "scale mechanic," which certificate shall be renewed annually on the first day of July and the state superintendent of weights and measures shall have the power and authority to refuse to renew such certificate if it appears to his satisfaction that such "scale mechanic" has secured the original certificate of registration by false representation as to his ability or has failed to comply with the provisions of this act and any and all rules and/or regulations promulgated in accordance therewith. (1941, c. 237, s. 5; 1943, c. 543.)

Editor's Note.—The 1943 amendment inserted after the word "annually" in the fifth line the words "on the first day of July."

§ 81-57. Rules and regulations.—Such rules and regulations as are necessary to carry out the purpose and intent of this act shall be made and published by the state superintendent of weights and measures by and with the advice of his advisory board. (1941, c. 237, s. 6.)

§ 81-58. Impersonation of registered "scale mechanic" and violation of rules.—Any person who shall impersonate in any way a registered "scale mechanic" as herein provided for or violate any of the provisions or related rules or regulations of this act, shall be guilty of a misdemeanor and punished by a fine of not less than ten dollars and not more than five hundred dollars or by imprisonment not exceeding thirty days or by both such fine and imprisonment upon conviction in any court of competent jurisdiction. (1941, c. 237, s. 7.)

Art. 6. Surveyors.

§ 81-59. Standard surveyor's chain; tests.—The standard measure for a surveyor's chain shall be twenty-two standard yards, a standard half or two-pole chain shall be eleven standard yards, a standard quarter or one-pole chain shall be five and one-half standard yards; but every person using a surveyor's chain, half-chain, or quarter-chain for measuring land shall every two years test the same in the manner hereinafter provided. (Rev., s. 3075; 1889, c. 409; 1899, c. 665; C. S. 8074.)

Cross Reference.—As to official survey base, see §§ 102-1 to 102-11.

§ 81-60. Using untested chain misdemeanor.—If any person shall use any chain for measuring land without having the same first measured and sealed by the state superintendent of weights and measures, his deputy or inspector, or shall use the same for a longer period than two years without bringing it to the state superintendent of weights and measures, his deputy or inspector, and having the same measured and sealed by him, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding ten dollars. (Rev., s. 3684; 1889, c. 409, s. 2; 1943, c. 543; C. S. 8075.)

Editor's Note.—The 1943 amendment inserted the words "state superintendent of weights and measures, his deputy or inspector."

§ 81-61. Tests for magnetic variation and for chain.—Every surveyor operating in any of the counties of this state with magnetic instruments, whether in a public or private capacity, shall, between the first day of January and thirty-first day of December in each and every year, carefully test his needle upon the official meridian monu-

ments in the county in which he resides or the nearest county in which such monuments have been erected, by adjusting his instrument over the intersection of the lines cut into the top of one of the meridian monuments so established and sighting to the intersection of the lines cut into the top of the other meridian monument, noting the variation of the magnetic from the true meridian and the direction thereof, and shall test the chain or other instrument of linear measure upon the distance from center to center as indicated by intersecting lines of the two beams, tablets, or other official monuments set at or near the county courthouse for this purpose, noting the error of such instrument as compared with the standard of the monuments. (Rev., s. 3076; 1899, c. 665, s. 1; 1901, c. 642; C. S. 8076.)

§ 81-62. Magnetic variation to be recorded with survey.—On every official record of a survey of lands made after the first day in July, nineteen hundred and one, in any county in which meridian monuments have been erected, there shall be entered by the surveyor making such survey a record as to the date of testing the magnetic instrument used, and the amount of declination or variation of the magnetic needle indicated at such test. (Rev., s. 3076; C. S. 8077.)

§ 81-63. Surveys in another county; data as to variation recorded.—Before making surveys in any county other than the one in which the magnetic instrument and instruments for linear measure to be used have already been tested, said surveyor shall procure in writing from the register of deeds of the county in which said monuments have been established, nearest to the point where the survey is to be made, a statement giving the declination of the magnetic needle for the year in which it was last determined, and the rate and direction of the variation of said magnetic needle since that time, and this data shall be recorded as a part of the record of his survey. But no surveyor shall be required to go outside of the county in which he resides for the purpose of testing the instruments herein named. (Rev., s. 3077; 1899, c. 665, s. 1; C. S. 8078.)

§ 81-64. Tests returned to register; records kept.—Such tests and the correction, if any, resulting therefrom shall be returned by the surveyor in writing and under oath to the register of deeds for the county in which such meridian is situate within ten days from the taking of the observations, setting forth the name of the surveyor, his residence, the character of the instrument tested, the date of the observations, the declination east or west of the magnetic needle from the true meridian, together with a fee of ten cents for filing and registering the same; and such return shall be filed and registered by the register of deeds in a book properly ruled and lettered, to be furnished by the board of commissioners of the county, to be used for such purpose exclusively and entitled "The Meridian Record." (Rev., s. 3078; 1899, c. 665, s. 1; C. S. 8079.)

§ 81-65. Meridian monuments protected by county commissioners.—It shall be the duty of the board of county commissioners to maintain and protect the meridian monuments and tablets or monuments for the testing of chains or other instruments of linear measure established by the state, or national surveys coöperating with the county authorities, in good order and condition as the official standards of the county. (Rev., s. 3079; 1899, c. 665, s. 2; C. S. 8080.)

§ 81-66. Defacing meridian monuments misdemeanor.—If any person shall in any manner injure, deface, remove, or destroy any meridian monument or tablets, or any part thereof, or shall fail, neglect, or refuse to do and perform any act, matter, or thing by law required of him to be done in connection with such monuments or tablets, he shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine or be imprisoned, or both, at the discretion of the court. (Rev., s. 3743; 1899, c. 665, s. 3; 1893, c. 282, s. 4; C. S. 8081.)

Art. 7. Standard Weight Packages of Grits, Meal and Flour.

§ 81-67. Corn meal.—It shall be unlawful for any person or persons to pack for sale, sell, or offer for sale in this state corn meal except in packages containing one pound, two pounds, three pounds, five pounds, ten pounds, twenty-five pounds, fifty pounds, or one hundred pounds, or multiple of one hundred pounds, and whether the meal is bolted or unbolted shall be stated on the package. (1921, c. 170, s. 1; C. S. 8081(a).)

Local Modification.—Clay, Lenoir, Transylvania, Swain: 1931, c. 299; Jackson: 1931, c. 122; Macon: 1933, c. 82.

Cross References.—As to other sections regulating the sale of grits, meal and flour, see §§ 106-203 to 106-209. As to act establishing uniform weights and measures in general, see §§ 81-1 to 81-22.

§ 81-68. Hominy or grits.—It shall be unlawful for any person or persons to pack for sale, sell, or offer for sale any hominy or grits except in packages of one pound, one and one-half pounds, two pounds, three pounds, five pounds, ten pounds, twenty-five pounds, fifty pounds, or one hundred pounds, or multiples of one hundred pounds. (1921, c. 170, s. 2; 1933, c. 162; C. S. 8081(b).)

Cross Reference.—See note to § 81-68.

Editor's Note.—Public Laws of 1933, c. 162, added "two pounds" and "twenty-five pounds" to the list of weights enumerated in this section.

§ 81-69. Flour; sales from bulk.—It shall be unlawful for any person or persons to pack for sale, sell, or offer for sale in this state flour, except in packages containing six pounds, twelve pounds, twenty-four pounds, forty-eight pounds, ninety-eight pounds, or one hundred and ninety-six pounds of flour, and the net weight of all grits, meal, or flour shall be stated on the package of such meal, flour, or grits, with the name and address of the maker or jobber: Provided, the provisions of this article shall not apply to the retailing of grits, meal or flour direct to customers from bulk, when the same is priced and delivered by actual weight. (1921, c. 170, s. 3; C. S. 8081(c).)

Cross References.—As to similar section regulating the sale of flour, see § 106-204. As to act establishing uniform weights and measures in general, see §§ 81-1 to 81-22.

§ 81-70. Packages of corn meal, grits or flour weighing five pounds or less.—The provisions of the above three sections shall not apply to pack-

ages of corn meal, grits and/or flour weighing five pounds or less but same may be packed for sale, sold or offered for sale when and if the said packages are plainly and conspicuously marked, which said marking must show the net contents by avoirdupois weight, and said packages must be so filled that the size will not tend to deceive or aid in the perpetration of fraud in the sale thereof. (1935, c. 269.)

Cross References.—See § 106-203. As to act establishing uniform weights and measures in general, see §§ 81-1 to 81-22.

§§ 81-71, 81-72: Repealed by Session Laws 1943, c. 543.

Chapter 82. Wrecks.

Sec.
82-1. Number and boundaries of wreck districts.
82-2. Commissioners of wrecks; appointment, residence and term of office.
82-3. Commissioners to give bond.
82-4. Commissioners to take oath of office.
82-5. Duty of commissioners.
82-6. Salvage to be paid, or its payment secured, before release of goods.
82-7. Adjustment of salvage when the parties cannot agree.
82-8. Sale of wrecked property for salvage; compensation of commissioner.
82-9. Compensation of commissioner when there is no sale.
82-10. Sale of unclaimed property.
82-11. Proceeds of sale to be paid to clerk of superior court.
82-12. Disposition of proceeds of sale by clerk.
82-13. Proof of ownership of property sold.
82-14. Stranded property to be reported; failure to report misdemeanor.
82-15. Expenses to be deducted from proceeds of sales.
82-16. Violation of chapter a misdemeanor.
82-17. Commissioner violating chapter liable for double damages and guilty of a misdemeanor.
82-18. Interfering with commissioner in the discharge of his duties.

§ 82-1. Number and boundaries of wreck districts.—The counties of Currituck, Dare, Hyde, Carteret, Onslow, Brunswick, and New Hanover are hereby divided into the following wreck districts, namely:

Currituck.—The first to extend from the Virginia state line to Judy's cove; the second to extend from the Judy's cove to Josephus Baum's fish house; the third to extend from Josephus Baum's fish-house to the county line of Dare.

Dare.—The first to extend from the county line of Currituck to the north point of Oregon inlet; the second to extend from the north point of Oregon inlet to the south point of New inlet; the third to extend from the south point of New inlet to the patrol house between Gull Shoal and Little Kennakeet life-saving stations; the fourth to extend from the last named patrol house to the patrol house between Big Kennakeet and Cape Hatteras life-saving stations; the fifth to extend from the last named patrol house to Creed's Hill life-saving stations; the sixth to extend from Creed's Hill life-saving stations to the county line of Hyde county.

Hyde.—The county of Hyde shall constitute one wreck district, which shall extend from the Dare county line to the Carteret county line.

Carteret.—The first from the Hyde county line to Core Banks life-saving station; the second from Core Banks life-saving station to Old Topsail inlet; the third from Old Topsail inlet to the Onslow county line.

Onslow.—The first from Bogue inlet to New River inlet; the second from New River inlet to the New Hanover county line.

New Hanover and Brunswick.—To extend from the Onslow county line to the South Carolina state line. (Rev., s. 5439; 1899, c. 79, ss. 1-9; 1903, c. 85; 1905, c. 199; 1915, c. 42; C. S. 8082.)

Editor's Note.—In the early case of Etheridge v. Jones, 30 N. C. 100, the question arose as to the right of the commissioners to take possession of a stranded ship without the consent of the master. It was held in that case that the commissioners did not have exclusive control of a wrecked vessel and the master or owner could take control of and dispose of a wrecked vessel without any responsibility to the commissioners.

The case of Hitfield v. Baum, 35 N. C. 394, 395, lays down the rule that there is an easement or right of way reserved by necessity for any person to enter over the land of another for the purpose of reaching and carrying away the cargo of a wrecked vessel.

§ 82-2. Commissioners of wrecks; appointment, residence and term of office. — The governor, whenever it may be necessary, shall appoint a commissioner of wrecks for each of the districts designated in § 82-1. Each commissioner shall reside in the district for which he is appointed, unless separated by navigable waters, in which case the distance shall not exceed three miles. The restrictions as to residence shall not apply to Hyde county. No person who holds any office of profit or trust under the laws of the United States or the state of North Carolina, nor any person who is a pilot, shall hold the office of commissioner of wrecks. The term of office shall be for two years. (Rev., s. 5440; 1899, c. 79, ss. 10, 12, 13; 1903, c. 85; 1907, c. 398; C. S. 8083.)

§ 82-3. Commissioners to give bond.—Every person appointed a commissioner of wrecks shall enter into a bond, with good and sufficient surety, in the sum of two thousand dollars, payable to the state of North Carolina and conditioned for the faithful performance of his duties. This bond shall be approved by the board of county commissioners and deposited in the office of the clerk of the superior court. (Rev., s. 305; 1899, c. 79, s. 10; C. S. 8084.)

§ 82-4. Commissioners to take oath of office.—Every person appointed a commissioner of wrecks, before entering upon the duties of his

office, shall go before some officer duly authorized to administer oaths and take an oath to perform faithfully the duties of his office, and the oaths to support the constitution of the state and of the United States. (Rev., s. 5441; 1899, c. 79, s. 11; C. S. 8085.)

§ 82-5. Duty of commissioners.—Upon the earliest intelligence given that any ship or vessel is stranded, it shall be the duty of the commissioner in whose district the same is stranded, or his duly authorized agent, to repair at once to such wrecked ship or vessel, and upon the permission of its master to summon immediately a sufficient number of men who, acting under the direction of the commissioner or his agent, shall at once proceed to save the cargo and material of such wrecked vessel. As soon as any such stranded property is saved it shall be immediately placed under guard, one guard to be selected by the commissioner or owner representing the same, and one other guard to be selected by the salvors. Such goods or stranded property shall be kept under strict guard until sold or the salvors are paid as provided in this chapter. (Rev., s. 5442; 1899, c. 79, s. 14; 1901, c. 178; C. S. 8086.)

§ 82-6. Salvage to be paid, or its payment secured, before release of goods. — Every person who assists in saving such cargo or material shall, within thirty days after saving the same, be paid a reasonable reward by the owner or master of the stranded vessel, or by the merchant whose vessel or goods are saved. In default of payment of a reasonable compensation the goods or other property so saved shall remain in the joint custody of the commissioner and salvors until all such charges are paid, or until the payment thereof is secured to the satisfaction of the parties saving such goods or other property. (Rev., s. 5443; 1899, c. 79, ss. 14, 15; C. S. 8087.)

§ 82-7. Adjustment of salvage when the parties cannot agree.—If the parties shall disagree touching the amount of reward or salvage to be paid to the persons employed, the commander, owner, or commissioner who represents the property saved shall choose one disinterested person, and the salvors shall nominate one other, who shall adjust and ascertain the same. If the persons thus chosen cannot agree, they shall choose one other indifferent person as umpire to decide between them: Provided, that the amount to be paid the salvors shall be determined and agreed upon before sale is made of such property. (Rev., s. 5444; 1899, c. 79, s. 16; C. S. 8088.)

§ 82-8. Sale of wrecked property for salvage; compensation of commissioner.—If the owner of the vessel, or the property which has been saved, shall fail for thirty days after the salvage has been ascertained, either by agreement or as provided for in § 82-7, to pay such salvage, it shall be the duty of the commissioner of wrecks in charge of such stranded or wrecked vessel or other property to sell the same at public sale, after first advertising such sale in the same manner as is required for sales of personal property under execution. Each commissioner shall provide himself with books and shall record in them all such sales by him made. He shall receive for selling any such wrecked or stranded property five per centum on the amount of sales, and in addition thereto he shall receive his actual expenses incurred in going to and returning from the place of the wreck, or where the property is stranded, to be paid out of the gross amount of such sales. At any public sale of stranded property, the salvors may select one person and the commissioner one other, who shall keep an accurate account of the sales, make the collections, settle with the commissioner his fees, and pay to the salvors the amount agreed on or awarded by the referees. (Rev., s. 5445; 1899, c. 79, s. 17; 1901, c. 178; 1905, c. 66; C. S. 8089.)

§ 82-9. Compensation of commissioner when there is no sale.—If any owner or merchant shall remove any such goods or other stranded property from the custody of any commissioner without a sale, then such commissioner shall receive, in addition to his actual expenses incurred for the purposes mentioned in § 82-8, two and one-half per centum on the amount of the value of such property, which amount shall be ascertained in the same manner as is provided for ascertaining the amount of the reward to be paid salvors in those cases where such reward cannot be determined by agreement. No commissioner shall receive any salvage or other reward except the commission prescribed in this chapter. (Rev., s. 5446; 1899, c. 79, ss. 17, 18; 1905, c. 66; C. S. 8090.)

§ 82-10. Sale of unclaimed property.—Whenever any vessel, cargo, or material of any ship or vessel or any other property shall be cast ashore or taken up at sea and brought to shore, and no person is present to claim the same as owner, it shall be the duty of the commissioner of the district where the same is brought or cast ashore to take charge of such property and to proceed to advertise and sell it at public sale, first giving twenty days notice of such sale at three public places. On making any such sale the commissioner shall, out of the gross proceeds thereof, retain a commission of five per centum as his compensation and the amount awarded to the salvors pursuant to the provisions of this chapter. (Rev., s. 5447; 1899, c. 79, ss. 19, 20; C. S. 8091.)

§ 82-11. Proceeds of sale to be paid to clerk of superior court.—When any commissioner shall undertake to sell any property where no person is or has been present to claim the same, it shall be his duty to notify the clerk of the superior court of his county of such sale. After any such sale is made, the commissioner shall forward to such clerk the proceeds of the sale, after deducting his commission of five per centum and paying the salvors the amount awarded to them as provided in this chapter. (Rev., s. 5448; 1899, c. 79, s. 21; C. S. 8092.)

§ 82-12. Disposition of proceeds of sale by clerk.—It shall be the duty of the clerk of the superior court to make a record and keep an account of all moneys received by him from any commissioner of wrecks, and he shall advertise in some weekly newspaper published in North Carolina the amount so received, giving a true description of the marks, numbers, and kinds of goods or other stranded property, for which the same was sold. Each commissioner shall give the clerk of the superior court all necessary information for the

proper enforcement of this section in each return made by him to the clerk. The clerk shall advertise for the space of sixty days, and if no person shall come to claim the money within a year and a day from the date of advertisement, then the clerk holding such money shall transmit the same, after deducting one per centum for his trouble and also after deducting the cost of advertising, to the treasurer of the state for the benefit of the public school funds. (Rev., s. 5449; 1899, c. 79, s. 22; C. S. 8093.)

§ 82-13. Proof of ownership of property sold.—If any person shall claim to be the owner of any property sold as provided in § 82-10 and shall present his claim to the clerk holding the money arising from the sale of such property, it shall be the duty of such person to prove his title to the satisfaction of the clerk. If any person making a claim to such property be unknown to the clerk, then the clerk shall submit such claim to the consideration of three disinterested persons, one of whom shall be chosen by the claimant, and the decision of such referees shall always be final. (Rev., s. 5450; 1899, c. 79, s. 23; C. S. 8094.)

§ 82-14. Stranded property to be reported; failure to report misdemeanor.—If any person shall find any wrecked or stranded property on or near the seashore, no person being present to claim the same, he shall as soon as possible give information thereof to the nearest commissioner of wrecks, who shall advertise and sell the same as provided in this chapter. If such finder shall refuse to report the goods so found, he shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars, or imprisoned not more than thirty days. (Rev., ss. 3548, 5451; 1899, c. 79, s. 24; C. S. 8095.)

§ 82-15. Expenses to be deducted from proceeds of sales.—All necessary expenses shall be deducted from the gross proceeds of any sales made under this chapter. Such necessary expenses shall include only the cost of advertising, guarding, and surveying, when a survey is called. (Rev., s. 5452; 1899, c. 79, s. 19; C. S. 8096.)

§ 82-16. Violation of chapter a misdemeanor.—If any person shall violate any of the provisions of this chapter he shall be guilty of a misdemeanor. (Rev., s. 3562; 1899, c. 79, s. 26; C. S. 8097.)

§ 82-17. Commissioner violating chapter liable for double damages and guilty of a misdemeanor.—If any commissioner of wrecks shall by fraud or wilful neglect violate any of the provisions of this chapter, or abuse the trust reposed in him, he shall forfeit and pay double the amount of damages to the party aggrieved. He shall also be guilty of a misdemeanor, and upon conviction shall forfeit his office and shall thereafter be incapable of acting as commissioner. (Rev. s. 3563; 1899, c. 79, s. 25; C. S. 8098.)

§ 82-18. Interfering with commissioner in the discharge of his duties.—If any person shall wilfully and unlawfully resist, delay, or obstruct any commissioner of wrecks in discharging or attempting to discharge his duties as such commissioner, he shall be guilty of a misdemeanor. (Rev., s. 3564; 1905, c. 66, s. 2; C. S. 8099.)

Division XII. Occupations.

Chapter 83. Architects.

§ 83-1. Architecture defined.—For the purpose of this chapter, the practice of architecture consists of rendering or offering to render for compensation design and/or related supervision services, of an aesthetic and/or structural nature, for the construction of buildings, structures or projects, wherein the safeguarding of life, health, and property and the promotion of the public welfare may be involved. An architect is a person who practices architecture as herein defined; provided that nothing herein shall prevent a building contractor from drafting designs and plans without compensation for use by him in constructing or repairing buildings for the owner. (1915, c. 270, s. 9; 1941, c. 369, s. 3; C. S. 4985.)

Editor's Note.—Tht 1941 amendment inserted the above in place of the former section.

For comment on this amendment, see 19 N. C. Law Rev. 446.

§ 83-2. State board of architectual examination and registration; creation; membership; vacancies.—There shall be a state board of architectural examination and registration, consisting of five members, to be appointed by the governor in the following manner, to wit: Within thirty days after the ninth day of March, one thousand nine hundred and fifteen, the governor shall appoint five persons who are reputable architects residing in the state of North Carolina, who have been engaged in the practice of architecture at least ten years. The five persons so appointed by the governor shall constitute the board of architectural examination and registration, and they shall be appointed for one, two, three, four, and five years, respectively. Thereafter, in each year, the governor in like manner shall appoint one licensed architect to fill the vacancy caused by the expiration of the term of office, the term of such new members to be for five years. If vacancy shall occur in the board for any cause, the same shall be filled by the appointment of the governor. (1915, c. 270, s. 1; C. S. 4986.)

§ 83-3. Oath of members. — Each member of the state board of architectural examination and registration shall, before entering upon the discharge of the duties of his office, take and file with the secretary of state an oath in writing to properly perform the duties of his office as a member of said board, and to uphold the constitution of North Carolina and the constitution of the United States. (1915, c. 270, s. 2; C. S. 4987.)

§ 83-4. Organization of board; officers; treasurer's bond.—The said board shall, within thirty days after its appointment by the governor, meet in the city of Raleigh, at a time and place to be designated by the governor, and organize by electing a president, vice-president, secretary, and treasurer, each to serve for one year. Said board shall have power to make such by-laws, rules, and regulations as it shall deem best, provided the same are not in conflict with the laws of North Carolina. The treasurer shall give bond in such sum as the board shall determine, with such security as shall be approved by the board, said bond to be conditioned for the faithful performance of the duties of his office and for the faithful accounting of all moneys and other property as shall come into his hands. (1915, c. 270, s. 1; C. S. 4988.)

§ 83-5. Seal of board.—The board shall adopt a seal for its own use. The seal shall have the words "Board of Architectural Examination and Registration, State of North Carolina," and the Secretary shall have charge, care, and custody thereof. (1915, c. 270, s. 5; C. S. 4989.)

§ 83-6. Meeting of board; quorum.—The board shall meet once a year in July of each succeeding year, for the purpose of electing officers and transacting such other business as may properly come before it. Due notice of such annul meeting, and the time and place thereof, shall be given to each member by letter, sent to his last postoffice address at least ten days before the meetings, and thirty days notice of such annual meeting shall be given in some newspaper published in the city of Raleigh, at least once a week for four weeks preceding such meeting. Three members of the board shall constitute a quorum. (1915, c. 270, s. 1; C. S. 4990.)

§ 83-7. Record of proceedings and of registration.—The secretary shall keep a record of the proceedings of the board and registration for all applicants for registration and admission to practice architecture, giving the name and location of the institution or place of training where the applicant was prepared for the practice of architecture, and such other information as the board may deem proper and useful. This registration shall be prima facie evidence of all matters recorded therein. (1915, c. 270, s. 1; C. S. 4991.)

§ 83-8. Examination and certificate of applicant.—Any person hereafter desiring to be reg-

istered and admitted to the practice of architecture in the state shall make a written application for examination to the board of architectural examination and registration, on a form prescribed by the board, giving his name, age (which shall not be less than twenty-one years), his residence, and such evidence of his qualification and proficiency as may be prescribed by said board, which application shall be accompanied by twenty-five dollars. If said application is satisfactory to the board, then the applicant shall be entitled to an examination to determine his qualifications. If the result of the examination of any applicant shall be satisfactory to the board, then the board shall issue to the applicant a certificate to practice architecture in North Carolina. Any person failing to pass such examination may be reëxamined at any regular meeting of the board without additional fee. (1915, c. 270, s. 3; 1919, c. 336, s. 1; C. S. 4992.)

§ 83-9. Refusal, revocation, or suspension of certificates.—Said board may refuse to grant certificate to any person convicted of a felony, or who, in the opinion of the board, has been guilty of gross, unprofessional conduct, or who is addicted to habits of such character as to render him unfit to practice architecture. The board of architectual examination and registration may suspend for a period or revoke the certificate of admission to practice, and forbid practice by any architect upon conviction, after a fair and impartial trial, of any dishonest practice, unprofessional conduct, or incompetence. For the purpose of such trial, the board shall have full power to subpœna and examine witnesses under oath as to the facts of the case. Any architect against whom charges are preferred shall have not less than sixty days notice before the trial of his case, and shall have the right to have witnesses subpœnaed in his behalf, and of being heard in person and by counsel. Any such trial shall be open to the public. (1915, c. 270, s. 5; 1919, c. 336, s. 3; C. S. 4993.)

§ 83-10. Examination fees; expenses of board.—All examination fees shall be paid in advance to the treasurer of said board of architectural examination and registration. The state of North Carolina shall not be liable for the compensation of any members or officers of said board. All expenses incurred by said board in the necessary discharge of their duties shall be paid out of funds derived from examination fees herein provided for, and shall be paid by the treasurer upon warrant drawn by the secretary and approved by the president. The said board shall have the power to determine what are necessary expenses and to fix the salaries of the respective officers. (1915, c. 270, s. 6; C. S. 4994.)

§ 83-11. Annual renewal of certificate; fee.—Every architect continuing his practice in the state shall, on or before the first day of July in each year, obtain from the board of architectural examination and registration a renewal of his certificate for the ensuing year upon the payment of a fee of five dollars, and upon failure to do so shall have his certificate of admission to practice revoked, but such certificate may be renewed at any time within one year upon the payment of a fee of ten dollars. (1919, c. 336, s. 2; C. S. 4995.)

§ 83-12. Holding out as architect without having certificate, provisos.—Any person not registered under this chapter who shall advertise or put up a sign or card or other device, or in any other way hold himself out to the public as an architect, or practice arichitecture as herein defined, shall be guilty of a misdemeanor and punished by a fine not exceeding fifty dollars: Provided, however, that nothing herein shall prevent any person from making plans or data for buildings for themselves: Provided, further, that nothing in this chapter shall prevent any person from selling or furnishing plans for the construction of residence or farm or commercial buildings of a value not exceeding fifteen thousand dollars; provided, further, that nothing in this chapter shall prevent any registered engineer duly licensed in this state from furnishing design or supervision services for plants or structures which are elements of engineering projects or utilities: And provided further, that nothing in this chapter shall prevent the procuring of plans and specifications from an architect residing outside of this state. Nonresident architects who come within the state to do business shall be subject to the same examination and upon same terms and conditions as resident applicants, unless such nonresident architects are permitted to engage in business in this state under the terms of the preceding section. (1915, c. 270, s. 4; 1941, c. 369, ss. 1, 2; C. S. 4996.)

Editor's Note.—The 1941 amendment inserted in the first sentence the words "or practice architecture as herein defined." It also inserted the second and third provisos and made changes in the first proviso.

§ 83-13. Seal of registered architect; plans to bear seal.—Every architect who shall have obtained from said board a certificate, shall have a seal which must contain the name of the architect, his place of business, and the words "Registered Architect, of North Carolina," and he shall stamp all drawings and specifications issued from his office, for use in this state, with an impression of said seal. (1915, c. 270, s. 7; C. S. 4997.)

§ 83-14. County record of registered architects; fees.—Every person holding a certificate of said board to practice architecture shall have said certificate recorded in the office of the clerk of the superior court of the county in which he resides or has his principal office. Said clerk shall record the same in a book to be kept by him, entitled "Record of Architecture," and the clerk shall be entitled to a fee of one dollar for recording such certificate: Provided, however, that in any counties where the clerk is on a salary and not on a fee basis, then the said fee of one dollar shall be paid into the county treasury. It shall be unlawful for any person to hold himself out as an architect until said certificate shall have been recorded, and any person found guilty of holding himself out as an architect without registration of his certificate, as aforesaid, shall be guilty of a misdemeanor, and fined not more than fifty dollars, in the discretion of the court. (1915, c. 270, s. 8; C. S. 4998.)

§ 83-15. Copy to registered architects.—A notice and copy of this chapter shall be mailed by the secretary of the state board of architectural examination and registration to each architect in and out of the state to whom a certificate has been issued under this chapter. (1919, c. 336, s. 3; C. S. 4993.)

Chapter 84. Attorneys at Law.

Art. 1. Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-1. Oaths taken in open court.—Attorneys before they shall be admitted to practice law shall, in open court before a justice of the supreme or judge of the superior court, take the oath prescribed for attorneys, and also the oaths of allegiance to the state, and to support the constitution of the United States, prescribed for all public officers, and the same shall be entered on the records of the court; and, upon such qualification had, and oath taken, may act as attorneys during their good behavior. (Rev., s. 209; Code, s. 19; R. C., c. 9, s. 3; 1777, c. 115, s. 8; C. S. 197.)

Non-Resident Attorneys. — As this section requires the oath of allegiance to the state, it debars a citizen of another state from obtaining a license to practice law and a non-resident attorney does not acquire the right to practice habitually in this state by having been previously allowed, through the courtesy of the courts, to appear in special cases. Manning v. Roanoke, etc., R. Co., 122 N. C. 824, 828, 28 S. E. 963.

§ 84-2. Persons disqualified.—No clerk of the superior or supreme court, nor deputy or assistant clerk of said courts, nor register of deeds, nor sheriff, nor any justice of the peace, nor county commissioner shall practice law. Persons violating this provision shall be guilty of a misdemeanor and fined not less than two hundred dollars. This section shall not apply to Confederate soldiers. (Rev., ss. 210, 3641; Code, ss. 27, 28, 110; 1870-1, c. 90; 1883, c. 406; 1871-2, c. 120; 1880, c. 43; C. C. P., s. 424; 1919, c. 205; 1933, c. 15; 1941, c. 177; 1943, c. 543; C. S. 198.)

Local Modification.—Burke: 1933, c. 135; Madison: 1935, c. 214.

Editor's Note.—Registers of deeds were, by Public Laws 1933, c. 15, added to the list of these excluded from practice.

The 1943 amendment made the former second paragraph of this section into a new section designated as § 84-2.1. That paragraph had been added by tht 1941 amendment.

§ 84-2.1. "Practice law" defined.—The phrase "practice law" as used in this chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation of deeds, mortgages, wills, trust instruments, reports of guardians, trustees, administrators, or executors, abstracting or passing upon titles, the preparation and filing of petitions for use in any court, or assisting by advice, counsel, or otherwise in any such legal work; and to advise or give

opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of such term, but shall be construed to include the foregoing particular acts, as well as all other acts within said general definition. (Rev., ss. 210, 3641; Code, ss. 27, 28, 110; 1870-1, c. 90; 1883, c. 406; 1871-2, c. 120; 1880, c. 43; C. C. P., s. 424; 1919, c. 205; 1933, c. 15; 1941, c. 177; 1943, c. 543; C. S. 198.)

Editor's Note.—Prior to the 1943 amendment this section appeared as the second paragraph of § 84-2. It had been added as said paragraph by the 1941 amendment. For comment on the 1941 act, see 19 N. C. L. Rev. 454.

What Constitutes Practicing Law. — To constitute a practicing of law, within the prohibition of this section, it is necessary that the person charged with its violation shall have customarily or habitually held himself out to the public as a lawyer, or that he demanded compensation for his services as such. State v. Bryan, 98 N. C. 644, 4 S. E. 522.

The fact that a person on one occasion acted as an attorney for a party to an action, is some evidence for the jury to consider, but is not conclusive of the question. Id.

§ 84-3. Officers of inferior courts disqualified in certain cases.—No judge or prosecuting attorney of any recorder's, municipal, or county court shall appear in any other court on behalf of the defendant in a criminal action, where such criminal action has been tried in the court of such officer. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars. (1917, c. 213; C. S. 199.)

Local Modification.—Iredell: 1917, c. 213, s. 3.

§ 84-4. Corporations and persons other than members of state bar prohibited from practicing law; exceptions. — It shall be unlawful for any corporation or any person or association of persons, except members of the bar of the state of North Carolina admitted and licensed to practice as attorneys at law, to appear as attorney or counsellor-at-law in any action or proceeding in any court in this state or before any judicial body or the North Carolina industrial commission or the unemployment compensation commission; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counselling in law or acting as attorney or counsellor-at-law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except members of the Bar, for a fee or any consideration, to give legal advice or counsel, perform for or furnish to another legal services, or, for or without a fee or any consideration, to prepare directly or through another for another person, firm or corporation, any will or testamentary disposition, or instrument of trust serving purposes similar to those of a will, except life insurance trusts, or, for a fee or any consideration, to organize corporations or prepare for another person, firm or corporation, any other legal document. Provided, that nothing herein shall prohibit any person from conferring with a person, firm or corporation with respect to the creation of a fiduciary relationship, or from coöperating with a licensed attorney of another in preparing any such legal document, if such attorney maintains his own place of business and is not an officer of a corporation represented by such person; or from drawing a will for another in an emergency wherein the imminence of death leaves insufficient time to have the same drawn and its execution supervised by a licensed attorney at law. (1931, c. 157, s. 1; 1937, c. 155, s. 1.)

Cross Reference.—As to officers disqualified to practice law, see § 84-2.

Editor's Note.—The act from which this section was codified became effective April 1, 1931, and provided that it should not apply to or affect "litigation now pending in any court."

The 1937 amendment inserted the words "or the unemployment compensation commission" immediately preceding the first semicolon in this section.

This section is constitutional and valid, the right to practice law being subject to legislative regulation within constitutional restrictions and limitations, and the statute not being in contravention of any provision of the state or federal constitutions. Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540.

The right to practice law is personal and may not be exercised by a corporation either directly or indirectly by employing lawyers to practice for it. Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540.

What Is Deemed Practice of Law.—The practice of law is not limited to the conduct of cases in court, but embraces, in its general sense, legal advice and counsel and the preparation of legal documents and contracts by which legal rights are secured, although such matter may or may not be pending in court. Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540.

Services of Motor Clubs Held to Violate Section.—Where defendant corporations, as a part of their services, were engaged in giving legal advice, in employing attorneys for members, in allowing lay members of the incorporated club to write letters on club stationery to persons involved in accidents with members of the club advising that such persons were liable in damages in law for negligence in causing such accidents, and in drawing up receipts stating that a certain sum was received as settlement of such damages when collections were made as a result of such letters, they were held to be engaged in the practice of law in violation of this section. Seawell v. Carolina Motor Club, 209 N. C. 624, 184 S. E. 540.

§ 84-5. Further prohibition as to practice of law by corporation; exceptions.—It shall be unlawful for any corporation to practice or appear as an attorney for any person other than itself in any court in this state, or before any judicial body or the North Carolina industrial commission or the unemployment compensation commission, or hold itself out to the public or advertise as being entitled to practice law; and no corporation shall organize corporations, or draw agreements, or other legal documents not relating to its lawful business, or draw wills, or practice law, or give legal advice not relating to its lawful business; or hold itself out in any manner as being entitled to do any of the foregoing acts, by or through any person orally or by advertisement, letter or circular: Provided, that the foregoing shall not prevent a corporation from employing an attorney in regard to its own affairs or in any litigation to which it may be a party. Provided, further, that the above provisions of this section and § 84-4 shall not be construed to prohibit a person or corporation acting in a fiduciary capacity from transacting the necessary clerical business incidental to the routine or usual administration of estates, trusts, guardianships, or other similar fiduciary capacities, such as offering wills for probate in common form, securing authority to expend principal as guardian or trustee,

filing accounts, preparing and filing tax returns of every nature, and other such administrative acts, where no special compensation is charged for such service and no compensation whatever is charged or received other than the usual commissions allowed by the court for administering the trust, or provided for by the instrument creating the trust or other fiduciary relationship. And provided, further, that nothing herein shall prohibit any insurance company from causing to be defended, or prosecuted, or from offering to cause to be defended, through lawyers of its own selection, the insured in policies issued or to be issued by it, in accordance with the terms of such policies; and shall not prohibit one such licensed attorney at law from acting for several common carriers and/or other corporations and/or associations or any of its subsidiaries pursuant to arrangement between said corporations and/or associations. (1931, c. 157, s. 2; 1937, c. 155, s. 2.)

Editor's Note.—The 1937 amendment inserted the words "or the unemployment compensation commission" immediately preceding the first semicolon in this section.

§ 84-6. Exacting fee for conducting foreclosures prohibited to all except licensed attorneys.—It shall be unlawful to exact, charge, or receive any attorney's fee for the foreclosure of any mortgage under power of sale, unless the foreclosure is conducted by a licensed attorney at law of North Carolina, and unless the full amount charged as attorney's fee is actually paid to and received and retained by such attorney, without being directly or indirectly shared with or rebated to any one else, and it shall be unlawful for any such attorney to make any showing that he has received such a fee unless he has received the same, or to share with or rebate to any other person, firm, or corporation such fee or any part thereof received by him; but such attorney may divide such fee with another licensed attorney at law maintaining his own place of business and not an officer or employee of the foreclosing party, if such attorney has assisted in performing the services for which the fee is paid, or resides in a place other than that where the foreclosure proceedings are conducted, and has forwarded the case to the attorney conducting such foreclosure. (1931, c. 157, s. 3.)

§ 84-7. Solicitors, upon application, to bring injunction or criminal proceedings. — The solicitor of any of the superior courts shall, upon the application of any member of the Bar, or of any bar association, of the State of North Carolina, bring such action in the name of the State as may be proper to enjoin any such person, corporation, or association of persons who it is alleged are violating the provisions of §§ 84-4 to 84-8, and it shall be the duty of the solicitors of this State to indict any person, corporation, or association of persons upon the receipt of information of the violation of the provisions of §§ 84-4 to 84-8. (1931, c. 157, s. 4.)

Cross Reference.—As to the power of the North Carolina State Bar to investigate and enjoin unauthorized practice of law, see § 84-37.

§ 84-8. Punishment for violations; legal clinics of law schools excepted.—Any person, corporation, or association of persons violating the provisions of §§ 84-4 to 84-8 shall be guilty of a misdemeanor and punished by a fine or imprisonment, or both, in the discretion of the court. Provided, that §§ 84-4 to 84-8 shall not apply to any law school or law schools conducting a legal clinic and receiving as their clientage only those persons unable financially to compensate for legal advice or services rendered. (1931, c. 157, s. 5; 1931, c. 347.)

§ 84-9. Unlawful for any one except attorney to appear for creditor in insolvency and certain other proceedings.—It shall be unlawful for any corporation, or any firm or other association of persons other than a law firm, or for any individual other than an attorney duly licensed to practice law, to appear for another in any bankruptcy or insolvency proceeding, or in any action or proceeding for or growing out of the appointment of a receiver, or in any matter involving an assignment for the benefit of creditors, or to present or vote any claim of another, whether under an assignment or transfer of such claim or in any other manner, in any of the actions, proceedings or matters hereinabove set out. (1931, c. 208, s. 2.)

Cross Reference.—As to unlawful solicitation of claims of creditors in insolvency, etc., proceedings, see § 23-46.

§ 84-10. Violation of preceding section a misdemeanor.—Any individual, corporation, or firm or other association of persons violating any provision of § 84-9 shall be guilty of a misdemeanor. (1931, c. 208, s. 3.)

Art. 2. Relation to Client.

§ 84-11. Authority filed or produced if requested.—Every attorney who claims to enter an appearance for any person shall, upon being required so to do, produce and file in the clerk's office of the court in which he claims to enter an appearance, a power or authority to that effect signed by the persons or some one of them for whom he is about to enter an appearance, or by some person duly authorized in that behalf, otherwise he shall not be allowed so to do: Provided, that when any attorney claims to enter an appearance by virtue of a letter to him directed (whether such letter purport a general or particular employment), and it is necessary for him to retain the letter in his own possession, he shall, on the production of said letter setting forth such employment, be allowed to enter his appearance, and the clerk shall make a note to that effect upon the docket. (Rev., s. 213; Code, s. 29; R. C., c. 31, s. 57; C. S. 200.)

Cross Reference.—As to general and specific appearances, see § 1-11.

Sufficiency of Writing. — The power of attorney which a lawyer may be required to file, pursuant to this section, is some writing addressed to him by the client or an agent for the client. Therefore, letters written by the client to third persons expressing qualification because of the employment of a particular attorney will not suffice to supply the want of power. Day v. Adams, 63 N. C. 254.

A power of attorney, signed by the purchaser of a note, in the name of the payee, is sufficient authority under this section for an attorney at law to appear in a cause in court, although the agent has no written authority to make the power. Johnson v. Sikes, 49 N. C. 70.

A power of attorney, given by a married woman, under this section, to dismiss an action need not be registered. Hollingsworth v. Harman, 83 N. C. 153, 154.

Time of Demand for Authority. — In Reece v. Reece, 66 N. C. 377 it is held that the defendant has the right, because of this section, to demand the authority at the return term of a summons.

If the demand for the power of attorney be made at the return term, it is the practice and within the discretion of the judge to extend the time; if, however, such demand is not made at the proper time, and before the right to appear has been recognized it comes too late, unless there be peculiar circumstances tending to excuse the party for not making it in apt time. Reece v. Reece, 65 N. C. 377.

After an attorney has entered an appearance and has been recognized by the court as attorney in the cause, no written authority can be required of him at a subsequent time. This evidently means that the opposite party shall not call in question his authority, unless he does so within the time and in accordance with the provision of this section. New Bern v. Jones, 63 N. C. 606, 607; Day v. Adams, 63 N. C. 254, 256.

When Client Present. — If a written authority be required under this section the attorney must produce the same, even if his client is present at the bar of the court. Day v. Adams, 63 N. C. 254, 256.

Authority to Dismiss Action. — Upon special appearance of the attorneys of a husband whose property has been attached by the wife, for the purpose of dismissing the action, the court should, on motion made, require them to file their written authority under this section. Walton v. Walton, 178 N. C. 73, 100 S. E. 176.

§ 84-12. Failure to file complaint, attorney liable for costs.—When a plaintiff is compelled to pay the costs of his suit in consequence of a failure on the part of his attorney to file his complaint in proper time, he may sue such attorney for all the costs by him so paid, and the receipt of the clerk may be given in evidence in support of such claim. (Rev., s. 214; Code, s. 22; R. C., c. 9, s. 5; 1786, c. 253, s. 6; C. S. 201.)

Power of Courts to Compel Payment. — This section is not exhaustive, and the courts have power to order counsel to pay costs of cases in which they have been guilty of gross negligence (even of a kind not included in this section) such conduct being a sort of contempt. Ex parte Robins, 63 N. C. 309.

§ 84-13. Fraudulent practice, attorney liable in double damages.—If any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages. (Rev., s. 215; Code, s. 23; R. C., c. 9, s. 6; 1743, c. 37; C. S. 202.)

Aliens Prevented from Practicing. — In Ex parte Thompson, 10 N. C. 355, 362, the court said "No one should be presented to the public under the panoply of such a license (to practice law), against whom an injured suitor would not have the full benefit of such legal remedy as the laws of the state provide, in the event of fraudulent or negligent practice." Hence the court reasoned that an alien could not be admitted to practice, as actions under this section would be removable to the United States courts.

Presumption of Fraud. — The relation of attorney and client is one of a fiduciary character, and gives rise to a presumption of fraud when the former, in dealing with the latter, obtains an advantage. Egerton v. Logan, 81 N. C. 172.

Art. 3. Arguments.

§ 84-14. Court's control of argument.—In all trials in the superior courts there shall be allowed two addresses to the jury for the state or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number. The Judges of the Superior Court are authorized to limit the time of argument of Counsel to the jury on the trial of actions, civil and criminal as follows: To not less than one hour on each side in misdemeanors and appeals from Justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; in capital felonies, the time of argument of Counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three Counsel on each side. Where any greater number of addresses or any extension of time are desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury. (Rev., s. 216; 1903, c. 433; 1927, ch. 52; C. S. 203.)

Discretion of Court. — The trial judge has a large discretion in controlling and directing the argument of counsel, but, under this section, this does not include the right to deprive a litigant of the benefit of his counsel's argument when it is confined within proper bounds and is addressed to the material facts of the case. Puett v. Caldwell, etc., R. Co., 141 N. C. 332, 53 S. E. 852; Irvin v. Southern R. Co., 164 N. C. 5, 17, 80 S. E. 78.

It is the duty of the judge to interfere when the remarks of counsel are not warranted by the evidence and are calculated to mislead or prejudice the jury. State v. Howley, 220 N. C. 113, 16 S. E. (2d) 705.

Arguing Law and Fact. — It is reversible error for the trial judge not to permit attorneys to argue law to the jury and to apply in the argument the decisions of the court as provided by this section. Howard v. Western Union Tel. Co., 170 N. C. 495, 87 S. E. 313.

Failure to charge upon a certain point is reversible error especially after counsel has argued the whole case "as well of law as of fact" as is permitted by this section. Nichols v. Fibre Co., 190 N. C. 1, 128 S. E. 471. It is the duty of the trial judge to instruct the jury upon the law, and he may correctly tell them to disregard the law as argued to them by counsel. Sears, Roebuck & Co. v. Banking Co., 191 N. C. 500, 132 S. E. 468.

Same—Reading and Commenting on Reported Cases. — As counsel have the right under this section to argue "the whole case as well as law as of fact," they may read to the jury reported cases and comment thereon; but the facts contained in the cases cannot be read as evidence of their existence in another case. Horah v. Knox, 87 N. C. 483.

Reading Dissenting Opinion as Law of Case.—It is not permissible for counsel, in his argument to the jury, to read a dissenting opinion by a Justice of the Supreme Court as the law of the case over the defendant's objection, and where this has been done a new trial will be awarded on the defendant's exception thereto. It is the duty of the trial court, either to direct counsel not to read the dissenting opinion or to plainly and unequivocally instruct that the dissenting opinion had no legal bearing upon the case. Conn v. Seaboard Air Line R. Co., 201 N. C. 157, 159 S. E. 331.

Limitation of Argument under Former Section. — See State v. Miller, 75 N. C. 73.

Cited in Teasley v. Burwell, 199 N. C. 18, 20, 153 S. E. 607.

Art. 4. North Carolina State Bar.

§ 84-15. Creation of North Carolina State Bar as an agency of the state.—There is hereby created as an agency of the State of North Carolina, for the purposes and with the powers hereinafter set forth, the North Carolina State Bar. (1933, c. 210, s. 1.)

Editor's Note.—For a review of this section and those immediately following, see 11 N. C. Law Rev. 191.

Quoted in In re Parker, 209 N. C. 693, 184 S. E. 532.

§ 84-16. Membership and privileges.—The membership of the North Carolina state bar shall consist of three classes, active, honorary and inactive.

The active members shall be all persons who shall have heretofore obtained, or who shall hereafter obtain, a license or certificate, which shall at the time be valid and effectual, entitling them to practice law in the state of North Carolina, who shall have paid the membership dues hereinafter specified, unless classified as an inactive member by the council as hereinafter provided. No person other than a member of the

North Carolina state bar shall practice in any court of the state, except foreign attorneys as provided by statute.

The honorary members shall be (a) the chief justice and associate justices of the supreme court of North Carolina; (b) the judges of the superior courts of North Carolina; (c) all former judges of the above-named courts resident in North Carolina, but not engaged in the practice of law; (d) judges of the district courts of the United States and of the circuit court of appeals resident in North Carolina.

Inactive members shall be all persons found by the Council to be not engaged in the practice of law and not holding themselves out as practicing attorneys and not occupying any public or private positions in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document, or law.

Only active members shall be required to pay annual membership fees, and shall have the right to vote. A member shall be entitled to vote at all annual or special meetings of the North Carolina state bar, and at all meetings of and elections held by the bar of each of the judicial districts in which he resides: Provided, that if he desires to vote with the bar of some district in which he practices, other than that in which he resides, he may do so upon filing with the resident judge of the district in which he desires to vote, and with the resident judge of the district in which he resides (and, after the North Carolina state bar shall have been organized as hereinafter set forth, with the secretary-treasurer of the North Carolina state bar), his statement in writing that he desires to vote in such other district: Provided, however, that in no case shall he be entitled to vote in more than one district. (1933, c. 210, s. 2; 1939, c. 21, s. 1; 1941, c. 344, ss. 1, 2, 3.)

Editor's Note.—The 1939 amendment inserted the requirement as to payment of membership dues in the second paragraph.

The 1941 amendment, in making this section applicable to inactive members, changed the first two paragraphs and inserted the fourth paragraph.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 453.

For comment on the 1939 amendatory act, see 17 N. C. Law Rev. 341.

§ 84-17. Government.—The government of the North Carolina state bar shall be vested in a council of the North Carolina state bar, hereinafter referred to as the "council," consisting of one councillor from each judicial district of the state, to be appointed or elected as hereinafter set forth, and the officers of the North Carolina state bar, who shall be ex officio members during their respective terms of office. Notwithstanding any provisions of this article as to the voting powers of members, the council shall be competent to exercise the entire powers of the North Carolina state bar in respect of the interpretation and administration of this article, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments hereto, and all other matters, except as otherwise directed or overruled, as in § 84-33 provided. The councillors elected shall serve as follows: Those elected from the first, fourth, seventh, tenth, thirteenth, sixteenth, and nineteenth districts shall serve for one year from the date of their elections; those elected from the second, fifth, eighth, eleventh, fourteenth, seventeenth, and twentieth districts shall serve for two years from the date of their election; and those elected from the third, sixth, ninth, twelfth, fifteenth, and eighteenth districts shall serve for three years from the date of their election: Provided, that upon the election of successors to the councillors first elected, the term of office and the period for which such councillors are elected shall be three years from the date of election.

All councillors elected from any additional judicial districts shall be elected for a term of three years. (1933, c. 210, s. 3; 1937, c. 51, s. 1.)

Editor's Note.—Public Laws 1937, c. 51, s. 1, struck out the former last paragraph of this section providing: "Neither a councillor nor any officer of the council or of the North Carolina state bar shall be deemed as such to be a public officer as that phrase is used in the constitution and laws of the state of North Carolina."

For a discussion of the 1937 amendment to this and the following three sections, see 15 N. C. Law Rev. 330 et seq.

§ 84-18. Election of councillors.—Within thirty days after this article shall have gone into effect the judge of each judicial district shall, by notice posted at the front door of each courthouse within his district and by such other means as he shall think desirable, call a meeting of the attorneys residing within his district, and any others who may declare in writing their desire to be affiliated with that district, as hereinabove provided, for the purpose of organizing the bar of the district, the said meeting to be held at a place deemed by the judge to be convenient, on a day fixed, not less than twenty nor more than thirty days from posting of notice. At that meeting such attorneys as attend shall constitute a quorum, and shall forthwith form such organization herein referred to as the "district bar," as they may deem advisable, of which organization all active members of the North Carolina state bar entitled to vote in that district shall be members. The district bar shall be the subdivision of the North Carolina state bar for that judicial district, and shall adopt such rules, regulations and by-laws not inconsistent with this article as it shall see fit, a copy of which shall be transmitted to the secretary-treasurer of the North Carolina state bar when organized; and copies of any amendments of such rules, regulations, and by-laws shall likewise be sent to said secretary-treasurer. The district bar so formed shall, at the time of its formation, elect a councillor to represent that district, and all subsequent elections of councillors, whether for regular terms or to fill vacancies, shall be held as provided by the said rules, regulations, and by-laws so adopted by the district bar. In case the judge of any judicial district, by reason of physical disability or otherwise, shall fail to call the meeting aforesaid within thirty days after this article shall have gone into effect, the same may be called within thirty days thereafter by any two attorneys residing in said district, by written notice signed by them and delivered to the clerk of the court of each county in the district to be posted at the front door of each courthouse as aforesaid, the said meeting to be held on a day fixed not less than twenty nor more than thirty days after the posting of said notice; and thereupon the same

proceedings shall take place as though the meeting had been called by the judge as aforesaid. Any clerk to whom any such notice shall be delivered to be posted shall immediately post the same and shall write upon the said notice the exact date and time when the same is so posted. In case more than one notice shall be posted hereunder by different groups of attorneys, that posted first in point of time shall prevail and be deemed to be the notice provided for under this article. Pending the organization of the council as hereinafter provided, notification of the election of each councillor shall be sent within five days after such election by the secretary of the district bar to the clerk of the supreme court of North Carolina; but after the organization of the council such notices shall be sent to its secretary-treasurer. In case neither the judge nor any two members shall call a meeting as aforesaid, a councillor for the said district, residing therein, shall be named at a meeting of such members of the council as shall have been elected in accordance herewith, to serve until such district bar shall be organized under the provisions of this article (except as to the time for calling meetings), either on the call of the judge of the district court or of two members of the bar, and shall have elected a councillor to serve for the unexpired term of the councillor so named. (1933, c. 210, s. 4.)

§ 84-19. Change of judicial districts.—In the event that a new district shall hereafter be carved out of an existing district, the councillor for the old district shall remain in office and continue to represent the district constituting that portion of the old district in which he resides or with which he has elected to be affiliated; and within thirty days after the division of the old district shall have become effective, or so soon thereafter as practicable, the same procedure shall be followed for the organization of the North Carolina state bar, constituting the remaining and unrepresented portion of the old district, and for the election of a councillor to represent the same, as is prescribed by § 84-18; and if a new district or more than one new district shall be formed by a recombination or reallocation of the counties in more than one existing district, the same procedure shall be followed as is prescribed by § 84-18, in said new district, or in each of them if there be more than one, within thirty days after the election or appointment of the judge or judges thereof; but in that event the office of councillor for each of the old districts the counties in which shall have been so recombined into or reallocated to such new district or districts shall cease, determine, and become vacant so soon as the bar or bars of such new district, or all of such new districts if there shall be more than one, shall have been organized and shall have elected a councillor or councillors therefor, but not earlier: Provided, that if at such time any councillor whose office shall thus become vacant be actually serving upon a committee before which there is pending any trial of a case of professional misconduct or malpractice, he shall, notwithstanding the election of a new councillor, continue to serve as councillor for the purpose of trying such case until judgment shall have been rendered therein. (1933, c. 210, s. 5.)

§ 84-20. Compensation of councillors. — The members of the council and members of committees when actually engaged in the performance of their duties, including committees sitting upon disbarment proceedings, shall receive as compensation, not exceeding ten ($10.00) dollars per day for the time spent in attending meetings, together with an expense allowance as follows: For subsistence—hotel and meals—not exceeding four dollars per day; for transportation, actual mileage, except when using personally owned automobiles, in which case a sum not exceeding five cents per mile of travel. The council shall determine per diem, subsistence and mileage to be paid. Such allowance as may be fixed by the council shall be paid by the secretary-treasurer of the North Carolina state bar upon certified statements presented by each member. (1933, c. 210, s. 6; 1935, c. 34.)

Editor's Note.—The part of this section following the colon was added by the 1935 amendment. The provision requiring that the members be "actually engaged in the performance of their duties" was also added.

§ 84-21. Organization of council; publication of rules, regulations and by-laws.—Upon receiving notification of the election of a councillor for each judicial district, or, if such notification shall not have been received from all said districts, within one hundred and twenty (120) days after this article shall have gone into effect, the clerk of the supreme court of North Carolina shall call a meeting of the councillors of whose election he shall have been notified, to be held in the city of Raleigh not less than twenty days nor more than thirty days after the date of said call; and at the meeting so held the councillors attending the same shall proceed to organize the council by electing officers, taking appropriate steps toward the adoption of rules and regulations, electing councillors for judicial districts which have failed to elect them, and taking such other action as they may deem to be in furtherance of this article. The regular term of all officers shall be one year, but those first elected shall serve until the first day of January, one thousand nine hundred thirty-five. The council shall be the judge of the election and qualifications of its own members. When the council shall have been fully organized and shall have adopted such rules, regulations and by-laws, not inconsistent with this article, as it shall deem necessary or expedient for the discharge of its duties, the secretary-treasurer shall file with the clerk of the supreme court of North Carolina a certificate, to be called the "certificate of organization," showing the officers and members of the council, with the judicial districts which the members respectively represent, and their post office addresses, and the rules, regulations and by-laws adopted by it; and thereupon the chief justice of the supreme court of North Carolina, or any judge thereof, if the court be then in vacation, shall examine the said certificate and, if of opinion that the requirements of this article have been complied with, shall cause the said certificate to be spread upon the minutes of the court; but if of opinion that the requirements of this article have not been complied with, shall return the said certificate to the secretary-treasurer with a statement showing in what respects the provisions of this article have not been complied with; and the said certificate shall not be again pre-

sented to the chief justice of the supreme court or any judge thereof, until any such defects in the organization of the council shall have been corrected, at which time a new certificate of organization shall be presented and the same course taken as hereinabove provided, and so on until a correct certificate showing the proper organization of the council shall have been presented, and the organization of the council accordingly completed. Upon (a) the entry of an order upon the minutes of the court that the requirements of this article have been complied with, or (b) if for any reason the chief justice or judge should not act thereon within thirty days, then, after the lapse of thirty days from the presentation to the chief justice or judge, as the case may be, of any certificate of organization hereinabove required to be presented by the secretary-treasurer, without either the entry of an order or the return of said certificate with a statement showing the respects in which this article has not been complied with, the organization of the council shall be deemed to be complete, and it shall be vested with the powers herein set forth; and the certificate of organization shall thereupon forthwith be spread upon the minutes of the court. A copy of the certificate of organization, as spread upon the minutes of the court, shall be published in the next ensuing volume of the North Carolina Reports. The rules and regulations set forth in the certificate of organization, and all other rules and regulations which may be adopted by the council under this article, may be amended by the council from time to time in any manner not inconsistent with this article. Copies of all such rules and regulations adopted subsequently to the filing of the certificate of organization, and of all amendments so made by the council, shall be certified to the chief justice of the supreme court of North Carolina, entered by it upon its minutes, and published in the next ensuing number of the North Carolina Reports: Provided, that the court may decline to have so entered upon its minutes any of such rules, regulations and amendments which in the opinion of the chief justice are inconsistent with this article. (1933, c. 210, s. 7.)

§ 84-22. Officers and committees of the North Carolina State Bar.—The officers of the North Carolina State Bar shall be a president, a first vice-president, a second vice-president, and a secretary-treasurer, who shall be deemed likewise to be the officers, with the same titles, of the council. Their duties shall be prescribed by the council. The president and vice-presidents shall be elected by the members of the North Carolina State Bar at its annual meeting, and the secretary-treasurer shall be elected by the council. All officers shall hold office for one year and until their successors are elected and qualified. The officers need not be members of the council. (1933, c. 210, s. 8; 1941, c. 344, ss. 4, 5.)

Editor's Note.—Prior to the 1941 amendment there was only one vice-president.

§ 84-23. Powers of council.—Subject to the superior authority of the general assembly to legislate thereon by general laws, and except as herein otherwise limited, the council is hereby vested, as an agency of the state, with the control of the discipline, disbarment and restoration of attorneys practicing law in this state: Provided, that from any order suspending an attorney from the practice of law and from any order disbarring an attorney, an appeal shall lie in the manner hereinafter provided, to the superior court of the county wherein the attorney involved resides. The council shall have power to administer this article; to formulate and adopt rules of professional ethics and conduct; to publish an official journal concerning matters of interest to the legal profession, and to do all such things necessary in the furtherance of the purposes of this article as are not prohibited by law. (1933, c. 210, s. 9; 1935, c. 74, s. 1; 1937, c. 51, s. 2.)

Editor's Note.—The words "and restoration" were inserted by the amendment of 1935.

Prior to the 1937 amendment an appeal lay "as of right" to the regular superior court judge.

In State v. Hollingsworth, 206 N. C. 739, 175 S. E. 99, construing former § 205, it was held that the court was without authority to set aside a judgment of disbarment on motion, especially since the enactment of this and subsequent sections.

Plea of Guilt.—Where an attorney has confessed his guilt in open court to four crimes, all involving moral turpitude, and he has been disbarred from practicing in the district court of the United States, disbarment must ultimately result regardless of this and the following sections. In re Brittain, 214 N. C. 95, 96, 197 S. E. 705.

§ 84-24. Admission to practice.—The provisions of the law now obtaining with reference to admission to the practice of law, as amended, and the rules and regulations prescribed by the supreme court of North Carolina with reference thereto, shall continue in force until superseded, changed or modified by or under the provisions of this article.

For the purpose of examining applicants and providing rules and regulations for admission to the bar including the issuance of license therefor, there is hereby created the board of law examiners, which shall consist of seven members of the bar, elected by the council of the North Carolina state bar, who need not be members of the council. No teacher in any law school, however, shall be eligible. The members of the board of law examiners elected from the bar shall each hold office for a term of three years: Provided, that the members first elected shall hold office, two for one year, two for two years, and two for three years.

The secretary of the North Carolina state bar shall be the secretary of the board, and serve without additional pay. The board of law examiners shall elect a member of said board as chairman thereof, who shall hold office for such period as said board may determine.

The examination shall be held in such manner and at such times as the board of law examiners may determine, but no change in the time or place shall become effective within one year from the date upon which the change is determined.

The board of law examiners, subject to the approval of the council, shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the bar as in their judgment shall promote the welfare of the state and the profession: Provided, that any change in the educational requirements for admission to the bar shall not become effective within two years from the date of the adoption of such change.

All such rules and regulations, and modifications, alterations and amendments thereof, shall

be recorded and promulgated as provided in § 84-21 in relation to the certificate of organization and the rules and regulations of the council.

Whenever the Council shall order the restoration of license to any person as authorized by § 84-32, it shall be the duty of the Board of Law Examiners to issue a written license to such person, noting thereon that the same is issued in compliance with an order of the Council of The North Carolina State Bar, whether the license to practice law was issued by the Board of Law Examiners or the Supreme Court in the first instance. (1933, c. 210, s. 10; c. 331; 1935, cc. 33, 61; 1941, c. 344, s. 6.)

Cross References.—As to discipline and disbarment, see § 84-28. As to restoration of license to practice law, see § 28-32.

Editor's Note.—Prior to the amendments of 1935, this section provided that a member of the supreme court should act as a member of the board of law examiners. Public Laws 1935, c. 61, struck out this provision and changed the number of members of the bar serving on the board from six to seven. Public Laws 1935, c. 33, repealed provisions relative to fees of applicants and to compensation of the board, previously included in this section, by enacting new and different provisions. These subjects are now provided for in §§ 84-25 to 84-27.

The 1941 amendment added the paragraph at the end of this section.

§ 84-25. Fees of applicants.—All applicants for examination before the board of law examiners for license to practice law in North Carolina shall pay a filing fee of one dollar and fifty cents ($1.50) and shall deposit with the secretary of the board of law examiners the sum of twenty-two and 0/100 ($22.00) dollars, of which sum two dollars shall be a deposit to pay for license, if issued. Any applicant who shall fail to pass examination shall receive a refund of twelve dollars from said twenty-two dollars deposit. (1935, c. 33, s. 1.)

§ 84-26. Pay of board of law examiners.—Each member of the board of law examiners shall receive the sum of fifty dollars for his services in connection with each examination and shall receive his actual expenses of travel and subsistence while engaged in duties assigned to him, provided that for transportation by the use of private automobile the expense of travel shall not exceed five cents per mile. (1935, c. 33, s. 2; 1937, c. 35.)

Editor's Note.—Prior to the 1937 amendment the maximum for subsistence was four dollars per day.

§ 84-27. Surplus received from applicants directed to supreme court library.—After the payment of all expenses incurred in connection with each examination held by the board of law examiners and expenses of said board at such meetings as may be necessary for the performance of its additional duties, the said board of law examiners shall cause to be paid at the end of each fiscal year of the State of North Carolina to the Supreme Court of North Carolina for its use in connection with the maintenance of its library, such surplus then remaining with said board of law examiners from fees received from applicants for examination. (1935, c. 33, s. 3.)

§ 84-28. Discipline and disbarment.—The council or any committee of its members appointed for that purpose shall have jurisdiction to hear and determine all complaints, allegations, or charges of malpractice, corrupt or unprofessional conduct, or the violation of professional ethics, made against any member of the North Carolina state bar; may administer the punishments of private reprimand, suspension from the practice of law for a period not exceeding twelve months, and disbarment as the case shall in their judgment warrant, for any of the following causes: 1. Commission of a criminal offense showing professional unfitness; 2. Detention without a bona fide claim thereto of property received or money collected in the capacity of attorney; 3. Soliciting professional business; 4. Conduct involving willful deceit or fraud or any other unprofessional conduct; 5. Detention without a bona fide claim thereto of property received or money collected in any fiduciary capacity; 6. The violation of any of the canons of ethics which have been adopted and promulgated by the council of the North Carolina state bar; may invoke the processes of the courts in any case in which they deem it desirable to do so, and shall formulate rules of procedure governing the trial of any such person which shall conform as near as may be to the procedure now provided by law for hearings before referees in compulsory references. Such rules shall provide for notice of the nature of the charges and an opportunity to be heard; for a complete record of the proceedings for purposes of appeal to the superior court of the county wherein the attorney involved resides on the record made before the council or the committee as the case may be. Upon such appeal to the superior court the accused attorney shall have the right to a trial by jury of the issues of fact arising on the pleadings, but such trial shall be only upon the written evidence taken before the trial committee or council. From the decision of the superior court the council and the accused attorney shall each have the right of appeal to the supreme court of North Carolina. Trial before the committee appointed for that purpose by the council shall be held in the county in which the accused member resides: Provided, however, that the committee conducting the hearing shall have power to remove the same to any county in which the offense, or any part thereof, was committed, if in the opinion of such committee the ends of justice or convenience of witnesses require such removal. The procedure herein provided shall apply in all cases of discipline or disbarments arising under this section. (1933, c. 210, s. 11; 1937, c. 51, s. 3.)

Cross References.—As to restoration of license, see § 84-32. As to issuance of written license upon restoration of license, see § 84-24.

Editor's Note.—The 1937 amendment so changed this section that a comparison here is not practicable.

The cases treated under this section were decided under those sections which appeared in Michie's Code of 1931 as §§ 204 and 205, the provisions of which were substantially similar to this section.

Constitutionality. — This section, and the other sections of this article, taken from the act of 1871, are constitutional. Ex parte Schenck, 65 N. C. 353.

The aforesaid act does not take away any of the inherent rights which are absolutely essential in the administration of justice. Id.

Civil Action. — Proceedings brought under this section are of a civil nature. In the Matter of Ebbs, 150 N. C. 44, 63 S. E. 190.

Not an "Enabling Act." — The act of 1871, upon which this and the other sections of this article are based, failed to provide any power to take the place of the power formerly invested in the courts, and so is a disabling statute. Kane v. Haywood, 66 N. C. 1; In the Matter of Ebbs, 150 N. C. 44, 63 S. E. 190.

Disbarment Is to Protect Public.—An order disbarring an attorney upon his conviction of a felony is not entered as

additional punishment, but as a protection to the public. State v. Spivey, 213 N. C. 45, 195 S. E. 1.

Indictment Necessary. — By a proper construction of this section, the court is shorn of its power to disrobe an attorney, except in the single instance where he has been indicted for some criminal offense, showing him unfit to be trusted in the discharge of the duties of his profession, and upon such indictment has either been convicted or plead guilty. Kane v. Haywood, 66 N. C. 1, 2.

Conviction or Confession of Guilt. — The words "conviction" and "confession," as used in the section, must be construed to convey the idea that the party has been convicted by a jury or has in open court declined to take issue by the plea of not guilty, and confessed himself guilty. Kane v. Haywood, 66 N. C. 1, 2.

So the admission of an attorney in an answer to a rule to show cause why he should not be attached for contempt for failure to pay money into court, not being voluntary, is not a confession in open court as contemplated by this section. Id.

Same — Conviction in Foreign State. — This section does not confer upon the court the power to disbar an attorney because he has been "convicted" in the courts of another state or of the United States. In the Matter of Ebbs, 150 N. C. 44, 63 S. E. 190.

Nature of Offense. — Under the acts of 1871, upon which this action was originally based, conviction of a "criminal offense" showing untrustworthiness was sufficient basis for disbarment; but by the act of 1907 conviction of a "felony" was necessary; construing these provisions together the court, in State v. Johnson, 171 N. C. 799, 88 S. E. 437, holds that the two provisions are consistent and reconcilable (a view evidently adopted by the revision commission of 1920, as the section now contains the language of both provisions), and further stated that the conviction of a criminal offense—the illegal sale of liquor —is sufficient grounds for disbarment as showing the attorney unfit for practice. See also State v. Johnson, 174 N. C. 345, 93 S. E. 847.

In the instant case it having appeared to the court that the defendant was guilty of an infamous misdemeanor, converted to a felony by §§ 14-1, 14-3, the court by virture of its inherent power was authorized to order his name stricken from the rolls of attorneys and his license to practice law in the state of North Carolina returned to the supreme court which issued it. State v. Spivey, 213 N. C. 45, 48, 195 S. E. 1.

Confession of a Felony.—A plea of guilty to an indictment charging defendant with wilfully, feloniously, secretly, and maliciously giving aid and assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Commissioner of Revenue, etc., was held a confession of a felony, and ground for disbarment if defendant is a practicing attorney under former section 205. State v. Harwood, 206 N. C. 87, 173 S. E. 24.

Fine and imprisonment is not the appropriate remedy to be applied to an attorney who, by reason of moral delinquency or other cause, has shown himself to be an unworthy member of the profession. Kane v. Haywood, 66 N. C. 1, 3.

Detention of Money or Property.—Under this section the detention of money received in his professional capacity without bona fide claim thereto is ground for the disbarment of an attorney. In re Encoffery, 216 N. C. 19, 3 S. E. (2d) 425.

§ 84-29. Concerning evidence and witness fees. —In any investigation of charges of professional misconduct the council and any committee thereof shall have power to summon and examine witnesses under oath, and to compel their attendance, and the production of books, papers, and other documents or writings deemed by it necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand of the secretary-treasurer or the president of the council or the chairman of the committee appointed to hear the charges, and shall have the force and effect of a summons or subpoena issued by a court of record, and any witness or other person who shall refuse or neglect to appear in obedience thereto, or to testify or produce the books, papers, or other documents or writings required, shall be liable to punishment for contempt either by the council or its committee, but with the right to appeal therefrom. Depositions may be taken in any investigations of professional misconduct as in civil proceedings; but the council or the committee hearing the case may, in its discretion, whenever it believes that the ends of substantial justice so require, direct that any witness within the state be brought before it. Witnesses giving testimony under a subpoena before the council or any committee thereof or by deposition shall be entitled to the same fees as in civil actions.

In cases heard before the council or any committee thereof, if the party shall be convicted of the charges against him, he shall be taxed with the cost of the hearings: Provided, however, that such bill of costs shall not include any compensation to the members of the council or committee before whom the hearings are conducted. (1933, c. 210, s. 12.)

§ 84-30. Rights of accused person.—Any person who shall stand charged with an offense cognizable by the council or any committee thereof shall have the right to invoke and have exercised in his favor the powers of the council and its committees in respect of compulsory process for witnesses and for the production of books, papers, and other writings and documents, and shall also have the right to be represented by counsel. (1933, c. 210, s. 13.)

§ 84-31. Designation of prosecutor; compensation.—Whenever charges shall have been preferred against any member of the bar, and the council shall have directed a hearing upon the charges, it shall also designate some member of the bar to prosecute said charges in such hearings as may be held, including hearing upon appeals in the superior and supreme courts. The council may allow the attorney performing such services at its request such compensation as it may deem proper. (1933, c. 210, s. 14.)

§ 84-32. Records and judgments and their effect; restoration of licenses.—In the case of persons charged with an offense cognizable by the council or any committee thereof, a complete record of the proceedings and evidence taken before the council or any committee thereof shall be made and preserved in the office of the secretary-treasurer, but the council may, upon sufficient cause shown and with the consent of the person so charged, cause the same to be expunged and destroyed. Final judgments of suspension or disbarment shall be entered upon the judgment docket of the superior court of the county wherein the accused resides, and also upon the minutes of the supreme court of North Carolina; and such judgment shall be effective throughout the state.

Whenever any attorney has been deprived of his license, the council, in its discretion, may restore said license upon due notice being given and hearing had and satisfactory evidence produced of proper reformation of the licentiate before restoration. (1933, c. 210, s. 15; 1935, c. 74, s. 2.)

Cross Reference.—As to issuance of written license upon restoration of license to practice, see § 84-24.

Editor's Note.—The amendment of 1935 struck out the words "under the provisions of this article" after the word "license" in line two of the second paragraph.

§ 84-33. Annual and special meetings.—There shall be an annual meeting of the North Carolina state bar, open to all members in good standing, to be held at such place and time after such no-

tice (but not less than thirty days) as the council may determine, for the discussion of the affairs of the bar and the administration of justice; and special meetings of the North Carolina state bar may be called, on not less than thirty days' notice, by the council, or on the call, addressed to the council, of not less than twenty-five per cent of the active members of the North Carolina state bar; but at special meetings no subjects shall be dealt with other than those specified in the notice. Notice of all meetings, whether annual or special, may be given by publication in such newspapers of general circulation as the council may select, or, in the discretion of the council, by mailing notice to the secretary of the several district bars or to the individual active members of the North Carolina state bar. The North Carolina state bar shall not take any action in respect of any decision of the council or any committee thereof relating to admission, exclusion, discipline or punishment of any person or other action, save after notice in writing of the action of the council or committee proposed to be directed or overruled, which notice shall be given to the secretary-treasurer thirty days before the meeting, who shall give, by mail, at least fifteen days notice to the members of the North Carolina state bar, and unless at the meeting two-thirds of the members present and voting shall favor the motion to direct or overrule At any annual or special meeting ten per cent of the active members of the bar shall constitute a quorum; but there shall be no voting by proxy. (1933, c. 210, s. 16.)

§ 84-34. Membership fees and list of members. — Every active member of the North Carolina State Bar shall on or before the first day of January, nineteen hundred and thirty-four, pay to the secretary-treasurer, without demand therefor, in respect of the calendar year nineteen hundred and thirty-three, a membership fee of three dollars, and shall thereafter, prior to the first day of July of each year, beginning with and including the year nineteen hundred and thirty-four, pay to the secretary-treasurer, in respect of the calendar year in which such payment is herein directed to be made, an annual membership fee of three dollars, and shall thereafter, prior to the first day of July of each year, beginning with the calendar year one thousand nine hundred and thirty-nine, pay to the secretary-treasurer, in respect to the calendar year in which such payment is herein directed to be made, an annual membership fee of five dollars; and in every case the member so paying shall notify the secretary-treasurer of his correct post-office address. The said membership fee shall be regarded as a service charge for the maintenance of the several services prescribed in this article, and shall be in addition to all fees now required in connection with admissions to practice, and in addition to all license taxes now or hereafter required by law. The said fee shall not be prorated: Provided, that no fee shall be required of an attorney licensed after this article shall have gone into effect until the first day of July of the second calendar year (a "calendar year" for the purposes of this article being treated as the period from January first to December thirty-first) following that in which he shall have been licensed; but this proviso shall not apply to attorneys from other states admitted on certificate. The said fees shall be disbursed by the secretary-treasurer on the order of the council. The secretary-treasurer shall annually, at a time and in a law magazine or daily newspaper to be prescribed by the council, publish an account of the financial transactions of the council, in a form to be prescribed by it. The secretary-treasurer shall compile and keep currently correct from the names and post-office addresses forwarded to him and from any other available sources of information a list of members of the North Carolina state bar and furnish to the clerk of the superior court in each county, not later than the first day of October in each year, a list showing the name and address of each attorney for that county who has not complied with the provisions of this article. The name of each of the active members who shall be in arrears in the payment of membership fees for one or more calendar years shall be furnished to the presiding judge at the next term of the superior court after the first day of October of each year, by the clerk of the superior court of each county wherein said member or members reside, and the court shall thereupon take such action as is necessary and proper. The names and addresses of such attorneys so certified shall be kept available to the public. The commissioner of revenue is hereby directed to supply the secretary-treasurer, from his record of license tax payments, with any information for which the secretary-treasurer may call in order to enable him to comply with this requirement. (1933, c. 210, s. 17; 1939, c. 21, ss. 2, 3.)

Cross Reference.—As to who is an active member, see § 84-16.

Editor's Note.—The 1939 amendment so changed this section that a comparison here is not practicable. For comment on the 1939 amendatory act, see 17 N. C. Law Rev. 341.

§ 84-35. Saving as to North Carolina Bar Association.—Nothing in this article contained shall be construed as affecting in any way the North Carolina Bar Association, or any local bar association. (1933, c. 210, s. 18.)

§ 84-36. Inherent powers of courts unaffected. —Nothing contained in this article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys. (1937, c. 51, s. 4.)

C. S., 204, 205, restricting the power of courts to disbar attorneys, were repealed by § 20, ch. 210, Public Laws of 1933, and the statutory method of disbarment, provided by the Act of 1933, is not exclusive, but to the contrary recognizes the inherent power of the courts, and the courts have jurisdiction to order the disbarment of an attorney upon his conviction of an infamous misdemeanor, converted to a felony by §§ 14-1 and 14-3. State v. Spivey, 213 N. C. 45, 195 S. E. 1; State v. Johnson, 174 N. C. 345, 93 S. E. 847.

§ 84-37. State bar may investigate and enjoin unauthorized practice.—The council or any committee of its members appointed for that purpose may inquire into and investigate any charges or complaints of unauthorized or unlawful practice of law. The council may bring or cause to be brought and maintain in the name of the North Carolina state bar an action or actions, upon information or upon the complaint of any private person or of any bar association against any person, partnership, corporation or association and any employee, agent, director, or officer thereof who engages in rendering any legal service or

makes it a practice or business to render legal services which are unauthorized or prohibited by law or statutes relative thereto. No bond for cost shall be required in such proceeding.

(a) In an action brought under this section the final judgment if in favor of the plaintiff shall perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof may be granted upon proof or by affidavit, that the defendant or defendants have violated any of the laws or statutes applicable to unauthorized or unlawful practice of law. The provisions of statute or rules relating generally to injunctions as provisional remedies in actions shall apply to such a temporary injunction and the proceedings thereunder.

(b) The venue for actions brought under this section shall be the superior court of any county in which such acts constituting unauthorized or unlawful practice of law are alleged to have been committed or in which there appear reasonable grounds that they will be committed or in the county where the defendants in such action reside.

(c) The plaintiff in such action shall be entitled to examination of the adverse party and witnesses before filing complaint and before trial in the same manner as provided by law for the examination of parties.

(d) This section shall not repeal or curtail any remedy now provided in cases of unauthorized or unlawful practice of law, and nothing contained herein shall be construed as disabling or abridging the inherent powers of the court in such matters. (1939, c. 281.)

Cross Reference.—As to the power of any solicitor of any of the superior courts to bring injunction or criminal proceedings, see § 84-7.

Editor's Note.—For comment on this enactment, see 17 N. C. Law Rev. 342.

Chapter 85. Auctions and Auctioneers.

Art. 1. In General.

Art. 2. Auction Sales of Articles Containing Hidden Value.

Art. 1. In General.

§ 85-1. Application of article.—The provisions of this article shall apply only to sales of jewelry and silverware at public auction, and to the auctioneers conducting or engaged in such sales.

This article does not affect any sale of jewelry or silverware (1) by auction of jewelry or silverware made pursuant to and in execution of any order, decree, or judgment of the courts of the United States or of this state; or (2) made in consequence of any assignment of property and estate for benefit of creditors; or (3) made by executors, administrators, collectors, or guardians; or (4) made pursuant to any law touching the collection of any tax or duty, or sale of any wrecked goods. (Rev., s. 220; Code, s. 2284; R. C., c. 10, s. 6; 1923, c. 243, s. 1; C. S. 4999.)

Editor's Note.—The Act of 1923, ch. 243 takes auction sales other than sales of jewelry and silverware, and auctioneers engaged in such sales out of the provisions of this article.

Auctioneer is the agent of both buyer and seller, and the entry on his lists, taken in connection with the advertisement, is a compliance with the statute of frauds. Cherry v. Long, 61 N. C. 466; Woodruff v. Trust Co., 173 N. C. 546, 92 S. E. 496; Dickerson v. Summons, 141 N. C. 325, 53 S. E. 850.

Authority of auctioneer to vary conditions of sale confirmed as agent of hirer. Satterfield v. Smith, 33 N. C. 60.

Authority of Auctioneer to Explain Conditions.—An advertisement of a sale of property by an auctioneer may be explained at the time of sale. Rankin v. Matthews, 29 N. C. 286.

Liability of Surety.—Since it is the duty of an auctioneer to pay over to his employer the proceeds of sales made by him, sureties on his official bond, which is conditioned that he will do whatsoever the law requires, are liable to his employers for proceeds of sale which he withholds. Comm'rs v. Holloway, 10 N. C. 234.

Bidders presumed to be acquainted with terms when the terms of auction are advertised or otherwise published. Christmas v. Jenkins, 3 N. C. 395.

§ 85-2. Appointment; bond.—No person shall exercise or conduct the trade or business of an auctioneer in this state or offer to conduct any such trade or business described in this article unless such person shall hold a license issued by the commissioner of revenue, and no license shall issue to any person who is not a resident of the state of North Carolina, and who has not been a bona fide resident for at least two years prior to the date when such application for license is filed with the Department of Revenue. The license shall issue only upon the filing of a bond in the sum of five thousand dollars ($5,000.00), with such conditions and sureties as may be required and approved by the commissioner of revenue. The license shall expire on the first day of April following, unless the authority is sooner revoked by the Commissioner of Revenue, and such authority shall be subject to revocation at any time by such officer for the causes and in the manner set forth in § 85-9. The fees for each license shall be two hundred dollars ($200.00). (Rev., s. 217; Code, s. 2281; 1889, c. 40; 1891, c. 576; R. C., c. 10, s. 1; 1923, c. 243, s. 1; 1941, c. 131; C. S. 5000.)

Editor's Note.—The act of 1923, ch. 243 made two years bona fide residence a prerequisite to application for a license; raised the bond required to $5,000 and the license fee to $200. The insurance commissioner was given power to revoke a license for failure to comply with the terms of the act, or for other cause. See 1 N. C. Law Rev. 302.

The 1941 amendment substituted the words "commissioner of revenue" for "insurance commissioner," and the words "department of revenue" in lieu of "insurance department."

§ 85-3. Requirements of law and of commissioner of revenue; false statement.—No person who shall conduct the business of an auctioneer in the state shall fail to comply with any provision of the law or any requirement of the commissioner of revenue pursuant to the law, and no such person shall make or cause to be made any false statement in any report required of him, and upon any violation of any section of this article, the commissioner of revenue may revoke his license to do business in this state. (1923, c. 243, s. 2; 1941, c. 131; 1941, c. 230, s. 2; C. S. 5000(a).)

§ 85-4. Punishment for violation of law.—Any person violating any of the provisions of this article shall be punished by a fine not exceeding two hundred dollars or by imprisonment in jail or worked on the roads for not exceeding two years, or by both such fine and imprisonment. (1923, c. 243, s. 3; C. S. 5000(b).)

§ 85-5. License tax by counties and municipalities.—Nothing in this article shall be construed to take away from the counties, cities or towns of this state any right or rights which they may now have, or may hereafter have, to levy a license tax on persons exercising or conducting the trade or business of an auctioneer. (1923, c. 243, s. 4; C. S. 5000(c).)

§ 85-6. Account semiannually; pay over moneys received.—It is the duty of such auctioneers, on the first days respectively of October and April, to render to the clerks of the superior court of their respective counties a true and particular account in writing of all the moneys made liable to duty by law, for which any jewelry or silverware may have been sold at auction, and also at private sale, where the price of the jewelry and silverware sold at private sale was fixed or agreed upon or governed by any previous sale at auction of any jewelry and silverware of the same kind; which account shall contain a statement of the gross amount of sales by them made for each particular person or company at one time, the date of each sale, the names of the owners of the jewelry and silverware sold, and the amount of the tax due thereon, which tax they shall pay as directed by law. The statement shall be subscribed by them and sworn to before the clerk of the said court, who is hereby authorized to administer the oath. And it is their further duty to account with and pay to the person entitled thereto the moneys received on the sales by them made. (Rev., s. 218; Code, s. 2282; R. C., c. 10, s. 2; C. S. 5001.)

§ 85-7. Acting without appointment; penalty.—No person shall exercise the trade or business of an auctioneer by selling any jewelry or silverware by auction or by any other mode of sale whereby the best or highest bidder is deemed to be the purchaser, unless such person is appointed an auctioneer pursuant to this article, on pain of forfeiting to the state for every such sale the sum of two hundred dollars, which shall be prosecuted to recovery by the solicitor of the district. (Rev., s. 219; Code, s. 2283; R. C., c. 10, s. 5; C. S. 5002.)

§ 85-8. Commissions; one per cent to town.—Auctioneers are entitled to such compensation as may be agreed upon, not exceeding two and a half per cent on the amount of sales; and auctioneers of incorporated towns shall retain and pay one per cent of the gross amount of sales to the commissioners or other authority of their respective towns. (Rev., s. 221; Code, s. 2285; R. C., c. 10, s. 7; C. S. 5003.)

Auctioneer's Fee Payable out of Trustee's Commissions.—See Duffy v. Smith, 132 N. C. 38, 43 S. E. 501.

§ 85-9. Power of Commissioner of Revenue to revoke licenses of auctioneers.—The Commissioner of Revenue of the State of North Carolina shall have power to revoke an auctioneer's license, upon the conviction of the auctioneer by any court of competent jurisdiction of the State of North Carolina of any of the offenses hereinafter set out, or upon a finding by the Commissioner of Revenue that such auctioneer is guilty of any of the offenses hereinafter set out, to-wit: (1) fraud; (2) failing to account for or to remit any money or properties coming into his possession which belong to others; (3) forgery, embezzlement, obtaining money under false pretense, larceny, conspiracy to defraud, or like offense or offenses; (4) false representations as to the origin, genuineness, cost to seller, value, or other matters relating to the sale of any property then or thereafter to be offered for sale at auction; (5) conviction of any crime involving moral turpitude either in this State or any other state; (6) making any false statement in the application for license; (7) violating any of the provisions of the laws of this State relating to sales at auction. Provided, that no license shall be revoked upon a finding by the Commissioner of Revenue except by charges preferred. The accused shall be furnished a written copy of such charges and given not less than twenty days' notice of the time and place when

the Commissioner shall accord a full and fair hearing on the charges. From any action of the Commissioner of Revenue depriving the accused of his license, the accused shall have the right of appeal to the Superior Court of the county of his residence, upon filing notice of appeal within ten days of the decision of the Commission of Revenue. The trial in the Superior Court shall be heard de novo as in the case of an appeal from a justice of the peace. (1941, c. 230, s. 1.)

Art. 2. Auction Sales of Articles Containing Hidden Value.

§ 85-10. Application of article.—The provisions of this article shall relate to all persons, firms and corporations who shall sell or offer to sell any of the goods, wares and merchandise hereinafter enumerated by means of auction sale of same conducted either by themselves or licensed auctioneers, except that it shall not apply to receivers, trustees in bankruptcy, trustees acting under a bona fide mortgage or deed of trust, trustees acting under the provisions of a will, any person acting under orders of any court, or to administrators or to executors while acting as such or to the bona fide holder of an article pledged to secure a debt. (1941, c. 371, s. 1.)

§ 85-11. Sale of certain articles in violation of article prohibited.—It shall be unlawful for any person, firm or corporation to offer for sale or sell to the highest bidder at an auction sale furs, objects of art, artware, glassware, silver plated ware, chinaware, gold, silver, precious or semi-precious stones, jewelry, watches, clocks, or gems of any kind, except as hereafter provided. (1941, c. 371, s. 2.)

§ 85-12. Licensing of auction merchants.—Before selling or offering for sale any of the articles hereinabove mentioned, the person, firm or corporation which is to conduct such auction sale shall apply to and obtain from the revenue department of the state of North Carolina a license or permit to engage in the activity covered by this article and pay therefor to the commissioner of revenue the sum of two hundred dollars ($200.00) for such license or permit. The license or permit issued by the revenue department shall entitle the person, firm or corporation named therein to conduct the auction sale as provided in this article in one county, and upon payment of one half of the fee for each additional county, such person, firm or corporation shall have authority to conduct auction sales in additional counties for which the tax has been paid. No person or copartnership shall receive any license or permit to conduct any such sale unless such person or a member of the copartnership is and has been for a period of one year prior to the issuance of the permit a resident of the state of North Carolina and is and has been for a period of six months prior thereto a resident of one of the counties for which he seeks permit, and no corporation shall receive a license or permit to conduct such sale unless such corporation is either a domestic corporation of the state of North Carolina or a foreign corporation which has complied with all requirements of the state of North Carolina and domesticated in North Carolina. (1941, c. 371, s. 3.)

§ 85-13. Bond prerequisite for license.—Before any person, firm or corporation shall offer for sale or sell at public auction any of the goods hereinabove described, such person, firm or corporation shall obtain the permit provided in § 85-12 and shall file with the commissioner of revenue a good and sufficient bond in the penal sum of five thousand dollars ($5,000.00), executed by a corporate surety licensed to do business in North Carolina or by two individual sureties who own real property in the state of North Carolina of a net value of twice the amount of such bond and who shall have justified on such bond before the clerk of the superior court of the county in which such individual sureties reside. Said bond shall be kept in full force and effect during the period for which such license is issued and for a period of one year thereafter. The conditions of said bond are to provide that the surety or sureties are irrevocably appointed as process agents on whom any process issued against the person, firm or corporation conducting such sale may be served, and shall further provide that the person, firm or corporation conducting said sale will pay all valid judgments secured against such person, firm or corporation on causes of action arising out of such sales by auction. (1941, c. 371, s. 4.)

§ 85-14. Conduct of sales by licensed auctioneer required.—An auctioneer duly licensed as such by the state of North Carolina shall be present and in charge of any such auction sale. (1941, c. 371, s. 5.)

§ 85-15. Regulation of bidding at sales. — At any such auction sale, no person interested either directly or indirectly as seller, and no person employed by any person interested either directly or indirectly as seller, shall bid on any articles offered for sale, and no person shall act as a fictitious bidder, or what is commonly known as a "capper," "booster," "by-bidder" or "shiller," and no person shall bid or offer to bid or pretend to buy an article sold or offered for sale at any such auction by prearranged agreement with any person interested in the sale directly or indirectly as seller. (1941, c. 371, s. 6.)

§ 85-16. Written description of articles purchased furnished to purchaser upon demand.—At any such auction sale any person who shall purchase any article may have the right to demand of the person, firm or corporation conducting such sale, at the time the sale is made or within forty-eight hours thereafter, a written description of the merchandise so purchased, which description shall be accurate and full, and shall give the name of the manufacturer or producer of such merchandise, if known; shall state whether the merchandise is an original, a copy, a reproduction, new or used, genuine or artificial, and shall also incorporate all representations made to induce persons to bid on such merchandise; such statement shall be deemed to be the representations upon which the merchandise is purchased, and upon a refusal to give such statement as herein provided, the sale may, at the option of the purchaser, be rescinded, in which event the purchaser shall have the privilege of demanding a return of all sums paid on account of such purchase. A notice of the right of a purchaser to demand such a statement shall be conspicuously displayed in each room where such auction shall take place. (1941, c. 371, s. 7.)

§ 85-17. Application of Fair Trade Act.—No sale shall be made at such auction sales which shall violate the provisions of the North Carolina Fair Trade Act. (1941, c. 371, s. 8.)

§ 85-18. Presence of merchant at sales required; responsibility for auctioneer's acts.—At all sales by auction conducted under the provisions of this article, the person, firm or corporation conducting such sale shall be present at all times in person or by an agent duly authorized in writing to represent such person, firm or corporation, and the person, firm or corporation conducting such sale shall be responsible for acts done and words spoken by the auctioneer or his assistants in furthering the sales by auction. (1941, c. 371, s. 9.)

§ 85-19. Statements in advertisements deemed representations; merchandise not as advertised.—At all such auction sales, all statements contained in the advertising of such sales shall be considered and deemed representations inducing purchasers to bid on and buy the merchandise advertised, and in the event any such merchandise shall not be as advertised, the purchaser thereof shall, at his option, be entitled to rescind such sale and have the right, upon such rescission, to demand and receive any sums paid by him on account of such purchase. (1941, c. 371, s. 10.)

§ 85-20. False and fraudulent advertising, labelling, etc., prohibited.—No person, firm or corporation conducting any such sale shall advertise any merchandise falsely or fraudulently, either by word of mouth, written or published advertisement, or other forms of advertisement, nor shall any such person, firm or corporation permit any article to be displayed or offered for sale which shall be falsely tagged, labeled or branded. (1941, c. 371, s. 11.)

§ 85-21. False statements as to value or costs prohibited.—No person, firm or corporation conducting any such sale shall allow or permit any false statement to be made by any person connected with such sale, either directly or indirectly, as seller, as to the value of any such merchandise being sold or as to the cost to the seller of any such merchandise being sold. (1941, c. 371, s. 12.)

§ 85-22. Application of article to agents.—The provisions of this article shall apply to the person, firm or corporation conducting such sale, whether such person, firm or corporation is the owner of the merchandise being sold, or selling such merchandise for others. (1941, c. 371, s. 13.)

§ 85-23. Violation made misdemeanor.—Any person violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than twenty-five ($25.00) dollars nor more than five hundred ($500.00) dollars, or imprisoned for not more than six months, or both, in the discretion of the court, and shall be permanently enjoined from thereafter participating in the conducting of any such auction sale, either directly or indirectly. (1941, c. 371, s. 14.)

§ 85-24. Church and civic organizations not prevented from holding auctions.—Nothing in this article shall be construed as preventing church and civic organizations from holding auction sales of antiques for charitable purposes. (1941, c. 371, s. 15.)

§ 85-25. Purpose of article.—It is the purpose of this article to provide for the protection of the public in purchasing articles containing a hidden value, which is not and cannot be determined except by persons having special knowledge thereof, when such articles are sold at public auction, where there is not ample time for deliberation and appraisal of such merchandise, and where the purchaser, by reason of the manner of sale, of necessity must rely principally upon the representations made by the seller as to value of said merchandise. (1941, c. 371, s. 18.)

§ 85-26. Rights and privileges conferred by article are additional to rights, etc., under other laws.—The rights and privileges herein granted to any purchaser shall be in addition to all other rights, privileges or remedies which such purchaser might otherwise have under the laws of North Carolina, and the provisions of this article shall not be deemed to deprive any such purchaser of any rights or remedies which he otherwise would have had. (1941, c. 371, s. 19.)

Chapter 86. Barbers.

§ 86-1. Necessity for certificate of registered barber or apprentice. — No person or combination of persons shall, either directly or indirectly, practice or attempt to practice barbering as hereinafter defined in the State of North Carolina without a Certificate of Registration either as a Registered Apprentice or as a Registered Barber issued pursuant to the provisions of this chapter by the State Board of Barber Examiners hereinafter established. (1929, c. 119, s. 1; 1941, c. 375, s. 1.)

Editor's Note.—The 1941 amendment struck out the words "for pay" formerly appearing after the word "shall" in line two.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 447.

Constitutionality.—This chapter, known as the Barber's Act, relates to the public health and is constitutional as a valid exercise of the police power of the State. State v. Lockey, 198 N. C. 551, 152 S. E. 693.

Application.—The provisions of this chapter apply to proprietor barbers, as in this case the owner and operator of a one-chair barber shop. State v. Lockey, 198 N. C. 551, 152 S. E. 693.

Cited in James v. Denny, 214 N. C. 470, 199 S. E. 617.

§ 86-2. What constitutes practice of barbering.—Any one or combination of the following practices shall constitute the practice of barbering in the purview of this chapter:

(a) Shaving or trimming the beard, or cutting the hair.

(b) Giving facial or scalp massages, or treatments with oils, creams, lotions and other preparations either by hand or mechanical appliances.

(c) Singeing, shampooing or dyeing the hair or applying hair tonics.

(d) Applying cosmetic preparations, antiseptics, powders, oils, clays and lotions to the scalp, neck or face. (1929, c. 119, s. 2; 1941, c. 375, s. 2.)

Editor's Note.—The 1941 amendment struck out the words "when done for pay" formerly appearing after the word "practices" in line two.

§ 86-3. Qualifications for issuance of certificates of registration.—No person shall be issued a certificate of Registration as a Registered Apprentice by the State Board of Barber Examiners, hereinafter established

(a) Unless such person is at least seventeen years of age.

(b) Unless such person passes a satisfactory physical examination prescribed by said Board of Barber Examiners.

(c) Unless each person has completed at least a six months' course in a reliable Barber School or College approved by said Board of Barber Examiners.

(d) Unless such person passes the examination prescribed by the Board of Barber Examiners and pays the required fees hereinafter enumerated. (1929, c. 119, s. 3.)

§ 86-4. Registered apprentice must serve under Registered Barber and take examination before opening shop.—No Registered Apprentice, registered under the provisions of this chapter, shall operate a barber shop in the State, but must serve his period of apprenticeship under the direct supervision of a Registered Barber, as required by § 86-5.

Every Registered Apprentice when eligible shall take the examination to receive a certificate of registration as a Registered Barber. No Registered Apprentice shall be permitted to practice for a period of more than three years without passing the required examination to receive a certificate of registration as a Registered Barber. (1929, c. 119, s. 4; 1941, c. 375, s. 3.)

Editor's Note.—The 1941 amendment added the paragraph at the end of this section.

§ 86-5. Period of apprenticeship; affidavit; qualifications for certificate as Registered Barber. —Any person to practice barbering as a Registered Barber, must have worked as a Registered Apprentice for a period of at least eighteen months under the direct supervision of a Registered Barber, and this fact must be demonstrated to the Board of Barber Examiners by the sworn affidavit of three Registered Barbers, or such other methods of proof as the Board may prescribe and deem necessary. A Certificate of Registration as a Registered Barber shall be issued by the Board hereinafter designated, to any person who is qualified under the provisions of this chapter, or meets the following qualifications:

(a) Who is qualified under the provisions of § 86-3;

(b) Who is at least nineteen years of age;

(c) Who passes a satisfactory physical examination as prescribed by said Board;

(d) Who has practiced as a Registered Apprentice for a period of eighteen months, under the immediate personal supervision of a Registered Barber; and

(e) Who has passed a satisfactory examination, conducted by the Board, to determine his fitness to practice barbering, such examination to be so prepared and conducted, as to determine whether or not the applicant is possessed of the requisite skill in such trade, to properly perform all the duties thereof, including the ability of the applicant in his preparation of tools, shaving, hair-cutting, and all the duties and services incident thereto, and has sufficient knowledge concerning diseases of the face, skin and scalp, to avoid the aggravation and spreading thereof in the practice of said trade. (1929, c. 119, s. 5.)

§ 86-6. State Board of Barber Examiners; appointment and qualifications; governor; term of office and removal.—A board to be known as the State Board of Barber Examiners is hereby established to consist of three members appointed by the Governor of the State. Each member shall be an experienced barber, who has followed the practice of barbering for at least five years in the State. The members of the first Board appointed shall serve for six years, four years and two years, respectively, after appointed, and members appointed thereafter shall serve for six

years. The Governor, at his option, may remove any member for good cause shown and appoint members to fill unexpired terms. (1929, c. 119, s. 6.)

§ 86-7. Office; seal; officers and secretary; bond.—The Board shall maintain a suitable office in Raleigh, North Carolina, and shall adopt and use a common seal for the authentication of its orders and records. Said Board shall elect its own officers, and in addition thereto, shall elect a full time Secretary, which Secretary shall receive an annual salary not to exceed three thousand dollars, such salary as well as all other expenses of said Board, to be paid only out of the revenue derived from fees collected under the provisions of this chapter. Said full time Secretary, before entering upon the duties of his office, shall execute to the State of North Carolina a satisfactory bond with a duly licensed bonding company in this State as surety or other acceptable surety; such bond to be in the penal sum of not less than ten thousand dollars ($10,000.00) and conditioned upon the faithful performance of the duties of his office and the true and correct accounting of all funds received by him. Said full time secretary shall turn over to the State Treasurer to be credited to the State Board of Barber Examiners all funds collected or received by him under this chapter, such funds to be held and expended under the supervision of the Director of the Budget, exclusively for the enforcement and administration of the provisions of this chapter, subject to the limitations hereof. Provided, however, that nothing herein shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer derived from fees collected under the provisions of this chapter and received by the said State Treasurer in the manner aforesaid. (1929, c. 119, s. 7; 1941, c. 375, s. 4; 1943, c. 53, s. 1.)

Editor's Note.—The 1943 amendment rewrote the provisions relating to the secretary, thereby omitting the sentence added by the 1941 amendment which provided that the board should employ such agents, assistants, and attorneys as it might deem necessary.

§ 86-8. Salary and expenses; employees; audit; annual report to Governor.—Each member of the Board of Barber Examiners shall receive for his services an annual salary of three thousand dollars ($3,000.00), payable in equal monthly installments, and shall be reimbursed for his actual expenses, and shall receive not less than five cents (5c) per mile for the distance traveled in performance of his duties, which said salary and expense and all other salaries and expenses in connection with the administration of this chapter, shall be paid upon warrant drawn on the State Treasurer, solely from the funds derived fom the fees collected and received under this chapter. The board shall employ such agents, assistants and attorneys as it may deem necessary. Each member of the Board of Barber Examiners, and each of its agents and assistants who collect any moneys or fees in the discharge of their duties, shall execute to the State of North Carolina a bond in the sum of one thousand dollars ($1,000.00) conditioned upon the faithful performance of his duties of office, and the true accounting for all funds collected. There shall be annually made by the State Auditing Department, a complete audit and examination of the receipts and disbursements, and the State Board of Barber Examiners shall report annually to the Governor, a full statement of its receipts and expenditures, and also a full statement of its work during the year, together with such recommendations as it may deem expedient. (1929, c. 119, s. 8; 1943, c. 53, s. 2.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 86-9. Application for examination; payment of fee.—Each applicant for an examination shall:

(a) Make application to the Board on blank forms prepared and furnished by the full-time Secretary, such application to contain proof under the applicant's oath of the particular qualifications of the applicant.

(b) Pay to the Board the required fee.

All applications for said examination must be filed with the full-time Secretary at least thirty days prior to the actual taking of such examination by applicants. (1929, c. 119, s. 9.)

Purpose of Fees—Constitutionality.—The fees prescribed for barbers who are subject to the provisions of this chapter are for the expenses and enforcement of the act, which is necessary to the public health and welfare, and not an annual occupation tax imposed for revenue, and the payment of the barber's license tax under the Revenue Act does not affect the obligation to pay the fees prescribed by the Barber's Act, and assessment of the fees thereunder is constitutional. State v. Lockey, 198 N. C. 551, 552, 152 S. E. 693.

§ 86-10. Board to conduct examinations not less than four times each year.—The Board shall conduct examinations of applicants for Certificates of Registration to practice as Registered Barbers, and of applicants for Certificate of Registration to practice as Registered Apprentices, not less than four times each year, at such times and places as will prove most convenient, and as the Board may determine. The examination of applicants for Certificates of Registration as Registered Barbers and Registered Apprentices shall include such practical demonstration and oral and written tests as the Board may determine. (1929, c. 119, s. 10.)

§ 86-11. Issuance of certificates of Registration.—Whenever the provisions of this chapter have been complied with, the Board shall issue, or have issued, a Certificate of Registration as a Registered Barber or as a Registered Apprentice, as the case may be. (1929, c. 119, s. 11.)

§ 86-12. Barbers from other states; temporary permits.—Persons who have practiced barbering in another state or county for a period of not less than two years, and who move into this State, shall prove and demonstrate their fitness to the Board of Barber Examiners, as herein created, before they will be issued a Certificate of Registration to practice barbering, but said Board may issue such temporary permits as are necessary. (1929, c. 119, s. 12; 1941, c. 375, s. 5.)

Editor's Note.—The 1941 amendment inserted the words "for a period of not less than two years."

§ 86-13. Procedure for registration.—The procedure for the registration of present practitioners of barbering shall be as follows:

(a) If such person has been practicing barbering for a shorter period of time than eighteen months, he shall, upon paying the required fee, and making an affidavit to that effect to the

Board of Barber Examiners, be issued a Certificate of Registration as an Apprentice.

(b) If such person has been practicing barbering in the State of North Carolina for more than eighteen months, he shall upon paying the required fee and making an affidavit to that effect, to the Board of Barber Examiners, be issued a Certificate of Registration as a Registered Barber.

(c) All persons, however, who are not actively engaged in the practice of barbering, at the time this chapter is enacted into law, shall be required to take the examination herein provided, and otherwise comply with the provisions of this chapter before engaging in the practice of barbering. (1929, c. 119, s. 13.)

§ 86-14. Procedure for registration of barbers not registered under section 86-13.—The procedure for the registration of present practitioners of barbering who were not registered under § 86-13, shall be as follows:

(a) If such person has been practicing barbering in the State of North Carolina for more than eighteen months and is actively engaged in the practice of barbering at the time this bill is enacted into law, he shall, upon making affidavit to that effect and paying the required fee to the Board of Barber Examiners, be issued a certificate of registration as a registered barber.

(b) All persons, however, who do not make application prior to January 1, 1938, shall be required to take the examination prescribed by the State Board of Barber Examiners, and otherwise comply with the provisions of this chapter before engaging in the practice of barbering. (1937, c. 138, s. 3.)

§ 86-15. Fees.—The fee to be paid by applicant for examination to determine his fitness to receive a certificate of registration, as a registered apprentice, shall be five ($5.00) dollars, and such fee must accompany his application. The annual license fee of an apprentice shall be three ($3.00) dollars. The fee to be paid by an applicant for an examination to determine his fitness to receive a certificate of registration as a registered barber shall be fifteen ($15.00) dollars, and such fee must accompany his application. The annual license fee of a registered barber shall be five ($5.00) dollars. All licenses, both for apprentices and for registered barbers, shall be renewed as of the thirtieth day of June of each and every year, and such renewals for apprentices shall be three ($3.00) dollars, and for registered barbers five ($5.00) dollars. The fee for restoration of an expired certificate for registered barbers shall be seven ($7.00) dollars, and restoration of expired certificate of an apprentice shall be four ($4.00) dollars: Provided, the difference between the fees being charged on March 13, 1937, and the fees herein provided for shall be used exclusively for the employment of additional inspectors and the payment of their necessary expenses of inspection, it being the purpose of this chapter to provide as nearly as possible equal inspection throughout the state of North Carolina. The fees herein set out are not to be increased by the board of barber examiners, but said board may regulate the payment of said fees and prorate the license fees in such manner as it deems expedient. (1929, c. 119, s. 14; 1937, c. 138, s. 4.)

Editor's Note.—The 1937 amendment increased the fees charged under this section and inserted the provision as to use of additional fees.

§ 86-16. Persons exempt from provisions of chapter. — The following persons are exempt from the provisions of this chapter while engaged in the proper discharge of their professional duties.

(a) Persons authorized under the laws of the State to practice medicine and surgery.

(b) Commissioned medical or surgical officers of the United States Army, Navy, or Marine Hospital Service.

(c) Registered nurses.

(d) Students in schools, colleges and universities, who follow the practice of barbering upon the school, college, or university premises, for the purpose of making a part of their school expenses.

(e) Undertakers.

(f) Persons practicing hair dressing and beauty culture exclusively for females. The provisions of this chapter shall apply to all persons except those persons specifically exempted by this section and § 86-24. (1929, c. 119, s. 15; 1937, c. 138, s. 2; 1941, c. 375, s. 6.)

Editor's Note.—The 1941 amendment substituted "exclusively for females" in subsection (f) for the former "in hairdressing and beauty shops patronized by women."

§ 86-17. Sanitary rules and regulations; inspection.—(a) Each barber and each owner or manager of a barber shop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

1. Inspection. — All barber shops, or barber schools and colleges, or any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the board of barber examiners, or its agents or assistants.

2. Proper Quarters.—Every barber shop, or any other place where barber service is rendered, shall be located in buildings or rooms of such construction that the same may be easily cleaned.

3. Barber Shops.—Every barber shop, or barber school, or barber college, or any other place where barber service is rendered, shall be well-lighted, well-ventilated, and kept in a clean, orderly and sanitary condition.

4. Position of Barber Shops.—Any room or place for barbering is prohibited which is used for other purposes, unless such a substantial partition or wall of ceiling height, separates such portion used for barber shops, or any place where barber service is rendered. However, this rule shall apply to sanitation only as determined by the discretion of the inspector.

5. Walls and Floors.—The floors, walls, and ceiling of all barber shops, or barber schools and colleges, or any other place where barber service is rendered, must be kept clean and sanitary at all times.

6. Fixture Conditions. — Work stands or cabinets, and chairs and fixtures of all barber shops, or any other place where barber service is rendered, must be kept clean and sanitary at all times. All lavatories, towel urns, paper jars, cuspidors,

and all receptacles containing cosmetics of any nature must be kept clean at all times.

7. Tools and Instruments.—Every owner or manager of each barber shop shall supply a separate tool cabinet, having a door as near air-tight as possible, for himself and each barber employed. All tools and instruments shall be kept clean and sanitary at all times and shall be kept in tool cabinets, and shall not be placed in drawers or on work stands. Cabinets shall be of such construction as to be easily cleaned and shall be clean and sanitary at all times.

8. Water.—(1) All barber shops, or any other place where barber service is rendered, located in towns or cities having a water system shall be required to connect with said water system. Running water, hot and cold, shall be provided, and lavatories shall be located at a convenient place in each barber shop.

9. Water.—(2) All barber shops or any other place where barber service is rendered, not located in cities or towns having water systems must supply hot and cold water under pressure in tank to hold not less than five gallons, and said tanks must be connected with a lavatory. Tanks and lavatory shall be of such construction that they may be easily cleaned. Said lavatory must have a drain pipe to drain all waste water out of the building. The dipping of shaving mugs and towels, etc., into water receptacles is prohibited.

10. Styptic Pencil and Alum.—No person serving as a barber shall, to stop the flow of blood, use alum or other material unless the same be used in liquid or powder form with clean towels. The use of common styptic pencil or lump alum shall not be permitted for any purpose.

11. Instruments. — Each person serving as a barber, shall, immediately before using razors, tweezers, combs, contact cup or pad of vibrator or massage machine, sterilize same by immersing in a solution of fifty per cent (50%) alcohol, five per cent (5%) carbolic acid, twenty per cent (20%) formaldehyde, or ten per cent (10%) lysol. Every owner or manager of each barber shop shall supply a separate container for each barber adequate to provide for a sufficient supply of the above solutions.

12. Hair Brushes and Combs.—Each barber shall maintain combs and hair brushes in clean and sanitary manner at all times, and each hair brush shall be thoroughly washed with hot water and soap before each separate use.

13. Mugs and Brushes. — Each barber shall thoroughly clean mug and lather brush before each separate use and same must be kept clean and sanitary at all times.

14. Headrest.—The headrest of every barber chair shall be protected with fresh, clean paper or clean laundered towel before its use for any person

15. Towels.—Each and every person serving as a barber shall use a clean freshly laundered towel for each patron. This applies to every kind of towel, dry-towel, steam-towel, or washcloth. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed, shall be provided to receive used towels and all used towels must be discarded in said receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed or washed in the barber shop. All wet and used towels must be removed from the work stand or lavatory after serving each patron.

16. Haircloths.—Whenever a haircloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neck strap shall be placed around the neck so as to prevent the haircloth from touching the skin. Haircloths shall be discarded when soiled.

17. Baths and Toilets.—Baths and toilets must be kept in a clean and sanitary manner at all times.

18. Barber Hands.—Every person serving as a barber shall thoroughly cleanse his or her hands immediately before serving each customer.

19. Barber Appearance.—Each person working as a barber shall be clean, both as to person and dress.

20. Health Certificate.—No person having an infectious or communicable disease shall practice as a barber in the state of North Carolina. Each and every barber practicing the profession in North Carolina shall furnish the state board of barber examiners a satisfactory health certificate, including Wassermann Test, at such times as the board of barber examiners may deem necessary, signed by a physician in good standing and licensed by the North Carolina board of medical examiners.

21. Diseases.—No barber shall serve any person having an infectious or communicable disease, and no barber shall undertake to treat any infectious or contagious disease.

22. Rules Posted.—The owner or manager of any barber shop, or any other place where barber service is rendered, shall post a copy of these rules and regulations in a conspicuous place in said shop.

(b) Any member of the board and its agents and assistants shall have authority to enter upon and inspect any barber shop or barber school, or other place where barber service is rendered, at any time during business hours in performance of the duties conferred and imposed by this act. A copy of the sanitary rules and regulations set out in this section shall be furnished by the board to the owner or manager of each barber shop or barber school, or any other place where barber service is rendered in the state, and such copy shall be posted in a conspicuous place in each barber shop or barber school. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7.)

Editor's Note.—The 1941 amendment struck out the former section and inserted the above in lieu thereof.

§ 86-18. Certificates to be displayed. — Every holder of a Certificate of Registration shall display it in a conspicuous place adjacent to or near his work chair. (1929, c. 119, s. 17.)

§ 86-19. Renewal or restoration of certificates. —Every registered barber and every registered apprentice who continues in practice or service shall annually, on or before June thirtieth of each year, renew his certificate of registration and furnish such health certificate as the board may prescribe and pay the required fee. Every certificate of registration shall expire on the thirtieth day of June in each and every year. A registered barber or a registered apprentice whose certificate of registration has expired may have his certificate re-

stored immediately upon paying the required restoration fee and furnishing health certificate prescribed by the board: Provided, however, that registered barber or registered apprentice whose certificate has expired for a period of three years shall be required to take the examination prescribed by the state board of barber examiners, and otherwise comply with the provisions of this chapter before engaging in the practice of barbering. (1929, c. 119, s. 18; 1937, c. 138, s. 5.)

Editor's Note.—The 1937 amendment added the provisions as to furnishing health certificate and taking examination.

§ 86-20. Disqualifications for certificate.—The Board may either refuse to issue or renew, or may suspend or revoke, any Certificate of Registration for any one or combination of the following causes:

1. Conviction of a felony shown by certified copy of the record of the court of conviction.
2. Gross malpractice or gross incompetency.
3. Continued practice by a person knowingly having an infectious or contagious disease.
4. Advertising by means of knowingly false or deceptive statements.
5. Habitual drunkenness or habitual addiction to the use of morphine, cocaine or other habit-forming drugs.
6. The commission of any of the offences described in § 86-22, sub-divisions three, four and six.
7. The violation of any one or a combination of the sanitary rules and regulations.
8. The violation of any of the provisions of § 86-4. (1929, c. 119, s. 19; 1941, c. 375, s. 8.)

Editor's Note.—The 1941 amendment added subsections 7 and 8.

§ 86-21. Notice; public hearing; appeal.—The Board may neither refuse to issue nor refuse to renew, nor suspend, or revoke any Certificate of Registration, however, for any of these causes, unless the person accused has been given at least thirty days' notice in writing of the charge against him and a public hearing by the Board.

Upon the hearing of any such proceeding, the Board may administer oaths and may procure by its subpoena, the attendance of witnesses and the production of relevant books and papers.

Any barber in the State whose case has been passed upon by the Board of Barber Examiners shall have the right and is hereby given the right to appeal to the Superior Court of the State, which Court may in its discretion reverse or modify any order made by the said Board of Barber Examiners. (1929, c. 119, s. 20; 1939, c. 218, s. 1.)

Cross Reference.—For uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

§ 86-22. Misdemeanors.—Each of the following constitutes a misdemeanor, punishable upon conviction by a fine of not less than ten dollars, nor more than fifty ($50.00) dollars, or thirty days in jail or both:

1. The violation of any of the provisions of § 86-1.
2. Permitting any person in one's employ, supervision or control to practice as an apprentice unless that person has a certificate of registration as a registered apprentice.
3. Permitting any person in one's employ, supervision or control, to practice as a barber unless that person has a certificate as a registered barber.
4. Obtaining or attempting to obtain a certificate of registration for money other than required fee, or any other thing of value, or by fraudulent misrepresentations.
5. Practicing or attempting to practice by fraudulent misrepresentations.
6. The wilful failure to display a certificate of registration as required by § 86-18.
7. The violation of the reasonable rules and regulations adopted by the state board of barber examiners for the sanitary management of barber shops and barber schools.
8. The violation of any of the provisions of § 86-5.
9. The refusal of any owner or manager to permit any member of the board, its agents, or assistants to enter upon and inspect any barber shop, or barber school, or any other place where barber service is rendered, at any time during business hours.
10. The violation of any one or a combination of the sanitary rules and regulations.
11. Practicing or attempting to practice barbering during the period of suspension or revocation of any certificate of registration granted under this chapter. Each day's operation during such period of suspension or revocation shall be deemed a separate offense, and, upon conviction thereof, shall be punished as prescribed in this section. (1929, c. 119, s. 21; 1933, c. 95, s. 1; 1937, c. 138, s. 6; 1941, c. 375, ss. 9, 10.)

Editor's Note.—Public Laws of 1933, c. 95, changed in subsection 7 the words "State Board of Health" to "State Board of Barber Examiners."

The 1937 amendment inserted the words "or thirty days in jail or both" in the first paragraph, and struck out the words "wilful and continued" formerly appearing before the word "violation" in subsection 7. It also inserted subsection 1(a) and 1(b). The 1941 amendment changed subsection 7 and added subsection 8.

§ 86-23. Board to keep record of proceedings; data on registrants.—The Board shall keep a record of its proceedings relating to the issuance, refusal, renewal, suspension, and revocation of Certificates of Registration. This record shall also contain the name, place of business and residence of each Registered Barber and Registered Apprentice, and the date and number of his Certificate of Registration. This record shall be open to public inspection at all reasonable times. (1929, c. 119, s. 22.)

§ 86-24. Barbering among members of same family.—This chapter shall not prevent a member of the family from practicing barbering on a member of his or her family. (1941, c. 375, s. 12.)

Chapter 87. Contractors.

Art. 1. General Contractors.

§ 87-1. Contractor defined.—For the purpose of this article a general contractor is defined to be one who, for a fixed price, commission, fee or wage, undertakes to bid upon or to construct or superintend the construction of any building, highway, sewer, grading or any improvement or structure where the cost of the undertaking is ten thousand dollars or more; and anyone who shall bid upon or engage in constructing or superintending the construction of any structures or any undertakings or improvements above mentioned in the state of North Carolina costing ten thousand dollars or more, shall be deemed and held to have engaged in the business of general contracting in the state of North Carolina. (1925, c. 318, s. 1; 1931, c. 62, s. 1; 1937, c. 429, s. 1.)

Editor's Note.—The 1937 amendment made this section applicable to bidding upon construction.

§ 87-2. Licensing board; organization.—There shall be a State licensing board for contractors consisting of five members who shall be appointed by the Governor within sixty days after March 10, 1925. At least one member of such board shall have as a larger part of his business the construction of highways; at least one member of such board shall have as the larger part of his business the construction of public utilities; at least one member shall have as the larger part of his business the construction of buildings. The members of the first board shall be appointed for one, two, three, four and five years respectively, their terms of office expiring on the thirty-first day of December of the said years. Thereafter in each year the Governor in like manner shall appoint to fill the vacancy caused by the expiration of the term of office a member for a term of five years. Each member shall hold over after the expiration of his term until his successor shall be duly appointed and qualified. If vacancies shall occur in the board for any cause the same shall be filled by the appointment of the Governor. The Governor may remove any member of the board for misconduct, incompetency or neglect of duty. (1925, c. 318, s. 2.)

§ 87-3. Members of board to take oath.—Each member of the board shall, before entering upon the discharge of the duties of his office, take and file with the Secretary of State an oath in writing to properly perform the duties of his office as a member of said board and to uphold the Constitution of North Carolina and the Constitution of the United States. (1925, c. 318, s. 3.)

§ 87-4. First meeting of board; officers; secretary-treasurer and assistants.—The said board shall, within thirty days after its appointment by the Governor, meet in the city of Raleigh, at a time and place to be designated by the Governor, and organize by electing a chairman, a vice chairman, and a secretary-treasurer, each to serve for one year. Said board shall have power to make such by-laws, rules and regulations as it shall deem best, provided the same are not in conflict with the laws of North Carolina. The secretary-treasurer shall give bond in such sum as the board shall determine, with such security as shall be approved by the board, said bond to be conditioned for the faithful performance of the duties of his office and for the faithful accounting of all moneys and other property as shall come into his hands. The secretary-treasurer need not be a member of the board, and the board is hereby authorized to employ a full time secretary-treasurer, whose salary shall not exceed thirty-six hundred dollars ($3600.00) per annum, and such other assistants and make such other expenditures as may be necessary to the proper carrying out of the provisions of this article. (1925, c. 318, s. 4; 1941, c. 257, s. 4.)

Editor's Note.—The 1941 amendment added the last sentence.

§ 87-5. Seal of board.—The board shall adopt a seal for its own use. The seal shall have the words "Licensing Board for Contractors, State of North Carolina," and the secretary shall have charge, care and custody thereof. (1925, c. 318, s. 5.)

§ 87-6. Meetings; notice; quorum.—The board shall meet twice each year, once in April and once in October, for the purpose of transacting such business as may properly come before it. At the April meeting in each year the board shall elect officers. Special meetings may be held at such times as the board may provide in the by-laws it shall adopt. Due notice of each meeting and the time and place thereof shall be given to each member in such manner as the by-laws may provide. Three members of the board shall constitute a quorum. (1925, c. 318, s. 6.)

§ 87-7. Records of board; disposition of funds.—The secretary-treasurer shall keep a record of the proceedings of the said board and shall receive and account for all moneys derived from the operation of this article. Any funds remaining in the hands of the secretary-treasurer to the credit of the board after the expenses of the board for the current year have been paid shall be paid over, to the Greater University of North Carolina for the use of its engineering department. The board has the right, however, to retain at least ten per cent of the total expense it incurs for a year's operation to meet any emergency that may arise. (1925, c. 318, s. 7.)

§ 87-8. Records; roster of licensed contractors. — The secretary-treasurer shall keep a record of the proceedings of the board and a register of all applicants for license showing for each the date of application, name, qualifications, place of business, place of residence, and whether license was granted or refused. The books and register of this board shall be prima facie evidence of all matters recorded therein. A roster showing the names and places of business and of residence of all licensed general contractors shall be prepared by the secretary of the board during the month of January of each year; such roster shall be printed by the board out of funds of said board as provided in § 87-7. On or before the first day of March of each year the board shall submit to the governor a report of its transactions for the preceding year, and shall file with the secretary of state a copy of such report, together with a complete statement of the receipts and expenditures of the board, attested by the affidavits of the chairman and the secretary, and a copy of the said roster of licensed general contractors. (1925, c. 318, s. 8; 1937, c. 429, s. 2.)

Editor's Note.—The 1937 amendment eliminated the requirement for mailing roster of contractors to clerks.

§ 87-9. Compliance with federal highway act, etc.; contracts financed by federal road funds.—Nothing in this article shall operate to prevent the state highway and public works commission from complying with any act of congress and any rules and regulations promulgated by the United States secretary of agriculture for carrying out the provisions of the Federal Highway Act, or shall apply to any person, firm or corporation proposing to submit a bid or enter into contract for any work to be financed in whole or in part with federal aid road funds in such manner as will conflict with any act of congress or any such rules and regulations of the United States secretary of agriculture. (1939, c. 230.)

§ 87-10. Application for license; examination;

certificate; renewal.—Anyone hereafter desiring to be licensed as a general contractor in this state shall make and file with the board, thirty days prior to any regular or special meeting thereof, a written application on such form as may then be by the board prescribed for examination by the board, which application shall be accompanied by the sum of sixty dollars ($60.00) if the application is for an unlimited license, or forty dollars ($40.00) if the application is for an intermediate license, or twenty dollars ($20.00) if the application is for a limited license; the holder of an unlimited license shall be entitled to engage in the business of general contracting in North Carolina unlimited as to the value of any single project, the holder of an intermediate license shall be entitled to engage in the practice of general contracting in North Carolina but shall not be entitled to engage therein with respect to any single project of a value in excess of three hundred thousand dollars ($300,000.00), the holder of a limited license shall be entitled to engage in the practice of general contracting in North Carolina but the holder shall not be entitled to engage therein with respect to any single project of a value in excess of seventy-five thousand dollars ($75,000.00) and the license certificate shall be classified as hereinafter set forth. Before being entitled to an examination an applicant must show to the satisfaction of the board from the application and proofs furnished that the applicant is possessed of a good character and is otherwise qualified as to competency, ability and integrity, and that the applicant has not committed or done any act, which, if committed or done by any licensed contractor would be grounds under the provisions hereinafter set forth for the suspension or revocation of contractor's license, or that the applicant has not committed or done any act involving dishonesty, fraud, or deceit, or that the applicant has never been refused a license as a general contractor nor had such license revoked, either in this state or in another state, for reasons that should preclude the granting of the license applied for, and that the applicant has never been convicted of a felony: Provided, no applicant shall be refused the right to an examination without being given an opportunity upon such notice, as may be prescribed by the board, to appear before the board and produce evidence in support of his application.

The board shall conduct an examination, either oral or written, of all applicants for license to ascertain the ability of the applicant to make a practical application of his knowledge of the profession of contracting, under the classification contained in the application, and to ascertain the qualifications of the applicant in reading plans and specifications, knowledge of estimating costs, construction, ethics and other similar matters pertaining to the contracting business and knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the state of North Carolina relating to contractors, construction and liens. If the results of the examination of applicant shall be satisfactory to the board, then the board shall issue to the applicant a certificate to engage as a general contractor in the state of North Carolina, as provided in said certificate, which may be limited into four classifications as the common use of the terms are known—that is, (1) building contractor; (2) highway contractor; (3) public utilities contractor; and, (4) specialty contractor, which shall include those whose operations as such are the performance of construction work requiring special skill and involving the use of specialized building trades or crafts, but which shall not include any operations now or hereafter under the jurisdiction, for the issuance of license, by any board or commission pursuant to the laws of the state of North Carolina.

If an applicant is an individual, examination may be taken by his personal appearance for examination, or by the appearance for examination of one or more of his responsible managing employees, and if a co-partnership or corporation, or any other combination or organization, by the examination of one or more of the responsible managing officers or members of the personnel of the applicant, and if the person so examined shall cease to be connected with the applicant, then in such event the license shall remain in full force and effect for a period of thirty days thereafter, and then be cancelled, but the applicant shall then be entitled to a re-examination, all pursuant to the rules to be promulgated by the board: Provided, that the holder of such license shall not bid on or undertake any additional contracts from the time such examined employee shall cease to be connected with the applicant until said applicant's license is reinstated as provided in this article.

Anyone failing to pass this examination may be re-examined at any regular meeting of the board without additional fee. Certificate of license shall expire on the first day of December following the issuance or renewal and shall become invalid on that day unless renewed, subject to the approval of the board. Renewals may be effected any time during the month of January without re-examination, by the payment of a fee to the secretary of the board of thirty dollars ($30.00) for unlimited license, twenty dollars ($20.00) for intermediate license and ten dollars ($10.00) for limited license: Provided, the classification herein provided for shall not apply to contracts of the state highway and public works commission. (1925, c. 318, s. 9; 1931, c. 62, s. 2; 1937, c. 328; 1937, c. 429, s. 3; 1941, c. 257, s. 1.)

Editor's Note.—The 1941 amendment substituted the above in lieu of the former section. For comment on the amendment, see 19 N. C. Law Rev. 446.

§ 87-11. Revocation of license; charges of fraud, negligence, incompetency, etc.; hearing thereon; notice of charges; reissuance of certificate.—The board shall have the power to revoke the certificate of license of any general contractor licensed hereunder who is found guilty of any fraud or deceit in obtaining a license, or gross negligence, incompetency or misconduct in the practice of his profession, or wilful violation of any provisions of this article. Any person may prefer charges of such fraud, deceit, negligence or misconduct against any general contractor licensed hereunder; such charges shall be in writing and sworn to by the complainant and submitted to the board. Such charges, unless dismissed without hearing by the board as unfounded or trivial, shall be heard and determined by the board within thirty days after the date in which they were preferred. A time and place for such hearing shall be fixed by the board and held in the county in which said charges originated or

such other county as the board may designate. A copy of the charges, together with the notice of the time and place of hearing, shall be legally served on the accused at least fifteen days before the fixed date for the hearing, and in the event that such service cannot be effected fifteen days before such hearing, then the date of hearing and determination shall be postponed as may be necessary to permit the carrying out of this condition. At said hearing the accused shall have the right to appear personally and by counsel and to cross-examine witnesses against him, her or them, and to produce evidence of witnesses in his, her or their defense. If after said hearing at least four members of the board vote in favor of finding the accused guilty of any fraud or deceit in obtaining license, or of gross negligence, incompetency or misconduct in practice the board shall revoke the license of the accused.

The board may reissue a license to any person, firm or corporation whose license has been revoked: Provided, three or more members of the board vote in favor of such reissuance for reasons the board may deem sufficient.

The board shall immediately notify the secretary of state of its finding in the case of the revocation of a license or of the reissuance of a revoked license.

A certificate of license to replace any certificate lost, destroyed or mutilated may be issued subject to the rules and regulations of the board. (1925, c. 318, s. 10; 1937, c. 429, s. 4.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor's Note.—The 1937 amendment so changed this section that a comparison here is not practical.

§ 87-12. Certificate evidence of license.—The issuance of a certificate of license or limited license by this board shall be evidence that the person, firm or corporation named therein is entitled to all the rights and privileges of a licensed or limited licensed general contractor while the said license remains unrevoked or unexpired. (1925, c. 318, s. 11; 1937, c. 429, s. 5.)

Editor's Note.—The 1937 amendment inserted the words "or limited license" in this section.

§ 87-13. Unauthorized practice of contracting; impersonating contractor; false certificate; giving false evidence to board; penalties.—Any person, firm or corporation not being duly authorized who shall contract for or bid upon the construction of any of the projects or works enumerated in § 87-1, without having first complied with the provisions hereof, or who shall attempt to practice general contracting in this state, except as provided for in this article, and any person, firm, or corporation presenting or attempting to file as his own the licensed certificate of another or who shall give false or forged evidence of any kind to the board or to any member thereof in maintaining a certificate of license or who falsely shall impersonate another or who shall use an expired or revoked certificate of license, and any architect or engineer who receives or considers a bid from any one not properly licensed under this article, shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than five hundred dollars or imprisonment of three months, or both fine and imprisonment in the discretion of the court. And the board may, in its discretion, use its funds to defray the expense, legal or otherwise, in the prosecution of any violations of this article. (1925, c. 318, s. 12; 1931, c. 62, s. 3; 1937, c. 429, s. 6.)

Editor's Note.—The 1937 amendment made an insertion in the first part of this section, and added the last sentence.

The reference to architect or engineer was inserted by the 1931 amendment.

§ 87-14. Regulations as to issue of building permits.—Any person, firm or corporation, upon making application to the building inspector or such other authority of any incorporated city, town or village in North Carolina charged with the duty of issuing building or other permits for the construction of any building, highway, sewer, grading or any improvement or structure where the cost thereof is to be ten thousand dollars ($10,000.00) or more, shall, before he be entitled to the issuance of such permit, furnish satisfactory proof to such inspector or authority that he is duly licensed under the terms of this article to carry out or superintend the same, and that he has paid the license tax required by the Revenue Act of the state of North Carolina then in force so as to be qualified to bid upon or contract for the work for which the permit has been applied; and it shall be unlawful for such building inspector or other authority to issue or allow the issuance of such building permit unless and until the applicant has furnished evidence that he is either exempt from the provisions of this article or is duly licensed under this article to carry out or superintend the work for which permit has been applied; and further, that the applicant has paid the license tax required by the State Revenue Act then in force so as to be qualified to bid upon or contract for the work covered by the permit; and such building inspector, or other such authority, violating the terms of this section shall be guilty of a misdemeanor and subject to a fine of not more than fifty dollars ($50.00). (1925, c. 318, s. 13; 1931, c. 62, s. 4; 1937, c. 429, s. 7.)

Editor's Note.—Prior to the 1937 amendment this section related to exemptions from article.

§ 87-15. Copy of article included in specifications; bid not considered unless contractor licensed.—All architects and engineers preparing plans and specifications for work to be contracted in the state of North Carolina shall include in their invitations to bidders and in their specifications a copy of this article or such portions thereof as are deemed necessary to convey to the invited bidder, whether he be a resident or nonresident of this state and whether a license has been issued to him or not, the information that it will be necessary for him to show evidence of a license before his bid is considered. (1925, c. 318, s. 14; 1937, c. 429, s. 8; 1941, c. 257, s. 2.)

Editor's Note.—The 1937 amendment added a second sentence to this section which was struck out by the 1941 amendment.

Art. 2. Plumbing and Heating Contractors.

§ 87-16. Board of Examiners; appointment; term of office.—For the purpose of carrying out the provisions of this article there is hereby created a State Board of Examiners of Plumbing and Heating Contractors, consisting of seven members to be appointed by the Governor within sixty days after February 27, 1931. The said board

shall consist of one member from the Engineering School of the Greater University of North Carolina, one member from the State Board of Health, one member to be a plumbing inspector from some city of the State, one licensed master plumber and one heating contractor, one member from the division of public health of the Greater University of North Carolina, and one member to be a licensed air conditioning contractor. The term of office of said members shall be so designated by the Governor that the term of one member shall expire each year. Thereafter in each year the Governor shall in like manner appoint one person to fill the vacancy on the board thus created. Vacancies in the membership of the board shall be filled by appointment by the Governor for the unexpired term. Whenever the word "board" is used in this article, it shall be deemed and held to refer to the state board of examiners of plumbing and heating contractors. (1931, c. 52, s. 1; 1939, c. 224, s. 1.)

Local Modification.—Carteret, Towns of Morehead City, Beaufort and Atlantic Beach; Moore, Towns of Southern Pines and Pinehurst; New Hanover; Stanly, Town of Albemarle: 1935, c. 338; Burke: 1939, c. 297; Surry, Town of Elkin: 1939, c. 297; Anson: 1939, c. 308; Durham and Wake: 1939, c. 381.

Editor's Note.—The 1939 amendment increased the members of the board from five to seven and added the last sentence.

§ 87-17. Removal, qualifications and compensation of members; allowance for expenses.—The Governor may remove any member of the board for misconduct, incompetency or neglect of duty. Each member of the board shall be a citizen of the United States and a resident of this State at the time of his appointment. Each member of the board shall receive ten dollars per day for attending sessions of the board or of its committees, and for the time spent in necessary traveling in carrying out the provisions of this article, and in addition to the per diem compensation, each member shall be reimbursed by the board from funds in its hands for necessary traveling expenses and for such expenses incurred in carrying out the provisions hereof, as shall be approved by a majority of the members of the board. (1931, c. 52, s. 2.)

§ 87-18. Organization meeting; officers seal; examination of witnesses and taking of testimony.—The board shall within thirty days after its appointment meet in the city of Raleigh and organize, and shall elect a chairman and secretary and treasurer, each to serve for one year. Thereafter said officers shall be elected annually. The secretary and treasurer shall give bond approved by the board for the faithful performance of his duties, in such sum as the board may, from time to time determine. The board shall have a common seal and shall formulate rules to govern its actions. (1931, c. 52, s. 3; 1939, c. 224, s. 2.)

Editor's Note.—The 1939 amendment struck out the following words "and each member of the board shall be empowered to administer oaths and have power to compel the attendance of witnesses, and it may take testimony and proofs concerning all matters within its jurisdiction."

§ 87-19. Regular and special meetings; quorum.—The board after holding its first meeting as hereinbefore provided, shall thereafter hold at least two regular meetings each year. Special meetings may be held at such times and places as the by-laws and/or rules of the board provide; or as may be required in carrying out the provisions hereof. A quorum of the board shall consist of not less than three members. (1931, c. 52, s. 4.)

§ 87-20. Record of proceedings and register of applicants; reports. — The board shall keep a record of its proceedings and a register of all applicants for examination, showing the date of each application, the name, age and other qualifications, place of business and residence of each applicant. The books and records of the board shall be prima facie evidence of the correctness of the contents thereof. On or before the first day of March of each year the board shall submit to the Governor a report of its activities for the preceding year, and file with the Secretary of State a copy of such report, together with a statement of receipts and expenditures of the board attested by the chairman and secretary. (1931, c. 52, s. 5.)

§ 87-21. Definitions; contractors licensed by board; towns excepted.—For the purpose of this article plumbing shall be deemed and held to include the plumbing system of a building consisting of water supply distributing pipes, the fixtures and fixture traps, soil, waste and vent pipes, all with their devices, appurtenances and connections, and all within, adjacent to or connected with the building, however shall not include the repair or installation of water supply pipe from the street to plumbing fixtures not connected with the sewerage or ventilating systems or to the repair or replacement of outside water faucets. For the purpose of this article heating shall be deemed and held to include all heating systems of a building requiring the use of high or low pressure steam, vapor, hot water, warm or conditioned air, and all piping, ducts, connections or mechanical equipment appurtenant thereto within, adjacent to or connected with the building. Any person, firm or corporation, who, for a valuable consideration, installs, alters or restores or offers to install, alter or restore either plumbing or heating, or both, as defined in this article, shall be deemed to be engaged in the business of either plumbing or heating contracting, or both, as the case may be. All persons, firms or corporations, whether resident or nonresident of the state of North Carolina, before engaging in either the plumbing or heating contracting business, or both, as defined in this article, shall first apply to the state board of examiners of plumbing and heating contractors for examination and shall procure a license. Each application shall be accompanied by a certified check in the amount of the annual license fee required by this article. In order to promote the health, comfort, and safety of the people of the state of North Carolina in the regulation of the business of plumbing or heating contracting, the board shall give each applicant for license an examination designed to ascertain the technical and practical knowledge of the applicant concerning the analysis of plans and specifications, estimating costs, construction, fundamentals of design and installation, sanitation, fire hazards, and related subjects. Regular examinations shall be given by the board in the months of February and August of each year; and additional exami-

nations may be given at such other time as the board may deem necessary. Any person, firm or corporation may demand in writing a special examination, and upon payment by the applicant of the cost of holding such examination and the deposit of the amount of the annual license fee, the board in its discretion will fix a time and place for such examination to be given, not less than ten nor more than thirty days from receipt of the written demand and the deposit of the cost. As the result of such examination, all applicants found by the board to be qualified to engage in and carry on the business of either plumbing or heating contracting, or both, as defined in this article, shall be entitled to and shall receive a license to do so. The said board shall have authority to issue a limited heating license to any applicant who establishes to the satisfaction of the board, by such examination, that he is qualified to engage in the business of heating contracting by the installation, alteration and renovation of any one or more types of heating systems, but such limited license shall authorize the licensee to engage in the heating contracting business only to the extent and under the conditions recited in the license. The board shall, within thirty days after March 30, 1939, meet and classify the business of heating contracting into the following groups for the purpose of issuing limited licenses as provided in this article: Group number one to consist of the installation, alteration or restoration of all heating systems which involve the use of high or low pressure steam, vapor, hot water and all piping, ducts, connections or mechanical equipment appurtenant thereto, within, adjacent or connected with a building; group number two to consist of the installation, alteration or restoration of all air conditioning systems which provide conditioned air for comfort cooling by the lowering of temperature within a building, including all parts and accessories necessary thereto. Persons, firms or corporations now holding licenses for heating contracting in accordance with the provisions of §§ 87-16 to 87-27 shall be granted, without examination, a limited heating license under group number one as classified under this section. Section 87-25 shall not apply to any person, firm or corporation engaged in the business of heating contracting as classified under group number two as defined in this section prior to January first one thousand nine hundred and forty. Employees who work under the supervision and jurisdiction of a person, firm or corporation, licensed in accordance with the provisions of this article, shall not be required to apply for and obtain a license while so engaged. The requirements of this article shall apply only to persons, firms or corporations engaged in the business of either plumbing or heating contracting, or both, in cities or towns having a population of more than thirty-five hundred. (1931, c. 52, s. 6; 1939, c. 224, s. 3.)

Editor's Note.—This section was so changed by the 1939 amendment that a comparison here is not practicable.

Classification Valid.—If the classification of the subjects of taxation, provided for in this section, is not arbitrary and unjust it cannot be regarded in law as a breach of the rule of uniformity. Classification by population is not in itself arbitrary, unreasonable, or unjust. Roach v. Durham, 204 N. C. 587, 591, 169 S. E. 149.

Plumbing and Heating Contracting. — A journeyman plumber, duly licensed under the ordinances of a municipality, who furnishes no materials, supplies or fixtures, but merely attaches or replaces fixtures, and does not install plumbing systems or make substantial alterations thereof, is not engaged in carrying on the business of plumbing and heating contracting within this section, since plumbing is defined in the act in terms of the "plumbing system" and the act refers to plumbing and heating "contractors", and even granting that the definition in the act is ambiguous and is susceptible to a construction which would include journeyman plumbers, the court could not adopt such construction, since the statute must be given that construction which is favorable to defendant and tends least to interfere with personal liberty. State v. Mitchell, 217 N. C. 244, 7 S. E. (2d) 567.

§ 87-22. License fee based on population; expiration and renewal; penalty.—All persons, firms, or corporations engaged in the business of either plumbing or heating contracting, or both, in cities or towns of ten thousand inhabitants or more shall pay an annual license fee of fifty dollars, and in cities or towns of more than thirty-five hundred and less than ten thousand inhabitants an annual license fee of twenty-five dollars. In the event the board refuses to license an applicant, the license fee deposited shall be returned by the board to the applicant. All licenses shall expire on the last day of December in each year following their issuance or renewal. It shall be the duty of the secretary and treasurer to cause to be mailed to every licensee registered hereunder notice to his last known address of the amount of fee required for renewal of license, such notice to be mailed at least one month in advance of the expiration of said license. In the event of failure on the part of any person, firm or corporation to renew the license certificate annually and pay the fee therefor during the month of January in each year, the board shall increase said license fee ten per centum for each month or fraction of a month that payment is delayed; provided that the penalty for nonpayment shall not exceed the amount of the annual fee, and provided, further that no penalty will be imposed if one-half of the annual license fee is paid in January and the remaining one-half in June of each year. (1931, c. 52, s. 7; 1939, c. 224, s. 4.)

Editor's Note.—This section was so changed by the 1939 amendment that a comparison here is not practicable.

§ 87-23. Revocation or suspension of license for cause.—The board shall have power to revoke or suspend the license of any plumbing or heating contractor, or both, who is guilty of any fraud or deceit in obtaining a license, or who fails to comply with any provision or requirement of this article, or for gross negligence, incompetency, or misconduct, in the practice of or in carrying on the business of either a plumbing or heating contractor, or both, as defined in this article. Any person may prefer charges of such fraud, deceit, gross negligence, incompetency, misconduct, or failure to comply with any provision or requirement of this article, against any plumbing or heating contractor, or both, who is licensed under the provisions of this article. All of such charges shall be in writing and verified by the complainant, and such charges shall be heard and determined by the board within ninety days after the same are received by it. A time and place for such hearing shall be fixed by the board and a copy of said charges together with notice of the time and place of hearing, shall be furnished to the person, firm, or corporation accused at least thirty days before the date fixed for the hearing.

At said hearing the person accused shall have the right to appear personally, or by counsel, and be heard in defense of said charges. Upon the conclusion of said hearing, if the board finds that the license of the accused person should be revoked or suspended for any one or more of the causes set forth in this section, the board shall enter upon its records a resolution revoking or suspending the license and furnish a copy of said resolution to the accused. Any person, firm, or corporation whose license shall be revoked or suspended by the board shall have the right to appeal to the superior court of the county in which the accused maintains his or its principal place of business, said appeal to be perfected within thirty days after receipt of the board's resolution by the accused, but not thereafter. (1931, c. 52, s. 8; 1939, c. 224, s. 5.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor's Note.—The 1939 amendment inserted the words "or suspend" near the beginning of the section and made other changes.

Purpose of Law.—The manifest purpose of the law is to promote the health, comfort, and safety of the people by regulating plumbing and heating in public and private buildings. Roach v. Durham, 204 N. C. 587, 591, 169 S. E. 149.

§ 87-24. Re-issuance of revoked licenses; replacing lost or destroyed licenses.—The board may in its discretion re-issue license to any person, firm or corporation whose license may have been revoked: Provided, three or more members of the board vote in favor of such re-issuance for reasons deemed sufficient by the board. A new certificate of registration to replace any license which may be lost or destroyed may be issued subject to the rules and regulations of the board. (1931, c. 52, s. 9.)

§ 87-25. Violations made misdemeanor; employees of licensees excepted.—Any person, firm or corporation who shall engage in or offer to engage in, or carry on the business of either plumbing or heating contracting, or both, as defined in § 87-21, without first having been licensed to engage in such business, or businesses, as required by the provisions of this article; or any person, firm or corporation holding a limited heating license under the provisions of this article who shall practice or offer to practice or carry on any type of heating contracting not authorized by said limited license; or any person, firm or corporation who shall give false or forged evidence of any kind to the board, or any member thereof, in obtaining a license, or who shall falsely impersonate any other practitioner of like or different name, or who shall use an expired or revoked license, or who shall violate any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction fined not less than one hundred dollars or imprisoned for not more than three months, or both, in the discretion of the court. Employees, while working under the supervision and jurisdiction of a person, firm or corporation licensed in accordance with the provisions of the article, shall not be construed to have engaged in the business of either plumbing or heating contracting, or both. (1931, c. 52, s. 10; 1939, c. 224, s. 6.)

Editor's Note.—The 1939 amendment so changed this section that a comparison here is not practicable.

Acts Not Constituting Contracting.—A journeyman plumber, contracting and agreeing with various persons to perform labor required to install certain plumbing at a stipulated lump sum price, and who does not maintain a fixed place of business or sell or contract to furnish materials, supplies or fixtures of any kind, and who fails to obtain a license from the state board of examiners of plumbing and heating contractors, is not guilty of a misdemeanor under the provisions of this section, since his occupation does not constitute carrying on the "business of plumbing and heating contracting" within the meaning of the penal provisions of the statute. State v. Ingle, 214 N. C. 276, 199 S. E. 10.

§ 87-26. Only one person in partnership or corporation need have license.—A corporation or partnership may engage in the business of either plumbing or heating, or both, provided one or more persons connected with such corporation or partnership is registered and licensed as herein required; and provided such licensed person shall execute all contracts, exercise general supervision over the work done thereunder and be responsible for compliance with all the provisions of this article. (1931, c. 52, s. 12; 1939, c. 224, s. 8.)

Editor's Note.—The 1939 amendment added the part of the section appearing after the semi-colon, and omitted a provision as to receiving license without examination.

§ 87-27. License fees payable in advance; application of.—All license fees shall be paid in advance to the secretary and treasurer of the board, and by him held as a fund for the use of the board. The compensation and expenses of the members of the board as herein provided, the salaries of its employees, and all expenses incurred in the discharge of its duties under this article shall be paid out of such fund, upon the warrant of the president and secretary and treasurer: Provided, upon the payment of the necessary expenses of the board as herein set out, and the retention by it of twenty-five per centum of the balance of funds collected hereunder, the residue, if any, shall be paid to the state treasurer. (1931, c. 52, s. 13; 1933, c. 57; 1939, c. 224, s. 9.)

Editor's Note.—Public Laws of 1933, c. 57, made a former proviso applicable in towns of less than 10,000 instead of 5,000, and added a proviso relating to renewals. These provisos were omitted by the 1939 amendment.

It is obvious that the pervading intent of this section is to provide for the maintenance of the board and not to impose a tax as a part of the general revenue of the State and thereby exclude the operation of the police power. It is true that the act does not in express words authorize the exercise of this power, but in our opinion it appears by implication that the exercise of such power was intended. Roach v. Durham, 204 N. C. 587, 591, 169 S. E. 149.

Art. 3. Tile Contractors.

§ 87-28. License required of tile contractors.—In order to protect the health and safety of the people of North Carolina any person, firm or corporation desiring to engage in tile contracting within the state of North Carolina as defined in this article shall make application in writing for license to the North Carolina licensing board for tile contractors: Provided, that the provisions of this article shall not apply to state colleges, hospitals and other state buildings. (1937, c. 86, s. 1; 1941, c. 219, s. 1.)

Editor's Note.—The first fourteen words of the section were added by the 1941 amendment, which changed the last word in the section from "institutions" to "buildings."

For comment on the 1941 amendment, see 19 N. C. Law Rev. 446.

For comment on 1939 amendment to this article, see 17 N. C. Law Rev. 337.

§ 87-29. Tile contracting defined. — Engaging in tile contracting for the purpose of this article is defined to mean any person, firm or corporation

who for profit undertakes to lay, set or install ceramic tile, marble, or terrazzo floors or walls in buildings for private or public use. (1937, c. 86, s. 2; 1939, c. 75, s. 1; 1941, c. 219, s. 2.)

Editor's Note.—The 1941 amendment omitted a proviso added by the 1939 amendment. It also substituted other words for the former words "engages in tile contracting business in the state of North Carolina."

§ 87-30. Licensing board created; membership; appointment and removal.—The North Carolina licensing board for tile contractors shall consist of five members, each of whom shall be a reputable tile contractor residing in the state of North Carolina who has been engaged in the business of tile contracting for at least five years. The members of the first board shall be appointed within sixty days after March 1, 1937, for terms of one, two, three, four, and five years by the governor, and the governor in each year thereafter shall appoint one licensed tile contractor to fill the vacancy caused by the expiration of the term of office, the term of such new member to be for five years. If vacancy shall occur in the board for any cause the same shall be filled by appointment of the governor. The governor shall have the power to remove from office any member of said board for incapacity, misconduct, or neglect of duty. (1937, c. 86, s. 3.)

§ 87-31. Oath of office; organization; meetings; authority; compensation.—The members of said board shall qualify by taking an oath of office in writing to be filed with the secretary of state to uphold the constitution of the United States and the constitution of North Carolina and to properly perform the duties of his office. The board shall elect a president, vice-president, and secretary-treasurer. A majority of the members of the board shall constitute a quorum. Regular meetings shall be held at least twice a year, at such time and place as shall be deemed most convenient. Due notice of such meetings shall be given to all applicants for license in such manner as the by-laws may provide. The board may prescribe regulations, rules, and by-laws for its own proceedings and government and for the examination of applicants not in conflict with the laws of North Carolina. Special meetings may be held upon a call of three members of the board. Each member of the board shall receive for his services the sum of ten ($10.00) dollars per day for each and every day spent in the performance of his duties, and shall be reimbursed for all necessary expenses incurred in the discharge of his duties. (1937, c. 86, s. 4.)

§ 87-32. Secretary-treasurer, duties and bond; seal; annual report to governor.—It shall be the duty of the secretary-treasurer to keep a record of all proceedings of the board and all licenses issued, and to pay all necessary expenses of the board out of the funds collected, and he shall give such bond as the board shall direct. All funds in excess of the sum of one hundred ($100.00) dollars remaining in the hands of the secretary-treasurer, after all of the expenses of the board for the current year have been paid, shall be paid over to the Greater University of North Carolina for the use of the ceramic engineering department of North Carolina State College to be devoted by it to the development of the safe, proper, and sanitary uses of tile. The board shall adopt a seal to be affixed to all of its official documents, and shall make an annual report of its proceedings to the governor on or before the first day of March of each year, which report shall contain an account of all moneys received and disbursed. (1937, c. 86, s. 5.)

§ 87-33. Applications for examinations; fee; qualifications of applicants.—Any person desiring to be examined by said board shall at least two weeks prior to the holding of an examination file an application upon the prescribed form to be furnished by the board. Each applicant upon making an application shall pay to the secretary-treasurer of the board an examination fee of twenty-five dollars ($25.00). To qualify and obtain a license such applicant must be a citizen of the United States, or person who has duly declared his intention of becoming such citizen, who shall have had at least two years experience, or its equivalent, next preceding the date of his application for license as a tile, marble and terrazzo student or mechanic, possessing the knowledge to specify the proper kind of tile, marble and terrazzo floors or walls for use in private or public buildings, and the ability to lay, set or install tile, marble and terrazzo in accordance with specifications and blue prints ordinarily used in the tile contracting business. (1937, c. 86, s. 6; 1941, c 219, s. 6.)

Editor's Note.—The 1941 amendment changed the wording of the first sentence, added the present second sentence and omitted a provision relating to registration and certificate thereof.

§ 87-34. Fee for annual renewal of registration; license revoked for default; penalty for reinstatement.—Every licensed tile contractor who desires to continue in business in this state shall annually, on or before the first day of January of each year, pay to the secretary-treasurer of the board the sum of fifty ($50.00) dollars for which he shall receive a renewal of such registration, and in case of the default of such registration by any person the license shall be revoked. Any licensed tile contractor whose license has been revoked for failure to pay the renewal fee, as herein provided, may apply to have the same regranted upon payment of all renewal fees that should have been paid, together with a penalty of ten ($10.00) dollars. (1937, c. 86, s. 7.)

§ 87-35. Power of board to revoke or suspend licenses; charges; notice and opportunity for hearing; appeal.—The board shall have the power after hearing to revoke or suspend the license of any tile contractor upon satisfactory proof that such license was secured by fraud or deceit practiced upon the board, or upon satisfactory proof that such tile contractor is guilty of gross negligence, incompetency, or inefficiency in carrying on the business of tile contracting. Each charge against any contractor submitted to the board shall be in writing and sworn to by the complainant: Provided, however, that before any license shall be revoked or suspended the holder thereof shall have notice of the specific charge or charges preferred, and at a date specified in said notice, at least thirty days after legal service thereof, be given public hearing, and have an opportunity to appear, cross-examine witnesses, and to produce evidence. Any person being aggrieved by the ac-

tion of the board shall have the right of appeal to the superior court. (1937, c. 86, s. 8.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor's Note.—While the provision as to examination of applicants refers only to those who were not so engaged at the time the statute went into effect, the provisions as to revocation refer to all. 15 N. C. Law Rev. 326.

§ 87-36. No examination required of present contractors.—All persons, firms or corporations now actively engaged in the tile contracting business in the state of North Carolina shall upon filing affidavit with the board be entitled to and receive a license without examination upon payment of the annual license fee. (1937, c. 86, s. 9; 1939, c. 75, s. 3; 1941, c. 219, s. 9.)

Editor's Note.—The 1939 amendment added a proviso exempting persons entering into contracts where the contract price did not exceed two hundred and fifty dollars. The 1941 amendment inserted the words "be entitled to" and omitted the proviso added by the 1939 amendment.

§ 87-37. License to one member of firm, etc., sufficient; employees exempt; restricted application of article.—Any firm, partnership or corporation may engage in the tile contracting business in this state, provided, one member of said firm, partnership or corporation is a licensed tile contractor actually employed by said firm, partnership or corporation, and personally present in charge of such tile contracting work. No license shall be required of any mechanic or employee of a licensed tile contractor performing duties for the employer. Provided, however, that none of the provisions of this article shall apply to jobs in which the total cost of tile, labor and other materials necessary for laying same is less than one hundred and fifty dollars ($150.00). (1937, c. 86, s. 10; 1941, c. 219, s. 10.)

Editor's Note.—The 1941 amendment made changes in the wording of the first sentence and added the proviso at the end of the section.

§ 87-38. Penalty for misrepresentation or fraud in procuring or maintaining license certificate.—Any person, firm, or corporation not being duly licensed to engage in tile contracting in this state as provided for in this article who engages therein, and any person, firm, or corporation presenting as his own the license certificate of another or who shall give false or forged evidence of any kind to the board or any member thereof in maintaining a certificate of license, or who shall falsely impersonate another, or who shall use an expired or revoked certificate of license, or an architect, engineer or contractor who receives or considers a bid from any one not properly licensed under this article, shall be guilty of misdemeanor, and for each offense of which he is convicted be punished by a fine of not less than two hundred ($200.00) dollars, or by imprisonment of not less than two months or both fined and imprisoned in the discretion of the court. (1937, c. 86, s. 11; 1939, c. 75, s. 4.)

Editor's Note.—The 1939 amendment inserted the words "who engages therein" after the word "article" in line three.

Prior to the amendment it was held that the section failed to define the acts prohibited, the doing of which should constitute a misdemeanor, and that such fatal deficiency could not be supplied by judicial interpolation of words to constitute a criminal offense. State v. Julian, 214 N. C. 574, 200 S. E. 24.

Art. 4. Electrical Contractors.

§ 87-39. Board of examiners created; members appointed and officers; terms; principal office; meetings; quorum; compensation and expenses.—A state board of examiners of electrical contractors is hereby created, which shall consist of the state electrical engineer, who shall act as chairman of the board, the secretary of the association of electrical contractors of North Carolina, and three other members to be appointed by the governor as follows: One from the faculty of the engineering school of the Greater University of North Carolina, one person who is serving as chief electrical inspector of a municipality in the state of North Carolina, and one representative of a firm, partnership or corporation located in the state of North Carolina and engaged in the business of electrical contracting. Of the three appointed members one shall be appointed for a term of one year, one for a term of two years, and one for a term of three years, and until their respective successors are appointed and qualified; and thereafter each appointment shall be for a term of three years. The principal office of the board shall be at such place as shall be designated by a majority of the members thereof. The board of examiners shall hold regular meetings quarterly and may hold special meetings on call of the chairman. They shall annually appoint and at their pleasure remove a secretary-treasurer, who need not be a member of the board, and whose duties shall be prescribed and whose compensation shall be fixed by the board. Three members of the board shall constitute a quorum. The appointive members of the board shall be entitled to receive the sum of seven dollars ($7.00) and actual and necessary expenses for each day actually devoted to the performance of their duties under this article: Provided, however, that none of the expenses of said board or the compensation or expenses of any officer thereof or any employee shall ever be paid or payable out of the treasury of the state of North Carolina; and neither the board nor any officer or employee thereof shall have any power or authority to make or incur any expense, debt or other financial obligation binding upon the state of North Carolina. (1937, c. 87, s. 1.)

§ 87-40. Board to appoint secretary-treasurer within thirty days; bond required; oath of membership.—The board of examiners of electrical contractors shall within thirty days after its appointment meet at the time and place designated by the chairman and appoint a secretary-treasurer. The secretary-treasurer shall give a bond approved by the board for the faithful performance of his duties in such form as the board may from time to time prescribe. The board shall have a common seal and shall formulate rules to govern its actions and may take testimony and proof concerning all matters within its jurisdiction. Before entering upon the performance of their duties hereunder each member of the board shall take and file with the secretary of state an oath in writing to properly perform the duties of his office as a member of said board, and to uphold the constitution of North Carolina and the constitution of the United States. (1937, c. 87, s. 2.)

§ 87-41. Seal for board; duties of secretary-treasurer; surplus funds; contingent or emergency fund.—The board shall adopt a seal for its own use. The seal shall have inscribed thereon the

words "board of examiners of electrical contractors, state of North Carolina," and the secretary shall have charge and custody thereof. The secretary-treasurer shall keep a record of the proceedings of said board and shall receive and account for all moneys derived under the operations of this article. Any funds remaining in the hands of the secretary-treasurer to the credit of the board after the expenses of the board for the current year have been paid shall be paid over to the electrical engineering department of the Greater University of North Carolina to be used for electrical experimentations: Provided, however, the board shall have the right to retain as a contingent or emergency fund ten per cent of such gross receipts in each year of its operation. (1937, c. 87, s. 3.)

§ 87-42. Board to give examinations and issue licenses.—It shall be the duty of the board of examiners of electrical contractors to receive all applications for licenses filed by persons, or representatives of firms or corporations seeking to enter upon or continue in the electrical contracting business within the state of North Carolina, as such business is herein defined, and upon proper qualification of such applicant to issue the license applied for; to prescribe the conditions of examination of, and, subject to the provisions of this article, to give examinations to all persons who are under the provisions of this article required to take such examination. (1937, c. 87, s. 4.)

§ 87-43. Persons required to obtain licenses; examination required; licenses for firms or corporations.—No person, firm or corporation shall engage in the business of installing, maintaining, altering or repairing within the state of North Carolina any electric wiring, devices, appliances or equipment for which a permit is now or may hereafter be required by the statutes of the state of North Carolina, or by municipal or county ordinances in the county in which such work is undertaken, dealing with the erection and inspection of buildings and fire protection and electrical installation unless such person, firm or corporation shall have received from the board of examiners of electrical contractors an electrical contractor's license: Provided, however, that the provisions of this article shall not apply (a) to the installation, construction, or maintenance of power systems for the generation and primary and secondary distribution of electric current ahead of the customer's meter; (b) to the installation, construction, maintenance, or repair of telephone, telegraph, or signal systems by public utilities; (c) to any mechanic employed by a licensee of this board; (d) to the installation, construction or maintenance of electrical equipment and wiring for temporary use by contractors in connection with the work of construction; (e) to the installation, construction, maintenance or repair of electrical wiring, devices, appliances or equipment by persons, firms or corporations, upon their own property, who maintain in regular and full-time employment electricians, when such electricians are employed and engaged exclusively by such persons, firms or corporations; (f) to the installation, construction, maintenance or repair of electrical wiring, devices, appliances or equipment by state institutions and private educational institutions which maintain a private electrical department. No license shall be issued by said board without an examination of the applicant for the purpose of ascertaining his qualifications for such work, but no such examination shall be required for the annual renewal of such license: Provided, however, that persons, firms or corporations residing in the state of North Carolina on March 1, 1937, who have paid the license fees required of electrical contractors by the State Revenue Act of one thousand nine hundred and thirty-five, upon proper certification or establishment of such fact, shall be granted a license by the board of examiners under this article without examination. Firms or corporations shall be eligible to secure licenses from the board of examiners provided they have in their respective organizations at least one person duly qualified as an electrical contractor under the provisions of this article. No license or renewal of any license shall be issued to any applicant until the fees herein prescribed shall have been paid. (1937, c. 87, s. 5.)

§ 87-44. Fees for licenses.—Before a license is granted to any applicant, and before any expiring license is renewed, the applicant shall pay to the board of examiners of electrical contractors a fee in such an amount as is herein specified for the license to be granted or renewed as follows:

For a Class 1, Electrical Contractor's License, state-wide $25.00
For a Class 2, Electrical Contractor's License, for one county only 5.00
(1937, c. 87, s. 6.)

§ 87-45. Licenses expire on June 30th, following issuance; renewal; fees used for administrative expense.—Each license issued hereunder shall expire on June thirtieth following the date of its issuance, and shall be renewed by the board of examiners of electrical contractors upon application of the holder of the license and payment of the required fee at any time within thirty days before the date of such expiration. Licenses renewed subsequent to the date of expiration thereof may in the discretion of the board be subject to a penalty not exceeding ten per cent. The fees collected for licenses under this article shall be used for the expenses of the board of examiners in carrying out the provisions of this article, subject to the provisions herein made with reference to payment of surplus to the electrical engineering department of the Greater University of North Carolina for electrical experimental purposes. (1937, c. 87, s. 7.)

§ 87-46. Examination before local examiner.—In order that applicants for licenses hereunder who are by the provisions of this article required to take an examination before the issuance thereof shall not be subject to any unreasonable inconvenience in connection therewith, the board of examiners of electrical contractors may, and upon the request of the board of commissioners of any county shall delegate to the electrical inspector of the county in which such applicant resides, or if there be no county electrical inspector, then to the electrical inspector of any municipality therein, the authority to conduct examinations of such applicant or applicants residing in such county, such examination, however, to be as prescribed by the board of examiners. In such an event the local examiner herein provided for shall transmit to the board of ex-

aminers of electrical contractors the results of such examination, and, if approved by the board, licenses on the basis of such examination shall be issued to the applicants upon the payment of the fees herein prescribed. (1937, c. 87, s. 8.)

§ 87-47. License signed by chairman and secretary-treasurer under seal of board; display in place of business required; register of licenses; records. — Licenses issued hereunder shall be signed by the chairman and the secretary-treasurer of the board of examiners, under the seal of the board. Every holder of license shall keep his certificate of license displayed in a conspicuous place in his principal place of business. The secretary of the board shall keep a register of all licenses to electrical contractors, which said register shall be open during the ordinary business hours for public inspection. The board of examiners shall keep minutes of all of its proceedings and an accurate record of its receipts and disbursements, which record shall be audited at the close of each fiscal year by a certified public accountant, and within thirty days after the close of each fiscal year a summary of its proceedings and a copy of the audit of its books shall be filed with the governor and the treasurer of the state. (1937, c. 87, s. 9.)

§ 87-48. Licenses not assignable or transferable; suspension or revocation.—No license issued in accordance with the provisions of this article shall be assignable or transferable. Any such license may, after hearing, be suspended for a definite length of time or revoked by the board of examiners if the person, firm or corporation holding such license shall wilfully or by reason of incompetence violate any of the statutes of the state of North Carolina, or any ordinances of any municipality or county relating to the installation, maintenance, alteration or repair of electric wiring, devices, appliances or equipment. (1937, c. 87, s. 10.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

Editor's Note.—While the provision as to examination of applicants refers only to those who were not so engaged at the time the statute went into effect, the provision as to revocation refers to all. There is no provision for an appeal to the superior court, but an electrical contractor whose license is suspended or revoked undoubtedly has such a right. 15 N. C. Law Rev. 326, 327.

§ 87-49. License does not relieve compliance with codes or laws.—Nothing in this article shall relieve the holder or holders of licenses issued under the provisions hereof from complying with the building or electrical codes or statutes or ordinances of the state of North Carolina, or of any county or municipality thereof, now in force or hereafter enacted. (1937, c. 87, s. 11.)

§ 87-50. Responsibility for negligence; non-liability of board.—Nothing in this article shall be construed as relieving the holder of any license issued hereunder from responsibility or liability for negligent acts on the part of such holder in connection with electrical contracting work; nor shall the board of examiners of electrical contractors be accountable in damages, or otherwise, for the negligent act or acts of any holder of such license. (1937, c. 87, s. 12.)

§ 87-51. Penalty for violation of article.—Any person, firm or corporation who shall violate any of the provisions of this article, or who shall engage or undertake to engage in the business of electrical contracting as herein defined, without first having obtained a license under the provisions of this article, shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than twenty-five dollars ($25.00) or more than fifty dollars ($50.00) for each offense. Conviction of a violation of this article on the part of a holder of a license issued hereunder shall automatically have the effect of suspending such license until such time as it shall have been reinstated by the board of examiners of electrical contractors. (1937, c. 87, s. 13.)

Chapter 88. Cosmetic Art.

§ 88-1. Practice of cosmetology regulated. —On and after June thirtieth, one thousand nine hundred and thirty-three, no person or combination of persons shall for pay, or reward, either directly or indirectly, practice or attempt to practice cosmetic art as hereinafter defined in the state of North Carolina without a certificate of registration, either as a registered apprentice or as a registered "cosmetologist," issued pursuant to the provisions of this chapter by the state board of cosmetic art examiners hereinafter established. (1933, c. 179, s. 1.)

§ 88-2. Cosmetic art.—Any one or a combination of the following practices, when done for pay, or reward, shall constitute the practice of cosmetic art in the meaning of this chapter:

The systematic massaging with the hands or mechanical apparatus of the scalp, face, neck, shoulders and hands; the use of cosmetic preparations and antiseptics; manicuring; cutting, dyeing, cleansing, arranging, dressing, waving, and marcelling of the hair, and the use of electricity for stimulating growth of hair. (1933, c. 179, s. 2.)

§ 88-3. Cosmetologist.—"Cosmetologist" is any person who, for compensation, practices cosmetic art, or conducts, or maintains a cosmetic art shop, beauty parlor, or hairdressing establishment. (1933, c. 179, s. 3.)

§ 88-4. Beauty parlor, etc. — "Cosmetic art shop," "beauty parlor," or "hairdressing establishment" is any building, or part thereof wherein cosmetic art is practiced. (1933, c. 179, s. 4.)

§ 88-5. Manager. — "Manager," or "managing cosmetologist," as used in this chapter, is defined as any person who has direct supervision over operators, or apprentices in a cosmetic art shop, beauty parlor, or hairdressing establishment. (1933, c. 179, s. 5.)

§ 88-6. Operator. — "Operator" is any person who is not a manager, itinerant, or apprentice cosmetologist, who practices cosmetic art under the direction and supervision of a managing cosmetologist. (1933, c. 179, s. 6.)

§ 88-7. Itinerant cosmetologist; application of chapter.—"Itinerant cosmetologist" is any person who practices as a business cosmetic art outside of a cosmetic art shop, beauty parlor, or hairdressing establishment, either in going from house to house or from place to place at regular, or irregular intervals: Provided, this chapter shall not apply to persons attending female institutions of learning, who defray the cost or a part of the cost of such attendance by the occasional practice of cosmetic art as defined herein, or to persons practicing the cosmetic art in rural communities without the use of mechanical appliances. (1933, c. 179, s. 7.)

§ 88-8. Manicurist.—"Manicurist" is any person who does manicuring only, outside of a cosmetic art shop, beauty parlor, or hairdressing establishment, for compensation. (1933, c. 179, s. 8.)

§ 88-9. Apprentice. — "Apprentice" is any person who is not a manager, itinerant cosmetologist, or operator, who is engaged in learning and acquiring the practice of cosmetic art under the direction and supervision of a licensed managing cosmetologist. (1933, c. 179, s. 9.)

§ 88-10. Qualifications for certificate of registration.—No person shall be issued a certificate of registration as a registered apprentice by the state board of cosmetic art examiners, hereinafter established—

(a) Unless such person is at least eighteen years of age.

(b) Unless such person passes a satisfactory physical examination prescribed by the said board of cosmetic art examiners.

(c) Unless such person has completed at least one thousand hours in classes in a reliable cosmetic art school, or college approved by said board of cosmetic art examiners.

(d) Unless such person passes the examination prescribed by the board of cosmetic art examiners and pays the required fees hereinafter enumerated. (1933, c. 179, s. 10; 1941, c. 234, s. 1.)

Editor's Note.—The 1941 amendment substituted "one thousand" for "four hundred and eighty" formerly appearing in subsection (c).

For comment on the 1941 amendemnt, see 19 N. C. Law Rev. 447.

§ 88-11. When apprentice may operate shop.—No registered apprentice, registered under the provisions of this chapter, shall operate a cosmetic art beauty shop, beauty parlor, or hairdressing establishment in this state, but must serve his or her period of apprenticehip under the direct supervision of a registered managing cosmetologist as required by this chapter: Provided, however, that any apprentice who, on June 30, 1933, is regularly employed under the direct supervision of one who is entitled to registration as a managing cosmetologist under the provisions of § 88-19 shall, upon recommendation of such managing cosmetologist, and upon passing a satisfactory physical examination, be entitled to registration as a registered cosmetologist. (1933, c. 179, s. 11.)

§ 88-12. Qualifications for registered cosmetologist. — Any person to practice cosmetic art as a registered cosmetologist must have worked as a registered apprentice for a period of at least six months under the direct supervision of a registered managing cosmetologist, and this fact must be demonstrated to the board of cosmetic art examiners by the sworn affidavit of three registered cosmetologists, or by such other methods of proof as the board may prescribe and deem necessary. A certificate of registration as a registered cosmetologist shall be issued by the board, hereinafter designated, to any person who is qualified under the provisions of this chapter, or meets the following qualifications:

(a) Who is qualified under the provisions of section ten of this chapter.

(b) Who is at least nineteen years of age.

(c) Who passes a satisfactory physical examination as prescribed by said board.

(d) Who has practiced as a registered apprentice for a period of six months, under the immediate personal supervision of a registered cosmetologist; and

(e) Who has passed a satisfactory examination, conducted by the board, to determine his or her fitness to practice cosmetic art, such examination to be prepared and conducted, as to determine

whether or not the applicant is possessed of the requisite skill in such trade, to properly perform all the duties thereof, and services incident thereto, and has sufficient knowledge concerning the diseases of the face, skin, and scalp, to avoid the aggravation and spreading thereof in the practice of said profession. (1933, c. 179, s. 12.)

§ 88-13. State board of cosmetic art examiners created; appointment and qualifications of members; term of office; removal for cause. — A board to be known as the state board of cosmetic art examiners is hereby established, to consist of three members appointed by the governor of the State. Each member shall be an experienced cosmetologist, who has followed the practice of all branches of the cosmetic art in the State of North Carolina for at least five years next preceding his or her appointment, and who, during such period of time, and at the time of appointment, shall be free of connection in any manner with any cosmetic art school or college or academy or training school. The appointment of the governor shall be for a term of three years. The governor, at his option, may remove any member for good cause shown and appoint members to fill unexpired terms. (1933, c. 179, s. 13; 1935, c. 54, s. 2.)

Editor's Note.—Several changes were made in this section by the amendment of 1935. The requirement that the appointee shall be free from connection with a school or college is new as was also the requirement for following "all branches" of the cosmetic art. Prior to the amendment the section provided that the first appointees should serve for three years, two years, and one year respectively.

Relator Must Show Interest in Action to Vacate Office. —It is necessary that a relator in an action to vacate an office under this section, have some interest in the action, though it is not required that he be a contestant for the office. State v. Ritchie, 206 N. C. 808, 175 S. E. 308.

Cited in Poole v. State Board of Cosmetic Art Examiners, 221 N. C. 199, 19 S. E. (2d) 635.

§ 88-14. Office in Raleigh; seal; officers and secretary.—The board of cosmetic art examiners shall maintain a suitable office in Raleigh, North Carolina, and shall adopt and use a common seal for the authentication of its orders and records. Said board shall elect its own officers and in addition thereto shall elect a full time secretary, which secretary shall receive an annual salary not to exceed one thousand and eight hundred dollars ($1,800.00). The secretary shall keep and preserve all the records of the board, issue all necessary notices and perform such other duties, clerical and otherwise, as may be imposed upon such secretary by said board of cosmetic art examiners. The secretary is hereby authorized and empowered to collect in the name and on behalf of said board the fees prescribed by this chapter and shall turn over to the state treasurer all funds collected or received under this chapter, which fund shall be credited to the board of cosmetic art examiners, and said funds shall be held and expended under the supervision of the director of the budget of the state of North Carolina exclusively for the administration and enforcement of the provisions of this chapter. The said secretary, shall, before entering upon the duties of the office, execute a satisfactory bond with a duly licensed surety or other surety approved by the director of the budget, said bond to be in the penal sum of not less than ten thousand dollars ($10,000.00), and conditioned upon the faithful performance of the duties of the office and the true and correct accounting of all funds received by such secretary by virtue of such office. Nothing in this chapter shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the state treasurer, derived from fees and fines collected under the provisions of this chapter and received by the state treasurer in the manner aforesaid. (1933, c. 179, s. 14; 1943, c. 354, s. 1.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 88-15. Compensation and expenses of board members; inspectors; reports; budget; audit. — Each member of the board of cosmetic art examiners shall receive for such services an annual salary in an amount to be fixed by the director of the budget, and shall be reimbursed for actual necessary expenses incurred in the discharge of such duties, not to exceed five dollars ($5.00) per day for subsistence, plus the actual traveling expenses, or an allowance of five cents (5c) per mile where such member uses his or her personally owned automobile.

Said board, with the approval of the director of the budget, shall appoint necessary inspectors who shall be experienced in all branches of cosmetic art. The salaries for such inspectors shall be fixed by the board with the approval of the director of the budget of the state of North Carolina. The inspectors or agents so appointed shall perform such duties as may be prescribed by the board. Any inspector appointed under authority of this section or any member of the board shall have the authority at all reasonable hours to examine cosmetic art shops, beauty parlors, hair dressing establishments, cosmetic art schools, colleges, academies or training schools with respect to and in compliance with the provisions of this chapter. The inspectors and agents appointed under authority of this chapter shall make such reports to the board of cosmetic art examiners as said board may require. The said board shall on, or before June first of each year, submit a budget to the director of the budget for the ensuing fiscal year, which shall begin July first of each year. The said budget so submitted shall include all estimated receipts and expenditures for the ensuing fiscal year including the estimated compensation and expenses of board members. The said budget shall be subject to the approval of the director of the budget and no expenditures shall be made unless the same shall have been set up in the budget adopted by the board of cosmetic art examiners, and approved by the director of the budget of the state of North Carolina; that all salaries and expenses in connection with the administration of this chapter shall be paid upon a warrant drawn on the state treasurer, said warrants to be drawn by the secretary of the board and approved by the state auditor.

The provisions of the Executive Budget Act and the Personnel Act shall fully apply to the administration of this chapter.

There shall be annually made by the auditor of the state of North Carolina a full audit and examination of the receipts and disbursements of the state board of cosmetic art examiners. The state board shall report annually to the governor a full statement of receipts and disbursements and also

a full statement of its work during the year. (1933, c. 179, s. 15; 1935, c. 54, s. 3; 1941, c. 234, s. 2; 1943, c. 354, s. 2.)

Editor's Note.—The 1943 amendment rewrote this section. The 1935 act had added two paragraphs relating to inspectors and reports which were rewritten by the 1941 amendment.

§ 88-16. Applicants for examination.—Each applicant for an examination shall:

(a) Make application to the board of cosmetic art examiners on blank forms prepared and furnished by the full time secretary, such application to contain proof under the applicant's oath of the particular qualifications of the applicant.

(b) Pay to the secretary of the said board the required examination fee, hereinafter established.

(c) All applications for said examination must be filed with the full time secretary at least thirty days prior to the actual taking of such examination by applicant. (1933, c. 179, s. 16.)

§ 88-17. Regular and special meetings of board; examinations. — The board of cosmetic art examiners shall meet four times a year in the months of January, April, July and October on the first Tuesday in each of said months, for the purpose of transacting all business of the board of cosmetic art examiners and to conduct examinations of applicants for certificates of registration to practice as registered cosmetologists, and of applicants for certificates of registration to practice as registered apprentices, meetings to be held at such places as the board may determine to be most convenient for such examinations. The examinations conducted for applicants for certificates of registration as registered cosmetologists and registered apprentices shall be open to all applicants, and shall include such practical demonstration and oral and written tests as the said board may determine. The chairman of the board is hereby authorized and empowered to call a meeting of said board whenever necessary, said meetings to be in addition to the quarterly meetings hereinbefore provided for. (1933, c. 179, 17; 1935, c. 54, s. 4.)

Editor's Note.—Prior to the amendment of 1935 this section provided for examination at least three times each year. The last sentence of the section was added by the amendment.

§ 88-18. Certificate of registration. — Whenever the provisions of this chapter have been complied with, the said board shall issue or cause to be issued, a certificate of registration as registered cosmetologist, or as a registered apprentice to the applicant, as the case may be. (1933, c. 179, s. 18.)

§ 88-19. Admitting operators from other states.—Persons who have practiced cosmetic art in another state and who move into this state shall prove and demonstrate his, or her fitness, physical and otherwise, as set out in §§ 88-10 and 88-12, to the board of cosmetic art examiners, as herein created, and as herein provided, before they will be issued a certificate of registration to practice cosmetic art, but said board may issue such temporary permits as are necessary. (1933, c. 179, s. 19.)

§ 88-20. Registration procedure.—The procedure for the registration of present practitioners of cosmetic art shall be as follows:

(a) Every person who has been practicing cosmetic art in North Carolina and who is practicing such art on June 30, 1933, upon making an affidavit to that effect, and complying with the provisions of this chapter as to physical fitness, and upon paying the required fee to the board of cosmetic art examiners shall be issued a certificate of registration as a registered cosmetologist.

(b) Any person who, on June 30, 1933, is operating a shop as a managing cosmetologist, shall, upon making an affidavit to that effect, and complying with the provisions of this chapter as to physical fitness and upon paying the required fee to the board of cosmetic art examiners be issued a certificate of registration as a managing cosmetologist.

(c) Any person who, on June 30, 1933, is regularly employed under a person who has registered as a managing cosmetologist shall be entitled to register as a cosmetologist as provided in § 88-11.

(d) All persons who are not actively engaged in the practice of cosmetic art on June 30, 1933, shall be required to comply with all of the provisions of this chapter.

(e) All persons, however, who do not make application prior to January 1, 1942, shall be required to take the examination prescribed by the State Board of Cosmetic Art Examiners and otherwise comply with the provisions of this chapter, as amended, before engaging in the practice of cosmetic art. (1933, c. 179, s. 20; 1941, c. 234, s. 3.)

Editor's Note.—The 1941 amendment added subsection (e). **Paragraph (a) prescribes a mandatory duty,** and the board of examiners has no discretionary power to refuse to issue the certificate in such instance, and therefore a complaint in suit for mandamus alleging full compliance with the provisions of the statute in this respect and the refusal of the board to issue the certificate to plaintiff, is not demurrable. Poole v. State Board of Cosmetic Art Examiners, 221 N. C. 199, 19 S. E. (2d) 635.

§ 88-21. Fees required.—The fee to be paid by an applicant for a certificate of registration to practice cosmetic art as an apprentice shall be three dollars. The fee to be paid by an applicant for examination to determine his or her fitness to receive a certificate of registration as a registered cosmetologist shall be five dollars. The annual license fee of a registered cosmetologist shall be three dollars fifty cents, while the annual license fee of a registered apprentice shall be two dollars fifty cents. All licenses, both for apprentices and registered cosmetologists, shall be renewed as of the 30th day of June each and every year; such renewals for apprentices shall be two dollars fifty cents, and for registered cosmetologists three dollars fifty cents. The fees herein set out shall not be increased by the board of cosmetic art examiners, but said board may regulate the payment of said fees and pro-rate the license fees in such manner as it deems expedient. The fee for registration of an expired certificate for a registered cosmetologist shall be five dollars and registration of an expired certificate of an apprentice shall be three dollars. (1933, c. 179, s. 21.)

§ 88-22. Persons exempt.—The following persons are exempt from the provisions of this chapter while engaged in the proper discharge of their professional duties:

(a) Persons authorized under the laws of the state to practice medicine and surgery.

(b) Commissioned medical or surgical officers of the United States army, navy, or marine hospital services.

(c) Registered nurses.

(d) Undertakers.

(e) Registered barbers.

(f) Manicurists as herein defined. (1933, c. 179, s. 22.)

§ 88-23. Rules and regulations of board. — The state board of cosmetic art examiners shall have authority to make reasonable rules and regulations for the sanitary management of cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies and training schools, hereinafter called shops and schools, and to have such rules and regulations enforced. The duly authorized agents of said board shall have authority to enter upon and inspect any shop or school at any time during business hours. A copy of the rules and regulations adopted by said board and approved by the state board of health shall be furnished from the office of the board or by the above mentioned authorized agents to the owner or manager of each shop or school in the State, and such copy shall be kept posted in a conspicuous place in each shop and school. (1933, c. 179, s. 23; 1935, c. 54, s. 5.)

Editor's Note.—The amendment of 1935 made this section applicable to academies and training schools.

§ 88-24. Posting of certificates. — Every holder of a certificate of registration shall display it in a conspicuous place adjacent to or near his, or her work chair. (1933, c. 179, s. 24.)

§ 88-25. Annual renewal of certificates.—Every registered cosmetologist and every registered apprentice, who continues in active practice or service shall annually, on or before June 30th, of each year, file with the secretary of the board, a renewal certificate as to physical fitness, renew his, or her certificate of registration which has not been renewed prior to, or during the month of July in any year, and which shall expire on the first day of August in that year. A registered cosmetologist, or a registered apprentice whose certificate of registration has expired may have his or her certificate restored immediately upon payment of the required restoration fee, and furnishing to the secretary of the board renewal certificate as to physical fitness. Any registered cosmetologist who retires from the practice of cosmetic art for not more than three years may renew his or her certificate of registration upon payment of the required restoration fee, and by furnishing to the secretary of the board renewal certificate as to physical fitness. (1933, c. 179, s. 25.)

§ 88-26. Causes for revocation of certificates. —The board of cosmetic art examiners may either refuse to issue or renew, or may suspend, or revoke any certificate of registration for any one, or combination of the following causes:

(a) Conviction of a felony shown by certified copy of the record of the court of conviction.

(b) Gross malpractice, or gross incompetency, which shall be determined by the board of cosmetic art examiners.

(c) Continued practice by a person knowingly having an infectious, or contagious disease.

(d) Advertising by means of knowingly false, or deceptive statements.

(e) Habitual drunkenness, or habitual addiction to the use of morphine, cocaine, or other habit-forming drugs.

(f) The commission of any of the offenses described in § 88-28, sub-sections (c), (d), (f) and (g). (1933, c. 179, s. 26; 1941, c. 234, s. 4.)

Editor's Note.—The 1941 amendment substituted "(c), (d), (f) and (g)" for the words "three, four and six" formerly appearing in subsection (f).

§ 88-27. Hearing on charges. — The board may neither refuse to issue, nor refuse to renew, nor suspend, nor revoke any certificate of registration, however, for any of these causes, unless the person accused has been given at least thirty days notice in writing of the charge against him or her and public hearing by the board of cosmetic art examiners.

(a) Upon the hearing of any such proceeding, the board may administer oaths and may procure by its subpoena, the attendance of witnesses and the production of relevant books and papers.

(b) Any cosmetologist in the state whose case has been passed upon by the board of cosmetic art examiners shall have the right to appeal to the superior court of the state, which court may in its discretion reverse, or modify any order made by the said board of cosmetic art examiners. (1933, c. 179, s. 27; 1939, c. 218, s. 1.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

§ 88-28. Acts made misdemeanors. — Each of the following constitutes a misdemeanor punishable upon conviction by a fine of not less than $10.00 and not more than $50.00, or imprisonment for not less than ten days, or more than thirty days:

(a) The violation of any of the provisions of § 88-1.

(b) Permitting any person in one's employ, supervision, or control to practice as an apprentice unless that person has a certificate of registration as a registered apprentice.

(c) Permitting any person in one's employ, supervision, or control, to practice as a cosmetologist unless that person has a certificate as a registered cosmetologist.

(d) Obtaining, or attempting to obtain, a certificate of registration for money other than required fee, or any other thing of value, or by fraudulent misrepresentations.

(e) Practicing or attempting to practice by fraudulent misrepresentations.

(f) The willful failure to display a certificate of registration as required by § 88-24.

(g) The willful and continued violation of the reasonable rules and regulations adopted by the state board of cosmetic art examiners, and approved by the state board of health, for the sanitary management of shops and schools. (1933, c. 179, s. 28.)

Variance.—Where defendant was tried upon a warrant charging that she permitted persons in her employ to practice as apprentices without certificate of registration as reg-

istered apprentices or registered cosmetologists, and the jury returned a special verdict to the effect that defendant permitted unlicensed students to work in her school, there is a fatal variance between the warrant and the special verdict and a failure of proof, and the adjudication that defendant was not guilty is affirmed. State v. McIver, 216 N. C. 734, 6 S. E. (2d) 493.

§ 88-29. Records to be kept by board.—The board of cosmetic art examiners shall keep a record of its proceedings relating to the issuance, refusal, renewal, suspension and revocation of certificates of registration. This record shall also contain the name, place of business, and residence of each registered cosmetologist and registered apprentice, and the date and number of his certificate of registration. This record shall be open to public inspection during all days, excepting Sundays and legal holidays. (1933, c. 179, s. 29.)

Chapter 89. Engineering and Land Surveying.

Sec.
89-1. Qualification to practice; registration.
89-2. Private practice.
89-3. State board of registration for engineers and surveyors.
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89-5. Certificate of appointment; oath; certificate of registration; seal; by-laws.
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89-15. Corporations and partnerships.
89-16. Land surveying.
89-17. Fees of surveyors and chain-carriers.

§ 89-1. Qualification to practice; registration.—In order to safeguard life, health, and property, any person practicing or offering to practice engineering or land surveying in this state shall hereafter be required to submit evidence that he or she is qualified so to practice, and shall be registered as hereinafter provided; and from February 25, 1922, it shall be unlawful for any person to practice or to offer to practice engineering or land surveying in this state, except as herein provided, unless such person has been duly registered under the provisions of this chapter. (1921, c. 1, s. 1; C. S. 6055(b).)

§ 89-2. Private practice.—Nothing in this chapter shall be construed as requiring registration for the purpose of practicing engineering or land surveying by an individual, firm, or corporation on property owned or leased by said individual, firm, or corporation, unless the same involves the public safety or health. (1921, c. 1, s. 2; C. S. 6055(c).)

§ 89-3. State board of registration for engineers and surveyors.—There is hereby created a state board of registration for engineers and land surveyors, hereinafter called the "board," consisting of five members, who shall be appointed by the governor within sixty days after this chapter becomes effective. At least two members of such board shall be appointed from the engineering faculty of the North Carolina state college of agriculture and engineering of the University of North Carolina. Not more than three members of said board shall be from the same branch of the profession of engineering. The members of the first board shall be appointed to serve for the following terms: Two members for one year, two members for two years, and one member for four years; said terms ending on the thirty-first day of December of the succeeding year. On the expiration of each of said terms the term of office of each newly appointed or reappointed member of the board shall be for a period of four years and shall terminate on the thirty-first day of December. Each member shall hold over after the expiration of his term until his successor shall be duly appointed and qualified. The governor may remove any member of the board for misconduct, incompetency, or neglect of duty. Vacancies in the membership of the board, however created, shall be filled by appointment by the governor for the unexpired term. (1921, c. 1, s. 3; C. S. 6055(d).)

§ 89-4. Requisites for appointment; pay.—Each member of the board shall be a citizen of the United States and a resident of this state at the time of his appointment. He shall have been engaged in the practice or teaching of his profession for at least ten years. Each member of the board shall receive ten dollars ($10) per day for attending sessions of the board or of its committees, and for the time spent in necessary travel, and, in addition, shall be reimbursed for all necessary traveling, incidental, and clerical expenses incurred in carrying out the provisions of this chapter. (1921, c. 1, s. 4; C. S. 6055(e).)

§ 89-5. Certificate of appointment; oath; certificate of registration; seal; by-law.—Each member of the board shall receive a certificate of appointment from the governor, and before beginning his term of office he shall file with the secretary of state the constitutional oath of office. Each member of the board first created shall receive a certificate of registration under this chapter from the governor of the state. The board shall have power to compel the attendance of witnesses, may administer oaths and may take testimony and proofs concerning all matters within its jurisdiction. The board shall adopt and have an official

seal, which shall be affixed to all certificates of registration granted; and shall make all by-laws and rules not inconsistent with law, needed in performing its duty. (1921, c. 1, s. 5; C. S. 6055(f).)

§ 89-6. Meetings; notice; quorum.—The board shall hold a meeting within thirty days after its members are first appointed, and thereafter shall hold at least two regular meetings each year. Special meetings shall be held at such times as the by-laws of the board may provide. Notice of all meetings shall be given in such manner as the by-laws may provide. The board shall elect annually from its members a chairman, a vice-chairman, and a secretary. A quorum of the board shall consist of not less than three members. (1921, c. 1, s. 6; C. S. 6055(g).)

§ 89-7. Fund of board; bond of secretary of board.—The secretary of the board shall receive and account for all moneys derived from the operation of this chapter and shall pay them to the state treasurer, who shall keep such moneys in a separte fund, to be known as the "Fund of the Board of Registration for Engineers and Land Surveyors," which fund shall be continued from year to year, and shall be drawn against only for the purpose of this chapter as herein provided. All expenses certified by the board as properly and necessarily incurred in the discharge of its duties, including authorized compensation, shall be paid out of said fund on the warrant of the auditor of the state, issued on requisition signed by the chairman and secretary of the board: Provided, however, that at no time shall the total of warrants issued exceed the total amount of funds accumulated under this chapter. The secretary of the board shall give a surety bond satisfactory to the state treasurer, conditioned upon the faithful performance of his duties. The premium on said bond shall be regarded as a proper and necessary expense of the board. (1921, c. 1, s. 7; C. S. 6055(h).)

§ 89-8. Record of proceedings and register of applicants; roster of engineers and surveyors; annual report.—The board shall keep a record of its proceedings and a register of all applicants for registration showing for each the date of application, name, age, education and other qualifications, place of business and place of residence, and whether the applicant was rejected or a certificate of registration granted, and the date of such action. The books and register of the board shall be prima facie evidence of all matters recorded therein. A roster showing the names and places of business and of residence of all registered engineers and land surveyors shall be prepared by the secretary of the board during the month of January of each year; such roster shall be printed by the board out of the fund of the said board as provided in § 89-7, and a copy mailed to and placed on file by the clerk of each incorporated city, town and county in the state. On or before the first day of March of each year the board shall submit to the governor a report of its transactions for the preceding year, and shall file with the secretary of state copy of such report, together with a complete statement of the receipts and expenditures of the board, attested by the affidavits of the chairman and the secretary, and a copy of the said roster of registered engineers and registered surveyors. (1921, c. 1, s. 8; C. S. 6055(i).)

§ 89-9. Certificates; issuance; fees; eligibility of applicants.—The board shall, on application therefor, on prescribed form, and the payment of a fee of twenty-five dollars ($25) by engineers, or the payment of a fee of ten dollars ($10) by land surveyors, issue a certificate of registration:

(1) To any person who submits evidence satisfactory to the board that he or she is fully qualified to practice engineering, or land surveying, such evidence after January first, one thousand nine hundred and twenty-three, to include an examination, oral or written; or

(2) To any person who holds a like unexpired certificate of registration issued to him or her by proper authority in any state or territory of the United States in which the requirements for the registration of engineers or land surveyors are of a standard satisfactory to the board: Provided, however, that the engineering registration board of said states or territories shall grant full and equal reciprocal registration rights and privileges to North Carolina registrants: Provided, however, that no person shall be eligible for registration who is under twenty-one years of age, who is not a citizen of the United States, who does not speak and write the English language, who is not of good character and repute.

Unless disqualifying evidence be before the board, the following facts established in the application shall be regarded as prima facie "evidence satisfactory to the board," that the applicant is fully qualified to practice engineering or land surveying, or both:

(a) Five (5) or more years of active engagement in engineering, or three or more years active practice in land surveying, February 25, 1921: Provided, however, each year of teaching, or of study satisfactorily completed, in a college of standing satisfactory to the board shall be considered as equivalent to one year of such active practice: Provided further, the period spent in the army, navy, marine corps, or other government service of the United States in the late war by any student whose engineering education was interrupted by such services shall also be counted as equivalent to an equal period of active practice: Provided, however, application for registration is made within twelve (12) months after February 25, 1921.

(b) Graduation, after a course of not less than four (4) years, in engineering from a school or college approved by the board as of satisfactory standing.

(c) Full membership in the American Society of Civil Engineers, American Institute of Chemical Engineers, American Institute of Electrical Engineers, American Society of Mechanical Engineers, American Institute of Mining and Metallurgical Engineers, American Society of Naval Architects and Marine Engineers, or such other national or state engineering or architectural societies as may be approved by the board, the requirements for full membership of which are not lower than the requirements for full mem-

bership in the professional societies or institutes named above.

Applicants for registration, in cases where the evidence originally presented in the application does not appear to the board conclusively or warranting the issuance of a certificate, may present further evidence which may include the results of a required examination, for the consideration of the board.

In case the board denies the issuance of a certificate to an applicant, the registration fee deposited shall be returned by the board to the applicant. (1921, c. 1, s. 9; C. S. 6055(j).)

Local Modification.—Macon: Pub. Loc. 1927, c. 657.

§ 89-10. Expiration and renewal of certificates. —Certificates of registration shall expire on the last day of the month of December following their issuance or renewal, and shall become invalid on that date unless renewed. It shall be the duty of the secretary of the board to notify by mail every person registered hereunder of the date of the expiration of his certificate and the amount of the fee required for its renewal for one year; such notice shall be mailed at least one month in advance of the date of the expiration of said certificate. Renewal may be effected at any time during the month of January by the payment of a fee of five dollars ($5) to the secretary of the board. The failure on the part of any registrant to renew his certificate annually in the month of January, as required above, shall not deprive such person of the right of renewal thereafter, but the fee paid for the renewal of a certificate after the month of January shall be increased ten per cent for each month or fraction of a month that payment for renewal is delayed: Provided, however, that the maximum fee for a delayed renewal shall not exceed twice the normal fee. (1921, c. 1, s. 9; C. S. 6055(k).)

§ 89-11. Revocation of license; reissue of revoked license; reinstatement; lost certificate. — The board shall have the power to revoke the certificate of registration of any engineer or land surveyor registered hereunder who is found guilty of any fraud or deceit in obtaining a certificate of registration, or gross negligence, incompetency or misconduct in the practice of engineering or land surveying. Any person may prefer charges of such fraud, deceit, negligence, incompetency or misconduct against any engineer or land surveyor registered hereunder; such charges shall be in writing and sworn to by the complainant and submitted to the board. Such charges, unless dismissed without hearing by the board as unfounded or trivial, shall be heard and determined by the board within three (3) months after the date on which they are preferred. Hearings shall be in the county of the residence of the person whose license is involved; provided that after notice such person and the board may agree that the hearing may be held in some other county. A copy of the charges, together with a notice of the time and place of hearing, shall be legally served on the accused at least thirty (30) days before the date fixed for the hearing, and in the event that such service cannot be effected thirty (30) days before such hearing, then the date of hearing and determination shall be postponed as may be necessary to permit the carrying out of this condition. At said hearing the accused shall have the right to appear personally and by counsel, and to cross-examine witnesses against him or her and to produce evidence or witnesses in his or her defense. If after said hearing the board unanimously votes in favor of finding the accused guilty of any fraud or deceit in obtaining the certificate or of gross negligence, incompetency, or misconduct in the practice of engineering or land surveying, the board shall revoke the certificate of registration of the accused. The board may reissue a certificate of registration to any person whose certificate has been revoked: Provided, three or more members of the board vote in favor of such reissuance for reasons the board may deem sufficient. The board shall immediately notify the secretary of state and the clerk of each incorporated city, town or county in the state of its findings in the case of the revocation of a certificate of registration or of its reissuance of a revoked certificate of registration. A new certificate of registration to replace any certificate lost, destroyed or mutilated may be issued, subject to the rules and regulations of the board. (1921, c. 1, s. 10; 1939, c. 218, s. 2; C. S. 6055(l).)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

§ 89-12. Evidence carried by certificate; seal of registrant. — The issuance of a certificate of registration by the board shall be evidence that the person named therein is entitled to all the rights and privileges of a registered engineer or registered land surveyor, or both, while the said certificate remains unrevoked or unexpired. Each registrant hereunder shall, upon registration, obtain a seal of the design authorized by the board, bearing the registrant's name and the legend "registered engineer," or "registered land surveyor." Plans, specifications, plats and reports issued by a registrant shall be stamped with said seal during the life of registrant's certificate, but it shall be unlawful for any one to stamp or seal any document or documents with said seal after the certificate of the registrant named thereon has expired or has been revoked unless said certificate has been renewed or reissued. (1921, c. 1, s. 11; C. S. 6055(m).)

§ 89-13. Acts declared misdemeanors; punishment.—Any person, who, after February 25, 1922, is not legally authorized to practice engineering or land surveying in this state, according to the provisions of this chapter, and shall practice or offer to practice engineering or land surveying in this state, except as provided in §§ 89-14 and 89-16, and any person presenting or attempting to file as his own the certificate of registration of another, or who shall give false or forged evidence of any kind to the board, or to any member thereof, in obtaining a certificate of registration, or who shall falsely impersonate any other practitioner, of like or different name, or who shall use an expired or revoked certificate of registration, shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than one hundred dollars ($100) or by imprisonment for three (3) months, or by both fine and im-

prisonment, in the discretion of the court. (1921, c. 1, s. 12; C. S. 6055(n).)

§ 89-14. Exemptions from operation of chapter. —The following shall be exempted from the provisions of this chapter:

(a) Any person or persons offering to practice in this state, as an engineer or land surveyor, not a resident of and having no established place of business in this state.

(b) Practice as an engineer or land surveyor in this state by any person not a resident of this state, and having no established place of business in this state, when this practice does not aggregate more than thirty (30) days in any calendar year: Provided, that said person is legally qualified for such professional service in his own state or country.

(c) Practice as an engineer or land surveyor in this state by any person not a resident of this state and having no established place of business in this state, or any person resident in this state but whose arrival in the state is recent: Provided, however, such person shall have filed an application for registration as an engineer or land surveyor and shall have paid the fee provided for in § 89-9. Such exemption shall continue for only such reasonable time as the board requires in which to consider and grant or deny the said application for registration.

(d) Engaging in engineering and land surveying work as an employee, or assistant, of a registered engineer or a registered land surveyor, or as an employee or assistant of a nonresident engineer or a nonresident land surveyor, provided for in paragraphs (b) and (c) of this section, provided that said work as an employee may not include responsible charge of design or supervision.

(e) Practice of engineering or land surveying by any person not a resident of and having no established place of business in this state, as a consulting associate or an architect, engineer or a land surveyor registered under the provisions of this chapter: Provided, the nonresident is qualified for such professional service in his own state or country.

(f) Practice of engineering and land surveying solely as an officer or as an employee of the United States. (1921, c. 1, s. 13; C. S. 6055(o).)

§ 89-15. Corporations and partnerships. — A corporation or partnership may engage in the practice of engineering or land surveying in this state: Provided, the person or persons connected with such corporation or partnership in charge of the designing or supervision which constitutes such practice is or are registered as herein required of engineers and land surveyors. The same exemptions shall apply to corporations and partnerships as apply to individuals under this chapter. (1921, c. 1, s. 14; C. S. 6055(p).)

§ 89-16. Land surveying. — Land surveying as covered by this chapter refers only to surveys for the determination of areas, or for the establishment or reëstablishment of land boundaries and the subdivision and platting of land, and making plats, maps, and drawing descriptions of the lands or lines so surveyed, platted or investigated. Nothing in this chapter shall be construed as prohibiting a duly qualified registered engineer from making land surveys; nor as prohibiting any person from doing land surveying provided he does not represent himself to be a registered land surveyor. (1921, c. 1, s. 15; C. S. 6055(q).)

Local Modification.—Cumberland: 1937, c. 110.

§ 89-17. Fees of surveyors and chain-carriers.— Surveyors appointed by courts to survey any lands the boundaries of which may come in question in any suit or proceeding pending therein, or called upon by the commissioners to assist in surveying and dividing the lands of intestates or others, held in common, shall receive the following fees, and no other, namely: For every survey on an entry containing three hundred acres or less, one dollar and sixty cents, and for every hundred more than that quantity, forty cents; for surveying lands in dispute, by order of court, traveling to and from the place, and performing the duty, two dollars per day, or such greater sum as the court may allow; for assisting in surveying and dividing the lands of intestates, or others, held in common, when called upon by the commissioners appointed to make partition, or in laying off dower, traveling to and from the place, and performing the duty, two dollars per day. For assisting in surveying and allotting the homestead exemption of any person when summoned to do so by the sheriff or other lawful officer, for traveling to and from the place and performing the duty, two dollars per day, which shall be taxed in the bill of costs. In all surveys made by order of the court, the chain-carriers shall be allowed such compensation as the court may determine, not exceeding one dollar each per day; and in matters of disputed boundary, which may come in question, in any suit, the court may make to the surveyor such allowance for plots as it may deem reasonable, which, with the allowance to chain-carriers, shall be taxed as costs. (Rev., s. 2802; Code, s. 3754; 1893, c. 58, s. 2; 1905, cc. 182, 263; C. S. 3921.)

Local Modification.—Cabarrus: 1935, c. 202.

Cross Reference.—As to fees for recording and indexing surveys of state lands, see § 146-42.

Chapter 90. Medicine and Allied Occupations.

Art. 1. Practice of Medicine.

Art. 2. Dentistry.

Art. 3. The Licensing of Mouth Hygienists, to Teach and Practice Mouth Hygiene in Public Institutions.

Art. 4. Pharmacy.

Part 1. Practice of Pharmacy.

Part 2. Dealing in Specific Drugs Regulated.

Art. 1. Practice of Medicine.

§ 90-1. North Carolina medical society incorporated.—The association of regularly graduated physicians, calling themselves the state medical society, is hereby declared to be a body politic and corporate, to be known and distinguished by the name of The Medical Society of the State of North Carolina. (Rev., s. 4491; Code, s. 3121; 1858-9, c. 258, s. 1; C. S. 6605.)

§ 90-2. Board of examiners.—In order to properly regulate the practice of medicine and surgery, there shall be established a board of regularly graduated physicians, to be known by the title of The Board of Medical Examiners of the State of North Carolina, which shall consist of seven regularly graduated physicians. (Rev., s. 4492; Code, s. 3123; 1858-9, c. 258, ss. 3, 4; Ex. Sess. 1921, c. 44, s. 1; C. S. 6606.)

§ 90-3. Medical society appoints board. — The medical society shall have power to appoint the board of medical examiners. (Rev., s. 4493; Code, s. 3126; 1858-9, c. 258, s. 9; C. S. 6607.)

§ 90-4. Board elects officers and fills vacancies. —The board of medical examiners is authorized to elect all such officers and to frame all such by-laws as may be necessary, and in the event of any vacancy by death, resignation, or otherwise, of any member of said board, the board, or a quorum thereof, is empowered to fill such vacancy. (Rev., s. 4494; Code, s. 3128; 1858-9, c. 258, s. 11; C. S. 6608.)

§ 90-5. Meetings of board.—The board of medical examiners may assemble once in every year in the city of Raleigh, and shall remain in session from day to day until all applicants who may present themselves for examination within the first

two days of this meeting have been examined and disposed of; other meetings in each year may be held at some suitable point in the state if deemed advisable. (Rev., s. 4495; 1915, c. 220, s. 1; 1935, c. 363; C. S. 6609.)

Editor's Note.—The amendment of 1935 substituted the word "may" for the word "shall" near the beginning of this section.

§ 90-6. Regulations governing applicants for license, examinations, etc.—The board of medical examiners is empowered to prescribe such regulations as it may deem proper, governing applicants for license, admission to examinations, the conduct of applicants during examinations, and the conduct of examinations proper. (1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 2; C. S. 6610.)

§ 90-7. Bond of secretary.—The secretary of the board of medical examiners shall give bond with good surety, to the president of the board, for the safe-keeping and proper payment of all moneys that may come into his hands. (Rev., s. 4497; Code, s. 3134; 1858-9, c. 258, s. 17; C. S. 6611.)

§ 90-8. Officers may swear applicants and summon witnesses. — The president and secretary of the board of medical examiners of this state shall have power to administer oaths to all persons who may apply for examination before the board, or to any other persons deemed necessary in connection with performing the duties of the board as imposed by law. The board shall have power to summon any witnesses deemed necessary to testify under oath in connection with any cause to be heard before it; or to summon any licentiate against whom charges are preferred in writing, and the failure of the licentiate, against whom charges are preferred, to appear at the stated time and place to answer to the charges, after due notice or summons has been served in writing, shall be deemed a waiver of his right to said hearing, as provided in § 90-14. (1913, c. 20, s. 7; Ex. Sess. 1921, c. 44, s. 3; C. S. 6612.)

§ 90-9. Examination for license; scope; conditions and prerequisites.—It shall be the duty of the board of medical examiners to examine for license to practice medicine or surgery, or any of the branches thereof, every applicant who complies with the following provisions: He shall, before he is admitted to examination, satisfy the board that he has an academic education equal to the entrance requirements of the University of North Carolina, or furnish a certificate from the superintendent of public instruction of the county that he has passed an examination upon his literary attainments to meet the requirements of entrance in the regular course of the state university. He shall exhibit a diploma or furnish satisfactory proof of graduation from a medical college in good standing requiring an attendance of not less than four years, and supplying such facilities for clinical and scientific instruction as shall meet the approval of the board; but the requirement of four years attendance at a school shall not apply to those graduating prior to January the first, nineteen hundred.

The examination shall cover the following branches of medical science: anatomy, embryology, histology, physiology, pathology, bacteriology, surgery, pediatrics, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics, gynecology, and the practice of medicine.

If on such examination the applicant is found competent, the board shall grant him a license authorizing him to practice medicine or surgery or any of the branches thereof.

Five members of the board shall constitute a quorum, and four of those present shall be agreed as to the qualification of the applicant. (Rev., s. 4498; 1913, c. 20, ss. 2, 3, 6; 1921, c. 47, s. 1; C. S. 6613.)

Constitutional Discrimination.—"That the statute is not in violation of the State Constitution is thoroughly discussed and held in State v. Vandoran, 109 N. C. 864, 14 S. E. 32. It is not to be questioned that the law making power of the State has the right to require an examination and certificate as to the competency of persons desiring to practice law or medicine." State v. Call, 121 N. C. 643, 645, 28 S. E. 517; State v. Siler, 169 N. C. 314, 84 S. E. 1015.

§ 90-10. Two examinations, preliminary and final, allowed.—It shall be the duty of the state board of medical examiners to examine any applicant for license to practice medicine on the subjects of anatomy, histology, physiology, bacteriology, embryology, pathology, medical hygiene, and chemistry, upon his furnishing satisfactory evidence from a medical school in good standing, and supplying such facilities for anatomical and laboratory instruction as shall meet with the approval of the board, that he has completed the course of study in the school upon the subjects mentioned. The board shall set to the credit of such applicant upon its record books the grade made by him upon the examination, which shall stand to the credit of such applicant; and when he has subsequently completed the full course in medicine and presents a diploma of graduation from a medical college in good standing, requiring a four years course of study of medicine for graduation, and when he has completed the examination upon the further branches of medicine, to wit, pharmacy, materia medica, therapeutics, obstetrics, gynecology, pediatrics, practice of medicine and surgery, he shall have accounted to his credit the grade made upon the former examination, and if then upon such completed examination he be found competent, said board shall grant him a license to practice medicine and surgery, and any of the branches thereof. (1921, c. 47, s. 2; Ex. Sess. 1921, c. 44, s. 4; C. S. 6614.)

§ 90-11. Qualification of applicant for license.—Every person making application for a license to practice medicine or surgery in the state shall be not less than twenty-one years of age, and of good moral character, before any license can be granted by the board of medical examiners: Provided, that the age requirement shall not apply to students taking the examinations of the first two years in medicine. (1921, c. 47, s. 3; Ex. Sess. 1921, c. 44, s. 5; C. S. 6615.)

§ 90-12. Limited license. — The board may, whenever in its opinion the conditions of the locality where the applicant resides are such as to render it advisable, make such modifications of the requirements of the preceding sections, both as to application for examination and examination for license, as in its judgment the interests of the people living in that locality may demand, and

may issue to such applicant a special license, to be entitled a "Limited License", authorizing the holder thereof to practice medicine and surgery within the limits only of the districts specifically described therein. The holder of the limited license practicing medicine or surgery beyond the boundaries of the district as laid down in said license shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars nor more than fifty dollars for each and every offense; and the board is empowered to revoke such limited license, in its discretion, after due notice. The clerk of the superior court, in registering the holder of a limited license, shall copy upon the certificate of registration and upon his record the description of the district given in the license. (1909, c. 218, s. 1; C. S. 6616.)

§ 90-13. When license without examination allowed.—The board of medical examiners shall in their discretion issue a license to any applicant to practice medicine and surgery in this state without examination if said applicant exhibits a diploma or satisfactory proof of graduation from a medical college in good standing, requiring an attendance of not less than four years and a license issued to him to practice medicine and surgery by the board of medical examiners of another state. (1907, c. 890; 1913, c. 20, s. 3; C. S. 6617.)

§ 90-14. Board may rescind license.—The board shall have the power to revoke and rescind any license granted by it, when, after due notice and hearing, it shall find that any physician licensed by it has been guilty of grossly immoral conduct, or of producing or attempting to produce a criminal abortion, or, by false and fraudulent representations, has obtained or attempted to obtain, practice in his profession, or is habitually addicted to the use of morphine, cocaine or other narcotic drugs, or has by false or fraudulent representations of his professional skill obtained, or attempted to obtain, money or anything of value, or has advertised or held himself out under a name other than his own, or has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which he holds a license, or is guilty of any fraud or deceit by which he was admitted to practice, or has been guilty of any unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession, or has been convicted in any court, state or federal, of any felony or other criminal offense involving moral turpitude. Upon the hearing before said board of any charge involving a conviction of such felony or other criminal offense, a transcript of the record thereof certified by the clerk of the court in which such conviction is had, shall be sufficient evidence to justify the revocation or rescinding of such license. The findings and action of said board shall, in all such cases and hearings, be final and conclusive. And, for any of the above reasons, the said board of medical examiners may refuse to issue a license to an applicant. The said board of medical examiners may, in its discretion, restore a license so revoked and rescinded, upon due notice being given and hearing had, and satisfactory evidence produced of reformation of the licentiate. (1921, c. 47, s. 4; Ex. Sess. 1921, c. 44, s. 6; 1933, c. 32; C. S. 6618.)

Editor's Note.—Public Laws of 1933, c. 32, substituted the above section for the former reading. A comparison of the two sections is necessary to determine the changes.

Unprofessional Conduct. — While the board does not have the power to revoke a license on the sole ground that the holder thereof has been convicted of the violation of a criminal statute in force in the State or in the United States, the board has the power to revoke a license upon a finding that the holder thereof was guilty of unprofessional conduct in that he had violated the provisions of the act. Board of Medical Examiners v. Gardner, 201 N. C. 123, 159 S. E. 8.

Appeal.—The appeal from the State Board of Medical Examiners allowed to a physician whose license has been revoked for immoral conduct in the practice of his profession, follows the procedure allowed in analogous cases, and the intent of the Legislature is interpreted to give a trial de novo in the Superior Court wherein the jury are to decide upon the evidence adduced before them the facts involved in the issue. State v. Carroll, 194 N. C. 37, 138 S. E. 339.

§ 90-15. License fee; salaries, fees, and expenses of board.—Each applicant for examinations shall pay to the treasurer of the board of medical examiners of the state of North Carolina a fee of fifteen dollars ($15) before being admitted to the examination: Provided, however, that in the case of applicants taking the examinations in two halves, as provided in § 90-10, the fee shall be seven and one-half dollars ($7.50) for each of the two half examinations. Whenever any license is granted without examination, as authorized in § 90-13, the applicant shall pay to the treasurer of the board a fee of fifty dollars ($50). Whenever a limited license is granted, as provided in § 90-12, the person shall pay to the treasurer of the board a fee of fifteen dollars ($15). A fee of five dollars ($5) shall be paid for each duplicate license. All fees shall be paid in advance to the treasurer of the board of medical examiners of the state of North Carolina, to be by him held as a fund for the use of said board. The compensation and expenses of the members and officers of said board, and all expenses proper and necessary in the opinion of said board, to the discharge of its duties under and to enforce the laws regulating the practice of medicine or surgery shall be paid out of such funds, upon the warrant of the president and secretary of said board. The salaries and fees of the officers and members of the said board shall be fixed by the board, but shall not exceed ten dollars ($10) per day per member, and railroad fare and hotel expenses; and no expense shall be created to exceed the income from fees herein provided. Any unexpended sum or sums of money remaining in the treasury of the said board at the expiration of the terms of office of the members thereof, shall be paid over to their successors after their election and qualification as such. (Rev., s. 4501; Code, s. 3130; 1858-9, c. 258, s. 13; 1913, c. 20, ss. 4, 5; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 7; C. S. 6619.)

§ 90-16. Board to keep record; publication of names of licentiates; transcript as evidence.—The board of examiners shall keep a regular record of its proceedings in a book kept for that purpose, together with the names of the members of the board present, the names of the applicants for license, and other information as to its actions. The board of examiners shall cause to be entered in a separate book the name of each applicant to

whom a license is issued to practice medicine or surgery, along with any information pertinent to such issuance. The board of examiners shall publish the names of those licensed in three daily newspapers published in the state of North Carolina, within thirty days after granting the same. A transcript of any such entry in the record books, or a certificate that there is not entered therein the name and proficiency or date of granting such license of a person charged with the violation of the provisions of this article, certified under the hand of the secretary and the seals of the board of medical examiners of the state of North Carolina, shall be admitted as evidence in any court of this state when it is otherwise competent. (Rev., s. 4500; Code, s. 3129; 1858-9, c. 258, s. 12; 1921, c. 47, s. 6; C. S. 6620.)

§ 90-17. Blanks furnished clerk.—It shall be the duty of the medical society of the state of North Carolina to prescribe proper form of certificates required by this article and all such blanks and forms as the clerk may need to enable him to perform his duties under this article. (Rev., s. 4505; 1889, c. 181, s. 7; 1899, c. 93, s. 4; C. S. 6621.)

§ 90-18. Practicing without license; practicing defined; penalties.—No person shall practice medicine or surgery, or any of the branches thereof, nor in any case prescribe for the cure of diseases unless he shall have been first licensed and registered so to do in the manner provided in this article, and if any person shall practice medicine or surgery without being duly licensed and registered, as provided in this article, he shall not be allowed to maintain any action to collect any fee for such services. The person so practicing without license shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars ($50) nor more than one hundred ($100), or imprisoned at the discretion of the court for each and every offense.

Any person shall be regarded as practicing medicine or surgery within the meaning of this article who shall diagnose or attempt to diagnose, treat or attempt to treat, operate or attempt to operate on, or prescribe for or administer to, or profess to treat any human ailment, physical or mental, or any physical injury to or deformity of another person: Provided, that the following cases shall not come within the definition above recited:

1. The administration of domestic or family remedies in cases of emergency.

2. The practice of dentistry by any legally licensed dentist engaged in the practice of dentistry and dental surgery.

3. The practice of pharmacy by any legally licensed pharmacist engaged in the practice of pharmacy.

4. The practice of medicine and surgery by any surgeon or physician of the United States army, navy, or public health service in the discharge of his official duties.

5. The treatment of the sick or suffering by mental or spiritual means without the use of any drugs or other material means.

6. The practice of optometry by any legally licensed optometrist engaged in the practice of optometry.

7. The practice of midwifery by any woman who pursues the vocation of midwife.

8. The practice of chiropody by any legally licensed chiropodist when engaged in the practice of chiropody, and without the use of any drug.

9. The practice of osteopathy by any legally licensed osteopath when engaged in the practice of osteopathy as defined by law, and especially § 90-129.

10. The practice of chiropractic by any legally licensed chiropractor when engaged in the manual adjustment of the twenty-four spinal vertebrae of the human body and without the use of drugs.

11. The practice of medicine or surgery by any reputable physician or surgeon in a neighboring state coming into this state for consultation with a resident registered physician. This proviso shall not apply to physicians resident in a neighboring state and regularly practicing in this state.

12. Physicians who have a diploma from a regular medical college or were practicing medicine and surgery in this state prior to the seventh day of March, one thousand eight hundred and eighty-five, and who are properly registered as required by law.

13. Any person practicing Radiology as hereinafter defined shall be deemed to be engaged in the practice of medicine within the meaning of this article. "Radiology" shall be defined as, that method of medical practice in which demonstration and examination of the normal and abnormal structures, parts or functions of the human body are made by use of x-rays. Any person shall be regarded as engaged in the practice of Radiology who makes or offers to make, for a consideration, a demonstration or examination of a human being or a part or parts of a human body by means of fluoroscopic exhibition or by the shadow imagery registered with photographic materials and the use of x-rays; or holds himself out to diagnose or able to make or makes any interpretation or explanation by word of mouth, writing or otherwise of the meaning of such fluoroscopic or registered shadow imagery of any part of the human body by use of x-rays; or who treats any disease or condition of the human body by the application of x-rays or radium. Nothing in this subsection shall prevent the practice of Radiology by any person licensed under the provisions of Articles 2, 7, 8, and 12 of this chapter. (Rev., ss. 3645, 4502; Code, s. 3122; 1858-9, c. 258, s. 2; 1885, c. 117, s. 2; 1885, c. 261; 1889, c. 181, ss. 1, 2; 1921, c. 47, s. 7; Ex. Sess. 1921, c. 44, s. 8; 1941, c. 163; C. S. 6622.)

Editor's Note.—This section was amended in 1921. Before these changes it provided against practice without license, and that an unlicensed practitioner could not maintain an action to collect fees for service, $25 was the minimum fine for practicing without license. The section was not applicable to mid-wives, physicians with diplomas granted before March 7, 1883, and reputable physicians from out of the state called in for consultation only. Puckett v. Alexander, 102 N. C. 95, 8 S. E. 767, holds that one not licensed to practice cannot collect for service. The contract was entered into before the act of 1885 which allowed one who graduated from a medical college before 1880 to practice.

The 1941 amendment added subsection 13.

Constitutionality.—This statute is not invalid, as it is the exercise of police power to protect the public, and is not the creation of a monopoly. State v. Call, 121 N. C. 643, 28 S. E. 517.

Nonmedicine Physicians.—The statute is applicable only to one holding himself out as a medical physician. If one cures by other means he is not subject to this statute. State v. Biggs, 133 N. C. 729, 46 S. E. 401.

A patent medicine vendor cannot hold himself out as a

physician, and then avoid the statute by only prescribing his own products. State v. Van Doran, 109 N. C. 864, 14 S. E. 32.

§ 90-19. Practicing without registration; penalties.—Any person desiring to engage in the practice of medicine or surgery shall personally appear before the clerk of the superior court of the county in which he resides or practices, for registration as a physician or surgeon. The person so applying shall produce and exhibit before the clerk of the superior court a license obtained from the board of medical examiners of the state. The clerk shall thereupon register the date of registration, with the name and residence of such applicant, in a book to be kept for this purpose in his office marked "Register of Physicians and Surgeons," and shall issue to him a certificate of registration under the seal of the superior court of the county upon the form furnished him by the medical society of North Carolina, for which the clerk shall be entitled to collect from said applicant a fee of twenty-five cents. The person obtaining such certificate shall be entitled to practice medicine or surgery, or both, in the county where the same was obtained, and in any other county in this state; but if he shall remove his residence to another county he shall exhibit said certificate to the clerk of such other county and be registered, which registration shall be made by said clerk without fee or charge.

Any person who practices or attempts to practice medicine or surgery in this state without first having registered and obtained the certificate required in this section, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars, or be imprisoned at the discretion of the court, for each and every offense: Provided, this section shall not apply to women pursuing the vocation of midwife, nor to reputable physicians or surgeons resident in a neighboring state coming into this state for consultation with a registered physician of this state. (Rev., ss. 3646, 4504; 1889, c. 181, ss. 4, 5; 1891, c. 420; Ex. Sess. 1921, c. 44, s. 9; C. S. 6623.)

Editor's Note.—By the amendment Ex. Sess. 1921 the part of this section allowing registration upon presentment of a diploma issued by a regular medical college prior to March 7, 1885 or making oath that he was practicing medicine or surgery in this state prior to the last mentioned date, was omitted.

What Constitutes Practicing.—To constitute the offense of practicing medicine without registration, etc., it is not necessary to allege or prove the person practiced upon; it is sufficient if the defendant held himself out to the public as a physician. State v. Van Doran, 109 N. C. 894, 14 S. E. 32.

§ 90-20. Clerk punishable for illegally registering physician.—If any clerk of the superior court shall register, or issue a certificate to, any person practicing medicine or surgery in any other manner than that prescribed by law, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two hundred dollars and shall be removed from office. (Rev., s. 3647; 1889, c. 181, s. 6; C. S. 6624.)

§ 90-21. Certain offenses prosecuted in superior court; duties of attorney-general.—In case of the violation of the criminal provisions of §§ 90-18 to 90-20, the attorney-general of the state of North Carolina, upon complaint of the board of medical examiners of the state of North Carolina, shall investigate the charges preferred, and if in his judgment the law has been violated, he shall direct the solicitor of the district in which the offense was committed to institute a criminal action against the offending persons. A solicitor's fee of five dollars shall be allowed and collected in accordance with the provisions of § 6-12. The board of medical examiners may also employ, at their own expense, special counsel to assist the attorney-general or the solicitor.

Exclusive original jurisdiction of all criminal actions instituted for the violations of §§ 90-18 to 90-20 shall be in the superior court, the provisions of any special or local act to the contrary notwithstanding. (1915, c. 220, s. 2; C. S. 6625.)

Art. 2. Dentistry.

§ 90-22. Board of dental examiners continued; membership; term of office; vacancies; present members hold over.—The North Carolina state board of dental examiners heretofore created by chapter one hundred and thirty-nine, Public Laws, one thousand eight hundred and seventy-nine and by chapter one hundred and seventy-eight, Public Laws one thousand nine hundred and fifteen, is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State, said board to consist of six (6) members of the North Carolina dental society, to be elected by the said society at its annual meeting; said members so elected to be commissioned by the governor for a period of three years or until their successors are elected, commissioned and qualified. Any vacancy in the said board shall be filled by a member of the North Carolina dental society to be elected by said board by and with the consent and approval of the executive committee of the North Carolina dental society, and commissioned by the governor to hold office for the unexpired term to which elected. Nothing in this article and no provision of this section shall in any way change the terms of office of the members of the North Carolina state board of dental examiners as now constituted, and said members of said board shall hold their office for the term to which they have been elected. (1935, c. 66, s. 1.)

§ 90-23. Officers; common seal. — The North Carolina state board of dental examiners shall, at each annual meeting thereof, elect one of its members president and one secretary-treasurer. The common seal which has already been adopted by said board, pursuant to law, shall be continued as the seal of said board. (1935, c. 66. s. 2.)

§ 90-24. Quorum; adjourned meetings.—Four (4) members of said board shall constitute a quorum for the transaction of business and at any meeting of the board, if four (4) members are not present at the time and the place appointed for the meeting, those members of the board present may adjourn from day to day until a quorum is present, and the action of the board taken at any adjourned meeting thus had shall have the same force and effect as if had upon the day and at the hour of the meeting called and adjourned from day to day. (1935, c. 66, s. 2.)

§ 90-25. Records and transcripts.—The said board shall keep a record of its transactions at

all annual or special meetings and shall provide a record book in which shall be entered the names and proficiency of all persons to whom licenses may be granted under the provisions of law. The said book shall show, also, the license number and the date upon which such license was issued and shall show such other matters as in the opinion of the board may be necessary or proper. Said book shall be deemed a book of record of said board and a transcript of any entry therein or a certification that there is not entered therein the name, proficiency and license number or date of granting such license, certified under the hand of the secretary-treasurer, attested by the seal of the North Carolina state board of dental examiners, shall be admitted as evidence in any court of this State when the same shall otherwise be competent. (1935, c. 66, s. 2.)

§ 90-26. Annual and special meetings. — The North Carolina state board of dental examiners shall meet annually on the fourth Monday in June of each year at such place as may be determined by the board, and at such other times and places as may be determined by action of the board or by any four (4) members thereof. Notice of the place of the annual meeting and of the time and place of any special or called meeting shall be given by advertising a copy of said notice in at least three daily newspapers published in this State at least ten days prior to said meeting. At the annual meeting or at any special or called meeting, the said board shall have the power to conduct examination of applicants and to transact such other business as may come before it, provided that in case of a special meeting, the purpose for which said meeting is called shall be stated in the notice. (1935, c. 66, s. 3.)

§ 90-27. Judicial powers; additional data for records. — The president of the North Carolina state board of dental examiners, and/or the secretary-treasurer of said board, shall have the power to administer oaths, issue subpoenas requiring the attendance of persons and the production of papers and records before said board in any hearing, investigation or proceeding conducted by it. The sheriff or other proper official of any county of the State shall serve the process issued by said president or secretary-treasurer of said board pursuant to its requirements and in the same manner as process issued by any court of record. The said board shall pay for the service of all process, such fees as are provided by law for the service of like process in other cases.

Any person who shall neglect or refuse to obey any subpoena requiring him to attend and testify before said board or to produce books, records or documents shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court.

The board shall have the power, upon the production of any papers, records or data, to authorize certified copies thereof to be substituted in the permanent record of the matter in which such books, records or data shall have been introduced in evidence. (1935, c. 66, s. 4.)

§ 90-28. By-laws and regulations. — The North Carolina state board of dental examiners shall have the power to make necessary by-laws and regulations, not inconsistent with the provisions of this article, regarding any matter referred to in this article and for the purpose of facilitating the transaction of business by the said board. (1935, c. 66, s. 5.)

§ 90-29. Necessity for license; dentistry defined; certain practices exempted. — No person shall engage in the practice of dentistry in this State or attempt to do so without first having applied for and obtained a license for such purpose from the said North Carolina state board of dental examiners, or without first having obtained from said board a certificate of renewal of license for the calendar year in which such person proposes to practice dentistry.

A person shall be deemed to practice dentistry in this State within the meaning of this article and this section of this article, who represents himself as being able to remove stains and accretions from teeth, diagnose, treat, operate or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the human teeth, alveolar process, gums or maxillary bones and associated tissues or parts and/or who offers or undertakes by any means or methods to remove stains or accretions from teeth, diagnose, treat, operate or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the same, or to take impressions of the teeth or jaws and/or who owns, maintains or operates an office for the practice of dentistry, and/or who engages in any of the practices included in the curricular of recognized and approved dental schools or colleges.

The fact that a person uses any dental degree or designation or any card, device, directory, poster, sign or other media whereby he represents himself to be a dentist practicing in the State, shall constitute prima facie evidence that such person is engaged in the practice of dentistry.

The following practices, acts, and operations, however, shall be exempt from the provisions of this article:

(a) Any act in the practice of his profession by a duly licensed physician or surgeon.

(b) The rendering of dental relief in emergency cases in the practice of his profession by a physician or surgeon licensed as such and registered under the laws of this State, unless he undertakes to reproduce or reproduces lost parts of the human teeth in the mouth, or to restore or replace in the human mouth, lost or missing teeth.

(c) The practice of dentistry in the discharge of their official duties by dentists in the United States army, the United States navy, the United States public health service, the United States veterans bureau, or other federal agency.

(d) The teaching of dentistry in dental schools or colleges as may be conducted in the State of North Carolina and approved by the said North Carolina state board of dental examiners, and the practice of dentistry by students in dental schools or colleges so approved when such students are acting under the direction and supervision of registered and licensed dentists acting as instructors.

(e) The practice of dentistry by licensed dentists of another state, territory or country at meet-

ings of the North Carolina dental society, or component parts thereof, meetings of dental colleges or other like dental organizations while appearing as clinicians, or when appearing in emergency cases upon the specific call of dentist duly licensed under the provisions of this article.

(f) The making, either upon written orders, prescriptions, casts, models or impressions furnished by a duly licensed dentist of artificial restorations, substitutes, appliances or materials for the correction of disease, loss, deformity, malposition, discoloration, fracture, injury to the jaws, teeth, lips, gums, cheeks, palate or associated tissues or parts. (1935, c. 66, s. 6.)

§ 90-30. Examination and licensing applicants; qualifications; causes for refusal to grant license; void licenses. — The North Carolina state board of dental examiners shall grant licenses to practice dentistry to such applicants who are graduates of a reputable dental institution, who, in the opinion of a majority of the board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of dentistry, subject, however, to the further provisions of this section and of the provisions of this article.

The applicant shall be of good moral character, at least twenty-one years of age at the time the application for examination is filed. The application shall be made to the said board in writing and shall be accompanied by evidence satisfactory to said board that the applicant is a person of good moral character, has an academic education, the standard of which shall be determined by the said board; that he is a graduate of and has a diploma from a reputable dental college or the dental department of a reputable university or college recognized, accredited and approved as such by the said board.

The North Carolina state board of dental examiners is authorized to conduct both written or oral and clinical examinations of such character as to thoroughly test the qualifications of the applicant, and may refuse to grant license to any person who, in its discretion, is found deficient in said examination, or to any person guilty of cheating, deception or fraud during such examination, or whose examination discloses to the satisfaction of the board, a deficiency in academic education.

The North Carolina state board of dental examiners may refuse to grant a license to any person guilty of a crime involving moral turpitude, or gross immorality, or to any person addicted to the use of alcoholic liquors or narcotic drugs to such an extent as, in the opinion of the board, renders the applicant unfit to practice dentistry.

Any license obtained through fraud or by any false representation shall be void ab initio and of no effect. (1935, c. 66, s. 7.)

Editor's Note.—The following cases were decided under C. S. section 6631, now repealed. However, these cases seem equally applicable to the present law as the provisions of former section 6631 are substantially set forth in the instant section.

Mandamus to Procure License.—The courts cannot by a mandamus compel the board of dental examiners to certify contrary to what they have declared to be truth. If the board refused to examine an applicant, upon his compliance with the regulations, the court could by mandamus compel them to examine him, but not to issue him a certificate, when the preliminary qualification required by law, that the applicant shall be found proficient and competent by the examining board, is lacking. Burton v. Furman, 115 N. C. 166, 20 S. E. 443; Loughran v. Hickory, 129 N. C. 281, 40 S. E. 46; Ewbank v. Turner, 134 N. C. 77, 83, 46 S. E. 508.

Failure of Clerk to Furnish Blanks.—A defendant, under an indictment for practicing dentistry without complying with the statute, is not excused because the designated officers had not furnished, as required of them, blanks upon which to make the statement. State v. Hicks, 143 N. C. 689, 57 S. E. 441.

Delay in Filing Verified Statement.—Time for filing the statement to practice dentistry is not of the essence of the enactment; by a compliance therewith a person will be entitled to a certificate to be registered. State v. Hicks, 143 N. C. 689, 57 S. E. 441.

Burden of Proof.—Under an indictment the burden of proof is upon the defendant to show he comes under the provision of this section and that he practiced dentistry in the State before the specified time, or has filed the required statement. State v. Hicks, 143 N. C. 689, 57 S. E. 441.

§ 90-31. Annual renewal of licenses. — The laws of North Carolina now in force, having provided for the annual renewal of any license issued by the North Carolina state board of dental examiners, it is hereby declared to be the policy of this State, that all licenses heretofore issued by the North Carolina state board of dental examiners or hereafter issued by said board are subject to annual renewal and the exercise of any privilege granted by any license heretofore issued or hereafter issued by the North Carolina state board of dental examiners is subject to the issuance on or before the first day of January of each year of a certificate of renewal of license.

On or before the first day of January of each year, each dentist engaged in the practice of dentistry in North Carolina shall make application to the North Carolina state board of dental examiners and receive from said board, subject to the further provisions of this section and of this article, a certificate of renewal of said license.

The application shall show the serial number of the applicant's license, his full name, address and the county in which he has practiced during the preceding year, the date of the original issuance of license to said applicant and such other information as the said board from time to time may prescribe, at least six months prior to January first of any year. (1935, c. 66, s. 8.)

§ 90-32. Contents of original license. — The original license granted by the North Carolina state board of dental examiners shall bear a serial number, the full name of the applicant, the date of issuance and shall be signed by the president and the majority of the members of the said board and attested by the seal of said board and the secretary thereof. The certificate of renewal of license shall bear a serial number which need not be the serial number of the original license issued, the full name of the applicant and the date of issuance. (1935, c. 66, s. 8.)

§ 90-33. Displaying license and current certificate of renewal.—The license and the current certificate of renewal of license to practice dentistry issued, as herein provided, shall at all times be displayed in a conspicuous place in the office of the holder thereof and whenever requested the license and the current certificate of renewal shall be exhibited to or produced before the North Carolina state board of dental examiners or to its authorized agents. (1935, c. 66, s. 8.)

§ 90-34. Refusal to grant renewal license. — For cause satisfactory to it or to a majority

thereof, the North Carolina state board of dental examiners may refuse to issue a certificate of renewal of license upon any application made to it therefor, and the applicant whose certificate of renewal of license is refused, for cause by said board, shall not be authorized to practice dentistry in North Carolina until said board shall, in its discretion, renew the license of the applicant. (1935, c. 66, s. 8.)

§ 90-35. Duplicate licenses. — When a person is a holder of a license to practice dentistry in North Carolina or the holder of a certificate of renewal of license, he may make application to the North Carolina state board of dental examiners for the issuance of a copy or a duplicate thereof accompanied by a fee of two dollars. Upon the filing of the application and the payment of the fee, the said board shall issue a copy or duplicate. (1935, c. 66, s. 8.)

§ 90-36. Licensing practitioners of other states. —The North Carolina state board of dental examiners may, in its discretion, issue a license to practice dentistry in this State without an examination other than clinical to a legal and ethical practitioner of dentistry who moves into North Carolina from another state or territory of the United States, whose standard of requirements is equal to that of the State of North Carolina and in which such applicant has conducted a legal and ethical practice of dentistry for at least five (5) years, next preceding his or her removal and who has not, during his period of practice, been charged with violation of the ethics of his profession, nor with the violation of the laws of the state which issued license to him, or of the criminal laws of the United States, nor whose license to practice dentistry has been revoked or suspended by a duly constituted authority.

Application for license to be issued under the provisions of this section shall be accompanied by a certificate from the dental board or like board of the State from which said applicant removed, certifying that the applicant is the legal holder of a license to practice dentistry in that State, and for a period of five (5) years immediately preceding the application has engaged in the practice of dentistry; is of good moral character and that during the period of his practice no charges have been filed with said board against the applicant for the violation of the laws of the State or of the United States, or for the violation of the ethics of the profession of dentistry.

Application for a license under this section shall be made to the North Carolina state board of dental examiners within the six (6) months of the date of the issuance of the certificate hereinbefore required, and said certificate shall be accompanied by the diploma or other evidence of the graduation from a reputable, recognized and approved dental college, school or dental department of a college or university.

Any license issued upon the application of any dentist from any other state or territory shall be subject to all of the provisions of this article with reference to the license issued by the North Carolina state board of dental examiners upon examination of applicants and the rights and privileges to practice the profession of dentistry under any license so issued shall be subject to the same duties, obligations, restrictions and the conditions as imposed by this article on dentists originally examined by the North Carolina state board of dental examiners. (1935, c. 66, s. 9.)

§ 90-37. Certificate issued to dentist moving out of state. — Any dentist duly licensed by the North Carolina state board of dental examiners, desiring to move from North Carolina to another state, territory or foreign country, if a holder of a certificate of renewal of license from said board, upon application to said board and the payment to it of the fee in this article provided, shall be issued a certificate showing his full name and address, the date of license originally issued to him, the date and number of his renewal of license, and whether any charges have been filed with the board against him. The board may provide forms for such certificate, requiring such additional information as it may determine proper. (1935, c. 66, s. 10.)

§ 90-38. Licensing former dentists who have moved back into state or resumed practice. — Any person who shall have been licensed by the North Carolina state board of dental examiners to practice dentistry in this State who shall have retired from practice or who shall have moved from the state and shall have returned to the state, may, upon a satisfactory showing to said board of his proficiency in the profession of dentistry and his good moral character during the period of his retirement, be granted by said board a license to resume the practice of dentistry upon making application to the said board in such form as it may require and upon the payment of the fee of ten dollars. The license to resume practice, after issuance thereof, shall be subject to all the provisions of this article. (1935, c. 66, s. 11.)

This section is constitutional and valid as an exercise of the police power of the state for the good and welfare of the people. Allen v. Carr, 210 N. C. 513, 187 S. E. 809.

And its provisions bear alike upon all classes of persons referred to. Hence the requirement made by the board that the plaintiff make to it a satisfactory showing of his proficiency in the profession of dentistry is no discrimination against the plaintiff. Allen v. Carr, 210 N. C. 513, 519, 187 S. E. 809.

Mandamus will not lie to control the decision of the board in the exercise of its discretionary power under this section, the extent of mandamus in such cases being limited to compel the exercise of the discretionary power, but not to control the decision reached in its exercise. Allen v. Carr, 210 N. C. 513, 187 S. E. 809.

Licensed Dentist Removing from State Must Take Second Examination upon Return.—A dentist licensed by the State Board of Dental Examiners, who thereafter moves from this state and practices his profession successively in other states, upon examination and license by them, and then returns to this state, must obtain a license to resume practice here by passing a second examination by the State Board of Dental Examiners, although such dentist has continuously practiced dentistry since he was first licensed by the State Board. Allen v. Carr, 210 N. C. 513, 187 S. E. 809.

§ 90-39. Fees collectible by board.—In order to provide the means of carrying out and enforcing the provisions of this article and the duties devolving upon the North Carolina state board of dental examiners, it shall charge and collect for: (a) each applicant for examination, a fee of twenty dollars; (b) each certificate of renewal of license, a fee of two dollars; (c) each certificate of practice to a resident dentist desiring to change to another state or territory, a fee of five dollars; (d) each license issued to a legal

practitioner of another state or territory to practice in this State, a fee of twenty dollars; (e) each license to resume the practice issued to a dentist who has retired from the practice of dentistry, or has removed from and returned to the state, a fee of ten dollars. (1935, c. 66, s. 12.)

§ 90-40. Unauthorized practice; penalty. — If any person shall practice or attempt to practice dentistry in this State without first having passed the examination and obtained a license from the North Carolina board of dental examiners; or, if a period of more than one year has elapsed since the issuance of his license, and he shall practice without first having obtained a certificate of renewal of license; or shall practice or attempt to practice dentistry while his license is revoked, or suspended, or when a certificate of renewal of license has been refused; or shall violate any of the provisions of this article for which no specific penalty has been provided, or shall practice dentistry under any name other than his own name, said person shall be guilty of a misdemeanor, and, upon conviction, shall be fined in the sum of fifty ($50.00) dollars for the first offense.

Whenever any person shall have been convicted once in this State of the violation of chapter one hundred and thirty-nine, Public Laws of one thousand eight hundred and seventy-nine, and/or chapter one hundred and seventy-eight, Public Laws of one thousand nine hundred and fifteen and/or amendments to said acts and/or of this article, and shall practice, or attempt to practice, dentistry in violation of the provisions of this article, he shall be guilty of a misdemeanor and, upon conviction, shall be fined or imprisoned in the discretion of the court. (1935, c. 66, s. 13.)

Editor's Note.—The following case was decided under C. S. section 6647, now repealed. However, this case seems applicable to the present law as the provisions of former section 6647 are substantially set forth in the instant section.

Constitutionality.—The legislature has constitutional authority to regulate the practice of dentistry, and a conviction for violating this section is proper. State v. Hicks, 143 N. C. 689, 57 S. E. 441.

§ 90-41. Revocation or suspension of license. —Whenever it shall appear to the North Carolina state board of dental examiners that any dentist who has received license to practice dentistry in this State, or who has received from the said board of dental examiners a certificate of renewal of license, has been guilty of fraud, deceit or misrepresentation in obtaining his license, or of gross immorality, or is an habitual user of intoxicants or drugs, rendering him unfit for the practice of dentistry, or has been guilty of malpractice, or is grossly ignorant or incompetent or has been guilty of wilful neglect in the practice of dentistry, or has been employing unlicensed persons to perform work which, under this article, can be legally done or performed only by persons holding a license to practice dentistry in this State, or of practicing deceit or other fraud upon the public or individual patients in obtaining or attempting to obtain practice, or has been guilty of fraudulent and/or misleading statements of his art, skill or knowledge, or of his method of treatment or practice, or any offense involving moral turpitude, or has by himself or another, solicited or advertised in any manner for professional business, or has been guilty of any other unprofessional conduct in the practice of dentistry, or in the procurement of license has filed, as his own, a diploma or license of another, or a forged diploma or a forged or false affidavit of identification or qualification, the board may revoke the license of such person, or may suspend the license of such person for such period of time as, in the judgment of said board, will be commensurate with the offense committed: Provided, however, it shall not be considered advertising within the meaning of this article for a dentist, duly authorized to practice in this State, to place a card containing his name, telephone number and office address and office hours in a registry or other publication, or to place upon the window or door of his office his name followed by the word, "dentist."

The North Carolina state board of dental examiners is authorized and empowered to appoint an investigator to ascertain the facts with reference to any information coming to the attention of the said board respecting the violation of any of the provisions of this article, or of any act heretofore in effect in this State.

Such investigator so appointed by the North Carolina state board of dental examiners is thereupon authorized and directed to make an investigation as to any information coming to his attention with reference to the violation of the provisions of this article or any act in force at the time of said violation, and formulate a statement of charges which the said board, upon presentation by the said investigator, shall cause to be served upon the dentist so accused. Said notice shall contain the statement of a time and place at which the charges against the accused shall be heard before the board or a quorum thereof, which time shall not be less then ten (10) days from the date of service of said statement and notice.

At the time and place named in said notice, the said board shall proceed to hear the charges against the accused upon competent evidence, oral or by deposition, and at said hearing said accused shall have the right to be present in person and/or represented by counsel. After hearing all the evidence, including such evidence as the accused may present, the board shall determine its action and announce the same.

From any action of the board depriving the accused of his license, or certificate of renewal of license, the accused shall have the right of appeal to the superior court of the county wherein the hearing was held, upon filing notice of appeal within ten days of the decision of the board. The record of the hearing before the North Carolina state board of dental examiners shall constitute the record upon appeal in the superior court and the same shall be heard in the superior court as in the case of consent references. (1935, c. 66, s. 14.)

Editor's Note.—The case discussed below was decided under C. S. section 6649, now repealed. However, this case seems equally applicable to the present law as the provisions of former section 6649 are substantially set forth in the instant section.

This section only makes the use of false advertising, or the circulation of fraudulent and misleading statements, unlawful, and the corollary follows that the use of truthful advertising and circulation of truthful statements are not unlawful, solicitation and advertising not being synonymous terms. In re Owen, 207 N. C. 445, 447, 177 S. E. 403.

Advertising, or the circulation of statements, without the taint of falsity or fraud, either by newspaper or sign, although paid for, cannot be construed as a violation of this section. Id.

§ 90-42. Restoration of revoked license. — Whenever any dentist has been deprived of his license, the North Carolina state board of dental examiners, in its discretion, may restore said license upon due notice being given and hearing had, and satisfactory evidence produced of proper reformation of the licentiate, before restoration. (1935, c. 66, s. 14.)

§ 90-43. Compensation and expenses of board. — Each member of the North Carolina state board of dental examiners shall receive as compensation for his services in the performance of his duties under this article a sum not exceeding ten dollars for each day actually engaged in the performance of the duties of his office, said per diem to be fixed by said board, and all legitimate and necessary expenses incurred in attending meetings of the said board.

The secretary-treasurer shall, as compensation for his services, both as secretary-treasurer of the board and a member thereof, be allowed a reasonable annual salary to be fixed by the board and shall, in addition thereto, receive all legitimate and necessary expenses incurred by him in attending meetings of the board and in the discharge of the duties of his office.

All per diem allowances and all expenses paid as herein provided shall be paid upon voucher drawn by the secretary-treasurer of the board who shall likewise draw voucher payable to himself for the salary fixed for him by the board.

The board is authorized and empowered to expend from funds collected hereunder such additional sum or sums as it may determine necessary in the administration and enforcement of this article. (1935, c. 66, s. 15.)

§ 90-44. Annual report of board.—Said board, shall, on or before the fifteenth day of February in each year, make an annual report as of the thirty-first day of December of the year preceding, of its proceedings, showing therein the examinations given, the fees received, the expenses incurred, the hearings conducted and the result thereof, which said report shall be filed with the governor of the State of North Carolina. (1935, c. 66, s. 15.)

§ 90-45. Exemption from jury duty.—All dentists duly licensed by the North Carolina state board of dental examiners and/or the holders of certificate of renewal of license from said board shall be exempt from service as jurors in any of the courts of this State. (1935, c. 66, s. 16.)

§ 90-46. Filling prescriptions.—Legally licensed druggists of this State may fill prescriptions of dentists duly licensed by the North Carolina state board of dental examiners. (1935, c. 66, s. 17.)

§ 90-47. Restrictions on lectures and teaching. — Lectures on the science of dentistry shall not be made in North Carolina in connection with the demonstration, promotion or distribution of any product or products used or claimed to be useful in the promotion of the health of the oral cavity, except after specific authority has been granted by the North Carolina state board of dental examiners, nor shall the science of dentistry be taught in North Carolina except by duly licensed dentists acting as teachers in a duly organized school or college of dentistry or a dental department of a college or university. (1935, c. 66, s. 18.)

§ 90-48. Rules and regulations of board; violation a misdemeanor.—The North Carolina state board of dental examiners shall be and is hereby vested, as an agency of the State, with full power and authority to enact rules and regulations governing the practice of dentistry within the State, provided such rules, and regulations are not inconsistent with the provisions of this article. Such rules and regulations shall become effective thirty days after passage, and the same may be proven, as evidence, by the president and/or the secretary-treasurer of the board, and/or by certified copy under the hand and official seal of the secretary-treasurer. A certified copy of any rule or regulation shall be receivable in all courts as prima facie evidence thereof if otherwise competent, and any person, firm, or corporation violating any such rule, regulation, or by-law shall be guilty of a misdemeanor, subject to a fine of not more than fifty ($50.00) dollars or imprisonment for not more than thirty days. (1935, c. 66, s. 19.)

Art. 3. The Licensing of Mouth Hygienists, to Teach and Practice Mouth Hygiene in Public Institutions.

§ 90-49. Qualifications and examinations of applicants.—Any person of good moral character who holds a grade "A" teacher's certificate issued by the Department of Education of the State of North Carolina, may be licensed to practice mouth hygiene in conjunction with the teaching of health subjects in the public institutions and public schools of the State as is hereinafter provided in this article.

Such person shall be a graduate in Mouth Hygiene from an approved school for such technical training, said approval to be by the North Carolina State Board of Dental Examiners. Upon the completion of such course or courses and upon the payment of a fee of ten dollars ($10.00), which shall not be returned, the applicant for such license shall apply to the North Carolina State Board of Dental Examiners, at their annual meeting which shall be held on the fourth Monday of June, or at any other such time as they deem necessary, for an examination on such subjects as said Board shall deem essential for the practice of mouth hygiene in this State; and if the examination is satisfactory to said Board of Dental Examiners, the applicant shall be registered and licensed by said Board as a mouth hygienist to practice as such only in the public institutions and public schools of the State. (1929, c. 304, s. 1.)

§ 90-50. By whom employed; duties. — Only public institutions and public school authorities of the State may employ such licensed mouth hygienist, whose clinical work shall be under the direct supervision of the dentist who shall be at the head of the Bureau of Mouth Hygiene of the State Board of Health. The duties of a mouth hygienist shall be to examine mouths of inmates of said institutions and of pupils of said public schools without expense, to make such

charts and records as the head of said Bureau shall require, and to furnish copies of the same to the guardians or teachers of those examined.

Such hygienist shall teach mouth hygiene and the proper care of the teeth and may recommend mouth washes, clean stains, remove deposits and accretions from the exposed surfaces of the teeth of said inmates and pupils, but shall not perform any other operation on the teeth or tissues of the mouth or body. Provided that no pupil may be so examined and treated over the written objection of such child's parents or guardian. (1929, c. 304, s. 2.)

§ 90-51. Revocation or suspension of license.—The State Board of Dental Examiners shall have the power to revoke or suspend the license of any mouth hygienist, who shall violate the provisions of this article, and the proceedings to revoke or suspend said license shall be the same as are provided in the case of suspension or revoking the license of a dentist as set out in §§ 90-22 to 90-48 of this Code. (1929, c. 304, s. 3.)

§ 90-52. Penalty for violation of article.— Any person falsely claiming to have a mouth hygienist's license, or who shall practice or attempt to practice mouth hygiene without first having been duly licensed thereto, as provided in this article, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined twenty-five dollars for each and every offense; any person, who, having been so licensed to practice mouth hygiene in said public institutions and public schools, fails to display the said license, or who practices or attempts to practice mouth hygiene elsewhere than in said public institutions and public schools, as hereinbefore provided, in this article, shall, upon conviction thereof, be fined twenty-five dollars for each and every offense and shall also forfeit her license to practice mouth hygiene in the said institutions and schools. (1929, c. 304, s. 4.)

Art. 4. Pharmacy.

Part 1. Practice of Pharmacy.

§ 90-53. North Carolina pharmaceutical association.—The North Carolina pharmaceutical association, and the persons composing the same, shall continue to be a body politic and corporate under the name and style of the North Carolina Pharmaceutical Association, and by said name have the right to sue and be sued, to plead and be impleaded, to purchase and hold real estate and grant the same, to have and to use a common seal, and to do such other things and perform such other acts as appertain to bodies corporate and politic not inconsistent with the constitution and laws of the state. (Rev., s. 4471; Code, s. 3135; 1881, c. 355, s. 1; C. S. 6650.)

§ 90-54. Object of pharmaceutical association.—The object of the association is to unite the pharmacists and druggists of this state for mutual aid, encouragement, and improvement; to encourage scientific research, develop pharmaceutical talent, to elevate the standard of professional thought, and ultimately restrict the practice of pharmacy to properly qualified druggists and apothecaries. (Rev., s. 4472; Code, s. 3136; 1881, c. 355, s. 2; C. S. 6651.)

§ 90-55. Board of pharmacy; election; terms; vacancies.—The board of pharmacy shall consist of five persons licensed as pharmacists within this state, who shall be elected and commissioned by the governor as hereinafter provided. The members of the present board of pharmacy shall continue in office until the expiration of their respective terms, and the rules, regulations, and by-laws of said board, so far as they are not inconsistent with the provisions of this article, shall continue in effect. The North Carolina pharmaceutical association shall annually elect a resident pharmacist from its number to fill the vacancy annually occurring in said board, and the pharmacist so elected shall be commissioned by the governor and shall hold office for the term of five years and until his successor has been duly elected and qualified. In case of death, resignation, or removal from the state of any member of said board of pharmacy, the said board shall elect in his place a pharmacist who is a member of said North Carolina pharmaceutical association, who shall be commissioned by the governor as a member of the said board of pharmacy for the remainder of the term. It shall be the duty of a member of the board of pharmacy, within ten days after receipt of notification of his appointment and commission, to appear before the clerk of the superior court of the county in which he resides and take and subscribe an oath to properly and faithfully discharge the duties of his office according to law. (Rev., s. 4473; 1905, c. 108, ss. 5-7; C. S. 6652.)

§ 90-56. Election of officers; bonds; annual meetings.—The board of pharmacy shall elect two officers, a president and a secretary-treasurer, who shall hold their offices until their successors shall have been elected and qualified. The president shall be elected from the membership of the board. The secretary-treasurer may or may not be a member of the board, as the board shall determine. The secretary-treasurer shall give bond in such sum as may be prescribed by the board, conditioned for the faithful discharge of the duties of his office acording to law, and said bond shall be made payable to the North Carolina board of pharmacy and approved by said board. The said board shall hold an annual meeting at such time and place as it may provide by rule for the examination of candidates and for the discharge of such other business as may legally come before it, and said board may hold such additional meetings as may be necessary for the examination of candidates and for the discharge of any other business. (Rev., s. 4474; 1905, c. 108, s. 8; 1923, c. 82; C. S. 6653.)

§ 90-57. Powers of board; reports; quorum; records.—The board of pharmacy shall have a common seal, and shall have the power and authority to define and designate nonpoisonous domestic remedies, to adopt such rules, regulations, and by-laws, not inconsistent with this article, as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under this article, and shall have power and authority to employ an attorney to conduct prosecutions and to assist in the conduct of prosecutions under this article, and for any other purposes which said board may deem

necessary. The said board of pharmacy shall keep a record of its proceedings and a register of all persons to whom certificates of license as pharmacists and permits have been issued, and of all renewals thereof; and the books and register of the said board, or a copy of any part thereof, certified by the secretary, attested by the seal of said board, shall be taken and accepted as competent evidence in all the courts of the state. The said board of pharmacy shall make annually to the governor and to the North Carolina pharmaceutical association written reports of its proceedings and of its receipts and disbursements under this article, and of all persons licensed to practice as pharmacists in this state. A majority of the board shall constitute a quorum for the transaction of all business. (Rev., s. 4475; 1905, c. 108, s. 9; 1907, c. 113, s. 1; C. S. 6654.)

§ 90-58. Compensation of secretary and board.—The secretary of the board of pharmacy shall receive such salary as may be prescribed by the board, and shall be paid his necessary expenses while engaged in the performance of his official duties. The other members of the said board shall receive the sum of ten dollars for each day actually employed in the discharge of their official duty and their necessary expenses while engaged therein: Provided, that the compensation and expenses of the secretary and members of the said board of pharmacy and all disbursements for expenses incurred by the said board in carrying into effect and executing the provisions of this article shall be paid out of the fees received by the said board. (Rev., s. 4476; 1905, c. 108, s. 10; 1921, c. 57, s. 2; C. S. 6655.)

§ 90-59. Secretary to investigate and prosecute.—Upon information that any provision of this article has been or is being violated by any member, the secretary of the board of pharmacy or any one appointed by the said board of pharmacy shall promptly make investigations of such matters, and, upon probable cause appearing, shall file complaint and prosecute the offender. All fines and penalties prescribed in this article shall be recoverable by suit in the name of the people of the state. In all prosecutions for the violation of any of the provisions of this article, a certificate under oath by the secretary of the board of pharmacy shall be competent and admissible as evidence in any court of the state that the person so charged with the violation of this article is not a registered pharmacist or assistant pharmacist, as required by law. (Rev., s. 4477; 1905, c. 108, s. 11; 1923, c. 74, s. 1; C. S. 6656.)

Editor's Note.—Prior to the amendment to this section by Public Laws 1923 investigation and prosecution was restricted to the secretary of the board and there was no provision for admission as evidence of a certificate of the secretary under oath. The effect is to make more effective the provisions of this section by directing any member of the Board of Pharmacy, or any person appointed by the Board to investigate and prosecute violations of the aforementioned article, in addition to the Secretary of the Board; and by making a certificate under oath by the secretary of the Board competent and admissible as evidence in any court of the state, a person charged with violation of such law is not duly licensed. See 1 N. C. Law Rev. 300.

§ 90-60. Fees collectible by board.—The board of pharmacy shall be entitled to charge and collect the following fees: For the examination of an applicant for license as a pharmacist ten dollars; for renewing the license as a pharmacist or an assistant pharmacist, five dollars; for issuing a permit to a physician to conduct a drug store in a village of not more than five hundred inhabitants, ten dollars; for the renewal of permit to a physician to conduct a drug store in a village of not more than five hundred inhabitants, five dollars. All fees shall be paid before any applicant may be admitted to examination or his name placed upon the register of pharmacists or before any license or permit, or any renewal thereof, may be issued by the board. (Rev., s. 4478; 1905, c. 108, s. 12; 1921, c. 57, s. 3; C. S. 6657.)

§ 90-61. Application and examination for license, prerequisites.—Every person licensed or registered as a pharmacist on February 4, 1905, under the laws of this state shall be entitled to continue in the practice of his profession until the expiration of the term for which his certificate of registration or license was issued. Every person who shall desire to be licensed as a pharmacist shall file with the secretary of the board of pharmacy an application, duly verified under oath, setting forth the name and age of the applicant, the place or places at which and the time he has spent in the study of the science and art of pharmacy, the experience in the compounding of physicians' prescriptions which the applicant has had under the direction of a legally licensed pharmacist, and such applicant shall appear at a time and place designated by the board of pharmacy and submit to an examination as to his qualifications for registration as a licensed pharmacist. The application referred to above shall be prepared and furnished by the board of pharmacy.

In order to become licensed as a pharmacist, within the meaning of this article, an applicant shall be not less than twenty-one years of age, he shall present to the board of pharmacy satisfactory evidence that he has had four years experience in pharmacy under the instruction of a licensed pharmacist, and that he is a graduate of a reputable school or college of pharmacy, and he shall also pass a satisfactory examination of the board of pharmacy: Provided, however, that the actual time of attendance at a reputable school or college of pharmacy, not to exceed three years, may be deducted from the time of experience required. Provided, further, that any person legally registered or licensed as a pharmacist by another state board of pharmacy, and who has had fifteen years continuous experience in North Carolina under the instruction of a licensed pharmacist next preceding his application shall be permitted to stand the examination to practice pharmacy in North Carolina upon application filed with said board. Any person who has had two years of college training and has been filling prescriptions in a drug store or stores for twenty years or longer may take the examination as provided in the above proviso. (Rev., ss. 4479, 4480; 1905, c. 108, s. 13; 1915, c. 165; 1921, c. 52; 1933, c. 206, ss. 1, 2; 1935, c. 181; 1937, c. 94; C. S. 6658.)

Editor's Note.—Public Laws of 1933, c. 206, inserted the last proviso of this section relative to pharmacists in another state taking the examination in North Carolina. The 1937 amendment abolished the time restriction formerly appearing in the proviso.

In the first proviso of the second paragraph of this sec-

tion the maximum deductible time was increased from two to three years by Public Laws of 1935, c. 181.

The provisions of this section, as amended in 1933, relative to a pharmacist licensed by another state, do not entitle a person meeting the qualifications of this act and being of the required age to be permitted to stand the examination upon his application therefor filed after 1 July, 1933, although he has previously made other applications therefor and has been permitted to stand examinations of the board held prior to 1 July, 1933, and has failed to pass such examinations, the request filed after 1 July, 1933, for a "re-examination" being in legal effect an application for an examination de novo, nor is this result affected by the fact that the board has permitted applicants who failed to pass the examination to stand a subsequent examination without filing a new application, and the issuance of a writ of mandamus directing the board to permit such applicant to stand the examination upon his application filed after 1 July, 1933, is error. McNair v. North Carolina Board of Pharmacy, 208 N. C. 279, 180 S. E. 78.

§ 90-62. When license issued.—If an applicant for license as pharmacist has complied with all the requirements of §§ 90-60 and 90-61, the board of pharmacy shall enroll his name upon the register of pharmacists and issue to him a license, which shall entitle him to practice as a pharmacist up to the first day of January next ensuing, as provided in this article for the annual renewal of every registration. (Rev., s. 4481; 1905, c. 108, s. 15; 1921, c. 68, s. 1; C. S. 6659.)

§ 90-63. Certain assistant pharmacists may take registered pharmacist's examination; no original assistants' certificates issued after January 1, 1939.—Every person who is the holder of a certificate as a registered assistant pharmacist, issued prior to January first, one thousand nine hundred and thirty-nine, shall be admitted to the registered pharmacist examination. After January first, one thousand nine hundred and thirty-nine, the board shall not issue an original certificate to any person as a registered assistant pharmacist: Provided, however, that nothing in this section shall prevent any person who was registered as an assistant pharmacist prior to January first, one thousand nine hundred and thirty-nine, from continuing to practice as a registered assistant pharmacist. (1937, c. 402.)

§ 90-64. When license without examination issued.—The board of pharmacy may issue licenses to practice as pharmacists in this state, without examination, to such persons as have been legally registered or licensed as pharmacists by other boards of pharmacy, if the applicant for such license shall present satisfactory evidence of the same qualifications as are required from licentiates in this state, and that he was registered or licensed by examination by such other board of pharmacy, and that the standard of competence required by such board of pharmacy is not lower than that required in this state. All applicants for license under this section shall, with their application, forward to the secretary of the board of pharmacy the same fees as are required of other candidates for license. (Rev., s. 4482; 1905, c. 108, s. 16; C. S. 6660.)

§ 90-65. When license refused or revoked; fraud.—The board of pharmacy may refuse to grant a license to any person guilty of felony or gross immorality, or who is addicted to the use of alcoholic liquors or narcotic drugs to such an extent as to render him unfit to practice pharmacy; and the board of pharmacy may, after due notice and hearing, revoke a license for like cause, or any license which has been procured by fraud. Any license or permit, or renewal thereof, obtained through fraud or by any fraudulent or false representations shall be void and of no effect in law. (Rev., s. 4483; 1905, c. 108, ss. 17, 25; C. S. 6661.)

§ 90-66. Expiration and renewal of license; failure to renew misdemeanor.—Every licensed pharmacist or assistant pharmacist who desires to continue in the practice of his profession, and every physician holding a permit to sell drugs in a village of not more than six hundred inhabitants, shall within thirty days next preceding the expiration of his license or permit, file with the secretary and treasurer of the board of pharmacy an application for the renewal thereof, which application shall be accompanied by the fee hereinbefore prescribed. If the board of pharmacy shall find that an applicant has been legally licensed in this state, and is entitled to a renewal thereof, or to a renewal of a permit, it shall issue to him a certificate attesting that fact. And if any pharmacist or assistant pharmacist shall fail, for a period of six days after the expiration of his license, to make application to the board for its renewal, his name shall be erased from the register of licensed pharmacists and assistant pharmacists and such person, in order to again become registered as a licensed pharmacist or assistant pharmacist shall be required to pay the same fee as in the case of original registration. And if any holder of a permit to sell drugs in a village of not more than six hundred inhabitants shall fail, for a period of sixty days after the expiration of his permit, to make application for the renewal thereof, his name shall be erased from the register of persons holding such permits, and he may be restored thereto only upon the payment of the fee required for the granting of original permit. The registration of every license and every permit issued by the board shall expire on the thirty-first day of December next ensuing the granting thereof: Provided, that the board of pharmacy, in its discretion, shall have the power to issue a license or permit, or renewals thereof, to any person whose license or permit has been revoked by operation of law or by the board of pharmacy, or whose renewal thereof has been refused by the board of pharmacy, after the expiration of one year from the date of such revocation of license or permit, or refusal of a renewal thereof, upon satisfactory proof that such person is entitled to such license or permit, or to a renewal thereof.

Every holder of a license or permit as a pharmacist or assistant pharmacist, who after the expiration thereof continues to carry on the business for which the license or permit was granted, without renewing the same as required by this section, shall be guilty of a misdemeanor, and fined not less than five nor more than twenty-five dollars. (Rev., ss. 3653, 4484; 1905, c. 108, ss. 18, 19, 27; 1911, c. 48; 1921, c. 68, s. 2; C. S. 6662.)

§ 90-67. License to be displayed; penalty.—Every certificate or license to practice as a pharmacist or assistant pharmacist and every permit to a practicing physician to conduct a pharmacy

or drug store in a village of not more than six hundred inhabitants, and every last renewal of such license or permit, shall be conspicuously exposed in the pharmacy or drug store or place of business of which the pharmacist, or other person to whom it is issued, is the owner or manager, or in which he is employed.

The holder of such license, permit, or renewal who fails to expose it as required by this section shall be guilty of a misdemeanor, and fined not less than five nor more than twenty-five dollars, and each day that such license, permit, or renewal thereof shall not be exposed shall be held to constitute a separate and distinct offense. (Rev., ss. 3651, 4485; 1905, c. 108, ss. 18, 26; 1921, c. 68, s. 3; C. S. 6663.)

§ 90-68. Unlicensed person not to use title of pharmacist; penalty.—It shall be unlawful for any person not legally licensed as a pharmacist or assistant pharmacist to take, use or exhibit the title of pharmacist or assistant pharmacist or licensed or registered pharmacist, or the title druggist or apothecary, or any other title, name, or description of like import.

Every person who violates this section shall be guilty of a misdemeanor and be fined not less than twenty-five nor more than one hundred dollars. (Rev., ss. 3652, 4486; 1905, c. 108, ss. 22, 29; 1921, c. 68, s. 4; C. S. 6664.)

§ 90-69. Purity of drugs protected; seller responsible; adulteration misdemeanor. — Every person who shall engage in the sale of drugs, chemicals, and medicines shall be held responsible for the quality of all drugs, chemicals, and medicines he may sell or dispense, with the exception of those sold in the original packages of the manufacturers, and also those known as "patent or proprietary medicines."

If any person engaged in the sale of drugs, chemicals, and medicines shall intentionally adulterate, or cause to be adulterated, or exposed to sale knowing the same to be adulterated, any drugs, chemicals, or medical preparations, he shall be guilty of a misdemeanor and liable to a fine not exceeding one hundred dollars, and if he is a licensed pharmacist or assistant pharmacist his name shall be stricken from the register of licensed pharmacists and assistant pharmacists. (Rev., ss. 3648, 4488; Code, s. 3145; 1881, c. 355, s. 11; 1897, c. 182, s. 7; 1905, c. 108, s. 3; 1921, c. 68, s. 5; C. S. 6665.)

§ 90-70. Prescriptions preserved; copies furnished.—Every proprietor or manager of a drug store or pharmacy shall keep in his place of business a suitable book or file, in which shall be preserved for a period of not less than five years the original of every prescription compounded or dispensed at such drug store or pharmacy. Upon the request of the prescribing physician, or of the person for whom such prescription was compounded or dispensed, the proprietor or manager of such drug store or pharmacy shall furnish a true and correct copy of such prescription, and said book or file of original prescriptions shall at all times be open to the inspection and examination of duly authorized officers of the law or other persons authorized and directed by the board of pharmacy to make such inspection and examination. (Rev., s. 4490; 1905, c. 108, s. 21; C. S. 6666.)

§ 90-71. Selling drugs without license prohibited; drug trade regulated.—It shall be unlawful for any person not licensed as a pharmacist or assistant pharmacist within the meaning of this article to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding, or dispensing of any drugs, chemicals, or poison, or for the compounding of physicians' prescriptions, or to keep exposed for sale at retail any drugs, chemicals, or poison, except as hereinafter provided, or for any person not licensed as a pharmacist within the meaning of this article to compound, dispense, or sell at retail any drug, chemical, poison, or pharmaceutical preparation upon the prescription of a physician or otherwise, or to compound physicians' prescriptions except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist under this article. Provided, that during the temporary absence of the licensed pharmacist in charge of any pharmacy, drug or chemical store, a licensed assistant pharmacist may conduct or have charge of said store. And it shall be unlawful for any owner or manager of a pharmacy or drug store or other place of business to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense, or sell at retail any drug, medicine, or poison, except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist.

Nothing in this section shall be construed to interfere with any legally registered practitioner of medicine in the compounding of his own prescriptions, nor with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shall keep in his employ at least one person who is licensed as a pharmacist, nor with the selling at retail of nonpoisonous domestic remedies, nor with the sale of patent or proprietary preparations which do not contain poisonous ingredients, nor, except in cities and towns wherein there is located an established drug store, and except in the counties of Avery, Bertie, Cleveland, Cabarrus, Cumberland, Duplin, Forsyth, Gaston, Guilford, Halifax, Harnett, Iredell, Henderson, Mecklenburg, Montgomery, Nash, Pender, Moore, New Hanover, Orange, Richmond, Rockingham, Robeson, Rowan, Scotland, and Wilson, shall this section be construed to interfere with the sale of paregoric, Godfrey's Cordial, Aspirin, alum, borax, bicarbonate of soda, calomel tablets, castor oil, compound carthartic pills, copperas, cough remedies which contain no poison or narcotic drugs, cream of tartar, distilled extract witch hazel, epsom salts, harlem oil, gum asafetida, gum camphor, glycerin, peroxide of hydrogen, petroleum jelly, saltpetre, spirit of turpentine, spirit of camphor, sweet oil, and sulphate of quinine, nor with the sale of poisonous substances which are sold exclusively for use in the arts or for use as insecticides when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word "Poison," the vignette of

the skull and crossbones, and the name of at least two readily obtainable antidotes.

In any village of not more than six hundred inhabitants the board of pharmacy may, after due investigation, grant any legally registered practicing physician a permit to conduct a drug store or pharmacy in such village, which permit shall not be valid in any other village than the one for which it was granted, and shall cease and terminate when the population of the village for which such permit was granted shall become greater than six hundred. (Rev., s. 4487; 1905, c. 108, s. 4; 1921, c. 68, s. 6; Ex. Sess. 1924, c. 116; C. S. 6667.)

Local Modification.—Johnston: 1929, c. 249; Onslow, McDowell: 1925, c. 27.

Editor's Note.—In 3 N. C. Law Rev. in considering this section it is said: it "prohibits the sale of drugs without a license and regulates the drug trade. It excepts from the requirements of a license physicians who compound their own prescriptions, also the sale of non-poisonous domestic remedies and patent medicines containing no poisonous ingredients.

"Ch. 116 Act 1924 adds to these exceptions a list of some thirty drugs and remedies, such as paregoric, aspirin, bicarbonate of soda, calomel, castor oil, camphor, etc. These may be sold by anybody without a pharmaceutical license, provided there is no established drug store in the same town. The act does not apply in twenty-six counties, which further restricts it.

"Since most of the list of drugs named are harmless in ordinary use, it may be safe enough to allow the small, country store-keeper to sell them, but the statute makes an opening which might lead to worse things. There may be a question whether paregoric, a strong narcotic, should ever be sold except upon a doctor's prescription. Similarly with other drugs in the list. It seems that the legislature would have done better to leave the details of drug-selling to the State Board of Pharmacy or to some other expert group who understand the nature and effect of drugs and the danger involved in allowing them to be sold by anybody."

§ 90-72. Compounding prescriptions without license.—If any person, not being licensed as a pharmacist or assistant pharmacist, shall compound, dispense, or sell at retail any drug, medicine, poison, or pharmaceutical preparation, either upon a physician's prescription or otherwise, and if any person being the owner or manager of a drug store, pharmacy, or other place of business, shall cause or permit any one not licensed as a pharmacist or assistant pharmacist to dispense, sell at retail, or compound any drug, medicine, poison, or physician's prescription contrary to the provisions of this article, he shall be deemed guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars. (Rev., s. 3649; 1905, c. 108, s. 24; 1921, c. 68, s. 7; C. S. 6668.)

Editor's Note.—By the amendment Public Laws 1921 this section was made applicable to assistant pharmacists.

Sale by a Clerk.—Where a clerk in a drug store unlawfully sells intoxicating liquor without the knowledge and against the orders of the owner, the owner is not liable for the act of the clerk. State v. Neal, 133 N. C. 689, 45 S. E. 756; State v. Kittelle, 110 N. C. 560, 15 S. E. 103, distinguished.

Stated in McNair v. North Carolina Board of Pharmacy, 208 N. C. 279, 282, 180 S. E. 78.

§ 90-73. Conducting pharmacy without license.—If any person, not being licensed as a pharmacist, shall conduct or manage any drug store, pharmacy, or other place or business for the compounding, dispensing, or sale at retail of any drugs, medicines, or poisons, or for the compounding of physicians' prescriptions contrary to the provisions of this article, he shall be deemed guilty of a misdemeanor, and be fined not less than twenty-five nor more than one hundred dollars, and each week such drug store or pharmacy or other place of business is so unlawfully conducted shall be held to constitute a separate and distinct offense. (Rev., s. 3650; 1905, c. 108, s. 23; C. S. 6669.)

§ 90-74. Pharmacist obtaining license fraudulently.—If any person shall make any fraudulent or false representations for the purpose of procuring a license or permit, or renewal thereof, either for himself or for another, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars; and if any person shall wilfully make a false affidavit or any other false or fraudulent representation for the purpose of procuring a license or permit, or renewal thereof, either for himself or for another, he shall be deemed guilty of perjury, and upon conviction thereof shall be subject to like punishment as is now prescribed for the crime of perjury. (Rev., s. 3654; 1905, c. 108, s. 25; C. S. 6670.)

§ 90-75. Registration of drug stores and pharmacies.—The Board of Pharmacy shall require and provide for the annual registration of every drug store and pharmacy doing business in this State; the proprietor of every drug store or pharmacy opening for business after January 1, 1928, shall apply to the Board of Pharmacy for registration and it shall be unlawful for any drug store or pharmacy to do business until so registered; the fee for such registration, whether original or annual, shall be one dollar ($1), and upon the payment thereof the Board of Pharmacy shall issue permit to applicant entitled to receive same. All permits issued under this section shall expire on December thirty-first of each year.

The terms "drug store" and "pharmacy" as used herein shall mean any store or other place in which drugs, medicines, chemicals, poisons, or prescriptions are compounded, dispensed, or sold at retail, or which uses the title "drug store," "pharmacy" or "apothecary" or any combination of such titles, or any title or description of like import: Provided, that nothing in this section shall apply to the sale of domestic remedies, patent and proprietary preparations, and insecticides as set out and provided for in paragraph two of § 90-71. (1927, c. 28, s. 1.)

§ 90-76. Substitution of drugs, etc., prohibited.—Any person or corporation engaged in the business of selling drugs, medicines, chemicals, or preparations for medical use or of compounding or dispensing physicians' prescriptions, who shall, in person or by his or its agents or employees, or as agent or employee of some other person, knowingly sell or deliver to any person a drug, medicine, chemical preparation for medicinal use, recognized or authorized by the latest edition of the United States Pharmacopœia and National Formulary, or prepared according to the private formula of some individual or firm, other or different from the drug, medicine, chemical or preparation for medicinal use, recognized or authorized by the latest edition of the United States Pharmacopœia and National Formulary, or prepared according to the private formula of some individual or firm, ordered or called for by such person, or called for in a physician's prescription,

shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine or imprisonment, or both, at the discretion of the court: Provided, that this section shall apply to registered drug stores and their employees only. (1937, c. 59.)

Part 2. Dealing in Specific Drugs Regulated.

§ 90-77. Poisons; sales regulated; label; penalties.—It shall be unlawful for any persons to sell or deliver to any person any of the following described substances or any poisonous compound, combination, or preparation thereof, to-wit: The compounds and salts of arsenic, antimony, lead, mercury, silver and zinc, oxalic and hydrocyanic acids and their salts, the concentrated mineral acids, carbolic acid, the essential oils of almonds, pennyroyal, tansy and savine, croton oil, creosote, chloroform, chloral hydrate, cantharides, or any aconite, belladonna, bitter almonds, colchicum, cotton root, conium, cannabis indica, digitalis, hyoscyamus, nux vomica, opium, ergot, cannabis stramonius, or any of the poisonous alkaloids or alkaloidal salts or other poisonous principles derived from the foregoing, or cocaine or any other poisonous alkaloids or their salts, or any other virulent poisons, except in the manner following: It shall first be learned by due inquiry that the person to whom delivery is made is aware of the poisonous character of the substance, and that it is desired for a lawful purpose, and the box, bottle, or other package shall be plainly labeled with the name of the substance, the word "Poison," and the name of the person or firm dispensing the substance.

Before a delivery is made of any of the following substances, to wit, the compounds and salts of arsenic, antimony and mercury, hydrocyanic acid and its salts, strychnine and its salts, and the essential oil of bitter almonds, there shall be recorded in a book kept for the purpose the name of the article, the quantity delivered, the purpose for which it is required as represented by the purchaser, the date of delivery, the name and address of the purchaser, the name of the dispenser, which book shall be preserved for at least five years and shall at all times be open to the inspection of the proper officers of the law: Provided, that the foregoing provision shall not apply to articles dispensed upon the order of persons believed by the dispenser to be lawfully authorized practitioners of medicine or dentistry: Provided, also, that the record of sale and delivery above mentioned shall not be required of manufacturers and wholesalers who shall sell any of the foregoing substances at wholesale; but the box, bottle, or other package containing such substances, when sold at wholesale, shall be properly labeled with the name of the substance, the word "Poison," and the name and address of the manufacturer or wholesaler: Provided further, that it shall not be necessary to place a poison label upon, or to record the delivery of, the sulphide of antimony or the dioxide or carbonate of zinc or lead, or of colors ground in oil and intended for use as paint, or paris green, when dispensed in the original package of the manufacturer or wholesaler, or calomel, paregoric, or other preparations of opium containing less than two grains of opium to the fluid ounce, nor in the case of preparations containing any of the substances named in this section when in a single box, bottle, or other package, or when the bulk of two fluid ounces or the weight of two avoirdupois ounces does not contain more than an adult medicinal dose of such poisonous substance.

If any person shall sell or deliver to any person any poisonous substance specified in this section without labeling the same and recording the delivery thereof in the manner prescribed, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars. (Rev., ss. 3655, 4489; 1905, c. 108, ss. 20, 28; C. S. 6671.)

§ 90-78. Certain patent cures and devices; sale and advertising forbidden.—It shall be unlawful for any person, firm, association, or corporation in the state, or any agent thereof, to sell or offer for sale any proprietary or patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found, or any mechanical device whose claims for the cure or treatment of disease are false or fraudulent; and it shall be unlawful for any person, firm, association, or corporation in the state, or agent thereof, to publish in any manner, or by any means, or cause to be published, circulated, or in any way placed before the public any advertisement in a newspaper or other publication or in the form of books, pamphlets, handbills, circulars, either printed or written, or by any drawing, map, print, tag, or by any other means whatsoever, any advertisement of any kind or description offering for sale or commending to the public any proprietary or patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found, or any mechanical device for the treatment of disease, when the North Carolina board of health shall declare that such device is without value in the treatment of disease.

Any person, firm, association, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars for each offense. Each sale, offer for sale, or publication of any advertisement for sale of any of the medicines, remedies, or devices mentioned in this section shall constitute a separate offense. (1917, c. 27, ss. 1, 2, 3; C. S. 6684.)

Editor's Note.—In 4 N. C. Law Rev. it is said: "There is a statute in this State which makes it unlawful for any person to publish any advertisement of any patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found or any mechanical device for the treatment of disease when the North Carolina Board of Health shall declare that such device is without value in the treatment of disease. This curious statute puts too heavy a burden on the advertising manager, for who is to say whether there is a cure for a disease or whether a device is of value in the treatment of disease."

§ 90-79. Certain patent cures and devices; enforcement of law.—To provide for the efficient enforcement of § 90-78, the same shall be under the supervision and management of the North Carolina board of pharmacy, and it shall be the

duty of all registered pharmacists to report immediately any violations thereof to the secretary of the board of pharmacy, and any wilful failure to make such report shall have the effect of revoking his license to practice pharmacy in this state. (1917, c. 27, ss. 4, 5; C. S. 6685.)

§ 90-80. Department of agriculture to analyze patent medicines.—The chemists and other experts of the department of agriculture shall, under such rules and regulations as may be prescribed by the board of pharmacy, and upon request of the secretary of said board, make an analytical examination of all samples of drugs, preparations, and compounds sold or offered for sale in violation of §§ 90-78 and 90-79. (1917, c. 27, s. 6; C. S. 6686.)

§ 90-81. Hypnotic drugs defined and enumerated.—In §§ 90-81 to 90-85, unless the context otherwise requires, the words "hypnotic drug" include:

Sulphonmethane (sulphonal).

Sulphonethylmethane (trional).

Diethyl sulphonedrethylmethane (tetronal).

Dietyl barbituric acid (barbital), or any of the foregoing by whatsoever trade name or designation; or any compound, preparation, mixture or solution thereof; or any salt or derivative thereof or of barbituric acid possessing hypnotic properties or effects.

Chloral hydrate or any mixture or solution thereof containing twenty grains or more thereof to the fluid ounce. (1931, c. 162, s. 1.)

§ 90-82. Sale prohibited except by physicians and pharmacists.—No person other than a licensed pharmacist, a duly licensed physician, doctor of dental surgery, or doctor of veterinary surgery shall sell or offer to sell any hypnotic drug to consumers or have such drug in his possession with intent to sell or give away to consumers. (1931, c. 162, s. 2.)

§ 90-83. Limitation on quantity that may be sold; exception; record of sales. — No hypnotic drug as defined in §§ 90-81 to 90-85 may be sold in quantities exceeding twelve therapeutic doses, except to persons known to be suffering with epilepsy: Provided, however, that nothing in §§ 90-81 to 90-85 shall apply to prescriptions of duly licensed physicians, doctors of dental surgery, or doctors of veterinary surgery.

Any person dispensing any hypnotic drug coming under the provisions of §§ 90-81 to 90-85, other than upon prescription, shall record in a book kept for the purpose the name of the article sold, the quantity delivered, the date of delivery, the name and address of the purchaser and the name of the dispenser, which record shall at all times be open to the inspection of the proper officer of the law. (1931, c. 162, s. 3.)

§ 90-84. Dispensing of drugs by physicians in lawful practice.—Nothing in §§ 90-81 to 90-85 shall be construed to limit the sale of hypnotic drugs to, nor to the dispensing of hypnotic drugs in the course of their professional practice by, duly licensed physicians, doctors of dental surgery or doctors of veterinary surgery lawfully practicing their profession in this State, or to registered retail or wholesale pharmacists, or to hospitals and other institutions for the treatment of defective, afflicted, sick and injured persons. (1931, c. 162, s. 4.)

§ 90-85. Violation of sections 90-81 to 90-85 a misdemeanor.—Any person who shall violate any provision of §§ 90-81 to 90-85 shall be deemed guilty of a misdemeanor and upon conviction therefor for the first offence shall be fined not more than twenty-five dollars, and upon conviction of the second offence shall be fined not more than one hundred dollars. (1931, c. 162, s. 5.)

Art. 5. Narcotic Drug Act.

§ 90-86. Title of article. — This article may be cited as the Uniform Narcotic Drug Act. (1935, c. 477, s. 26.)

§ 90-87. Definitions. — The following words and phrases as used in this article shall have the following meanings unless the context otherwise requires:

(a) "Person" includes any corporation, association, copartnership or one or more individuals.

(b) "Physician" means any person authorized by law to practice medicine in this State and any other person authorized by law to treat sick and injured human beings in this State and to use narcotic drugs in connection with such treatment.

(c) "Dentist" means any person authorized by law to practice dentistry in this State.

(d) "Veterinarian" means any person authorized by law to practice veterinary in this State.

(e) "Manufacturer" means a person who by compounding, mixing, cultivating, growing or other process produces or prepares narcotic drugs, but does not include a pharmacist who compounds narcotic drugs to be sold or dispensed on prescription.

(f) "Wholesaler" means a person who supplies narcotic drugs that he himself has not produced or prepared, on official written order, but not on prescription.

(g) "Pharmacist" means a registered pharmacist of this State.

(h) "Pharmacy owner" means the owner of a store or other place of business where narcotic drugs are compounded or dispensed by a registered pharmacist; but nothing in this article contained shall be construed as conferring on a person who is not registered or licensed as a pharmacist any authority, right or privilege that is not granted to him by the pharmacy laws of this State.

(i) "Hospital" means an institution for the care and treatment of the sick and injured, approved by the state board of pharmacy as proper to be entrusted with the custody of narcotic drugs and the professional use of narcotic drugs under the direction of a physician, dentist or veterinarian.

(j) "Laboratory" means a laboratory to be entrusted with the custody of narcotic drugs and the use of narcotic drugs for scientific, experimental and medical purposes and for purposes of instruction approved by the state board of pharmacy.

(k) "Sale" includes barter, exchange or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant or employee.

(l) "Coca leaves" includes cocaine and any compound, manufacture, salt, derivative, mixture

or preparation of coca leaves, except derivatives of coca leaves which do not contain cocaine, ecgonine, or substances from which cocaine or ecgonine may be synthesized or made.

(m) "Opium" includes morphine, codeine and heroin and any compound, manufacture, salt, derivative, mixture, or preparation of opium.

(n) "Cannabis" includes the following substances under whatever means they may be designated:

(1) The dried flowering or fruiting tops of the pistillate plant cannabis sativa L. from which the resin has not been extracted;

(2) The resin extracted from such tops; and

(3) Every compound, manufacture, salt, derivative, mixture, or preparation of such resin or of such tops from which the resin has not been extracted; and

(4) Peyote or mara huanna.

(o) "Narcotic drugs" means coca leaves, opium, cannabis, and every substance not chemically distinguishable from them.

(p) "Federal narcotic law" means the laws of the United States relating to opium, coca leaves and other narcotic drugs.

(q) "Official written order" means an order written on a form provided for that purpose by the United States commissioner of narcotics, under any laws of the United States making provision therefor, if such order forms are authorized and required by federal law.

(r) "Dispense" includes distribute, leave with, give away, dispose of or deliver.

(s) "Registry number" means the number assigned to each person registered under the federal narcotic laws. (1935, c. 477, s. 1.)

Editor's Note.—For an analysis of this article, see 13 N. C. Law Rev. 403.

Applied in State v. Williams, 210 N. C. 159, 185 S. E. 661.

§ 90-88. Manufacture, sale, etc., of narcotic drugs regulated.—It shall be unlawful for any person to manufacture, possess, nave under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this article. (1935, c. 477, s. 2.)

Indictment Quashed for Uncertainty.—Where the defendant was indicted under this section, the indictment following the words of the section and charging defendant in one count with the commission of the several acts forbidden, the several offenses being charged by the use of the disjunctive "or," it was held that it was impossible to ascertain from the indictment which of the several separate offenses defendant was charged with committing, the indictment failing to charge the commission of each of them, since the disjunctive "or" is used, and defendant's motion to quash the indictment for uncertainty should have been allowed. State v. Williams, 210 N. C. 159, 185 S. E. 661.

§ 90-89. Conditions of sale of drugs. — A duly licensed manufacturer or wholesaler may sell and dispense narcotic drugs to any of the following persons but only on official written orders:

(a) To a manufacturer, wholesaler, pharmacist or pharmacy owner.

(b) To a physician, dentist or veterinarian.

(c) To a person in charge of a hospital, but only for use by or in that hospital.

(d) To a person in charge of a laboratory, but only for use in that laboratory for scientific and medicinal purposes.

A duly licensed manufacturer or wholesaler may sell narcotic drugs to any of the following persons:

(a) On a special written order accompanied by a certificate of exemption, as required by the federal narcotic laws, to a person in the employ of the United States government or of any state, territory, district, county, municipality, or insular government, purchasing, receiving, possessing or dispensing narcotic drugs by reason of his official duties.

(b) To a master of a ship or a person in charge of any air craft upon which no physician is regularly employed for the actual medical needs of persons on board such ship or air craft when not in port, provided such narcotic drug shall be sold to the master of such ship or person in charge of such air craft only in pursuance of a special order form approved by a commanding medical officer or acting assistant surgeon of the United States public health service.

(c) To a person in a foreign country if the provisions of the federal narcotic laws are complied with. (1935, c. 477, s. 3.)

§ 90-90. Execution of written orders; use in purchase; preserving copies for inspection. — An official written order for any narcotic drug shall be signed in duplicate by the person giving said order or by his duly authorized agent. The original shall be presented to the person who sells or dispenses the narcotic drug or drugs named therein. In the event of the acceptance of such order by said person, each party to the transaction shall preserve his copy of such order for a period of two years, in such a way as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this article. It shall be deemed a compliance with this section if the parties to the transaction have complied with the federal narcotic laws respecting the requirements governing the use of order forms. (1935, c. 477, s. 4.)

§ 90-91. Lawful possession of drugs.—Possession of or control of narcotic drugs obtained as authorized in this article shall be lawful if obtained in the regular course of business, occupation, profession, employment or duty of the possessor. (1935, c. 477, s. 5.)

§ 90-92. Dispensing of drugs regulated. — A person in charge of a hospital or of a laboratory, or in the employ of this State or of any other state, or of any political subdivision thereof, and the master or other proper officer of a ship or air craft, who obtains narcotic drugs under the provisions of this article or otherwise shall not administer, nor dispense, nor otherwise use such drugs within this State except within the scope of his employment or official duty and then only for scientific or medicinal purposes and subject to the provisions of this article. (1935, c. 477, s. 6.)

§ 90-93. Sale of drugs on doctor's prescription.—A pharmacist in good faith may sell and dispense narcotic drugs to any person upon the written prescription of a physician, dentist or veterinarian, provided it is properly executed, dated and signed by the person prescribing on the day when issued and bearing the full name and address of the patient for whom, or of the

owner of the animal for which, the drug is dispensed, and the full name, address and registry number under the federal narcotic laws of the person so prescribing if he is required by those laws to be so registered. If the prescription be for an animal, it shall state the species of animal for which the drug is prescribed. A person filling the prescription shall write the date of filling and his own signature on the face of the prescription. The prescription shall be retained on file by the proprietor of the pharmacy in which it is filled for a period of two years so as to be readily accessible for the inspection of any officers engaged in the enforcement of this article. The prescription shall not be refilled.

The legal owner of any stock of narcotic drugs in a pharmacy, upon discontinuance of dealing in said drugs, may sell said stock to a manufacturer, wholesaler, pharmacist or pharmacy owner but only upon an official written order.

A pharmacist, only upon an official written order, may sell to a physician, dentist or veterinarian in quantities not exceeding one ounce at any one time, aqeous or oleaginous solutions of which the content of narcotic drugs does not exceed a proportion greater than twenty per centum (20%) of the complete solution, to be used for medicinal purposes. (1935, c. 477, s. 7.)

Editor's Note.—The case treated below was decided under C. S. section 6677, now repealed. This case is made available to the practitioner as an aid in construing the present law, but it must be read in the light of the former law.

Liability to Husband for Injury to Wife.—One who, despite the protests and warnings of a husband, persistently sells drugs to the latter's wife, is liable in damages to the husband for the injuries so sustained. Holleman v. Harward, 119 N. C. 150, 25 S. E. 927.

§ 90-94. Prescribing, administering or dispensing by physicians or dentists. — A physician or a dentist, in good faith and in the course of his professional practice, only, may prescribe on a written prescription, administer, or dispense narcotic drugs or may cause the same to be administered by a nurse or interne under his direction and supervision. Such a prescription shall be dated and signed by the person prescribing on the day when issued and shall bear the full name and address of the patient for whom the narcotic drug is prescribed and the full name, address and registry number under the federal narcotic laws of the person prescribing, providing he is required by those laws to be so registered. (1935, c. 477, s. 8.)

§ 90-95. Prescribing, administering or dispensing by veterinarians. — A veterinarian, in good faith and in the course of his professional practice only not for use by a human being, may prescribe on a written prescription, administer and dispense narcotic drugs and he may cause them to be administered by an assistant or orderly under his direction and supervision. Such a prescription shall be dated and signed by the person prescribing on the day when issued and shall bear the full name and address of the owner of the animal, the species of the animal for which the narcotic drug is prescribed and the full name, address and registry number under the federal narcotic laws of the person prescribing, provided he is required by those laws to be so registered. (1935, c. 477, s. 8.)

§ 90-96. Returning unused portions of drugs.— Any person who has obtained from a physician, dentist or veterinarian any narcotic drug for administration to a patient during the absence of such physician, dentist or veterinarian shall return to such physician, dentist or veterinarian any unused portion of such drug when it is no longer required by the patient. (1935, c. 477, s. 8.)

§ 90-97. Article not applicable in certain cases. —Except as otherwise herein specifically provided, this article shall not apply to the following cases:

(1) Prescribing, administering, compounding, dispensing or selling at retail of any medicinal preparation that contains in one fluid ounce, or if a solid or semi-solid preparation, in one avoirdupois ounce (a) not more than two grains of opium, (b) not more than one-quarter grain of morphine or of any of its salts, (c) not more than one grain of codeine, or of any of its salts, (d) not more than one-eighth of a grain of heroin or of any of its salts, (e) not more than one-half of a grain of extract of cannabis nor more than one-half of a grain of any more potent derivative or preparation of cannabis.

(2) Prescribing, administering, compounding, dispensing or selling at retail of liniments, ointments, and other preparations that are susceptible of external use only and that contain narcotic drugs in such combinations as prevent their being readily extracted from such liniments, ointments, or preparations, except that this article shall apply to all liniments, ointments, and other preparations that contain coca leaves in any quantity or combinations.

(3) The exemptions authorized by this section shall be subject to the following conditions:

(a) The medicinal preparation, or the liniment, ointment, or other preparation susceptible of external use only, prescribed, administered, dispensed, or sold, shall contain, in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone.

(b) Such preparation shall be prescribed, administered, compounded, dispensed and sold in good faith as a medicine, and not for the purpose of evading the provisions of this article.

(4) Nothing in this section shall be construed to limit the kind and quantity of any narcotic drug that may be prescribed, administered, compounded, dispensed, or sold, to any person or for the use of any person or animal, when it is prescribed, administered, compounded, dispensed, or sold, in compliance with the general provisions of this article. (1935, c. 477, s. 9.)

§ 90-98. Records of drugs dispensed; records of manufacturers and wholesalers; records of pharmacists; written orders unnecessary for certain drugs; invoices rendered with sales. — Every physician, dentist, veterinarian, or other person who is authorized to administer or professionally use narcotic drugs shall keep a record of such drugs received by him, and a record of all such drugs administered, dispensed, or professionally used by him otherwise than by prescription. It shall, however, be deemed a sufficient compliance with this section if any such

person using small quantities or solutions or other preparations of such drugs for local application shall keep a record of the quantity, character, and potency of such solutions or other preparations purchased or made up by him, and of the dates when purchased or made up, without keeping a record of the amount of such solution or other preparation applied by him to individual patients.

Manufacturers and wholesalers shall keep records of all narcotic drugs compounded, mixed, cultivated, grown, or by any other process produced or prepared, and of all narcotic drugs received and disposed of by them, in accordance with the provisions of this section.

Pharmacists and pharmacy owners shall keep records of all narcotic drugs received and disposed of by them, in accordance with the provisions of this article.

The keeping of a record required by or under the federal narcotic law shall constitute the only record required to be kept by every person who purchases for resale or who sells narcotic drug preparations exempted.

Written orders shall not be required for the sale of cannabis indica or cannabis sativa, or peyote and mara huanna, and the provisions of the article in respect to written orders and records shall not apply to cannabis indica, cannabis sativa, peyote and mara huanna, but manufacturers and wholesalers of cannabis indica, cannabis sativa, peyote and mara huanna shall be required to render with every sale of cannabis indica or cannabis sativa, peyote and mara huanna, an invoice, whether such sale be for cash or on credit; and such invoice shall contain the date of such sale, the name and address of the purchaser, and the amount of cannabis indica or cannabis sativa or peyote and mara huanna so sold.

Every purchaser of cannabis indica, cannabis sativa or peyote and mara huanna from a wholesaler or manufacturer shall be required to keep the invoice rendered with such purchase for a period of two years. (1935, c. 477, s. 10.)

§ 90-99. Labeling packages containing drugs.— Whenever a manufacturer sells or disposes of a narcotic drug and whenever a wholesaler sells and dispenses a narcotic drug in a package prepared by him, he shall securely affix to each package in which that drug is contained a label showing in legible English the name and address of the vendor and the quantity, kind and form of narcotic drug contained therein. No person, except a pharmacist for the purpose of filling a prescription under this article, shall alter, deface or remove any label so affixed. (1935, c. 477, s. 11.)

§ 90-100. Labeling containers of drugs dispensed on prescriptions. — Whenever a pharmacist sells or dispenses any narcotic drug on prescription issued by a physician, dentist, or veterinarian he shall affix to the container in which such drug is sold or dispensed, a label showing his own name, address, and registry number, or the name, address and registry number of the pharmacist or pharmacy owner for whom he is lawfully acting; the name and address of the patient, or, if the patient is an animal, the name and address of the owner of the animal and the species of the animal; the name, address and registry number of the physician, dentist or veterinarian, by whom the prescription was written; and such directions as may be stated on the prescription. No person shall alter, deface or remove any label so affixed as long as any of the original contents remain. (1935, c. 477, s. 11.)

§ 90-101. Lawful possession in original containers. — A person to whom or for whose use any narcotic drug has been prescribed, sold or dispensed by a physician, dentist, pharmacist, or other person authorized under the provisions of this article, the owner of any animal for which any such drug has been prescribed, sold, or dispensed by a veterinarian, may lawfully possess it only in the container in which it was delivered to him by the person selling or dispensing the same. (1935, c. 477, s. 12.)

§ 90-102. Common carriers and warehousemen excepted; other persons exempt.—The provisions of this article restricting the possessing and having control of narcotic drugs shall not apply to common carriers or to warehousemen while engaged in lawfully transporting or storing such drugs, or to any employees of the same acting within the scope of his employment; or to public officers or employees in the performance of their official duties requiring possession or control of narcotic drugs; or to temporary incidental possession by employees or agents of persons lawfully entitled to possession, or by persons whose possession is for the purpose of aiding public officers in performing their official duties. (1935, c. 477, s. 13.)

§ 90-103. Places unlawfully possessing drugs declared nuisances.—Any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same shall be deemed a common nuisance. No person shall keep or maintain such common nuisance. (1935, c. 477, s. 14.)

§ 90-104. Forfeiture and disposition of drugs unlawfully possessed. — All narcotic drugs the lawful possession of which is not established, or the title to which cannot be ascertained, which have come into the custody of a peace officer, shall be forfeited, and disposed of as follows:

(a) The court or magistrate having jurisdiction shall immediately notify the state board of pharmacy and unless otherwise requested within fifteen days by the state board of pharmacy in accordance with sub-section (b) of this section shall order such narcotic drugs forfeited and destroyed. A record of the place where said drugs were seized, of the kinds and quantities of drugs so destroyed, and of the time, place and manner of destruction, shall be kept, and a return under oath, reporting said destruction, shall be made to the court or magistrate and to the United States commissioner of narcotics, by the officer who destroys them.

(b) Upon written application by the state board of pharmacy the court or magistrate by whom the forfeiture of narcotic drugs has been decreed may order the delivery of them except heroin and

its salts and derivatives to said state board of pharmacy for distribution or destruction, as hereinafter provided.

(c) Upon application by any hospital within this State, not operated for private gain, the state board of pharmacy may in its discretion deliver any narcotic drugs that have come into its custody by authority of this section to the applicant for medicinal use. The state board of pharmacy may from time to time deliver excess stocks of such drugs to the United States commissioner of narcotics, or shall destroy the same.

(d) The state board of pharmacy shall keep a full and complete record of all drugs received and of all drugs disposed of, showing the exact kinds, quantities and forms of such drugs; the persons from whom received and to whom delivered; by whose authority received, delivered and destroyed; and the dates of the receipt, disposal, or destruction, which record shall be open to inspection by all federal and state officers charged with the enforcement of federal and state narcotic laws. (1935, c. 477, s. 15.)

Editor's Note.—The case treated below was decided under C. S. section 6679, now repealed, which made the possession of certain drugs unlawful. This case is made available to the practitioner as an aid in construing the present law, but must be read in the light of the former law.

Constructive Possession.—"In State v. Lee, 164 N. C. 533, 80 S. E. 405, the Court held that under this statute the guilty possession was not necessarily actual possession, but that the statutory presumption could arise from the constructive possession; that the statute includes actual and constructive possession." State v. Ross, 168 N. C. 130, 131, 83 S. E. 307.

§ 90-105. Prescriptions, stocks, etc., open to inspection by officials.—Prescriptions, orders and records, required by this article, and stocks of narcotic drugs shall be open for inspection only to federal, state, county and municipal officers, whose duty it is to enforce the laws of this State or of the United States relating to narcotic drugs. No officer having knowledge by virtue of his office of any such prescription, order or record shall divulge such knowledge, except in connection with a prosecution or proceeding in court or before a licensing board or officer to which prosecution or proceeding the person to whom such prescriptions, orders or records relate is a party. (1935, c. 477, s. 16.)

§ 90-106. Fraudulent attempts to obtain drugs prohibited.—No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of false name or the giving of a false address.

(a) Information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication.

(b) No person shall wilfully make a false statement in any prescription, order, report, or record, required by this article.

(c) No person shall, for the purpose of obtaining a narcotic drug, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, pharmacist, pharmacy owner, physician, dentist, veterinarian, or other authorized person.

(d) No person shall make or utter any false or forged prescription or written order.

(e) No person shall affix any false or forged label to a package or receptacle containing narcotic drugs. (1935, c. 477, s. 17.)

§ 90-107. Application of certain restrictions. — The provisions of § 90-106 shall apply to all transactions relating to narcotic drugs under the provisions of § 90-97 in the same way as they apply to transactions under all other sections. (1935, c. 477, s. 18.)

§ 90-108. Possession of hypodermic syringes and needles regulated.—No person except a manufacturer or a wholesaler or a retail dealer in surgical instruments, pharmacist, physician, dentist, veterinarian, nurse or interne shall at any time have or possess a hypodermic syringe or needle or any instrument or implement adapted for the use of habit forming drugs by subcutaneous injections and which is possessed for the purpose of administering habit forming drugs, unless such possession be authorized by the certificate of a physician issued within the period of one year prior hereto. (1935, c. 477, s. 19.)

§ 90-109. Burden on defendant to prove exemption. — In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this article, it shall not be necessary to negative any exception, excuse, proviso, or exemption, contained in this article, and the burden of proof of any such exception, excuse, proviso, or exemption shall be upon the defendant. (1935, c. 477, s. 20.)

§ 90-110. State board of pharmacy and peace officers to enforce article.—It is hereby made the duty of the state board of pharmacy, its officers, agents, inspectors and representatives, and of all peace officers within the State, and of all state's attorneys, to enforce all provisions of this article, except those specifically delegated, and to coöperate with all agencies charged with the enforcement of the laws of the United States, of this State and of all other states, relating to narcotic drugs. (1935, c. 477, s. 21.)

§ 90-111. Penalties for violation. — Any person violating any provision of this article shall, upon conviction, be punished for the first offense by a fine not exceeding one thousand ($1,000.00) dollars or by imprisonment for not exceeding three years, or both; and for any subsequent offense by a fine not exceeding three thousand dollars ($3,000.00) or by imprisonment for not exceeding five years, or both. (1935, c. 477, s. 22.)

Editor's Note.—The cases discussed below were decided under C. S. section 6683, now repealed. These cases are made available to the practitioner as an aid in construing the present law, but they must be read in the light of the former law.

This section confers no power on the Board to revoke the license of a physician who has been convicted of its violation. Board of Medical Examiners v. Gardner, 201 N. C. 123, 127, 159 S. E. 8.

Power of Board to Renew Revoked License.—When the license of a pharmacist convicted of the unlawful sale of cocaine, etc., is revoked, the board has no authority to renew the license upon the tender of the prescribed fee of $2. Thomas v. Board, 152 N. C. 373, 67 S. E. 925.

§ 90-112. Double jeopardy. — No person shall be prosecuted for a violation of any provision of this article if such person has been acquitted or convicted under the federal narcotic laws of the same act or commission, which, it is alleged, constitutes a violation of this article. (1935, c. 477, s. 23.)

§ 90-113. Construction of article. — This article shall be so interpreted and construed as to effectuate its general purpose and to make uniform the laws of those states which enact it. (1935, c. 477, s. 25.)

Art. 6. Optometry.

§ 90-114. Optometry defined. — The practice of optometry is hereby defined to be the employment of any means, other than the use of drugs, medicines, or surgery, for the measurement of the powers of vision and the adaptation of lenses for the aid thereof; and in such practices as above defined, the optometrist may prescribe, give directions or advice as to the fitness or adaptation of a pair of spectacles, eyeglasses or lenses for another person to wear for the correction or relief of any condition for which a pair of spectacles, eyeglasses or lenses are used, or to use or permit or allow the use of instruments, test-cards, test types, test lenses, spectacles or eyeglasses or anything containing lenses, or any device for the purpose of aiding any person to select any spectacles, eyeglasses or lenses to be used or worn by such last mentioned person or by any other person. (1909, c. 444, s. 1; 1923, c. 42, s. 1; C. S. 6687.)

Editor's Note.—By the amendment Public Laws 1923 the part of this section following the semi-colon was added.

The purpose of the amendment "is to raise the standards of the practice of optometry in North Carolina. Its chief effect upon this section is the requirement of two years attendance at a recognized optical college, eliminating the option of two years under a registered optometrist, the raising of the examination fee from $10 to $20, and the raising of the compensation of the Board of Examiners from $5 to $10 for each day spent in the duties of the office." 1 N. C. Law Rev. 300.

§ 90-115. Practice without registration unlawful.—After the passage of this article it shall be unlawful for any person to practice optometry in the state unless he has first obtained a certificate of registration and filed the same, or a certified copy thereof, with the clerk of the superior court of his residence, as hereinafter provided. Within the meaning of this article, a person shall be deemed as practicing optometry who does, or attempts to, sell, furnish, replace, or duplicate, a lens, frame, or mounting, or furnishes any kind of material or apparatus for ophthalmic use, without a written prescription from a person authorized under the laws of the State of North Carolina to practice optometry, or from a person authorized under the laws of North Carolina to practice medicine: Provided, however, that the provisions of this section shall not prohibit persons or corporations from selling completely assembled spectacles, without advice or aid as to the selection thereof, as merchandise from permanently located or established places of business, nor shall it prohibit persons or corporations from making mechanical repairs to frames for spectacles; nor shall it prohibit any person, firm, or corporation engaged in grinding lenses and filling prescriptions from replacing or duplicating lenses on original prescriptions issued by a duly licensed optometrist, and oculist. (1909, c. 444, s. 2; 1935, c. 63; C. S. 6688.)

Editor's Note.—The amendment of 1935 added all of this section except the first sentence.

§ 90-116. Board of examiners in optometry. — There is hereby created a board, whose duty it shall be to carry out the purposes and enforce the provisions of this article, and which shall be styled the "North Carolina State Board of Examiners in Optometry." This board shall be elected by the North Carolina State Optometric Society and commissioned by the governor and shall consist of five regular optometrists who are members of the North Carolina state optometric society and who have been engaged in the practice of optometry in the state for five years. The terms of the members shall be as follows: One for one year, one for two years, one for three years, one for four years, one for five years. The terms of members thereafter appointed shall be for five years. The members of the board, before entering upon their duties, shall respectively take all oaths taken and prescribed for other state officers, in the manner provided by law, which shall be filed in the office of the secretary of state, and the board shall have a common seal. The North Carolina State Optometric Society shall have the power to fill all vacancies on said board for unexpired terms, and members so elected shall be commissioned by the governor. (1909, c. 444, s. 3; 1915, c. 21, s. 1; 1935, c. 63; C. S. 6689).

Editor's Note.—The amendment of 1935 added the last two sentences of the section.

§ 90-117. Organization; meetings and powers thereat; records, witnesses and evidence. — The board of examiners shall choose, at the first regular meeting and annually thereafter, one of its members as president and one as secretary and treasurer. The board shall make such rules and regulations, not inconsistent with law, as may be necessary to the proper performance of its duties, and each member may administer oaths and take testimony concerning any matter within the jurisdiction of the board. A majority of the board shall constitute a quorum. The board shall meet at least once a year, the times and places of meeting to be designated by the president and secretary. The secretary of the board shall keep a full record of its proceedings, which shall at all reasonable times be open to public inspection. The president, secretary-treasurer, or any member of the board shall have power in connection with any matter within the jurisdiction of the board to summon and examine witnesses under oath and to compel their attendance and the production of books, papers, or other documents or writings deemed by it necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand of the secretary-treasurer or the president of the board and shall have the force and effect of a summons or subpoena issued by a court of record, and any witness who shall refuse or neglect to appear in obedience thereto or to testify or produce books, papers, or other documents or writings required shall be liable to punishment

for contempt by the board. Said board shall pay to any witness subpoenaed before it the fees and per diem as paid witnesses in civil actions in the superior court of the county where such hearing is held. (1909, c. 444, s. 4; 1935, c. 63; C. S. 6690.)

Editor's Note.—The amendment of 1935 reduced the number of meetings from twice a year to once a year and added the last three sentences.

§ 90-118. Examination for practice; prerequisites; registration. — Every person, before beginning to practice optometry in this state after the passage of this article, shall pass an examination before the board of examiners. The examination shall be confined to such knowledge as is essential to practice of optometry. Every applicant for examination at the time of examination must comply with the following conditions:

1. He must be twenty-one years of age.

2. He shall file with the secretary of the board a certificate of good moral character, signed by two reputable citizens of this state; but an applicant from another state may have such certificate signed by any state officer of the state from which he comes.

3. He shall satisfy the board that he has been in actual attendance in approved school of optometry, and that he holds a certificate of graduation from said school, which school shall be approved by the North Carolina Board of Examiners in Optometry.

4. He must pay to the board for the use of the board the sum of twenty dollars, and if he shall successfully pass the examination he shall pay to the secretary for the use of the board a further sum of five dollars on the issuance to him of the certificate: Provided, the applicant may stand any subsequent examination by paying an additional fee of five dollars.

Every person successfully passing the examination shall be registered in the board registry, which shall be kept by the secretary, as licensed to practice optometry, and he shall also receive a certificate of registration, to be signed by the president and secretary of the board: Provided, that any person holding a certificate by examination to practice optometry in another state where the qualifications prescribed are equal to the qualifications required in this state may be licensed without examination on the same conditions and on the payment of the same fees as are required of other applicants. (1909, c. 444, s. 5; 1915, c. 21, ss. 2, 3, 4; 1923, c. 42, ss. 2, 3; 1935, c. 63; C. S. 6691.)

Editor's Note.—The amendment of 1935 changed the requirements of subsection 3 and substituted the last words of subsection 4 "by paying an additional fee of five dollars" for the words "without paying another fee."

Where one discontinues the practice of optometry and engages in other business for eighteen years, this will not constitute an abandonment of his license to practice so as to make him a "beginner" within the meaning of this section when no action was taken by the board as provided in § 90-123 since such revocation of the certificate is the only method prescribed by statute for foreclosing the right to practice the profession after an optometrist has been admitted to such practice. Mann v. North Carolina State Board of Examiners, 206 N. C. 853, 855, 175 S. E. 281.

§ 90-119. Persons in practice before passage of statute.—Every person who had been engaged in the practice of optometry in the state for two years prior to the date of the passage of this article shall hereafter file an affidavit as proof thereof with the board. The secretary shall keep a record of such persons who shall be exempt from the provisions of the preceding section. Upon payment of three dollars he shall issue to each of them certificates of registration without the necessity of an examination. Failure on the part of a person so entitled within six months of the enactment of this article to make written application to the board for the certificate of registration accompanied by a written statement, signed by him and duly verified before an officer authorized to administer oaths within this state, fully setting forth the grounds upon which he claims such certificate, shall be deemed a waiver of his right to a certificate under the provisions of this section. A person who has thus waived his right may obtain a certificate thereafter by successfully passing examination and paying a fee as provided herein. (1909, c. 444, ss. 6, 7, 9; C. S. 6692.)

§ 90-120. Filing of certificate by licensee; fees; failure to file, certified copies.—Each recipient of the certificate of registration shall present the same for record to the clerk of the superior court of the county in which he resides, and shall pay a fee of fifty cents for recording the same. The clerk shall record it in a book to be provided by him for that purpose. Any person so licensed, before engaging in the practice of optometry in any other county, shall file the certificate for record with the clerk of the superior court of the county in which he desires to practice, and pay the clerk for recording it a fee of fifty cents. Any failure, neglect, or refusal on the part of a person holding a certificate to file it for record, for thirty days after the issuance thereof, shall forfeit the certificate and it shall become null and void. Upon the request of any person entitled to a certificate of registration the board shall issue a certified copy thereof, and upon the fact of the loss of the original being made to appear, the certified copy shall be recorded in lieu of the original, and the board shall be entitled to a fee of one dollar for recording such certified copy. (1909, c. 444, s. 8; C. S. 6693.)

§ 90-121. Certificate to be displayed at office.—Every person to whom a certificate of examination or registration is granted shall display the same in a conspicuous part of his office wherein the practice of optometry is conducted. (1909, c. 444, s. 10; C. S. 6694.)

§ 90-122. Compensation of boards; surplus funds.—Out of the funds coming into possession of said board each member thereof may receive as compensation the sum of ten dollars for each day he is actually engaged in the duties of his office and mileage of five cents per mile for all distances necessarily traveled in going to and coming from the meetings of the board. Such expenses shall be paid from the fees and assessments received by the board under the provisions of this article, and no part of the salary or other expenses of the board shall ever be paid out of the state treasury. All moneys received in excess of per diem allowance and mileage, as above provided, shall be held by the secretary as a special fund for meeting expenses of the board

and carrying out the provisions of this article, and he shall give the state such bond as the board shall from time to time direct for the faithful performance of his duties, and the board shall make an annual report of its proceedings to the governor on the first Monday in January of each year, which report shall contain an account of all moneys received and disbursed by them pursuant to this article. The secretary-treasurer shall receive from the funds of the board such salary as may be determined by the board. (1909, c. 444, s. 11; 1923, c. 42, s. 4; 1935, c. 63; C. S. 6695.)

Editor's Note.—The amendment of 1935 added the last sentence of this section.

§ 90-123. Annual fees; failure to pay; revocation of license; collection by suit.—For the use of the board in performing its duties under this article, every registered optometrist shall, in every year after the year one thousand nine hundred and thirty-seven pay to the board of examiners the sum of not exceeding fifteen ($15.00) dollars, the amount to be fixed by the board, as a license fee for the year. Such payments shall be made prior to the first day of April in each year, and in case of default in payment by any registered optometrist his certificate may be revoked by the board at the next regular meeting of the board after notice as herein provided. But no license shall be revoked for non-payment if the person so notified shall pay, before or at the time of consideration, his fee and such penalty as may be imposed by the board. The penalty imposed on any one person so notified as a condition of allowing his license to stand shall not exceed five and no/100 dollars ($5.00). The board of examiners may collect any dues or fees provided for in this section by suit in the name of the board. The notice hereinbefore mentioned shall be in writing, addressed to the person in default in the payment of dues or fees herein mentioned at his last known address as shown by the records of the board, and shall be sent by the secretary of the board by registered mail, with proper postage attached, at least twenty (20) days before the date upon which revocation of license is considered, and the secretary shall keep a record of the fact and of the date of such mailing. The notice herein provided for shall state the time and place of consideration of revocation of the license of the person to whom such notice is addressed. (1909, c. 444, s. 12; 1923, c. 42, s. 5; 1933, c. 492; 1937, c. 362, s. 1; C. S. 6696.)

Editor's Note.—The 1933 amendment so changed this section that a comparison here is not practical.

The 1937 amendment changed the date in the first sentence from 1932 to 1937 and increased the annual license fee from five to fifteen dollars.

The valid statutory method of revoking a license to practice optometry as provided by this section is exclusive and must be first resorted to and in the manner specified therein. Mann v. North Carolina State Board of Examiners, 206 N. C. 853, 855, 175 S. E. 281.

§ 90-124. Revocation and regrant of certificate.—The board shall have the power to make such rules and regulations, not inconsistent with the laws of the State of North Carolina, as may be necessary and proper for the regulation of the practice of the profession of optometry, and for the performance of its duties. The board shall have the power to revoke any certificate of registration granted by it under this article for conviction of crime, habitual drunkenness, gross incompetence, contagious or infectious disease; and the board shall likewise have the power to revoke any such certificate of registration upon the finding by the board that the holder of such certificate has been guilty of unethical conduct or practice. Unethical practice as herein stipulated as a condition for revocation of license shall include the following:

(1) Advertising the "free examination of the eyes," "free consultation," "consultation without obligation," "free advice," or any words or phrases of similar import which convey, or are calculated to convey, the impression to the public that the eyes are examined free, or of a character tending to deceive or mislead the public, or in the nature of "bait advertising";

(2) Use of advertising, directly or indirectly, whether printed, radio, display, or of any other nature which seeks or solicits practice on any installment payment plan;

(3) House-to-house canvassing or peddling, directly or through any agent or employee, for the purpose of selling, fitting, or supplying frames, mounting, lenses, or other opthalmic products.

Before any certificate shall be so revoked for any of the grounds or reasons herein set forth, the holder thereof shall be served with a written notice by any officer authorized to serve civil summons. The said notice shall inform the holder of the charge or charges against him and shall specify the day, which shall be at least 30 days from the date of the issuance of the notice, the place, and the time of the hearing before the board. The holder of the certificate shall have an opportunity to produce testimony in his behalf, and to confront the witnesses against him. Any person whose certificate has been revoked for any of the grounds or reasons herein set forth, or on account of non-payment of dues, may, after the expiration of ninety days, and within two years, apply to the board to have same regranted, and upon a showing satisfactory to the said board, and at the discretion of the board, license to practice optometry may be restored to such person. (1909, c. 444, s. 13; 1935, c. 63; C. S. 6697.)

Editor's Note.—Public Laws of 1935, c. 63, struck out the former section and inserted the above in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 90-125. Practicing under other than own name or as a salaried or commissioned employee.—It shall be unlawful for any person licensed to practice optometry under the provisions of this article to advertise, practice, or attempt to practice under a name other than his own, except as an associate of or assistant to an optometrist licensed under the laws of the state of North Carolina; and it shall be likewise unlawful for any corporation, lay body, organization, group, or lay individual to engage, or undertake to engage, in the practice of optometry through means of engaging the services, upon a salary or commission basis, of one licensed to practice optometry or medicine in any of its branches in this state. Likewise, it shall be unlawful for any optometrist licensed under the provisions of this article to undertake to engage in the practice of optometry as a salaried or commissioned employee of any corporation, lay

body, organization, group, or lay individual. (1935, c. 63; 1937, c. 362, s. 2.)

Editor's Note. — The 1937 amendment inserted the words "or medicine in any of its branches" near the end of the first sentence.

Where Suit to Enjoin Enforcement of Section Not Allowed by Federal Court.—Defendants had been enjoined by a state court for an alleged violation of this section. In a suit brought in the district court to enjoin the enforcement of this section, as violating the commerce clause and due process and equal protection clauses of the constitution, it was held that this was a suit to enjoin the decree of a state court and was prohibited by a federal statute. Ritholz v. North Carolina State Board of Examiners, 18 F. Supp. 409.

§ 90-126. Violation of article forbidden. — Any person who shall violate any of the provisions of this article, and any person who shall hold himself out to the public as a practitioner of optometry without a certificate of registration provided for herein, shall be deemed guilty of a misdemeanor, and upon conviction may be punished by a fine of not more than one hundred dollars or imprisonment for not more than four months, or both, in the discretion of the court. (1909, c. 444, s. 14; C. S. 6698.)

§ 90-126.1. Board may enjoin illegal practices. —In view of the fact that the illegal practice of optometry imminently endangers the public health and welfare, and is a public nuisance, the North Carolina state board of optometry may, if it shall find that any person is violating any of the provisions of this article, apply to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. If upon such application, it shall appear to the court that such person has violated, or is violating, the provisions of this article, the court shall issue an order restraining any further violations thereof. All such actions by the board for injunctive relief shall be governed by the provisions of article thirty-seven of the chapter on "Civil Procedure:" Provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under the provisions of § 90-126. (1943, c. 444.)

§ 90-127. Application of article. — Nothing in this article shall be construed to apply to physicians and surgeons authorized to practice under the laws of North Carolina, except the provisions contained in § 90-125, or prohibit persons to sell spectacles, eyeglasses, or lenses as merchandise from permanently located and established places of business. (1909, c. 444, s. 15; 1937, c. 362, s. 3; C. S. 6699.)

Editor's Note.—The 1937 amendment inserted the reference to § 90-125.

§ 90-128. Repeal of laws; exception.—Nothing in the provisions amending §§ 90-114, 90-118, 90-122, and 90-123, shall repeal any of the provisions of § 90-127. (1923, c. 42, s. 7; C. S. 6699(b).)

Art. 7. Osteopathy.

§ 90-129. Osteopathy defined.—For the purpose of this article osteopathy is defined to be the science of healing without the use of drugs, as taught by the various colleges of osteopathy recognized by the North Carolina Osteopathic Society, Incorporated. (1907, c. 764, s. 8; 1913, c. 92, s. 3; C. S. 6700.)

§ 90-130. Board of examiners; membership; officers; meetings.—There shall be a state board of osteopathic examination and registration, consisting of five members appointed by the governor, in the following manner, to wit: within thirty days after this article goes into effect the governor shall appoint five persons who are reputable practitioners of osteopathy, selected from a number of not less than ten who are recommended by the North Carolina osteopathic society, and this number may be increased to fifteen, upon the request of the governor; the recommendation of the president and secretary being sufficient proof of the appointees' standing in the profession; and said appointees shall constitute the first board of osteopathic examination and registration. Their term of office shall be so designated by the governor that the term of one member shall expire each year. Thereafter in each year the governor shall in like manner appoint one person to fill the vacancy in the board thus created, from a number of not less than five, who are recommended by the state osteopathic society; the term of said appointee to be for five years. A vacancy occurring from any other cause shall be filled by the governor for the unexpired term in the same manner as last above stated. The board shall, within thirty days after its appointment, meet in the city of Raleigh, and organize by electing a president, secretary and treasurer, each to serve for one year. Thereafter the election of said officers shall occur annually. The treasurer and secretary shall each give bond, approved by the board, for the faithful performance of their respective duties, in such sum as the board may from time to time determine. The board shall have a common seal, and shall formulate rules to govern its actions; and the president and secretary shall be empowered to administer oaths. The board shall meet in the city of Raleigh at the call of the president, in the month following the election of its officers, and in July of each succeeding year, and at such other times and places as a majority of the board may designate. Three members of the board shall constitute a quorum, but no certificate to practice osteopathy shall be granted on an affirmative vote of less than three. The board shall keep a record of its proceedings, and a register of all applicants for certificates, giving the name and location of the institution granting the applicant the degree of doctor of or diploma in osteopathy, the date of his or her diploma, and also whether the applicant was rejected or a certificate granted. The record and registers shall be prima facie evidence of all matters recorded therein. (1907, c. 764, s. 1; 1913, c. 92, s. 1; 1937, c. 301, s. 1; C. S. 6701.)

Editor's Note.—The 1937 amendment struck out the words "or other nondrug-giving school of medical practice" formerly appearing after the word "osteopathy" in the next to the last sentence.

§ 90-131. Examination and certification of applicant; prerequisites.—Any person, before engaging in the practice of osteopathy in this state, shall, upon the payment of a fee of twenty-five dollars, make application for a certificate to practice osteopathy to the board of osteopathic examination and registration on a form prescribed by the board, giving, first, his name, age (which shall not be less than twenty-one years), and residence; second, evidence that such appli-

cant shall have, previous to the beginning of his course in osteopathy, a certificate of examination for admission to the freshman class of a reputable literary or scientific college, a diploma from a high school, academy, state normal school, college, or university, approved by aforesaid board; third, the date of his diploma, and evidence that such diploma was granted on personal attendance and completion of a course of not less than four terms of five months each, and after July, one thousand nine hundred and seventeen, of four terms of not less than nine months each in three separate years; fourth, the name of the school or college of osteopathy from which said applicant was a graduate, and which shall have been in good repute as such at the time of the granting of his diploma, as determined by the board. The board may, in its discretion, accept, as the equivalent of any part or all of the second, third, and fourth requirements, evidence of five or more years reputable practice of osteopathy, provided such substitution be specified in the certificate, if the facts thus set forth, and to which the applicant shall be required to make affidavit, shall meet the requirements of the board, as prescribed by its qualifications for the practice of osteopathy, which shall include the subjects of anatomy, physiology, physiological chemistry, toxicology, osteopathic pathology, bacteriology, osteopathic diagnosis, hygiene, osteopathic obstetrics and gynecology, minor surgery, principals and practice of osteopathy, and such other subjects as the board may require. A physician's certificate issued by a reputable school of osteopathy to a graduate from a reputable school of medicine, after an attendance of not less than two terms of nine months each in two separate years, may be accepted by the board on the same terms as a diploma, and the holder thereof be subject to the same regulations in all other respects as other applicants before the board. The board may refuse to grant a certificate to any person convicted of a felony, or of gross unprofessional conduct, or who is addicted to any vice to such a degree as to render him unfit to practice osteopathy, and may, after due notice and hearing, revoke such certificate for like cause. (1907, c. 764, s. 2; 1913, c. 92, s. 1; C. S. 6702.)

In General.—Those who practice and receive pay for the treatment of human diseases without the use of drugs, and who are not licensed osteopaths, are required to take the examination and receive the license provided for by statute. State v. Siler, 169 N. C. 314, 84 S. E. 1015.

This case was decided before §§ 90-139 to 90-157 were passed.—Ed. Note.

§ 90-132. When examination dispensed with; temporary permit.—The board may, upon the payment of a fee of two dollars, grant a certificate to practice osteopathy in this state without examination, if application therefor is filed within ninety days after the passage of this act, to any person having a diploma from a legally chartered school or college of osteopathy, which was in good standing at the time of issuing of such diploma as defined by the board, and who shall meet the requirements of the board in other respects, and who was in active practice in this state at the time of the passage of this article.

The board may, in its discretion, dispense with an examination in the case, first, of an osteopathic physician duly authorized to practice osteopathy in any other state or territory, or the District of Columbia, who presents a certificate of license issued after an examination by the legally constituted board of such state, territory, or District of Columbia, accorded only to applicants of equal grade with those required in this state; or, second, an osteopathic physician who has been in the actual practice of osteopathy for five years, who is a graduate of a reputable school of osteopathy, who may desire to change his residence to this state, and who makes application on a form to be prescribed by the board, accompanied by a fee of twenty-five dollars.

The secretary of the board may grant a temporary permit until a regular meeting of the board, or to such time as the board can conveniently meet, to one whom he considers eligible to practice in the state, and who may desire to commence the practice immediately. Such permit shall only be valid until legal action of the board can be taken. In all the above provisions the fee shall be the same as charged to applicants for examination. (1907, c. 764, s. 2; C. S. 6703.)

§ 90-133. Fees held by board; salaries; payment of expenses.—All fees shall be paid in advance to the treasurer of the board, to be by him held as a fund for the use of the state board of osteopathic examination and registration. The compensation and expenses of the members and officers of said board, and all expenses proper and necessary, in the opinion of said board, to discharge its duties under and to enforce the law, shall be paid out of such fund, upon the warrant of the president and secretary of said board, and no expense shall be created to exceed the income of fees or fines as herein provided. The salaries shall be fixed by the board, but shall not exceed ten dollars per day per member, and railroad and hotel expenses. (1907, c. 764, s. 3; C. S. 6705.)

§ 90-134. Subject to state and municipal regulations.—Osteopathic physicians shall observe and be subject to all state and municipal regulations relating to the control of contagious diseases, the reporting and certifying of births and deaths, and all matters pertaining to public health, the same as physicians of other schools of medicine, and such reports shall be accepted by the officers or department to whom the same are made. (1907, c. 764, s. 4; C. S. 6706.)

§ 90-135. Record of certificates; fees. — Every person holding a certificate from the state board of examination and registration shall have it recorded in the office of the county clerk of the county in which he or she expects to practice. Until such certificate is filed for record, the holder shall exercise none of the rights or privileges therein conferred. Said clerk of the county shall keep in a book for that purpose a complete list of all certificates recorded by him, with the date of the recording of each certificate. Each holder of a certificate shall pay to said clerk a fee of one dollar for making such record. (1907, c. 764, s. 5; C. S. 6707.)

§ 90-136. Revocation or suspension of license. —The North Carolina state board of osteopathic examination and registration may refuse to issue a license to any one otherwise qualified, and may suspend or revoke any license issued by it to any osteopathic physician, who is not of good moral character, and/or for any one or any combination of the following causes:

1. Conviction of a felony, as shown by a certified copy of the record of the court of conviction;

2. The obtaining of or an attempt to obtain a license, or practice in the profession, or money, or any other thing of value, by fraudulent misrepresentations;

3. Gross malpractice;

4. Advertising by means of knowingly false or deceptive statements;

5. Advertising, practicing, or attempting to practice under a name other than one's own;

6. Habitual drunkenness or habitual addiction to the use of morphine, cocaine, or other habit-forming drugs.

Each of the following acts constitutes a misdemeanor, punishable upon conviction by a fine of not less than twenty-five ($25.00) dollars nor more than two hundred ($200.00) dollars; or imprisonment for not less than thirty days nor more than one year, or both in the discretion of the court:

1. The practice of osteopathy or an attempt to practice osteopathy, or professing to do so without a license;

2. The obtaining of or an attempt to obtain a license, or practice in the profession, or money, or any other thing of value by fraudulent misrepresentation;

3. The making of any wilfully false oath or affirmation whenever an oath or affirmation is required by this article;

4. Advertising, practicing or attempting to practice osteopathy under a name other than one's own.

The state board may neither suspend nor revoke any license, however, for any of the causes hereinabove set forth unless the person accused has been given at least twenty days notice in writing of the charge against him and a public hearing had by said board, or a quorum thereof.

At the time and place named in said notice the said board, or a quorum thereof, shall proceed to hear the charges against the accused upon competent evidence, oral or by deposition, and at said hearing said accused shall have the right to be present in person and/or represented by counsel. After hearing all the evidence, including such evidence as the accused may present, the board shall determine its action and announce the same.

From any action of the board depriving the accused of his license, or certificate of renewal of license, the accused shall have the right of appeal to the superior court of the county wherein the hearing was held, upon filing notice of appeal within ten days of the decision of the board. The record of the hearing before the North Carolina state board of osteopathic examination and registration shall constitute the record upon appeal in the superior court. (1937, c. 301, s. 3.)

§ 90-137. Restoration of revoked license. — Whenever any osteopath has been deprived of his license, the North Carolina state board of osteopathic examination and registration, in its discretion, may restore said license upon due notice being given and hearing had, and satisfactory evidence produced of proper reformation of the licentiate before restoration. (1937, c. 301, s. 3.)

§ 90-138. Objects of North Carolina osteopathic society.—The object of the North Carolina osteopathic society shall be to unite the osteopaths of this state for mutual aid, encouragement, and improvements; to encourage scientific research in the laws of health and treatment of diseases of the human family; to elevate the standard of professional thought and conduct in the practice of osteopathy and to restrict the practice of osteopathy to persons educated and trained in the science and possessing a diploma from a reputable college of osteopathy. (1907, c. 764, s. 7; C. S. 6709.)

Art. 8. Chiropractic.

§ 90-139. Creation and membership of board of examiners. — There is hereby created and established a board to be known by the name and style of the state board of chiropractic examiners. The board shall be composed of three practicing chiropractors of integrity and ability, who shall be residents of the state, and no more than two members of said board shall be graduates from the same school or college of chiropractic. (1917, c. 73, s. 1; C. S. 6710.)

Editor's Note.—The case of State v. Gibson, 169 N. C. 381, 85 S. E. 7, was decided before this and following sections were passed. The above cited case applied the rule laid down in § 90-131 to all nondrug-giving practitioners.

§ 90-140. Appointment; term; successors; recommendations. — The governor shall appoint the members of the state board of chiropractic examiners, whose terms of office shall be as follows: One member shall be appointed for a term of one year from the close of the next regular annual meeting of the North Carolina chiropractic association; one member shall be appointed for a term of two years from such time, and one member shall be appointed for a term of three years from such time. Annually thereafter, at the time of the annual meeting or immediately thereafter the governor shall appoint one member of the state board of chiropractic examiners, whose term of office shall be three years, and such members of the board of examiners shall be appointed from a number of not less than five who shall be recommended by the North Carolina chiropractic association. (1917, c. 73, s. 2; 1933, c. 442, s. 1; C. S. 6711.)

Editor's Note.—Public Laws of 1933, c. 442, changed "North Carolina board of chiropractors" to "North Carolina chiropractic association."

§ 90-141. Organization and vacancies. — The board of chiropractic examiners shall elect such officers as they may deem necessary, and in case of a vacancy, caused by death or in any other manner, a majority of the board shall have the right to fill the vacancy by the election of some other member of the North Carolina chiropractic association. (1917, c. 73, s. 4; 1933, c. 442, s. 1; C. S. 6713.)

Editor's Note.—Public Laws of 1933, c. 442, changed "North Carolina board of chiropractors" to "North Carolina chiropractic association."

§ 90-142. Rules and regulations. — The state board of chiropractic examiners may adopt suitable rules and regulations for the performance of their duties. (1919, c. 148, s. 4; C. S. 6714.)

§ 90-143. Definitions of chiropractic; examinations; educational requirements.—Chiropractic is herein defined to be the science of adjusting the cause of disease by realigning the twenty-four movable vertebrae of the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body. It shall be the duty of the board of examiners to examine all applicants who shall furnish satisfactory proof of good character and of graduation from a regular chiropractic school of good standing, and such examination shall embrace such branches of study as are usually included in the regular course of study for chiropractors in chiropractic schools or colleges of good standing, including especially an examination of each applicant in the science of chiropractic as herein defined. Every applicant for license shall furnish to said board of examiners sufficient and satisfactory evidence that, prior to the beginning of his course in chiropractic, he had obtained a high school education, or what is equivalent thereto, entitling him to admission in a reputable college or university; and he shall also exhibit to said board of chiropractic examiners, or satisfy them that he holds, a diploma from a reputable chiropractic college, and not a correspondence school, and that said diploma was granted to him on a personal attendance and completion of a regular four years' course in such chiropractic college, and such applicant shall be examined in the following studies: Chiropractic analysis, chiropractic philosophy, chiropractic neurology, palpation, nerve tracing, microscopy, histology, anatomy, gynecology, jurisprudence, chemistry, pathology, hygiene, physiology, embryology, eye, ear, nose, and throat, dermatology, symptomology, spinography, chiropractic orghopody, and the theory, teaching and practicing of chiropractic.

Provided further, that the said state board of chiropractic examiners may license by reciprocity, upon application, any chiropractor holding a license issued to him by a regular board of chiropractic examiners in another state when said board is satisfied that such applicant has educational qualifications, or the equivalent thereof, equal to those prescribed by said board for admission to practice chiropractic in this state, and upon proof of good moral character and that he has practiced chiropractic under such license for at least one year. (1917, c. 73, s. 5; 1919, c. 148, ss. 1, 2, 5; 1933, c. 442, s. 1; 1937, c. 293, s. 1; C. S. 6715.)

Editor's Note.—Public Laws of 1933, c. 442, changed "North Carolina board of chiropractors" to "North Carolina chiropractic association." The act also raised the personal attendance course from three to four years.

The 1937 amendment struck out the last sentence in this section and inserted the above provision in lieu thereof.

Discretionary Power of Board.—Chapter 73, Public Laws 1917, establishing a board of chiropractic examiners, gives this board large discretionary powers to examine and license applicants to practice this science, and to pass upon their other qualifications specified therein; and, construed with its amendatory act of 1919, ch. 148, under § 2, it is provided that those practicing chiropractics in this State prior to 1918 may receive their license upon proof of good character and proper proficiency upon examination; it is also provided that those so practicing prior to 1917 shall be granted a license without examination. Neither the proviso of the Laws of 1918 or 1917 dispenses with the discretionary power of the board to pass upon the requisites of good character, or the fact as to whether the applicants thereunder had been bona fide practitioners for the requisite time, into which the courts will not inquire, and a mandamus will not lie. Hamlin v. Carlson, 178 N. C. 431, 101 S. E. 22.

§ 90-144. Annual meetings. — The board of chiropractic examiners and the North Carolina chiropractic association shall hold their annual meetings at the same time and place. But the said board of examiners may, in their discretion, meet not more than three days in advance of the annual meeting of the North Carolina chiropractic association. (1917, c. 73, s. 6; 1933, c. 442, s. 1; C. S. 6716.)

Editor's Note.—Public Laws of 1933, c. 442, changed "North Carolina board of chiropractors" to "North Carolina chiropractic association."

§ 90-145. Grant of license; temporary license.— The board of chiropractic examiners at such regular annual meeting of the board shall grant to each applicant who is found to be competent, upon examination, a license authorizing him or her to practice chiropractic in North Carolina. Any two members of said board may grant a temporary license to any applicant who shall comply with the requirements of this article as to proof of good character and of graduation from a chiropractic school or college as prescribed in this article; but such temporary license shall not continue in force longer than until the next annual meeting of the said board of examiners, and in no case shall a temporary license be granted to an applicant who has already been refused a license by the board of examiners at an annual meeting. (1917, c. 73, s. 7; C. S. 6717.)

§ 90-146. Graduates from other states. — A graduate of a regular chiropractic school who comes into this state from another state may be granted a license by the board of examiners as required in his article. (1917, c. 73, s. 8; C. S. 6718.)

§ 90-147. Practice without license a misdemeanor.—Any person practicing chiropractic in this state without having first obtained a license as provided in this article shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1917, c. 73, s. 9; C. S. 6719.)

§ 90-148. Records of board. — The secretary of the board of chiropractic examiners shall keep a record of the proceedings of the board, giving the name of each applicant for license, and the name of each applicant licensed and the date of such license. (1917, c. 73, s. 10; C. S. 6720.)

§ 90-149. Application fee.—Each applicant shall pay the secretary of said board a fee of twenty-five dollars. (1917, c. 73, s. 11; C. S. 6721.)

§ 90-150. Exempt from jury service. — All duly licensed chiropractors of this state shall be exempt from service as jurors in any of the courts of this state. (1933, c. 442, s. 2.)

§ 90-151. Extent and limitation of license.—Any

person obtaining a license from the board of chiropractic examiners shall have the right to practice the science known as chiropractic, in accordance with the method, thought, and practice of chiropractors, as taught in recognized chiropractic schools and colleges, but shall not prescribe for or administer to any person any medicine or drugs, nor practice osteopathy or surgery. (1917, c. 73, s. 12; 1933, c. 442, s. 3; C. S. 6722.)

Editor's Note.—Public Laws of 1933, c. 442, inserted, near the middle of this section, the words "as taught in recognized chiropractic schools and colleges."

§ 90-152. Registration of license. — Any person desiring to engage in the practice of chiropractic, having first obtained a license as herein provided, shall appear before the clerk of the superior court of the county in which he resides, or proposes to practice, for registration as a chiropractor. He shall produce and exhibit to the said clerk a license obtained from the board of chiropractic examiners, and upon such exhibition the clerk shall register the name and residence of the applicant, giving the date of such registration, in a book to be kept for the purpose of registering chiropractors, and shall issue to him a certification of such registration under the seal of the superior court of such county, for which the clerk shall be entitled to collect from said applicant a fee of fifty cents. The person obtaining such certificate shall be entitled to practice chiropractic anywhere in this state; but if he shall remove his residence to another county, he shall exhibit said certificate to the clerk of the superior court of such other county and be registered. Any one receiving a temporary license as provided in this article shall not be entitled to register, but may practice anywhere in this state during the time such temporary license shall be in force. (1917, c. 73, s. 13; C. S. 6723.)

§ 90-153. Licensed chiropractors may practice in public hospitals.—A licensed chiropractor in this state may have access to and practice chiropractic in any hospital or sanitarium in this state that receives aid or support from the public. (1919, c. 148, s. 3; C. S. 6724.)

§ 90-154. Grounds for refusal or revocation of license. — The board of chiropractic examiners may refuse to grant or may revoke a license to practice chiropractic in this state, upon the following grounds: Immoral conduct, bad character, the conviction of a crime involving moral turpitude, habitual intemperance in the use of ardent spirits, narcotics, or stimulants to such an extent as to incapacitate him or her for the performance of such professional duties. (1917, c. 73, s. 14; C. S. 6725.)

§ 90-155. Annual fee for renewal of license. — All persons practicing chiropractic in this state shall, on or before the first Tuesday after the first Monday in January in each year after licenses issued to them as herein provided, pay to the secretary of the board of chiropractic examiners a renewal license fee of ten ($10.00) dollars, the payment of which, and a receipt from the secretary of the board, shall work a renewal of the license fee for twelve months.

Any license or certificate granted by the board under this article shall automatically be cancelled if the holder thereof fails to secure a renewal within three months from the time herein provided; but any license thus cancelled may, upon evidence of good moral character and proper proficiency, be restored upon the payment of fifteen ($15.00) dollars. (1917, c. 73, s. 15; 1933, c. 442, s. 4; 1937, c. 293, s. 2; C. S. 6726.)

Editor's Note.—Prior to the 1937 amendment the fee specified in the first paragraph was two dollars and the fee in the second paragraph was ten dollars.

§ 90-156. Pay of board and authorized expenditures.—The members of the board of chiropractic examiners shall receive their actual expenses, including railroad fare and hotel bills, when meeting for the purpose of holding examinations, and performing any other duties placed upon them by this article, such expenses to be paid by the treasurer of the board out of the moneys received by him as license fees, or from renewal fees. The board shall also expend out of such fund so much as may be necessary for preparing licenses, securing seal, and all other necessary expenses in connection with the duties of the board. (1917, c. 73, s. 16; C. S. 6727.)

§ 90-157. Chiropractors subject to state and municipal regulations. — Chiropractors shall observe and be subject to all state and municipal regulations relating to the control of contagious and infectious diseases. (1917, c. 73, s. 17; C. S. 6728.)

Art. 9. Trained Nurses.

§ 90-158. Board of examiners. — A board of nurse examiners composed of five members, to consist of three registered nurses to be elected by the North Carolina State Nurses' Association, and one representative each from the North Carolina State Medical Society and the North Carolina State Hospital Association, is hereby created to be known by the title "The North Carolina Board of Nurse Examiners."

The members of the first board elected under this article shall serve as follows: The representative of the North Carolina State Medical Society and the representative of the North Carolina State Hospital Association shall serve for a term expiring June 1, 1925, or until their successors are qualified; and the three registered nurses elected by the North Carolina State Nurses' Association shall serve for a term expiring June 1, 1926, or until their successors are qualified. Thereafter, each member of said board shall serve a term of three years, or until his or her successor is appointed. The board shall fill any vacancy for an unexpired term.

The Board of nurse examiners is hereby empowered to prescribe such regulations as it may deem proper, governing applicants for licenses, admission to examinations, the conduct of applicants during examinations, and the conduct of the examinations proper with the approval of the standardization board hereinafter created. (1917, c. 17, s. 1; 1925, c. 87, s. 2; 1931, c. 56; C. S. 6729.)

Editor's Note.—Prior to Public Laws of 1925 it was provided by this section that there be two physicians on the board elected by the state medical society. A provision for the appointment of an inspector of the training schools by the nurse association was omitted, and there is a new

provision giving the board power to make rules and regulations, by the amendment.

The Act of 1931 merely changed "The Board of Nurse Examiners of North Carolina" to its present title.

§ 90-159. Committee on standardization. — A joint committee on standardization, consisting of three members appointed from the North Carolina state nurses' association, and four members from the North Carolina state hospital association, whose members shall serve for a term of three years, or until their successors are elected, is hereby created. The joint committee on standardization shall advise with the board of nurse examiners herein created in the adoption of regulations governing the education of nurses, and shall jointly with the North Carolina board of nurse examiners have power to establish standards and provide minimum requirements for the conduct of schools of nursing of which applicants for examination for nurse's license under this chapter must be graduates before taking such examination. (1925, c. 87, s. 3; 1931, c. 56; 1933, c. 203.)

Editor's Note.—The Act of 1931 struck out the second sentence of this section and inserted the one above in lieu thereof.

Public Laws of 1933, c. 203, changed the number of members from the North Carolina State Hospital Association from three to four, and inserted the provision making the exercise of power joint with the North Carolina board of nurse examiners.

§ 90-160. Educational director of schools of nursing. — An educational director of schools of nursing shall be annually appointed by the North Carolina State Nurses' Association, who shall report annually to the board of nurse examiners, and to the North Carolina State Hospital Association. Such director shall be a registered nurse, her duties and compensation to be fixed by the board of nurse examiners and the standardization board. (1925, c. 87, s. 4.)

§ 90-161. Organization of board; seal; officers; compensation.—Three members of the board shall constitute a quorum, two of whom shall be nurses.

The board shall adopt and have custody of a seal and shall frame by-laws and regulations for its own government and for the execution of the provisions of this article. The officers of said board shall be a president and a secretary-treasurer, both to be elected from its nurse members. The treasurer shall give bond in such sum as may be fixed in the by-laws, and the premium therefor to be paid from the treasury of said board. The members of the board shall receive such compensation in addition to actual traveling and hotel expenses as shall be fixed by the board. The secretary-treasurer may receive an additional salary to be fixed by the board, said expenses and salaries to be paid from fees received by the board under the provisions of this article, and in no case to be charged upon the treasury of the State.

All moneys received in excess of said allowance, and other expenses provided for, shall be held by the secretary-treasurer for the expenses of the board and for extending nursing education in the State. (1917, c. 17, s. 2; 1925, c. 87, s. 5; C. S. 6730.)

Editor's Note.—Prior to Public Laws 1925, four dollars per diem and actual traveling and hotel expenses was the compensation of each member of the board.

§ 90-162. Meetings for examination; prerequisites for applicants. — The board of nurse examiners of North Carolina shall convene not less frequently than once annually, and at any time ten or more applicants shall notify the secretary-treasurer that they desire an examination. Thirty days prior to such meetings notice stating time and place of examination shall be published in one nursing journal and three daily State papers.

At such meetings it shall be the duty of the board of nurse examiners to examine graduate nurses applying for license to practice their profession in North Carolina. An applicant must prove to the satisfaction of the board that he or she is twenty-one years of age, is of good moral character, and has graduated from high school or has equivalent credits.

Applicants shall have graduated from a school of nursing connected with a general hospital giving a three years' course of practical and theoretical instruction, which said hospital meets the minimum requirements and standards for the conduct of schools of nursing which may have been set up and established by the joint committee on standardization provided for in § 90-159. Such schools of nursing may give credit for college work on the three years' course to the extent and as may be approved by the board of nurse examiners, such credits not to total more than one year for any one person. (1917, c. 17, s. 3; 1925, c. 87, s. 6; 1931, c. 56; C. S. 6731.)

Editor's Note.—Public Laws 1925 added a provision that schools shall meet the requirements of the American Nurse's Association formerly appearing in the third paragraph of this section. The Act of 1931 struck out this paragraph and inserted another in lieu thereof. This Act struck out from the second paragraph the words "receive at least one year of high school education or its equivalent," and inserted in lieu thereof the words: "graduated from high school or has equivalent credits."

§ 90-163. Scope of examination; fees; licensing. —Examinations shall be held in anatomy and physiology, materia medica, dietetics, hygiene and elementary bacteriology, obstetrical, medical and surgical nursing, nursing of children, contagious diseases and ethics of nursing, and such other subjects as may be prescribed by the examining board. The subject of contagious diseases may be given in theory only. If on examination the applicant should be found competent, the board shall grant a license authorizing him or her to register as herein provided and to use the title "registered nurse," signified by the letters "R. N."

Before an applicant shall be permitted to take such an examination he or she shall pay to the secretary of the examining board an examination fee of ten dollars. In the event of the failure of the applicant to pass examination, one-half of the above named fee shall be returned to the applicant. (1917, c. 17, s. 4; 1925, c. 87, s. 7; C. S. 6732.)

Editor's Note.—This section was re-enacted without change by Public Laws 1925.

§ 90-164. Licenses and certificates without examination; fee.—The board of nurse examiners shall have authority to issue licenses without examination to nurses registered in other states: Provided, that said states shall maintain an equivalent standard of registration requirements. The examination fee shall accompany each such application for license.

The board shall also have power in the exercise

of its discretion to issue a license without examination to any applicant who has been duly registered as a registered nurse under the laws of another state: Provided, said applicant possesses qualifications at least equal to those required by the State of North Carolina. The fee for license without examination shall be twenty-five dollars ($25.00). (1917, c. 17, s. 5; 1925, c. 87, s. 8; C. S. 6733.)

Editor's Note.—The second paragraph of this section is new with Public Laws 1925.

§ 90-165. Only licensed nurses to practice.—On and after February 28, 1925, all "trained," "graduate," "licensed," or "registered" nurses must obtain licenses from the board of nurse examiners before practicing their profession in this State, and before using the abbreviation "R. N." must obtain certificates of registration from the clerk of the Superior Court of any county as hereinafter provided; but nothing in this section shall be construed to apply to any nurse who is qualified and practicing her profession on February 28, 1925. (1917, c. 17, s. 6; 1917, c. 288; 1925, c. 87, s. 9; C. S. 6734.)

Editor's Note.—Public Laws 1925 omitted a former proviso preventing the section having retroactive effect, otherwise it is substantially the same.

§ 90-166. Certain persons not affected by this article.—This article shall not be construed to affect or apply to the nursing of the sick by friends or members of the family. (1917, c. 17, s. 7; 1925, c. 87, s. 10; 1931, c. 56; C. S. 6735.)

Editor's Note.—This section was re-enacted without change by Public Laws 1925.

The Act of 1931 struck out the whole of this section and inserted in lieu thereof the above.

§ 90-167. Temporary nursing in state. — The board of nurse examiners may make reasonable rules of comity allowing registered nurses from other states to do temporary nursing in this State. (1925, c. 87, s. 10½.)

§ 90-168. Registration of nurses.—The clerk of the Superior Court of any county, upon presentation to him of a license from the State Board of Nurse Examiners issued at a date not more than twelve months previous, shall enter the date of registration and the name and residence of the holder thereof in a book to be kept in his office for this purpose, and marked "record of registered nurses," and shall issue to the applicant a certificate of such registration, under the seal of the Superior Court of the county upon a form to be prescribed by the board of nurse examiners. For such registration he shall charge a fee of fifty cents. (1917, c. 17, s. 8; 1925, c. 87, s. 11; C. S. 6736.)

Editor's Note. — This section was re-enacted without change by the Public Laws 1925.

§ 90-169. Revocation of license. — The board shall have power to revoke the license of any registered nurse upon conviction of gross incompetence, dishonesty, intemperance, or any act derogatory to the morals or standing of the profession of nursing. No license shall be revoked except upon charges preferred. The accused shall be furnished a written copy of such charges, and given not less than twenty days notice of the time and place when said board shall accord a full and fair hearing on the same. Upon the revocation of a license and certificate the name of the holder thereof shall be stricken from the roll of registered nurses in the hands of the secretary of the board, and by the clerk of the Superior Court from his register upon notification of such action by said secretary. (1917, c. 17, s. 9; 1925, c. 87, s. 12; C. S. 6737.)

Editor's Note.—This section was re-enacted without change by Public Laws 1925.

§ 90-170. Violation of article misdemeanor. — Any person procuring license under this article by false representation, or who shall refuse to surrender a license which has been revoked in the manner prescribed in the preceding section, or who shall use the title "trained", "graduate," "licensed" or "registered nurse," or the abbreviation "R. N." without having first obtained a license, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. Each act shall constitute a new offense. (Rev., s. 3656; 1917, c. 17, s. 10; 1925, c. 87, s. 13; C. S. 6738.)

Editor's Note.—This section was re-enacted without change by Public Laws 1925.

§ 90-171. Training school for nurses at Sanatorium.—The state sanatorium for the treatment of tuberculosis, located at Sanatorium, North Carolina, is hereby authorized and power is hereby expressly given it to organize and conduct a training school for nurses in connection with the said sanatorium. The superintendent of the North Carolina sanatorium for the treatment of tuberculosis shall be ex officio dean of the training school for nurses, and he shall have power and authority to appoint such faculty, prescribe such course or courses of lectures, study and clinical work, and award such diplomas, certificates, or other evidence of the completion of such course or courses as he may think wise and proper, and perform such other functions and do such other acts as he may think necessary in the conduct of the said training school. (1915, c. 163, ss. 1, 2; C. S. 6739.)

Art. 10. Midwives.

§ 90-172. Midwives to register. — All persons, other than regularly registered physicians, practicing midwifery in this state shall register, without fee, their names and addresses with the secretary of North Carolina state board of health, as required by the provisions of article 17, entitled Inflammation of Eyes of Newborn, of the chapter Public Health. (1917, c. 257, ss. 8, 9; C. S. 6750.)

§ 90-173. Persons forbidden to practice midwifery.—It shall be unlawful for any person who habitually gets drunk, or who is addicted to the excessive use of cocaine or morphine or other opium derivative, to practice midwifery for a fee. (1911, c. 34, s. 1; C. S. 6751.)

§ 90-174. Disinfection of hands of practitioners. —It shall be unlawful for any midwife or other person who practices midwifery for fees to touch or otherwise handle the private parts of the person of any patient upon whom such person is in attendance unless the person so in attendance shall first and immediately previous thereto thoroughly wash and disinfect his or her hands. (1911, c. 34, s. 2; C. S. 6752.)

§ 90-175. Violation of two preceding sections misdemeanor.—Any person violating §§ 90-173

and 90-174 shall be guilty of a misdemeanor, and upon conviction shall be fined not less than five nor more than ten dollars. (1911, c. 34, s. 4; C. S. 6753.)

§ 90-176. Practice of midwifery regulated by state board of health.—The state board of health is hereby authorized, empowered and directed to adopt, promulgate and enforce rules and regulations governing the practice of midwifery in this State. (1935, c. 225, s. 1.)

§ 90-177. Permit from state board of health.—No person shall practice midwifery in this State, except upon a permit granted and issued by the state board of health, under rules and regulations which it shall adopt with respect thereto, and upon forms which it shall prescribe. Provided that all persons who have practiced midwifery in this State for a period of five (5) years or more shall as a matter of right be entitled to the issuance of a permit to practice such occupation, if such person or persons shall make application therefor on or before April 24, 1936. (1935, c. 225, s. 2.)

§ 90-178. Practicing without permit a misdemeanor; authority of local health officers unaffected; counties may exempt themselves from law.—Any person who shall practice midwifery in this State without such permit from the state board of health, or who, in such practice, shall violate any of the rules and regulations adopted and promulgated by the state board of health, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than fifty ($50.00) dollars, or imprisonment of not more than thirty (30) days; provided, the provisions of §§ 90-176 to 90-178 shall not apply to licensed medical or osteopathic physicians. Provided nothing herein shall be construed to interfere with or supplant the authority of the local health officers over the practice of midwifery in those counties and/or cities having organized health departments now controlling and regulating the practice of midwifery. Provided that any county in the State not desiring to remain under the provisions of §§ 90-176 to 90-178 may withdraw from same by resolution duly passed by the board of commissioners of said county and certified to state board of health. (1935, c. 225, s. 3.)

Art. 11. Veterinaries.

§ 90-179. State veterinary medical association incorporated.—The association of veterinary surgeons and physicians calling themselves the North Carolina state veterinary medical association is declared to be a body politic and corporate under the name and style of The North Carolina State Veterinary Medical Association. (Rev., s. 5431; 1903, c. 503; C. S. 6754.)

§ 90-180. Board of veterinary medical examiners; appointment; membership; organization. — In order to properly regulate the practice of veterinary medicine and surgery there shall be a board to be known as the North Carolina board of veterinary medical examiners, to consist of five members of the North Carolina veterinary medical association. The governor shall annually appoint one member of such board, who shall hold his office for five years, and until his successor is appointed and qualified. Every person so appointed shall, within thirty days after notice of appointment, appear before the clerk of the superior court of the county in which he resides and take oath to faithfully discharge the duties of his office. (Rev., s. 5432; 1903, c. 503, s. 2; C. S. 6755.)

§ 90-181. Meeting of board; powers. — The board of examiners shall meet at least once a year at such times and places as the association may decide upon, and remain in session sufficiently long to examine all who may make application at the appointed time for a license. Three members of said board shall constitute a quorum. The board of examiners shall elect a president and a secretary, who shall also perform the duties of a treasurer. They shall keep a regular record of their proceedings in a book to be kept for that purpose, which shall always be open for inspection, and shall keep a record of all applicants for a certificate and of all who are granted a certificate, and shall publish the names of the successful applicants at least once each year in two newspapers published in the state. The board shall have authority to adopt such by-laws and regulations as may be necessary. (Rev., s. 5433; 1903, c. 503, ss. 3, 4, 6, 7; C. S. 6756.)

§ 90-182. Compensation of board.—The members of such board shall receive such compensation for their services, not to exceed four dollars per day, and their traveling expenses, as the association may decide upon, to be paid by the secretary of the board out of any money coming into his hands as secretary. None of the expenses of the board or of the members shall be paid by the state. (Rev., s. 5434; 1903, c. 503, s. 9; C. S. 6757.)

§ 90-183. Examination and licensing of veterinaries. — The board of examiners shall, at their annual meeting, examine all applicants who desire license to practice veterinary medicine or surgery. If upon such examination the applicant be found to possess sufficient skill to practice veterinary medicine or surgery, and good moral character, a license or certificate shall be issued to him. No certificate shall be granted except with a concurrence of a majority of the members present. To prevent delay and inconvenience two members of the board of examiners may grant a temporary certificate to practice veterinary medicine or surgery, which shall be in force only until the next regular meeting of the board of examiners, but in no case shall such temporary certificate be granted to any person who has been an unsuccessful applicant for a certificate before the board. The board shall have power to require each applicant to pay a fee of not more than ten dollars before issuing a certificate and five dollars before issuing a temporary certificate. (Rev., s. 5435; 1903, c. 503, ss. 3, 5, 8; C. S. 6758.)

§ 90-184. Rescission of license. — The board shall have power to rescind any certificate that may have been granted by it or annul any registration made under this article in accordance with the provisions of §§ 150-1 to 150-8 upon satisfactory proof that the person thus licensed has been guilty of grossly immoral conduct or malpractice as determined by the board. And it shall be the duty of said board to furnish any information pertaining to the practice of veterinary medicine or

surgery upon application for same by any one practicing under this article. (Rev., s. 5436; 1903, c. 503, s. 10; C. S. 6759.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

§ 90-185. Practitioners before one thousand nine hundred and thirty-five.—All persons who had, on the first day of January, one thousand nine hundred and thirty-five, been practicing veterinary medicine or surgery and who have for a period of twenty years paid all fees as are required by law shall be allowed to practice veterinary medicine or surgery in this State: Provided, they make affidavit to the effect that they have practiced veterinary medicine or surgery as a profession for a period of twenty years prior to the first day of January, one thousand nine hundred and thirty-five, and that they have for a period of twenty years prior to the first day of January, one thousand nine hundred and thirty-five, paid all fees as may have been required by law. (Rev., s. 5437; 1903, c. 503, s. 11; 1905, c. 320; 1913, c. 129; 1919, c. 94; 1921, c. 171; Ex. Sess. 1921, c. 68; 1924, c. 38; 1935, c. 387; C. S. 6760.)

Editor's Note.—Public Laws of 1935, c. 387, struck out the former section and inserted the above in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 90-186. When may practice without license.—Nothing in this article shall be construed to prohibit any member of the medical profession from prescribing for domestic animals in cases of emergency and collecting a fee therefor, nor to prohibit gratuitous services by any person in an emergency, nor to prevent any person from practicing veterinary medicine or surgery on any animal belonging to himself, or to prevent any one from castrating or spaying any of the domestic animals. And this article shall not apply to commissioned veterinary surgeons in the United States army. (Rev., s. 5438; 1903, c. 503, s. 12; C. S. 6761.)

§ 90-187. Violation of article misdemeanor. — Any person practicing veterinary surgery or medicine in this state, without first having complied with the provisions of this article, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars or imprisoned not less than thirty days, in the discretion of the court. (1913, c. 129, s. 2; C. S. 6762.)

Art. 12. Chiropodists.

§ 90-188. Chiropody defined.—Chiropody (podiatry) as defined by this article is the surgical, medical and mechanical treatment of all ailments of the human foot, except the correction of deformities requiring the use of the knife, amputation of the foot or toes, or the use of an anesthetic other than local. (1919, c. 78, s. 2; C. S. 6763.)

§ 90-189. Unlawful to practice unless registered.—On and after the first of July, one thousand nine hundred and nineteen, it shall be unlawful for any person to practice or attempt to practice chiropody (podiatry) in this state or to hold himself out as a chiropodist (podiatrist) or to designate himself or describe his occupation by the use of any words or letters calculated to lead others to believe that he is a chiropodist (podiatrist) unless he is duly registered as provided in this article. (1919, c. 78, s. 1; C. S. 6764.)

§ 90-190. Board of chiropody examiners; how appointed; terms of office.—There shall be established a board of chiropody (podiatry) examiners for the state of North Carolina. This board shall consist of three members who shall be appointed by the North Carolina pedic association. All of such members shall be chiropodists who have practiced chiropody in North Carolina for a period of not less than one year. The members of the board shall be appointed by said association for a term of three years: Provided, the members of the first board shall be appointed to hold office for one, two and three years respectively, and one member shall be appointed annually thereafter by said association. The board shall have authority to elect its own presiding and other officers. (1919, c. 78, s. 3; C. S. 6765.)

§ 90-191. Applicants to be examined; examination fee; requirements. — Any person not heretofore authorized to practice chiropody (podiatry) in this state shall file with the board of chiropody examiners an application for examination accompanied by a fee of twenty-five dollars, together with proof that the applicant is more than twenty-one years of age, is of good moral character, and has obtained a preliminary education equivalent to four years instruction in a high school. Such applicant before presenting himself for examination, must be a graduate of a legally incorporated school of chiropody (podiatry) acceptable to the board. (1919, c. 78, s. 9; C. S. 6766.)

§ 90-192. Examinations; subjects; certificates.—The board of chiropody examiners shall hold at least one examination annually for the purpose of examining applicants under this article. The examinations shall be held at such time and place as the board may see fit, and notice of the same shall be published in one or more newspapers in the state. The board may make such rules and regulations as it may deem necessary to conduct its examinations and meetings. It shall provide such books, blanks and forms as may be necessary to conduct such examinations, and shall preserve and keep a complete record of all its transactions. Examinations for registration under this article shall be in the English language and shall be written, oral, or clinical, or a combination of written, oral, or clinical, as the board may determine, and shall be in the following subjects wholly or in part: Anatomy, physiology, pathology, bacteriology, chemistry, diagnosis and treatment, therapeutics, clinical chiropody and asepsis; limited in their scope to the treatment of the foot. No applicant shall be granted a certificate unless he obtains a general average of seventy-five or over, and not less than fifty per cent in any one subject. After such examination the board shall, without unnecessary delay, act on same and issue certificates to the successful candidates, signed by each member of the board; and the board of chiropody examiners shall report annually to the North Carolina pedic association. (1919, c. 78, s. 4; C. S. 6767.)

§ 90-193. Reëxamination of unsuccessful applicants.—An applicant failing to pass his examina-

tion shall within one year be entitled to reexamination upon the payment of two dollars, but not more than two reëxaminations shall be allowed any one applicant. Should he fail to pass his third examination he shall file a new application before he can again be examined. (1919, c. 78, s. 6; C. S. 6768.)

§ 90-194. Practitioners before enactment of this article; certificates.—Every person who is engaged in the practice of chiropody (podiatry) in this state one year next prior to the enactment of this article shall file with the board of chiropody examiners on or before the first day of July, one thousand nine hundred and nineteen, a written application for a certificate to practice chiropody (podiatry), together with proof satisfactory to the board that the applicant is more than twenty-one years of age and has been practicing chiropody in this state for a period of more than one year next prior to the passage of this article, and upon the payment of a fee of ten dollars the said board of chiropody examiners shall issue to such applicant a certificate to practice chiropody (podiatry) in this state. (1919, c. 78, s. 5; C. S. 6769.)

§ 90-195. Certificates to registered chiropodists of other states.—Applicants registered or certified by examiners of other states whose requirements are equal to those of this state may, upon the payment of a fee of twenty-five dollars, be granted a certificate without examination: Provided, that the provisions of this section shall be extended only to those states which extend to this state the same privilege. (1919, c. 78, s. 8; C. S. 6770.)

§ 90-196. Certificates filed with clerk of court; clerk to keep record.—Every person receiving a certificate from the board shall file the same with the clerk of the court of the city or county in which he resides. It shall be the duty of the clerk to register the name and address and date of the certificate in a book kept for such purpose as a part of the records of his office, and the number of the book and the page therein containing said recorded copy shall appear on the face of the certificate over the name of the clerk recording the same. The person thus registering shall pay to the clerk a fee of fifty cents. (1919, c. 78, s. 7; C. S. 6771.)

§ 90-197. Revocation of certificate; grounds for; suspension of certificate.—The board of chiropody examiners may revoke by a majority vote of its members, and in accordance with the provisions of §§ 150-1 to 150-8, any certificate it has issued, and cause the name of the holder to be stricken from the book of the registration by the clerk of the court in the city or county in which the name of the person whose certificate is revoked is registered, for any of the following causes:

1. The wilful betrayal of a professional secret.

2. Any person who in any affidavit required of the applicant for certificate, registration, or examination under this article shall make a false statement.

3. Any person convicted of a crime involving moral turpitude.

4. Any person habitually indulging in the use of narcotics, ardent spirits, stimulants or any other substance which impairs intellect and judgment to such an extent as in the opinion of the board to incapacitate such person for the performance of his professional duties.

Any person against whom charges have been made shall be notified of the fact and a copy of the charges shall be sent him by the board, and he shall be given a fair and impartial trial by the board, whose decisions shall be made by a majority vote of its members.

The board may suspend any certificate granted under this article for a period not exceeding six months on account of any misconduct on the part of the person registered which would not, in the judgment of the board, justify the revocation of his certificate. (1919, c. 78, ss. 12, 13; C. S. 6772.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

§ 90-198. Fees for certificates and examinations; compensation of board.—To provide a fund in order to carry out the provisions of this article the board shall charge ten dollars for each certificate issued and fifteen dollars for each examination. From such funds all expenses and salaries, not exceeding four dollars per diem for each day actually spent in the performance of the duties of the office and actual railroad expenses in addition, shall be paid by the board: Provided, that at no time shall the expenses exceed the cash balance on hand. (1919, c. 78, s. 14; C. S. 6773.)

§ 90-199. Annual fee of $10 required; cancellation or renewal of license. — On or before the first day of July of each year every chiropodist engaged in the practice of chiropody in this State shall transmit to the Secretary-Treasurer of the said North Carolina State Board of Chiropody Examiners his signature and post office address, the date and year of his or her certificate, together with a fee to be set by the Board of Chiropody Examiners not to exceed ten ($10.00) dollars, and receive therefor a renewal certificate. Any license or certificate granted by said Board under or by virtue of this or the following section, shall automatically be cancelled and annulled if the holder thereof fails to secure the renewal herein provided for within a period of thirty days after the thirty-first day of July of each year, and such delinquent chiropodist shall pay a penalty of five dollars for reinstatement: Provided that any legally registered chiropodist in this state who has retired from practice or who has been absent from the state may, upon furnishing affidavit to that effect, reinstate himself by paying all fees due for the years in which he was absent or retired, the said amount in no case to exceed fees for five years. (1931, c. 191.)

§ 90-200. Issuance of license upon payment of fees.—Upon payment of the fees prescribed in the above section, by or before July first, nineteen hundred and thirty-one, by any person who has heretofore practiced chiropody in the State of North Carolina, for a period of five successive years regularly, it shall be the duty of the State Board of Chiropody Examiners to issue to said person a license which shall grant to such person all the rights and privileges of chiropodists now engaged in practicing chiropody. (1931, c. 191.)

§ 90-201. Unlawful practice of chiropody a misdemeanor.—Any person who shall practice or attempt to practice chiropody (podiatry) in this state

without having complied with the provisions of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty nor more than two hundred dollars, or shall be imprisoned for not less than thirty nor more than ninety days. Nothing in this article shall be construed to interfere with physicians in the discharge of their professional duties. (1919, c. 78, s. 10; C. S. 6774.)

§ 90-202. Sheriffs and police to report violators of this article.—It shall be the duty of the police department of the cities and the sheriff of each county in the state to see that all practitioners of chiropody (podiatry) in the state are legally registered according to the provisions of this article, and to report to the state's attorney of the city or county all cases of violation of this article; whereupon the state's attorney shall promptly prosecute those violating the provisions of this article. (1919, c. 78, s. 11; C. S. 6775.)

Art. 13. Embalmers.

§ 90-203. State board; election; qualifications; term; vacancies.—The State board of embalmers shall consist of five members, elected by the state board of health, all of whom shall be licensed and practical embalmers, having experience in the care and disposition of dead human bodies. One member of such board shall be elected in June, one thousand nine hundred and five, and annually thereafter during the month of June one member of such board shall be elected. The term of office shall begin on the first day of July next after the election, and continue for five years. The state board of health shall fill all vacancies in such board. (Rev., s. 4384; 1901, c. 338, ss. 1, 2, 3; 1931, c. 174; C. S. 6777.)

Editor's Note.—The Act of 1931 struck out the words "three of whom shall be members of the State Board of Health, the other two shall be" formerly appearing in lines four and five of this section and inserted in lieu thereof "all of whom shall be licensed and."

§ 90-204. Members; removal; oath. — The state board of health shall have power to remove from office any member of said board for neglect of duty, incompetency, or improper conduct. The state board of health shall furnish each person appointed to serve on the state board of embalmers a certificate of appointment. The appointees shall qualify by taking and subscribing to the usual oath of office before some person authorized to administer oaths, within ten days after said appointment has been made, which oath shall be filed with the board of embalmers. (Rev., s. 4385; 1901, c. 338, ss. 3, 4; C. S. 6778.)

§ 90-205. Common seal; powers. — The board shall adopt a common seal, and shall have all the powers and privileges conferred on it by the laws of the state. (Rev., s. 4386; 1901, c. 338, s. 6; C. S. 6779.)

§ 90-206. Meetings; quorum; by-laws; officers; president to administer oaths.—The board shall meet at least once every year, during the month of July, at such place as it may determine. Three members shall constitute a quorum. At each annual meeting the board from its members shall select a president and a secretary, who shall hold their offices for one year, and until their successors are elected. The board shall, from time to time, adopt rules, regulations, and by-laws not inconsistent with the laws of this state or of the United States, whereby the performance of the duties of such board and the practice of embalming of dead human bodies shall be regulated. The president of the board (and in his absence a president pro tempore elected by the members present) is authorized to administer oaths to witnesses testifying before the board. (Rev., s. 4387; 1901, c. 338, ss. 5, 6, 7, 8; C. S. 6780.)

§ 90-207. Grant and renewal of licenses; fees; licenses displayed.—Every person not licensed as an embalmer, now engaged or desiring to engage in the practice of embalming dead human bodies, shall make written application to the state board of embalmers for a license, accompanying the same with a license fee of five dollars, whereupon the applicant shall present himself before the board at a time and place to be fixed by the board, and if the board shall find, upon due examination, that the applicant is of good moral character, possessed of skill and knowledge of said science of embalming and the care and disposition of the dead, and has a responsible knowledge of sanitation and the disinfection of bodies of deceased persons and the apartment, clothing, and bedding, in case of death from infectious or contagious disease, and has had a special course in embalming in an approved school, or two years practical experience with a licensed and practical embalmer, who shall make affidavit upon the application that said applicant has had such experience under him, the board shall issue to such applicant a license to practice the art of embalming and the care and disposition of the dead, and shall register such applicant as a duly licensed embalmer. Such license shall be signed by a majority of the board and attested by its seal. All persons receiving a license under the provisions of this article shall also register the fact at the office of the board of health of the city, and where there is no board of health, with the clerk of the superior court in the county or counties in which it is proposed to carry on said practice, and shall display said license in a conspicuous place in the office of such licentiate. Every registered embalmer who desires to continue the practice of his profession shall annually, during the time he shall continue in such practice, on such day as the board may determine, pay to the secretary of the board a fee of two dollars for the renewal registration. (Rev., s. 4388; 1901, c. 338, ss. 9, 10; 1917, c. 36; 1919, c. 88; C. S. 6781.)

Cross Reference.—As to uniform procedure for suspension or revocation of licenses, see §§ 150-1 to 150-8.

§ 90-208. Embalming without license.—If any person shall practice or hold himself out as practicing the art of embalming, without having complied with the provisions of this article, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than one hundred dollars for each offense. (Rev., s. 3644; 1901, c. 338, s. 14; C. S. 6782.)

§ 90-209. Expenses and salaries of board.—All expenses, salary, and per diem to members of this board shall be paid from fees received under the provisions of this article, and shall in no manner be an expense to the state. All moneys received

in excess of said per diem allowance and other expenses provided for shall be held by the secretary of said board as a special fund for meeting the expenses of said board. (Rev., s. 4389; 1901, c. 338, s. 11; C. S. 6783.)

§ 90-210. Embalming schools have privileges of medical schools as to cadavers.—Schools for teaching embalming shall have extended to them the same privileges as to the use of bodies for dissection while teaching as those granted to medical colleges. (Rev., s. 4390; 1901, c. 338, s. 15; C. S. 6784.)

Art. 14. Cadavers for Medical Schools.

§ 90-211. Board for distribution.—The North Carolina board of anatomy shall consist of three members, one each from the University of North Carolina School of Medicine, the Duke University School of Medicine, and the Bowman Gray School of Medicine of Wake Forest College, appointed by the deans of the respective medical schools. This board shall be charged with the distribution of dead human bodies for the purpose of promoting the study of anatomy in this state, and shall have power to make proper rules for its government and the discharge of its functions under this article. (Rev., s. 4287; 1903, c. 666, s. 1; 1943, c. 100; C. S. 6785.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-212. What bodies to be furnished.—All officers, agents or servants of the state of North Carolina, or of any county or town in said state, and all undertakers doing business within the state, having charge or control of a dead body required to be buried at public expense, or at the expense of any institution supported by state, county or town funds, shall be and hereby are required immediately to notify, and, upon the request of said board or its authorized agent or agents, without fee or reward, deliver, at the end of a period not to exceed thirty-six hours after death, such body into the custody of the board, and permit the board or its agent or agents to take and remove all such bodies or otherwise dispose of them: Provided, that such body be not claimed within thirty-six hours after death to be disposed of without expense to the state, county or town, by any relative within the second degree of consanguinity, or by the husband or wife of such deceased person: Provided, further, that the thirty-six hour limit may be prolonged in cases within the jurisdiction of the coroner where retention for a longer time may be necessary: Provided, further, that the bodies of all such white prisoners dying while in Central Prison or road camps of Wake County, whether death results from natural causes or otherwise, shall be equally distributed among the white funeral homes in Raleigh, and the bodies of all such negro prisoners dying under similar conditions shall be equally distributed among the negro funeral homes in Raleigh; but only such funeral homes can qualify hereunder as at all times maintain a regular licensed, embalmer: Provided, further, that nothing herein shall require the delivery of bodies of such prisoners to funeral directors of Wake County where the same are claimed by relatives or friends.

Whenever the dead body is that of an inmate of any state hospital, the state school for the deaf, the state school for the deaf, dumb and blind, or of any traveler or stranger, it may be embalmed and delivered to the North Carolina board of anatomy, but it shall be surrendered to the husband or wife of the deceased person or any other person within the second degree of consanguinity upon demand at any time within ten days after death upon the payment to said board of the actual cost to it of embalming and preserving the body. (Rev., s. 4288; 1903, c. 666, s. 2; 1911, c. 188; 1923, c. 110; 1937, c. 351; 1943, c. 100: C. S. 6786.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-213. Autopsies unlawful without consent of board.—It is hereby declared unlawful to hold an autopsy on any dead human body subject to the provisions of this article without first having obtained the consent, in writing, of the chairman of the board or of his accredited agent: Provided, that nothing in this article shall limit the coroner in the fulfillment of his duties: Provided, further, that nothing in §§ 90-211 through 90-216, inclusive, shall prevent a person from making testamentary disposition of his or her body after death. (Rev., s. 4289; 1903, c. 666, s. 3; 1911, c. 188; 1943, c. 100; C. S. 6787.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-214. Bodies to be distributed to medical schools.—The bodies obtained under this article shall be distributed, with due precautions to shield them from the public view, among the several medical schools in a proportion to be agreed upon by a majority of the members of the North Carolina board of anatomy, such bodies to be used within the state for the advancement of science. (Rev., s. 4290; 1903, c. 666, s. 4; 1943, c. 100; C. S. 6788.)

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-215. How expenses paid.—All expenses for the delivery, distribution and embalming of the dead bodies obtained under this article upon the request of the North Carolina board of anatomy, under such rules and regulations as the board may provide shall be borne by the medical school receiving same, and in no case shall the state or any county or town be liable therefor. (Rev., s. 4291; 1903, c. 666, s. 5; 1943, c. 100; C. S. 6789).

Editor's Note.—The 1943 amendment rewrote this section.

§ 90-216. Violation of article misdemeanor.—Any person failing or refusing to perform any duty imposed by this article, or violating any of its provisions shall be guilty of a misdemeanor, punishable by a fine and/or imprisonment in the discretion of the court. (Rev., s. 3567; 1903, c. 666, s. 6; 1943, c. 100; C. S. 6790.)

Editor's Note.—The 1943 amendment rewrote this section.

Art. 15. Autopsies.

§ 90-217. Limitation upon right to perform autopsy.—The right to perform an autopsy upon the dead body of a human being shall be limited to cases specially provided by statute or by direction or will of the deceased; cases where a coroner or the majority of a coroner's jury deem it necessary upon an inquest to have such an autopsy; and cases where the husband or wife or one of the next of kin or nearest known relative or other person charged by law with the duty of

burial, in the order named and as known, shall authorize such examination or autopsy. (1931, c. 152; 1933, c. 209.)

Cross References.—As to authority of coroners, see § 152-7. As to authority of prosecuting officer, see § 15-7. As to cadavers for medical schools, see § 90-212.

Editor's Note.—The right of burial belongs to the surviving relations in the order of inheritance. See Floyd v. R. R., 167 N. C. 55, 83 S. E. 12 (1914), 9 N. C. Law Rev. 348.

Public Laws 1933, c. 209, deleted a clause reading "for the purpose of ascertaining the cause of death," which formerly appeared at the end of this section.

Cited in Gurganious v. Simpson, 213 N. C. 613, 197 S. E. 163.

§ 90-218. Post-mortem examination of inmates of certain public institutions.—Upon the death of any inmate of any institution now maintained, or in the future established, by the state, or any city, county or other political subdivision of the state, for the care of the sick, the feeble-minded or insane, the superintendent, or other administrative head of such institution in which such death occurs, is empowered to authorize a post-mortem examination of the deceased person. Such examination shall be of such scope and nature as may be thought necessary or desirable to promote knowledge of the human organism and the disorders to which it is subject. (1943, c. 87, s. 1.)

§ 90-219. Post-mortem examinations in certain medical schools.—The post-mortem examinations and studies authorized may be made in the laboratories of incorporate medical schools of colleges and universities on such conditions as may be agreed upon by the superintendent, or other administrative head of such institution, authorizing the examination and the head of the medical school undertaking to make the examination. (1943, c. 87, s. 2.)

§ 90-220. Written consent for post-mortem examinations required.—No superintendent, or other administrative head of such institution, shall authorize any post-mortem examination, as described in §§ 90-218 and 90-219, without first securing the written consent of the deceased person's husband or wife, or one of the next of kin, or nearest known relative or other person charged by law with the duty of burial, in the order named and as known. A copy of the written consent shall be filed in the office of the superintendent, or other administrative head of the institution wherein said inmates dies. (1943, c. 87, s. 3.)

Chapter 91. Pawnbrokers.

§ 91-1. Pawnbroker defined.—Any person, firm, or corporation who shall engage in the business of lending or advancing money on the pledge and possession of personal property, or dealing in the purchasing of personal property or valuable things on condition of selling the same back again at stipulated prices, is hereby declared and defined to be a pawnbroker. (1915, c. 198, s. 1; C. S. 7000.)

§ 91-2. License; business confined to municipalities.—No person, firm, or corporation shall engage in the business of lending money, or other things, for profit or on account of specific articles of personal property deposited with the lender in pledge in this state, which business is commonly known as that of pawnbrokers, except in incorporated cities and towns, and without first having obtained a license to do so from such incorporated cities and towns, and by paying the county, state, and municipal license tax required by law, and otherwise complying with the requirements made in this and succeeding sections. (1915, c. 198, s. 1; C. S. 7001.)

Cross Reference.—As to the state license tax, see § 105-50.

§ 91-3. Municipal authorities to grant and control license; bond.—The board of aldermen, or other governing body, of any city or town in this state may grant to such person, firm, or corporation as it may deem proper, and who shall produce satisfactory evidence of good character, a license authorizing such person, firm, or corporation to carry on the business of a pawnbroker, which said license shall designate the house in which such person, firm, or corporation shall carry on said business, and no person, firm, or corporation shall carry on the business of a pawnbroker without being duly licensed, nor in any other house than the one designated in the said license. Every person, firm, or corporation so licensed to carry on the business of a pawnbroker shall, at the time of receiving such license, file with the mayor of the city or town granting the same, a bond payable to such city or town in the sum of one thousand dollars, to be executed by the persons so licensed and by two responsible sureties, or a surety company licensed to do business in the State of North Carolina, to be approved of by such mayor, which said bond shall be for the faithful performance of the requirements and obligations pertaining to the business so licensed. The board of aldermen, or other governing body, shall have full power and authority to revoke such license and sue for forfeiture of the bond upon a breach thereof. Any person who may obtain a judgment against a pawnbroker and upon which judgment execution is returned unsatisfied, may maintain an action in his own name upon the said bond of said pawnbroker, in any court having jurisdiction of the amount de-

manded, to satisfy said judgment. (1915, c. 198, s. 2; C. S. 7002.)

§ 91-4. Records to be kept.—Every pawnbroker shall keep a book in which shall be legibly written, at the time of the loan, an account and description of the goods, articles or things pawned or pledged, the amount of money loaned thereon, the time of pledging the same, the rate of interest to be paid on said loan, and the name and residence of the person pawning or pledging the said goods, articles, or things. (1915, c. 198, s. 3; C. S. 7003.)

§ 91-5. Pawn ticket.—And every such pawnbroker shall at the time of each loan deliver to the person pawning or pledging any goods, articles, or things a ticket or memorandum or note signed by him containing the substance of the entry required to be made by him in his book as aforesaid, and a copy of the said ticket, memorandum, or note so given to the person pawning or pledging any goods, articles, or things of value, shall be filed within forty-eight hours in the office of the chief of police of the city or town issuing the license to such pawnbroker. The said tickets or memorandums so issued shall be numbered consecutively and dated the day issued. (1915, c. 198, s. 3; C. S. 7004.)

§ 91-6. Sale of pledges. — No pawnbroker shall sell any pawn or pledge until the same shall have remained sixty days in his possession after the maturity of the debt for which the property was pledged. And no pawnbroker shall advertise or sell at his place of business as unredeemed pledges any articles of property other than those received by him as pawns or pledges in the usual course of his business at the place where he is licensed to do business. (1915, c. 198, s. 4; C. S. 7005.)

Cross Reference.—As to sale of pledged goods, see § 105-50.

§ 91-7. Usury law applicable.—The provisions of this chapter shall not be construed to relieve any person from the penalty incurred under the laws against usury in this state. (1915, c. 198, s. 5; C. S. 7006.)

§ 91-8. Violation of chapter misdemeanor.—Any person, firm, or corporation violating the provisions of this chapter shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1915, c. 198, s. 5; C. S. 7007.)

Chapter 92. Photographers.

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§ 92-1. Definitions.—Words used in this chapter, unless otherwise expressly stated, shall have the following meaning:

"Board"—The board of photographic examiners.

"Person"—Any individual person, firm, corporation or association.

"Photography"—(a) The art or process of reproduction, recording the visible and invisible image through the action of light upon chemically sensitized substance or material. (b) The processes of projecting and registering images by means of lens and camera upon sensitized materials, development and fixation of the latent image to render same visible and permanent and the subsequent reproduction or transfer of such image, either negative or positive, upon sensitized material, by aid of light and chemical action.

"Photo finishing"—The process of reproducing or transferring any image made by means of camera and lens, either negative or positive, upon

sensitized material by aid of light and chemical action.

"The practice of photography"—The profession or occupation of taking or producing photographs or any part thereof for hire.

"Photographer" — Any individual, person, firm or corporation who shall practice photography.

"Apprentice" — Any individual or person who shall study, train or work under the guidance of a duly registered photographer for the purpose of acquiring the necessary knowledge to practice photography.

"Licensee"—A licensed photographer or apprentice. (1935, c. 155, art. 1; 1939, c. 280, s. 1.)

Editor's Note.—The 1939 amendment changed the definition of the practice of photography.

Constitutionality.—This and following sections, providing for regulating and licensing photographers, sets up sufficiently definite standards of competency, ability and integrity, and requires the licensing board to issue licenses to all applicants who meet these qualifications without discrimination, an applicant having recourse at law for any arbitrary acts of the board, and the statute does not violate due process of law, nor deprive any person of fundamental, inalienable rights, nor create a monopoly in contravention of the state constitution. State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366.

What Constitutes Engaging in Photography.—To solicit persons to have their photographs taken, arrange for the sitting, and actually have the camera present and take what is popularly called a picture, but in fact is a "negative," which is the outline of the subject on glass, is engaging within the state in the profession or business of photography within the meaning of this section. Lucas v. Charlotte, 14 F. Supp. 163, 167.

Applied in State v. Lueders, 214 N. C. 558, 200 S. E. 22.

§ 92-2. State board of photographic examiners created; terms of office.—A state board of photographic examiners is hereby created, which shall consist of five members, all of whom shall be residents of the State of North Carolina and shall have had not less than five (5) years experience as professional photographers, who shall be commissioned by the governor and hold office as follows: Two for one year, two for two years and one for three years, their successors to be commissioned by the governor for a term of three years. (1935, c. 155, art. 2, s. 1; 1935, c. 318.)

§ 92-3. Chairman and secretary.—The members of the state board of photographic examiners shall annually elect one of their number to act as chairman, and appoint and at their pleasure remove a secretary, who need not be a member of the board, and whose compensation shall be fixed by the board. The said secretary shall also act as treasurer and shall perform the duties prescribed by this chapter and such other duties as the board may from time to time direct. (1935, c. 155, art. 2, ss. 2, 3.)

§ 92-4. Pay and expenses; principal office; quorum.—The members of the board upon the certification by the majority of said members shall receive the sum of seven dollars and actual and necessary expenses for each day actually devoted to the performance of their duties under this chapter. The principal office of the board shall be at such place designated by a majority of the members of the board. Three members of the board shall constitute a quorum. (1935, c. 155, art. 2, ss. 4-6.)

§ 92-5. Organization meeting; bond of secretary-treasurer; powers of board.—The board of photographic examiners shall within thirty days after its appointment, meet in the city of Raleigh, and organize and shall elect a chairman and appoint a secretary-treasurer. The secretary-treasurer shall give bond approved by the board for the faithful performance of his duties, in such sum as the board may, from time to time, determine. The board shall have a common seal and shall formulate rules to govern its actions, and it may take testimony and proof concerning all matters within its jurisdiction. (1935, c. 155, art. 3, s. 1.)

§ 92-6. Record of proceedings.—The said board shall keep a record of its proceedings relating to issuance, refusal, renewal, suspension and revocation of certificates of registration. This record shall also contain the name, place of business and residence of every registered photographer and registered apprentice, and the date and number of his certificate of registration. This record shall be open to public inspection at all reasonable times. (1935, c. 155, art. 3, s. 2.)

§ 92-7. Rules and orders. — The board may adopt and enforce all rules and orders necessary to carry out the provisions of this chapter. Every rule or order of the board shall be available for public inspection in the office of the board. (1935, c. 155, art. 3, s. 3.)

§ 92-8. Conduct of hearings.—The board is authorized to conduct hearings in any part of the state or may designate any member of the board so to do, which hearing shall be held pursuant to the rules and regulations adopted and promulgated by the board. (1935, c. 155, art. 3, s. 4.)

§ 92-9. Appointment and removal of assistants. — Said board shall have the power to appoint and at its pleasure remove any technical, legal, or other assistants as may be necessary to carry out the provisions of this chapter and to prescribe their powers and duties and fix their compensation. (1935, c. 155, art. 3, s. 5.)

§ 92-10. Examination and licensing of applicants; temporary certificates.—The board shall provide for the examination of applicants who desire to practice photography in this state, and shall collect fees, as hereinafter provided, for such examinations and issue certificates of registration and licenses to practice photography to anyone who shall qualify as to competency, ability and integrity. The board may issue temporary certificates to practice photography until such time as the board shall hold an examination, provided such applicants are, in the opinion of the board, entitled thereto, and provided that application and deposit for examination is made at the time of application for such temporary license, and such certficate shall be null and void after the next examination held by the board, and provided further, that no such applicant shall, thereafter, be eligible to apply for and receive a temporary certificate. (1935, c. 155, art. 4, s. 1.)

§ 92-11. Qualifications of applicants for examination.—Prior to any applicant being admitted to an examination or licensed, said board shall have the power to require proof as to the technical qualifications, business record and moral

character of such applicant, and if an applicant shall fail to satisfy the board in any or all of these respects, the board may decline to admit said applicant to examination, or to issue license. (1935, c. 155, art. 4, s. 2.)

Section Constitutional.—This section, providing that the board of examiners may require proof as to the business record of an applicant for photographer's license does not set up an unconstitutional method of ascertaining the qualifications of an applicant, the "business record" not being of itself a test to be applied by the board, but being merely a suggested source which the board may consider in determining the applicant's competency, ability and integrity. State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366.

§ 92-12. Semi-annual examinations; separate certificate for two branches of photography.— The board shall provide a place and give a written, and/or an oral and/or a practical examination at least twice a year to all duly qualified applicants covering the two branches of photography, to-wit: Photography and photo-finishing. Separate certificates shall be provided for each branch. A certificate for one branch shall not permit the practicing in the other branch, although any photographer may hold certificates in both branches if qualified under this chapter. All applicants may take the examination in either or both branches and the examination fee as hereinafter set forth shall cover both branches if taken at the same time. (1935, c. 155, art. 4, s. 3.)

§ 92-13. Application for license; examination fees; examination requirements. — Every person desiring to commence the practice of photography in this State shall file an application for a license with the board on a form prescribed by it. At the time of making such application the applicant shall deposit with the board an examination fee of twenty-five ($25.00) dollars: Provided, that the examination fees for persons engaged exclusively in the development, finishing, and/or enlarging of kodak pictures shall be in the sum of fifteen ($15.00) dollars. All applicants must appear for examination at the time and place designated by the board and shall present such references and credentials as the board may require, and shall give satisfactory evidence as to their competency and fitness to conduct the practice of photography based on their technical knowledge, their business record and their moral character. (1935, c. 155, art. 4, s. 4.)

§ 92-14. No fees refunded; fees for additional examinations.—No fee for examination shall in any case be refunded, but in case the applicant fails in the first examination he may take three subsequent examinations in the branches in which he failed and the fee for each such subsequent examination shall be ten ($10.00) dollars. (1935, c. 155, art. 4, s. 5.)

§ 92-15. Registration and licensing of successful applicants.—Every applicant successfully passing such examination shall be registered in the records of the board as a qualified photographer in the branch or branches in which he has been successful, and shall receive a license signed by the chairman and secretary of said board authorizing the applicant to practice photography in the branch or branches in which he has been successful in this State. (1935, c. 155, art. 4, s. 6.)

§ 92-16. Requirements for students or apprentices.—Every person desiring to commence the study of photography in this State for the purpose of practicing photography shall file a certificate signed by a duly licensed photographer that the said person has started to study photography with the said licensed photographer and that said student or apprentice commenced his studies or work prior to the date of the certificate, and such other information as the board may require. (1935, c. 155, art. 4, s. 7.)

§ 92-17. Licenses not transferable.—No license shall be transferable, nor shall it be issued to any person, firm or corporation, designed to operate under an assumed or fictitious name. (1935, c. 155, art. 4, s. 8.)

§ 92-18. Licensing without examination of photographers now practicing; license fee. — The board shall, upon application, issue a license to every photographer who has been continuously engaged in the practice of photography and/or photo-finishing in this State for one year next preceding the passage of this chapter, without examination. All applications for license under this section shall be accompanied by a fee of five ($5.00) dollars, in addition to the annual license fee hereinafter prescribed, and such application must be made within thirty days after notification from the board. (1935, c. 155, art. 4, s. 9.)

§ 92-19. Annual license fees for business establishments and employees.—All licensees who maintain an established place for the practice of photography and/or photo-finishing in the State of North Carolina, or who are not employees of an established place for the practice of photography and/or photo-finishing in the State of North Carolina, shall pay an annual license fee of five ($5.00) dollars. All licensees who are employees of an established place in the State of North Carolina for the practice of photography and/or photo-finishing shall pay an annual license fee of three ($3.00) dollars. (1935, c. 155, art. 4, s. 10.)

Cross References.—As to state-wide privilege tax for photographers, see § 105-41. As to requirement of bond by photographers who sell certain coupons redeemable for photographs, see § 66-61.

Not Interference with Interstate Commerce.—It was contended that the taxes under this section and § 105-41 were a burden upon and an interference with interstate commerce and therefore void. The court held that the fact that the negatives of photographs, after the taking, were sent to another state to be finished, does not make the transaction one of interstate commerce. Lucas v. Charlotte, 86 F. (2d) 394, 396.

§ 92-20. Conduct of business unless registered prohibited.—No person, firm or corporation shall sell, offer for sale, or solicit orders for any product of photography unless duly registered under the terms of this chapter, or employed by a person, firm or corporation duly registered under the terms of this chapter. (1935, c. 155, art. 4, s. 11.)

§ 92-21. Display of license.—Every recipient of a license to practice photography or photo-finishing shall keep such license conspicuously displayed on his business premises. (1935, c. 155, art. 4, s. 12.)

§ 92-22. Time of payment of license fees;

powers conferred by various fees.—All annual license fees prescribed by this chapter shall be paid to the board on or before the first day of July of each year. The board shall issue its receipt for every payment. The annual establishment fee of five ($5.00) dollars shall entitle the licensee, if otherwise qualified, to practice photography and photo-finishing. The annual employees' fee of three ($3.00) dollars shall entitle the licensee, if otherwise qualified, to practice photography and photo-finishing, but only for and on behalf of a duly registered photographer or photo-finisher. (1935, c. 155, art. 4, s. 13.)

§ 92-23. Revocation of license; reinstatement.—Should any licensee fail or neglect to pay his annual license on or before the first day of July of every year, the board shall notify him that his license will be revoked and unless said fee is paid in full on or before the first day of August of the same year, the board shall revoke said license.

(a) Any photographer and/or photo-finisher whose license has been revoked for failure to pay the annual license fee may make application to the board for reinstatement. Such application shall be accompanied by a fee of five ($5.00) dollars, in addition to the regular license fee required. If the board shall find the applicant to be guilty of no violation of this chapter other than default in payment of annual license fees he may be immediately reinstated.

(b) The board shall have the power to revoke any license granted by it to any photographer and/or photo-finisher or apprentice found by the board to be guilty of fraud or unethical practices or of wilful misrepresentation, or found guilty under the laws of the State of North Carolina of any crime involving moral turpitude.

(c) Before any license is revoked, except for failure to pay the annual license fee, the holder thereof shall be given notice, in writing, either personally or by mailing by registered mail to his last known address, setting forth the charges against him and the time and place for a hearing to be had on such charges, which such charges must be filed in writing under oath with said board, and the said hearing shall be not less than thirty days from the time of the service of the said notice. The person charged shall be given a public hearing at which he may be represented by counsel and he shall have an opportunity to enter a defense and produce witnesses on his behalf. The board on such hearing shall provide a competent stenographer for the purpose of taking a complete record of such hearing, which record shall be filed with the board.

(d) If at such hearing of the accused the board shall be satisfied that the accused has been guilty of the offense charged it shall thereupon, without further notice, revoke the license of the person so accused: Provided, the accused shall not be barred the right of appeal to the superior courts. (1935, c. 155, art. 4, s. 14; 1939, c. 218, s. 1.)

Cross References.—As to uniform procedure for suspension or revocation of licenses, see chapter 150. As to prevention of certain fraudulent practices by photographers, see §§ 66-59 to 66-64.

§ 92-24. Violation of chapter a misdemeanor; separate offenses; disposition of fines and forfeitures.—Any person violating any of the provisions of this chapter, or engaging in any of the activities or practices herein defined without being duly licensed as herein provided, shall be guilty of a misdemeanor, and upon conviction shall be fined the sum of not less than fifty ($50.00) dollars, nor more than two hundred ($200.00) dollars for the first offense, and shall be imprisoned not more than thirty days, and/or fined not exceeding two hundred ($200.00) dollars for any subsequent offense. Each and every violation hereof shall constitute a separate offense: Provided, all fines paid for violations of this chapter or bail forfeiture collected for appearances given by virtue of any process issued from any of the courts of this state shall be paid one-half to the treasurer of the county where such process was issued for the general fund of such county and one-half to the state treasurer to be by him deposited to the credit of the general funds of the State. (1935, c. 155, art. 5.)

§ 92-25. Application and examination of non-residents.—All non-resident photographers and/or photo-finishers, desiring to do business in this State, shall apply to the board for examination at least thirty days prior to the next examination and obtain license before entering into said business, and no person, firm or corporation shall represent or in any way solicit or accept business for such non-resident photographers and/or photo-finishers, unless and until they have complied with the provisions of this chapter. (1935, c. 155, art. 6.)

§ 92-26. Records of proceedings and moneys received.—The secretary-treasurer shall keep a record of the proceedings of the said board and shall receive and account for all moneys derived from the operation of this chapter. (1935, c. 155, art. 7, s. 1.)

§ 92-27. Expenses of administration.—All expenses of administering this chapter shall be paid upon order of the board from the funds derived from the examination, license fees and penalties herein prescribed, and, in no event, shall such expense exceed the income from said sources. (1935, c. 155, art. 7, s. 2.)

§ 92-28. Persons exempted.—Nothing in this chapter shall be construed to apply to:

(a) Persons in the employ of or acting under contract to newspapers or periodical publications: Provided, that this exemption shall apply only with respect to negatives and photographs made for newspapers and publication: And provided further, that such negatives or photographs are not sold or offered for sale, or otherwise disposed of for profit to any purchaser or user other than newspapers, publications, press agencies or associations serving newspapers and publications. The provisions of this chapter shall not apply to press photographers with regard to the unsolicited sale of negatives and prints made on regular press assignments.

(b) Any person (not regularly engaged in an occupation in which his compensation depends, in whole or in part, upon his making of negatives or photographs) who makes negatives or photographs for his own pleasure and occasionally sells or offers for sale a negative or photograph so

made by him: Provided, that this exemption shall not extend to any person who solicits or accepts orders for such negatives, or prints or photographs made therefrom, before such negatives are made.

(c) Any person who is in the employ of the United States, the State of North Carolina, or any of its political subdivisions, or of any school, college, university or state institution, who makes negatives or any reproduction thereof solely for public use or for the use of such school, college, university or state institution, or educational or scientific purposes, provided such negatives or photographs are not sold or offered for sale in this state.

(d) Any duly licensed practitioner of medicine and allied occupations, hospitals or institutions who make negatives or photographs for clinical, surgical or medical purposes.

(e) Any motion picture photographer in the making of motion pictures. (1935, c. 155, art. 8; 1939, c. 280, ss. 2, 3.)

Editor's Note.—The 1939 amendment changed subsections (a) and (b).

§ 92-29. Excepted cities and towns and low priced photographers. — This chapter shall only apply to cities and towns having a population of more than twenty-five hundred: Provided this chapter shall not apply to those photographers whose product is retailed at a unit price not exceeding ten cents (10c) per picture. (1935, c. 155, art. 10.)

Chapter 93. Public Accountants.

§ 93-1. "Public accounting" defined.—The term "Practice of Public Accounting" as used in this chapter is defined as follows:

A person engages in the practice of public accounting, within the meaning and intent of this chapter, who offers his or her services to the public as one who is qualified to render professional service in the analysis, verification and audit of financial records and the interpretation of such service through statements and reports. (1925, c. 261, s. 1; 1929, c. 219, s. 1.)

In Scott v. Gillis, 197 N. C. 223, 226, 148 S. E. 315, it was held that plaintiff and defendant were certified Public Accountants, citing this and the following sections.

§ 93-2. Qualifications. — Any citizen of the United States, or person who has duly declared his intention of becoming such citizen, over twenty one years of age and of good moral character, and who shall have received from the State Board of Accountancy a certificate of qualification admitting him to practice as a certified public accountant as hereinafter provided, or who is the holder of a valid and unrevoked certificate issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, shall be licensed to practice and be styled and known as a certified public accountant. (1925, c. 261, s. 2.)

§ 93-3. Unlawful use of title "certified public accountant" by individual. — It shall be unlawful for any person who has not received a certificate of qualification admitting him to practice as a certified public accountant to assume or use such a title, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the person using same has been admitted to practice as a certified public accountant. (1925, c. 261, s. 3.)

Editor's Note.—This section was reviewed in 3 N. C. Law Rev. 149.

This act was probably intended to cure defects and omissions of the former statutes. Respass v. Rex Spinning Co., 191 N. C. 809, 813, 133 S. E. 391.

As to construction of prior law, see notes under section 93-12.

§ 93-4. Use of title by firm.—It shall be unlawful for any firm, copartnership, or association to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the members of such firm, copartnership or association have been admitted to practice as certified public accountants, unless each of the members of such firm, copartnership or association first shall have received a certificate of qualification from the State Board of Accountancy admitting him to practice as a certified public accountant. (1925, c. 261, s. 4.)

§ 93-5. Use of title by corporation.—It shall be unlawful for any corporation to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that such corporation has received a certificate of qualification from the State Board of Accountancy admitting it to practice as a certified public accountant. (1925, c. 261, s. 5.)

§ 93-6. Practice without certificate unlawful; corporations; exceptions.—It shall be unlawful for

any person, firm, copartnership or association to engage in the practice of public accounting in the State of North Carolina unless such person, or each of the members of such firm, copartnership or association first shall have received from the State Board of Accountancy a certificate of qualification admitting him to practice as a certified public accountant. It shall be unlawful for any corporation to engage in the practice of public accounting in the State of North Carolina: Provided, however, that nothing herein contained shall be construed to prohibit the practicing of the profession of public accounting by any person, firm, copartnership, association, or corporation who shall on March 10, 1925, be engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, or an accountant who has served two years or more as a civil service employee of the Federal government in the capacity of senior field auditor. (1925, c. 261, s. 6.)

§ 93-7. Registration of accountants already practicing.—Any person, firm, copartnership, association or corporation who shall on March 10, 1925, be engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, may, within six months thereafter, apply to the State Board of Accountancy for registration as a public accountant, and the State Board of Accountancy, upon the production of satisfactory evidence that such applicant was engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina on March 10, 1925, shall register such person, firm, copartnership, association or corporation. Such registration shall be conclusive evidence of the right of such person, firm, copartnership, association or corporation to engage in the practice of public accounting in the State of North Carolina, but such registration shall not be construed in any way as indicating that the State of North Carolina or the State Board of Accountancy has approved the educational and professional experience and qualifications of the registrant. (1925, c. 261, s. 7.)

§ 93-8. Use of title "public accountant" without qualification.—It shall be unlawful for any person, firm, copartnership, association or corporation, not having qualified under this chapter, to assume or use the style of title of public accountant, or other means of indentification to indicate that such person, firm, copartnership, or association or corporation is engaged in the practice of public accounting in the State of North Carolina: Provided, however, that the inhibitions of this section shall not be construed to apply to any person, firm, copartnership, association or corporation who on March 10, 1925, was engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina. (1925, c. 261, s. 8.)

§ 93-9. Assistants need not be certified.—Nothing contained in this chapter shall be construed to prohibit the employment by a certified public accountant, or by any person, firm, copartnership, association, or corporation permitted to engage in the practice of public accounting in the State of North Carolina, of persons who have not received certificates of qualification admitting them to practice as certified public accountants, as assistant accountants or clerks: Provided, that such employees work under the control and supervision of certified public accountants or public accountants, and do not certify to any one the accuracy or verification of audits or statements; and provided further, that such employees do not hold themselves out as engaged in the practice of public accounting. (1925, c. 261, s. 9.)

§ 93-10. Persons certified in other states.—A public accountant who holds a valid and unrevoked certificate as a certified public accountant, or its equivalent, issued under authority of any state, or the District of Columbia, and who resides without the State of North Carolina, may perform work within the State: Provided, that he register with the State Board of Accountancy and comply with its rules regarding such registration. (1925, c. 261, s. 10.)

§ 93-11. Not applicable to officers of state, county or municipality.—Nothing herein contained shall be construed to restrict or limit the power or authority of any State, county or municipal officer or appointee engaged in or upon the examination of the accounts of any public officer, his employees or appointees. (1925, c. 261, s. 12.)

Cross References.—As to municipal accounting, see § 160-290. As to county accounting systems, see § 153-30.

§ 93-12. Board of accountancy; powers and duties.—The State Board of Accountancy shall consist of four persons to be appointed by the Governor, all of whom shall be the holders of valid and unrevoked certificates as certified public accountants heretofore issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, or issued under the provisions of this chapter. They shall hold office for the term of three years and until their successors are appointed: Provided, that no appointments to the board shall be made under the provisions of this chapter until the expiration of the terms of the members of the present board. The powers and duties of the board shall be as follows:

(1) To elect from its members a president, vice-president and secretary-treasurer. The members of the board shall be paid, for the time actually expended in pursuance of the duties imposed upon them by this chapter, an amount not exceeding ten dollars ($10) per day, and they shall be entitled to necessary traveling expenses.

(2) To employ legal counsel and clerical assistance and to fix the compensation of same, and to incur such other expenses as may be deemed necessary to carry into effect the provisions of this chapter.

(3) To formulate rules for the government of the board and for the examination of applicants for certificates of qualifications admitting such applicants to practice as certified public accountants.

(4) To hold written or oral examinations of applicants for certificates of qualification at least once a year, or oftener, as may be deemed necessary by the board.

(5) To issue certificates of qualification admitting to practice as certified public accountants each applicant, who, being the graduate of an ac-

credited high school or having an equivalent education, shall have had at least two years experience or its equivalent next preceding the date of his application on the field staff of a certified public accountant or public accountant, one of which shall have been as a senior or accountant in charge, and who shall receive the endorsement of three certified public accountants of any state as to his eligibility to become a certified public accountant; or who, in lieu of the two years experience or its equivalent, above mentioned, shall have had one year's experience after graduating from a recognized school of accountancy; or an accountant who has served two years or more as a civil service employee of the Federal government in the capacity of senior field auditor, and who shall have passed a satisfactory examination in "theory of accounts," "practical accounting," "auditing," "commercial law" and other related subjects.

(6) In its discretion to grant certificates of qualification admitting to practice as certified public accountants such applicants who shall be the holders of valid and unrevoked certificates as certified public accountants, or the equivalent, issued by or under the authority of any state, or territory of the United States or the District of Columbia; or who shall hold valid and unrevoked certificates or degrees as certified public accountants, or the equivalent, issued under authority granted by a foreign nation; when in the judgment of the board the requirements for the issuing or granting of such certificates or degrees are substantially equivalent to the requirements established by this chapter: Provided, however, that such applicants signify their intention of engaging in the practice of public accounting within the State.

(7) To charge for each examination and certificate provided for in this chapter a fee of twenty-five dollars. This fee shall be payable to the secretary-treasurer of the board by the applicant at the time of filing application. If at any examination an applicant shall have received a passing grade in one subject, he shall have the privilege of one reëxamination at any subsequent examination held within eighteen months from the date of his application upon payment of a reexamination fee of fifteen dollars. In no case shall the examination fee be refunded, unless in the discretion of the board the applicant shall be deemed ineligible for examination.

(8) To require the renewal of all certificates of qualification annually on the first day of July, and to charge and collect a fee not to exceed five dollars for such renewal.

(9) The board shall have the power to revoke any certificate issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, or issued under the provisions of this chapter, for good and sufficient cause: Provided, that written notice shall have been mailed to the holder of such certificate at his last known address thirty days before any hearing thereof, stating the cause of such contemplated action, and appointing a time for a hearing thereon by the board, and provided further, that no certificate shall be revoked until such hearing shall have been had. At all such hearings the Attorney General of the State, or one of his assistants designated by him, shall sit with the board with all the powers of a member thereof.

(10) Within sixty days after March 10, 1925, the board shall formulate rules for the registration of those persons, firms, copartnerships, associations or corporations who, not being holders of valid and unrevoked certificates as certified public accountants issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, and who, having on March 10, 1925, been engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, shall, under the provisions of § 93-7 apply to the board for registration as public accountants. The board shall maintain a register of all persons, firms, copartnerships, associations or corporations who have made application for such registration and have complied with the rules of registration adopted by the board.

(11) Within sixty days after March 10, 1925, the board shall formulate rules for registration of these public accountants who are qualified to practice under this chapter and who under the provisions of § 93-10 are permitted to engage in work within the State of North Carolina. The board shall have the power to deny or withdraw the privilege herein referred to for good and sufficient reasons.

(12) To submit to the Commissioner of Revenue the names of all persons who have qualified under this chapter as practitioners of public accountancy, and who have complied with the rules of the board. The Commissioner of Revenue shall issue only to those whose names are so submitted to him by the board a license for the privilege of practicing the profession of public accountancy, and the license so issued shall be evidence of his registration with the board.

(13) The board shall keep a complete record of all its proceedings and shall annually submit a full report to the Governor.

(14) All fees collected on behalf of the State Board of Accountancy, and all receipts of every kind and nature, as well as the compensation paid the members of the board and the necessary expenses incurred by them in the performance of the duties imposed upon them by this chapter, shall be reported annually to the State Treasurer. Any surplus remaining in the hands of the board over the amount of three hundred dollars shall be paid to the State Treasurer at the time of submitting the report, and shall go to the credit of the general fund: Provided, that no expense incurred under this chapter shall be charged against the State.

(15) Any certificate of qualification issued under the provisions of this chapter, or issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, shall be forfeited for the failure of the holder to renew same and to pay the renewal fee therefor to the State Board of Accountancy within thirty days after demand for such renewal fee shall have been made by the State Board of Accountancy. (1925, c. 261, s. 11; 1939, c. 218, s. 1.)

Cross References.—As to uniform revocation of licenses, see chapter 150. As to privilege tax, see § 105-41.

Editor's Note.—Chapter 157, Public Laws of 1913, codified as C. S. 7008 to 7024, was expressly repealed by the Public Laws of 1925, c. 261. However, as many of the provisions of the old act were reenacted by the repealing act and will be found in this chapter, the constructions of the 1913 act are here inserted.

In General.—The provisions of the act creating and incorporating the State Board of Accountancy, confers upon its members continuous quasi-judicial powers as an arm of the State Government in which the people of the State are interested, both as to their administration and to a certain extent in the funds of the board, the compensation of members being paid by fees fixed by law, any surplus to be deposited in the State Treasury, and in these, and in other respects, its members are to be regarded as State officials to the extent of their duties specified in the statute. State v. Scott, 182 N. C. 865, 109 S. E. 789.

Exercise of Police Power.—Our statutes creating a State Board of Accountancy and giving them authority to pass upon applications and issue licenses to those qualified as public accountants are within the exercise of the police powers of the State, in which the public, as well as one to whom a certificate has been issued, is interested; and the State is also interested in the requirement that moneys collected and not necessary to the purposes of the act be turned into the State Treasury. State v. Scott, 182 N. C. 865, 109 S. E. 789.

When License Not Required.—Section 7023 of the Consolidated Statutes does not embrace within its terms an isolated instance of the employment of a firm of certified public accountants licensed in another state, who send their representative to this state to acquire information from the books of a corporation for a statement of its condition to be made out in the state in which the auditing concern is authorized to do business. Respass v. Rex Spinning Co., 191 N. C. 809, 133 S. E. 391.

Holding Examination Beyond State Boundaries.—The exercise of the powers of the State Board of Accountancy, the members of which are to be regarded as State officials, is coextensive with the State boundaries, and may not be exercised beyond them, the word jurisdiction embracing not only the subject-matter coming within the powers of officials, but also the territory within which the powers are to be exercised. State v. Scott, 182 N. C. 865, 109 S. E. 789.

The legislative intent will not be construed by implication to extend the exercise of a quasi-judicial power by public officers to places beyond the State boundaries, as where the statute creates a State Board of Accountancy, gives it the power to examine and license applicants, and states that the board may do so "at such place as it may designate;" for the presumption being against the exercise of such extra territorial power, the discretion of the board in the exercise of this power will be confined to places within the boundaries of this State. State v. Scott, 182 N. C. 865, 109 S. E. 789.

Where a statute prescribes the means for the exercise of a power granted by the act, no other or different means can be implied as being more effective or convenient, and the Legislature having incorporated a State Board of Public Accountancy, giving it the power to determine upon examination whether applicants for licenses therein are qualified to receive them, it is for the courts of the State, upon proper action, to pass upon the question of whether the board acts ultra vires in holding an examination beyond the boundaries of the State upon the request of nonresident desiring to obtain a certificate, and a declaration in the fixing of such place that it would be the last time the board would hold an examination outside the State is not binding or controlling on the question. State v. Scott, 182 N. C. 865, 109 S. E. 789.

§ 93-13. Violation of chapter; penalty.—Any violation of the provisions of this chapter shall be deemed a misdemeanor, and upon conviction thereof the guilty party shall be fined not less than fifty dollars and not exceeding two hundred dollars for each offense. (1925, c. 261, s. 11.)

Division XIII. Employer and Employee.

Chapter 94. Apprenticeship.

§ 94-1. Purpose.—The purposes of this chapter are: To open to young people the opportunity to obtain training that will equip them for profitable employment and citizenship; to set up, as a means to this end, a program of voluntary apprenticeship under approved apprentice agreements providing facilities for their training and guidance in the arts and crafts of industry and trade, with parallel instruction in related and supplementary education; to promote employment opportunities for young people under conditions providing adequate training and reasonable earnings; to relate the supply of skilled workers to employment demands; to establish standards for apprentice training; to establish an apprenticeship council and local and state joint apprenticeship committees to assist in effectuating the purposes of this chapter; to provide for a director of apprenticeship within the department of labor; to provide for reports to the legislature and to the public regarding the status of apprentice training in the state; to establish a procedure for the determination of apprentice agreement controversies; and to accomplish related ends. (1939, c. 229, s. 1.)

Editor's Note.—For comment on this enactment, see 17 N. C. Law Rev. 327.

§ 94-2. Apprenticeship council.—The commissioner of labor shall appoint an apprenticeship council, composed of three representatives each from employer and employee organizations respectively. The state official who has been designated by the state board for vocational education as being in charge of trade and industrial education shall ex officio be a member of said council, without vote. The terms of office of the members of the apprenticeship council first appointed by the commissioner of labor shall expire as designated by the commissioner at the time of making the appointment: One representative each of employers, employees, being appointed for one year; one representative each of employers, employees, being appointed for two years, and one representative each of employers and employees for three years. Thereafter, each member shall be appointed for a term of three years. Any member appointed to fill a vacancy occurring prior to the expiration of the term of his predecessor shall be appointed for the remainder of said term. Each member of the council not otherwise compensated by public monies, shall be reimbursed for transportation and shall receive such per diem compensation as is provided generally for boards and commissions under the biennial Maintenance Appropriation Acts for each day spent in attendance at meetings of the apprenticeship council.

The apprenticeship council shall meet at the call of the commissioner of labor and shall aid him in formulating policies for the effective administration of this chapter. Subject to the approval of the commissioner, the apprenticeship council shall establish standards for apprentice agreement which in no case shall be lower than those prescribed by this chapter, shall issue such rules and regulations as may be necessary to carry out the intent and purposes of said chapter, and shall perform such other functions as the commissioner may direct. Not less than once a year the apprenticeship council shall make a report through the commissioner of labor of its activities and findings to the legislature and to the public. (1939, c. 229, s. 2.)

§ 94-3. Director of apprenticeship.—The commissioner of labor is hereby directed to appoint a director of apprenticeship which appointment shall be subject to the confirmation of the state apprenticeship council by a majority vote. The commissioner of labor is further authorized to appoint and employ such clerical, technical, and professional help as shall be necessary to effectuate the purposes of this chapter. (1939, c. 229, s. 3.)

§ 94-4. Powers and duties of director of apprenticeship.—The director, under the supervision of the commissioner of labor and with the advice and guidance of the apprenticeship council is authorized to administer the provisions of this chapter; in cooperation with the apprenticeship council and local and state joint apprenticeship committees, to set up conditions and training standards for apprentice agreements, which conditions or standards shall in no case be lower than those prescribed by this chapter; to act as secretary of the apprenticeship council and of each state joint apprenticeship committee; to approve for the council if in his opinion approval is for the best interest of the apprentice, any apprentice agreement which meets the standards established under this chapter; to terminate or cancel any apprentice agreement in accordance with the provisions of such agreement; to keep a record of apprentice agreements and their disposition; to issue certificates of completion of apprenticeship; and to perform such other duties as are necessary to carry out the intent of this chapter: Provided, that the administration and supervision of related and supplemental instruction for apprentices, coordination of instruction with job experiences, and the selection and training of teachers and coordinators for such instruction shall be the responsibility of state and local boards responsible for vocational education. (1939, c. 229, s. 4.)

§ 94-5. Local and state joint apprenticeship committees.—A local joint apprenticeship committee may be appointed, in any trade or group of

trades in a city or trade area, by the apprenticeship council, whenever the apprentice training needs of such trade or group of trades justifies such establishment: Provided, that when a state joint apprenticeship committee in any trade or group of trades shall have been established, as hereinafter authorized, such state committee shall thereafter have the power of appointment of local joint apprenticeship committees in the trade or group of trades which it represents. Such local joint apprenticeship committee shall be composed of an equal number of employer and employee representatives chosen from names submitted by the respective local employer and employee organizations in such trade or group of trades. In a trade or group of trades in which there is no bona fide local employer or employee organization, the committee shall be appointed from persons known to represent the interests of employers and of employees respectively. The function of a local joint apprenticeship committee shall be: To cooperate with school authorities in regard to the education of apprentices; in accordance with the standards set up by the apprenticeship committee for the same trade or group of trades, where such committee has been appointed, to work in an advisory capacity with employers and employees in matters regarding schedule of operations, application of wage rates, and working conditions for apprentices and to specify the number of apprentices which shall be employed locally in the trade under apprentice agreements under the chapter; and to adjust apprenticeship disputes, subject to the approval of the director. Until the appointment of a state joint apprenticeship committee for any trade or group of trades, as hereinafter provided, the local joint apprenticeship committee for that trade or group of trades shall, for the city or trade area for which it is appointed, exercise the functions of the state joint apprenticeship committee for the said trade or group of trades which it represents.

When two or more local joint apprenticeship committees have been established in the state for a trade or group of trades, or at the request of any trade or group of trades, the apprenticeship council may appoint a state joint apprenticeship committee for such trade or group of trades, composed of an equal number of employer and employee representatives chosen from names submitted by the respective employer and employee organizations. In a trade or group of trades in which there is no bona fide employer or employee organization, the apprenticeship council may appoint such a committee from persons known to represent the interests of employers and employees respectively. The functions of a state joint apprenticeship committee shall be: To coordinate the activities of local joint apprenticeship committees in the trade or group of trades which it represents; to ascertain the prevailing rate for journeymen in the respective trade areas within the state in such trade or trades and specify the graduated scale of wages applicable to apprentices in such trade or trades in each such area; to ascertain employment needs in such trade or trades and specify the appropriate current ratio of apprentices to journeymen; and to make recommendations for the general good of apprentices engaged in the trade or trades represented by the committee. The members of a state joint apprenticeship committee shall be reimbursed for transportation and shall receive such per diem compensation as is provided generally for boards and commissions under the biennial Maintenance Appropriation Acts for each day spent in attendance at meetings of the committee. (1939, c. 229, s. 5.)

§ 94-6. Definition of an apprentice.—The term "apprentice", as used herein, shall mean a person at least sixteen years of age who is covered by a written agreement, with an employer, an association of employers, or an organization of employees acting as employer's agent, and approved by the apprenticeship council; which apprentice agreement provides for not less than four thousand hours of reasonably continuous employment for such person for his participation in an approved schedule of work experience and for at least one hundred forty-four hours per year of related supplemental instruction. The required hours for apprenticeship agreements may vary in accordance with standards adopted by local or state joint apprenticeship committees, subject to approval of the state apprenticeship council and commissioner of labor. (1939, c. 229, s. 6.)

§ 94-7. Contents of agreement. — Every apprentice agreement entered into under this chapter shall contain:

(1) The names of the contracting parties.

(2) The date of birth of the apprentice.

(3) A statement of the trade, craft, or business which the apprentice is to be taught, and the time at which the apprenticeship will begin and end.

(4) A statement showing the number of hours to be spent by the apprentice in work and the number of hours to be spent in related and supplemental instruction, which instruction shall be not less than one hundred forty-four hours per year: Provided, that in no case shall the combined weekly hours of work and of required related and supplemental instruction of the apprentice exceed the maximum number of hours of work prescribed by law for a person of the age and sex of the apprentice.

(5) A statement setting forth a schedule of the processes in the trade or industry division in which the apprentice is to be taught and the approximate time to be spent at each process.

(6) A statement of the graduated scale of wages to be paid the apprentice and whether the required school time shall be compensated.

(7) A statement providing for a period of probation of not more than five hundred hours of employment and instruction extending over not more than four months, during which time the apprentice agreement shall be terminated by the director at the request in writing of either party, and providing that after such probationary period the apprentice agreement may be terminated by the director by mutual agreement of all parties thereto, or cancelled by the director for good and sufficient reason. The council at the request of a joint apprentice committee may lengthen the period of probation.

(8) A provision that all controversies or differences concerning the apprentice agreement which cannot be adjusted locally in accordance with § 94-5 shall be submitted to the director for determination as provided for in § 94-10.

(9) A provision that an employer who is unable to fulfill his obligation under the apprentice agreement may with the approval of the director transfer such contract to any other employer: Provided, that the apprentice consents and that such other employer agrees to assume the obligations of said apprentice agreement.

(10) Such additional terms and conditions as may be prescribed or approved by the director not inconsistent with the provisions of this chapter. (1939, c. 229, s. 7.)

§ 94-8. Approval of apprentice agreements; signatures.—No apprentice agreement under this chapter shall be effective until approved by the director. Every apprentice agreement shall be signed by the employer, or by an association of employers or an organization of employees as provided in § 94-9, and by the apprentice, and if the apprentice is a minor, by the minor's father: Provided, that if the father be dead or legally incapable of giving consent or has abandoned his family, then by the minor's mother; if both father and mother be dead or legally incapable of giving consent, then by the guardian of the minor. Where a minor enters into an apprentice agreement under this chapter for a period of training extending into his majority, the apprentice agreement shall likewise be binding for such a period as may be covered during the apprentice's majority. (1939, c. 229, s. 8.)

§ 94-9. Rotation of employment.—For the purpose of providing greater diversity of training or continuity of employment, any apprentice agreement made under this chapter may in the discretion of the director of apprenticeship be signed by an association of employers or an organization of employees instead of by an individual employer. In such a case, the apprentice agreement shall expressly provide that the association of employers or organization of employees does not assume the obligation of an employer but agrees to use its best endeavors to procure employment and training for such apprentice with one or more employers who will accept full responsibility, as herein provided, for all the terms and conditions of employment and training set forth in said agreement between the apprentice and employer association or employee organization during the period of each such employment. The apprentice agreement in such a case shall also expressly provide for the transfer of the apprentice, subject to the approval of the director, to such employer or employers who shall sign in written agreement with the apprentice, and if the apprentice is a minor with his parent or guardian, as specified in § 94-8, contracting to employ said apprentice for the whole or a definite part of the total period of apprenticeship under the terms and conditions of employment and training set forth in the said agreement entered into between the apprentice and employer association or employee organization. (1939, c. 229, s. 9.)

§ 94-10. Settlement of controversies or complaints.—Under the complaint of any interested person or upon his own initiative, the director may investigate to determine if there has been a violation of the terms of an apprentice agreement, made under this chapter, and he may hold hearings, inquiries, and other proceedings necessary to such investigations and determination. The parties to such agreement shall be given a fair and impartial hearing, after reasonable notice in writing thereof. All such hearings, investigations and determinations shall be made under authority of reasonable rules and procedures prescribed by the apprenticeship council, subject to the approval of the commissioner of labor.

The determination of the director shall be filed with the commissioner. If no appeal therefrom is filed with the commissioner within ten days after the date thereof, as herein provided, such determination shall become the order of the commissioner. Any person aggrieved by any determination or action of the commissioner, may appeal therefrom to the council, who shall hold a hearing thereon after due notice in writing to the interested parties. Any party to an apprentice agreement aggrieved by an order or decision of the council may appeal to the courts on questions of law. The decision of the council shall be final on the questions of fact. The decision of the council shall be conclusive if such appeal therefrom shall not be filed within thirty days after the date of such order or decision.

No person shall institute any action for the enforcement of any apprentice agreement, or damages for the breach of any apprentice agreement, made under this chapter, unless he shall first have exhausted all administrative remedies provided by this section. (1939, c. 229, s. 10.)

§ 94-11. Limitation.—Nothing in this chapter or in any apprentice agreement approved under this chapter shall operate to invalidate any apprenticeship provision in any collective agreement between employers and employees, setting up higher apprenticeship standards. (1939, c. 229, s. 11.)

Chapter 95. Department of Labor and Labor Regulations.

Art. 1. Department of Labor.

Art. 1. Department of Labor.

§ 95-1. Department of labor established.—A Department of Labor is hereby created and established. The duties of said department shall be exercised and discharged under the supervision and direction of a commissioner, to be known

as the Commissioner of Labor. (Rev., s. 3909; 1919, c. 314, s. 4; 1931, c. 312, s. 1; C. S. 7309.)

Editor's Note.—Public Laws 1931, c. 312, effected a reorganization of the Department of Labor and Printing, henceforth to be known as the Department of Labor. Sec. 17 of the act provided: "This act shall be in force and effect from and after April first, one thousand nine hundred and thirty-one: Provided, that the Child Welfare Commission shall continue operating under existing laws until June thirtieth in order to complete the year's program of inspections, use printed material and complete statistical studies, but the Executive Secretary, the Commissioner of Labor, with the approval of the Governor, shall proceed to complete plans for reorganization of Department of Labor to be made effective promptly July first, one thousand nine hundred and thirty-one."

In 9 N. C. Law Rev. 413, 414, it is said: "There are some disappointing features and omissions in connection with the plan of reorganization. In the first place, the writer is of the opinion that the Commissioner of Labor should be appointed by the Governor rather than elected by popular vote. This office calls for an expert, and there is little reason to think that the person who is likely to be elected will possess the necessary qualifications. Secondly, there is complete absence of advisory boards to confer with and advise the Commissioner or heads of any of the several divisions. There seems little justification for burdening the Division of Standards and Inspections with the duty of collecting information and statistics concerning water-power, agriculture, dairying, etc. To be sure, these matters are important, and have a bearing, directly or indirectly, on the welfare of the working classes of the State. But so does almost any other aspect of economic activity that could be mentioned. Such inquiry properly belongs to other departments, and should not be required of a department that is going to have its hands full with matters with which it should properly concern itself. The practice of making the labor department a catch-all for all sorts of duties which other departments should, but do not do, is one that is altogether too common, and one that is not conducive to effective administration. Finally, the absence of machinery of any sort for the settlement of industrial disputes is a matter of some surprise. In view of the recent experiences in Gastonia, Marion, and elsewhere within the State it is almost incomprehensible. While the presence of such machinery by no means guarantees that disputes will be settled promptly and effectively, or at all, for that matter, the experience of other states which have such machinery, with competent men administering it, would seem to fully warrant its establishment. This omission, together with the above duties imposed upon the Division of Statistics and Inspections which are somewhat foreign to its primary purpose, seem to the writer the most serious defects in the plan of the reorganization which in most other respects is fairly satisfactory."

§ 95-2. Election of commissioner; term; salary; vacancy.—The commissioner of labor shall be elected by the people in the same manner as is provided for the election of the secretary of state. His term of office shall be four years, and he shall receive a salary of six thousand and six hundred dollars ($6600.00) per annum. Any vacancy in the office shall be filled by the governor, until the next general election. The office of the department of labor shall be kept in the city of Raleigh and shall be provided for as are other public offices of the state. (Rev., ss. 3909, 3910; 1919, c. 314, s. 4; 1931, c. 312, s. 2; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 415; 1939, c. 349; 1943, c. 499, s. 2; C. S. 7310.)

Editor's Note.—The Act of 1931 amended this section by adding the provisions as to salary and filling vacancies, and omitting a former provision as to the assistant commissioner. Sec. 3 of the Act provided that nothing in the above section "shall be construed as affecting or in any way interfering with the term of office of the present Commissioner of Labor and Printing, who shall hereafter be known as the Commissioner of Labor and who shall hold office until the expiration of his present term, to which he was elected, and until his successor has been elected and qualified" under the provisions of the above section.

The 1937 and 1939 amendments increased the salary.

The 1943 amendment increased the salary from $6,000 to $6,600.

§ 95-3. Divisions of department; commissioner; administrative officers.—The Department of Labor shall consist of the following officers, divisions and sections:

A Commissioner of Labor.

A Division of Workmen's Compensation, as a separate and distinct unit, the officers of the Industrial Commission or the Division of Workmen's Compensation acting separately and independently of the other officers, divisions and sections herein provided for.

A Division of Standards and Inspections.

A Division of Statistics.

Each division, except the Division of Workmen's Compensation, shall be in the charge of a chief administrative officer and shall be organized under such rules and regulations as the Commissioner of Labor and the head of the division concerned, with the approval of the Governor, shall prescribe and promulgate. The Commissioner of Labor, with the approval of the Governor, may make provision for one person to act as chief administrative officer of two or more divisions, when such is deemed advisable. The chief administrative officers of the several divisions, except the Industrial Commission, shall be appointed by the Commissioner of Labor with the approval of the Governor, and he shall fix their compensation, subject to the approval of the Budget Bureau. The Commissioner of Labor, with the approval of the Governor may combine or consolidate the activities of two or more of the divisions of the department except the Division of Workmen's Compensation, or provide for the setting up of other divisions when such action shall be deemed advisable for the more efficient and economical administration of the work and duties of the department. (1931, cc. 277, 312, s. 4; 1933, c. 46.)

§ 95-4. Authority, powers and duties of commissioner.—The commissioner of labor shall be the executive and administrative head of the department of labor. In addition to the other powers and duties conferred upon the commissioner of labor by this article, the said commissioner shall have authority and be charged with the duty:

(a) To appoint and assign to duty such clerks, stenographers, and other employees in the various divisions of the department, with approval of said director of division, as may be necessary to perform the work of the department, and fix their compensation, subject to the approval of the Budget Bureau. The commissioner of labor may assign or transfer stenographers, or clerks, from one division to another, or inspectors from one division to another, or combine the clerical force of two or more divisions, or require from one division assistance in the work of another division, as he may consider necessary and advisable: Provided, however, the provisions of this subsection shall not apply to the industrial commission, or the division of workmen's compensation.

(b) To make such rules and regulations with reference to the work of the department and of the several divisions thereof as shall be necessary to properly carry out the duties imposed upon the said commissioner and the work of the department; such rules and regulations to be made subject to the approval of the governor.

(c) To take and preserve testimony, examine witnesses, administer oaths, and under proper restriction enter any public institution of the state, any factory, store, workshop, laundry, public eating-house or mine, and interrogate any person employed therein or connected therewith, or the proper officer of a corporation, or file a written or printed list of interrogatories and require full and complete answers to the same, to be returned under oath within thirty days of the receipt of said list of questions.

(d) To secure the enforcement of all laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating-places, and commercial institutions in the state. To aid him in the work, he shall have power to appoint factory inspectors and other assistants. The duties of such inspectors and other assistants shall be prescribed by the commissioner of labor.

(e) To visit and inspect, personally or through his assistants and factory inspectors, at reasonable hours, as often as practicable, the factories, mercantile establishments, mills, workshops, public eating-places, and commercial institutions in the state, where goods, wares, or merchandise are manufactured, purchased, or sold, at wholesale or retail.

(f) To aid veterans of the World War in securing the adjustment of claims against the Federal government.

(g) To enforce the provisions of this section, and to prosecute all violations of laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating-houses, and commercial institutions in this state before any justice of the peace or court of competent jurisdiction. It shall be the duty of the solicitor of the proper district or the prosecuting attorney of any city or county court, upon the request of the commissioner of labor, or any of his assistants or deputies, to prosecute any violation of a law, which it is made the duty of the said commissioner of labor to enforce. (1925, c. 288; 1931, cc. 277, 312, ss. 5, 6; 1933, cc. 46, 244.)

Editor's Note.—Public Laws of 1933, c. 244, added subsections (c), (d), (e), and (g) of this section as they now appear.

See 11 N. C. Law Rev. 234, for changes made in this section by Public Laws 1933.

§ 95-5. Annual report to Governor; recommendation as to legislation needed. — The commissioner of labor shall annually, on or before the first day of January, file with the governor a report covering the activities of the department, and the report so made on or before January first of the years in which the general assembly shall be in session shall be accompanied by recommendations of the commissioner with reference to such changes in the law applying to or affecting industrial and labor conditions as the commissioner may deem advisable. The report of the commissioner of labor shall be printed and distributed in such manner and form as the director of the budget shall authorize. (1931, c. 312, s. 7.)

§ 95-6. Statistical report to Governor; publication of information given by employers.—It shall be the duty of the commissioner of labor to collect in the manner herein provided for, and to assort, systematize, and present to the governor as a part of the report provided for in § 95-5, statistical details relating to all divisions of labor in the State, and particularly concerning the following: The extent of unemployment, the hours of labor, the number of employees and sex thereof, and the daily wages earned; the conditions with respect to labor in all manufacturing establishments, hotels, stores, and workshops; and the industrial, social, educational, moral, and sanitary conditions of the labor classes, in the productive industries of the State. Such statistical details shall include the names of firms, companies, or corporations, where the same are located, the kind of goods produced or manufactured, the period of operation of each year, the number of employees, male or female, the number engaged in clerical work and the number engaged in manual labor, with the classification of the number of each sex engaged in such occupation and the average daily wage paid each: Provided, that the commissioner shall not, nor shall anyone connected with his office, publish or give or permit to be published or given to any person the individual statistics obtained from any employer, and all such statistics, when published, shall be published in connection with other similar statistics and be set forth in aggregates and averages. (1931, c. 312, s. 8.)

§ 95-7. Power of commissioner to compel the giving of such information; refusal as contempt. —The commissioner of labor, or his authorized representative, for the purpose of securing the statistical details referred to in § 95-6, shall have power to examine witnesses on oath, to compel the attendance of witnesses and the giving of such testimony and production of such papers as shall be necessary to enable him to gain the necessary information. Upon the refusal of any witness to comply with the requirements of the commissioner of labor or his representative in this respect, it shall be the duty of any judge of the superior court, upon the application of the commissioner of labor, or his representative, to order the witness to show cause why he should not comply with the requirements of the said commissioner, or his representative, if in the discretion of the judge such requirement is reasonable and proper. Refusal to comply with the order of the judge of the superior court shall be dealt with as for contempt of court. (1931, c. 312, s. 9.)

§ 95-8. Employers required to make statistical report to Commissioner; refusal as contempt. —It shall be the duty of every owner, operator, or manager of every factory, workshop, mill, mine, or other establishment, where labor is employed, to make to the department, upon blanks furnished by said department, such reports and returns as the said department may require, for the purpose of compiling such labor statistics as are authorized by this article, and the owner or business manager shall make such reports and returns within the time prescribed therefor by said Commissioner, and shall certify to the correctness of the same. Upon the refusal of any person, firm, or corporation to comply with the provisions of this section, it shall be the duty of any judge of the superior court, upon application by the commissioner or by any representative of the department authorized by him, to order the person, firm, or corporation to show

cause why he or it should not comply with the provisions of this section. Refusal to comply with the order of the judge of the superior court shall be dealt with as for contempt of court. (1931, c. 312, s. 10.)

§ 95-9. Employers to post notice of laws.—It shall be the duty of every employer to keep posted in a conspicuous place in every room where five or more persons are employed a printed notice stating the provisions of the law relative to the employment of adult persons and children and the regulation of hours and working conditions. The Commissioner of Labor shall furnish the printed form of such notice upon request. (1933, c. 244, s. 6.)

§ 95-10. Division of workmen's compensation.—The North Carolina industrial commission, created under the provisions of the workmen's compensation act, § 97-1 et seq., is hereby transferred to the department of labor as one of its integral units. The powers, duties, and personnel of the said industrial commission shall continue as provided for in the workmen's compensation act: Provided, however, that such adjustments shall be made in connection with the statistical work and the work of inspection of said industrial commission and the statistical work and work of inspection of other divisions of the department of labor as the commissioner of labor, with the advice of the industrial commission and of the heads of the divisions directly concerned, may, with the approval of the Governor, prescribe, for the purpose of facilitating, expediting, and improving the work of the department as a whole. (1931, c. 312, s. 11.)

§ 95-11. Division of Standards and Inspection.—(a) The chief administrative officer of the Division of Standards and Inspection shall be known as the director of the division. It shall be his duty, under the direction and supervision of the Commissioner of Labor, and under rules and regulations to be adopted by the Department as herein provided, to make or cause to be made all necessary inspections to see that all laws, rules, and regulations concerning the safety and well-being of labor are promptly and effectively carried out.

(b) The Division shall make studies and investigations of special problems connected with the labor of women and children, and create the necessary organization, and appoint an adequate number of investigators, with the consent of the Commissioner of Labor and the approval of the Governor; and the Director of said division, under the supervision and direction of the Commissioner of Labor and under such rules and regulations as shall be prescribed by said Commissioner, with the approval of the Governor, shall perform all duties devolving upon the Department of Labor, or the Commissioner of Labor with relation to the enforcement of laws, rules, and regulations governing the employment of women and children.

(c) The Director shall report annually to the Commissioner of Labor the activities of the division, with such recommendations as may be considered advisable for the improvement of the working conditions for women and children.

(d) The Division shall collect and collate information and statistics concerning the location, estimated and actual horsepower and condition of valuable water-powers, developed and undeveloped, in this State; also concerning farm lands and farming, the kinds, character, and quantity of the annual farm products in this State; also of timber lands and timbers, truck gardening, dairying, and such other information and statistics concerning the agricultural and industrial welfare of the citizens of this State as may be deemed to be of interest and benefit to the public. The Director shall also perform the duties of mine inspector as prescribed in the chapter on Mines and Quarries.

(e) The Division shall conduct such research and carry out such studies as will contribute to the health, safety, and general well-being of the working classes of the State. The finding of such investigations, with the approval of the Commissioner of Labor and the Governor and the cooperation of the chief administrative officer of the Division or Divisions directly concerned, shall be promulgated as rules and regulations governing work places and working conditions. All recommendations and suggestions pertaining to health, safety, and well-being of employees shall be transmitted to the Commissioner of Labor in an annual report which shall cover the work of the Division of Standards and Inspection.

(f) The Division shall make, promulgate and enforce rules and regulations for the protection of employees from accident and from occupational disease; and shall upon request, and after such investigation as it deems proper, issue certificates of compliance to such employers as are found by it to be in compliance with the rules and regulations made and promulgated in accordance with the provisions of this paragraph. (1931, c. 312, s. 12, c. 426; 1935; c. 131.)

Editor's Note.—Subsection (f) was added by the 1935 amendment.

§ 95-12. Division of Statistics.—The Division of Statistics shall be in charge of a Chief Statistician. It shall be his duty, under the direction and supervision of the Commissioner of Labor, to collect, assort, systematize, and print all statistical details relating to all divisions of labor in this State as is provided in § 95-6. (1931, c. 312, s. 13.)

§ 95-13. Enforcement of rules and regulations.—In the event any person, firm or corporation shall, after notice by the commissioner of labor, violate any of the rules or regulations promulgated under the authority of this article or any laws amendatory hereof relating to safety devices, or measures, the attorney general of the state, upon the request of the commissioner of labor, may take appropriate action in the civil courts of the state to enforce such rules and regulations. Upon request of the attorney general, any solicitor of the state of North Carolina in whose district such rule or regulation is violated may perform the duties hereinabove required of the attorney general. (1939, c. 398.)

§ 95-14. Agreements with certain federal agencies for enforcement of Fair Labor Standards Act.—The North Carolina state department of labor may and it is hereby authorized to enter into agreements with the wage and hour division, and the children's bureau, United States department of labor, for assistance and coöperation in the enforcement within this state of the

act of Congress known as the Fair Labor Standards Act of one thousand nine hundred thirty-eight, approved June twenty-fifth, one thousand nine hundred thirty-eight, and is further authorized to accept payment and/or reimbursement for its services as provided by said act of Congress. Any such agreement may be subject to the regulations of the administrator of the wage and hour division, or the chief of the children's bureau of the United States department of labor, as the case may be, and shall be subject to the approval of the director of the state budget. Nothing in this section shall be construed as authorizing the state department of labor to spend in excess of its appropriation from state funds, except to the extent that such excess may be paid and/or reimbursed to it by the United States department of labor. All payments received by the state department of labor under this section shall be deposited in the state treasury and are hereby appropriated to the state department of labor to enable it to carry out the agreements entered into under this section. (1939, c. 245.)

Art. 2. Maximum Working Hours.

§ 95-15. Title of article.—This article shall be known and may be cited as the "Maximum Hour Law." (1937, c. 409, s. 1.)

§ 95-16. Declaration of public policy; enactment under police power.—As a guide to interpretation and application of this article, the public policy of this state is declared as follows: The relationship of hours of labor to the health, morals and general welfare of the people is a subject of general concern which requires appropriate legislation to limit hours of labor to promote the general welfare of the people of the state without jeopardizing the competitive position of North Carolina business and industry.

The general assembly, therefore, declares that in its considered judgment the general welfare of the state requires enactment of this law under the police power of the state. (1937, c. 409, s. 2.)

§ 95-17. Limitations of hours of employment; exceptions.—No employer shall employ a female person for more than forty-eight hours in any one week or nine hours in any one day, or on more than six days in any period of seven consecutive days.

No employer shall employ a male person for more than fifty-six hours in any one week, or more than twelve days in any period of fourteen consecutive days or more than ten hours in any one day, except that in case where two or more shifts of eight hours each or less per day are employed, any shift employee may be employed not to exceed double his regular shift hours in any one day whenever a fellow employee in like work is prevented from working because of illness or other cause: Provided, that any male person employed working in excess of fifty-five hours in any one week shall be paid time and a half at their regular rate of pay for such excess hours: Provided, in case of emergencies, repair crews, engineers, electricians, firemen, watchmen, office and supervisory employees and employees engaged in hereinafter defined continuous process operations and in work, the nature of which prevents second shift operations, may be employed for not more than sixty hours in any one week: Provided, also, that the ten hours per day maximum shall not apply to any employee when his employment is required for a longer period on account of an emergency due to breakdown, installation or alteration of equipment: Provided, that boys over fourteen years of age delivering newspapers on fixed routes and working not more than twenty-four hours per week, and watchmen may be employed seven days per week: Provided further, that from the eighteenth of December to and including the following twenty-fourth of December and for two periods of one week's duration each during the year for purpose of taking inventory, female persons over sixteen years of age in mercantile establishments may be employed not to exceed ten hours in any one day: Provided further, that female persons engaged in the operation of seasonal industries in the process of conditioning and preserving perishable or semi-perishable commodities may be employed for not more than ten hours in any one day and not more than fifty-five hours in any one week.

No provision in this article shall be deemed to authorize the employment of any minor in violation of the provisions of any law expressly regulating the hours of labor of minors or of any regulations made in pursuance of such laws.

Where the day is divided into two or more work periods for the same employee, the employer shall provide that all such periods shall be within twelve consecutive hours, except that in the case of employees of motion picture theatres, restaurants, dining-rooms, and public eating places, such periods shall be within fourteen consecutive hours:

Provided, that the transportation of employees to and from work shall not constitute any part of the employees' work hours.

Nothing in this section or any other provisions of this article shall apply to the employment of persons in agricultural occupations, ice plants, cotton gins and cottonseed oil mills or in domestic service in private homes and boarding houses, or to the work of persons over eighteen years of age in bona fide office, foremanship, clerical or supervisory capacity, executive positions, learned professions, commercial travelers, motion picture theatres, seasonal hotels and club houses, commercial fishing or tobacco redrying plants, tobacco warehouses, employers employing a total of not more than eight persons in each place of business, charitable institutions and hospitals: Provided further, that nothing in this section or in any other provision of this article shall apply to railroads, common carriers and public utilities subject to the jurisdiction of the interstate commerce commission or the North Carolina utilities commission, and utilities operated by municipalities or any transportation agencies now regulated by the federal government: Provided, nothing in this article shall apply to the state or to municipal corporations or their employees, or to employees in hotels.

When, by reason of a seasonal rush of business, any employer finds or believes it to be necessary that the employees of his or its manufacturing plant shall work for more than fifty-six hours per week, the employer may apply to the commissioner of labor of the state of North Carolina for permission to allow the employees of such estab-

lishment to work a greater number of hours than fifty-six for a definite length of time not exceeding sixty days; and the commissioner, after investigation, may, in his discretion, issue such permit on the condition that all such employees shall receive one and one-half times the usual compensation for all hours worked over fifty-six per week: Provided, this shall not apply to the hours of any female person or any person under the age of eighteen years: Provided further, employees in all laundries and dry cleaning establishments shall not be employed more than fifty-five hours in any one week: Provided further, nothing contained in this article shall be construed to limit the hours of employment of any outside salesmen on commission basis. Provided, that this article shall not apply to male clerks in mercantile establishments. Provided, that this article shall not apply to retail or wholesale florists nor to employees of retail or wholesale florists during the following periods of each year: one week prior to and including Easter, one week prior to and including Christmas, and one week prior to and including Mother's Day. (1937, cc. 406, 409, s. 3; 1939, c. 312, s. 1; 1943, c. 59.)

Cross Reference.—Compare sections 95-26 and 95-27.

Editor's Note.—The 1939 amendment added the last proviso.

The 1943 amendment substituted "fifty-six" for "fifty-five" in line two of the second paragraph and in lines four, nine and fourteen of the last paragraph. It also inserted the first proviso in the second paragraph.

§ 95-18. Definitions.—Whenever used in this article

(a) "Employ" includes permit or suffer to work.

(b) "Employer" includes every person, firm, corporation, partnership, stock association, agent, manager, representative or foreman, or other person having control or custody of any employment, place of employment or of any employee.

(c) "Day" includes any period of twenty-four consecutive hours.

(d) "Continuous process operations" includes bleaching, dyeing, finishing, redrying, dry kiln operations, and any other processing requiring continuous handling or work for completion. (1937, c. 409, s. 4.)

§ 95-19. Posting of law.—Every employer shall post and keep conspicuously posted in or about the premises wherein any employee is employed, a printed abstract of this article to be furnished by the state commissioner of labor upon request. (1937, c. 409, s. 5.)

§ 95-20. Time records kept by employers.—Every employer shall keep a time book and/or record which shall state the name and occupation of each employee employed and which shall indicate the number of hours worked by him or her on each day of the week, and the amount of wages paid each pay period to each such employee. Such time book and/or record shall be kept on file at least one year after the entry of the record. The state commissioner of labor or his duly authorized representative shall, for the purpose of examination, have access to and the right to copy from such time book and/or record for the purpose of prosecuting violations of the provisions of the article. Any employer who fails to keep such time book and/or record, or knowingly and intentionally makes any false statement therein, or refuses to make such time book and/or record accessible, upon request, to the state commissioner of labor or his duly authorized representative shall be deemed to have violated this section. (1937, c. 409, s. 6.)

§ 95-21. Enforcement by commissioner of labor.—It shall be the duty of the state commissioner of labor to enforce all the provisions of this article. The state commissioner of labor and his authorized representatives shall have the power and authority to enter any place of employment, and, in the enforcement of this article, the state commissioner of labor and his authorized representatives may enter and inspect as often as practicable all such places of employment. They may investigate all complaints of violations of this article received by them, and may institute prosecutions as hereinafter provided for violations of this article. (1937, c. 409, s. 7.)

§ 95-22. Interference with enforcement prohibited.—No person shall hinder or delay the state commissioner of labor or any of his authorized representatives in the performance of his duties; nor shall any person refuse to admit to, or lock out from, any place of employment the state commissioner of labor or any of his authorized representatives, or refuse to give the state commissioner of labor or his authorized representatives information required for the proper enforcement of this article. (1937, c. 409, s. 8.)

§ 95-23. Violation a misdemeanor.—Any person who, whether on his own behalf or for another, or through an agent, manager, representative, foreman or other person, shall knowingly and intentionally violate any provisions of this article, shall be guilty of a misdemeanor. (1937, c. 409, s. 9.)

§ 95-24. Penalties.—Whoever knowingly and intentionally violates any provisions of § 95-17, upon complaint lodged by the state commissioner of labor, shall be punished by a a fine of not less than ten ($10.00) dollars nor more than fifty ($50.00) dollars, or by imprisonment for not more than thirty days in the discretion of the court; and whenever any person shall have been notified by the state commissioner of labor or his authorized representative, or by the service of a summons in a prosecution, that he is violating such provision, he shall be subject to like penalties in addition for each and every day that such violation shall have been continued after such notification.

Whoever knowingly and intentionally violates any of the provisions of §§ 95-19, 95-20, or 95-22 of this article shall be punished, for the first offense, by a fine of not less than five ($5.00) dollars nor more than twenty-five ($25.00) dollars, or imprisonment for not more than thirty days, in the discretion of the court, and whenever any person shall have been notified by the state commissioner of labor or his authorized representative that he is violating such provisions, and shall have been given a reasonable time in which to remedy the conditions which shall constitute such violations, he shall be subject to like penalties in addition to the penalties aforesaid, for each and every day that such violation shall have continued after the expiration of the time allowed by the state commissioner of labor or his authorized representative

for remedying the aforesaid conditions. (1937, c. 409, s. 10.)

§ 95-25. Intimidating witnesses. — Whoever shall, by force, intimidation, threat of procuring dismissal from employment, or by any other manner whatsoever, induce or attempt to induce an employee to refrain from giving testimony in any investigation or proceeding relating to or arising under this article, or whoever discharges or penalizes any employee for so testifying, shall be subject to a fine of not less than ten ($10.00) dollars nor more than fifty ($50.00) dollars, or by imprisonment for not more than thirty days. (1937, c. 409, s. 11.)

Art. 3. Various Regulations.

§ 95-26. Week's work of women to be fifty-five hours.—Not more than fifty-five hours shall constitute a week's work for women over sixteen in any laundry, dry-cleaning establishment, pressing club, work-shop, factory, manufacturing establishment, or mill, of the State, and no woman over sixteen employed in any of the above-named places shall be worked exceeding eleven hours in any one day or over fifty-five hours in any one week. Any employer of labor violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days, and each day's work exceeding the said hours shall constitute a separate offense. Provided, that this section shall not apply to those employed in the operation of seasonal industries in their process of conditioning and of preserving perishable or semi-perishable commodities, or to those engaged in agricultural work. Provided, further, that this section shall not apply to retail or wholesale florists nor to employees of retail or wholesale florists during the following periods of each year: one week prior to and including Easter, one week prior to and including Christmas, and one week prior to and including Mother's Day. (1915, c. 148, s. 2; 1931, c. 289; 1935, c. 406; 1939, c. 312, s. 2; C. S. 6554.)

Cross Reference.—For hours law applicable to employers hiring nine or more employees, see §§ 95-15 to 95-25.

Editor's Note.—The Act of 1931 struck out the former section which provided a sixty hour week for men and women, permitting the men to exceed it under special contract for overtime, and substituted a section making no provision for male workers.

The amendment of 1935 made this section applicable to laundries, dry-cleaning establishments, pressing clubs and work-shops.

The 1939 amendment added the second proviso.

§ 95-27. Hours of work for women in certain industries.—It shall be unlawful for any person, firm, or corporation, proprietor or owner of any retail, or wholesale mercantile establishment or other business where any female help is employed for the purpose of serving the public in the capacity of clerks, salesladies or waitresses and other employees of public eating places, to employ or permit to work any female longer than ten hours in any one day or over fifty-five hours in any one week; nor shall any female be employed or permitted to work for more than six hours continuously at any one time without an interval of at least half an hour except where the terms of employment do not call for more than six and a half hours in any one day or period.

Nothing in this section shall be construed to apply to females whose full time is employed as bookkeepers, cashiers or office assistants or to any establishment that does not have in its employment three or more persons at any one time.

Every employer shall post in a conspicuous place in every room of the establishment in which females are employed a printed notice stating the provisions of this section and the hours of labor. The printed form of such notice shall be furnished, upon request, by the commissioner of labor.

Any employer of labor violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars or imprisoned not exceeding sixty days and each day's work exceeding the said hours shall constitute a separate offense. (1933, c. 35; 1935, c. 407.)

Cross Reference.—For hours law applicable to employers hiring nine or more employees, see §§ 95-15 to 95-25.

Editor's Note.—The amendment of 1935 omitted a proviso, which formerly appeared in the second paragraph, stating that the section should not apply to establishments in towns of less than five thousand inhabitants.

§ 95-28. Working hours of employees in state institutions.—It shall be unlawful for any person or official or foreman or other person in authority in the state hospital at Raleigh, the state hospital at Morganton, the state hospital at Goldsboro, or any penal or correctional institution of the State of North Carolina, excepting the state prison and institutions under the control of the state commission of highways and public works, to require any employee to work for a greater number of hours than twelve (12) during any twenty-four (24) hour period, or not more than eighty-four (84) hours during any one one week, or permit the same, during which period the said employee shall be permitted to take one continuous hour off duty; except in case of an emergency as determined by the superintendent, in which case the limitation of twelve (12) hours in any consecutive twenty-four (24) shall not apply. Nothing in this section shall be construed to effect the hours of doctors and superintendents in these hospitals. Any violation of this section shall be a misdemeanor, punishable within the discretion of the court. (1935, c. 136.)

§ 95-29. Seats for women employees; failure to provide, a misdemeanor.—All persons, firms, or corporations who employ females in a store, shop, office, or manufacturing establishment, as clerks, operatives, or helpers in any business, trade, or occupation carried on or operated in the state of North Carolina, shall be required to procure and provide proper and suitable seats for all such females, and shall permit the use of such seats, rests, or stools as may be necessary, and shall not make any rules, regulations, or orders preventing the use of such seats, stools, or rests when any such female employee or employees are not actively employed or engaged in their work in such business or employment.

If any employer of female help fails to provide seats, as required in this article, or makes any rules, orders or regulations in his or its shop, store, or other place of business requiring females to remain standing when not necessarily employed or engaged in service or labor therein, he shall be

guilty of a misdemeanor, and upon conviction thereof shall be punished by fine or imprisonment, or both, within the discretion of the court.

The Commissioner of Labor, or his duly authorized agents, may at any time enter and inspect all stores, shops, offices, or manufacturing or other establishments coming within the provisions of this section, and he may make such rules and regulations as he deems necessary to enforce the provisions of this section. It shall be unlawful for any person, firm or corporation to refuse permission to enter, obstruct, or prevent any duly authorized agent of the commissioner in his effort to make the inspection herein provided for. (1909, c. 857, ss. 1, 2; 1919, c. 100, s. 12; C. S. 6555.)

§ 95-30. Medical chests in factories; failure to provide, a misdemeanor.—Every person, firm, or corporation operating a factory or shop employing over twenty-five laborers, in which machinery is used for any manufacturing purpose, or for any purpose except for elevation or for heating or hoisting apparatus, shall at all times keep and maintain free of expense to the employees a medical or surgical chest which shall contain two porcelain pans, two tourniquets, gauze, absorbent cotton, adhesive plasters, bandages, antiseptic soap, one bottle of carbolic acid with directions on bottle, one bottle antiseptic tablets, one pair scissors, one folding stretcher, for the treatment of persons injured or taken ill upon the premises: Provided, this section does not require any employer to spend over ten dollars for such equipment.

Any person, firm, or corporation violating this section shall be subject to a fine of not less than five dollars nor more than twenty-five dollars for every week during which such violation continues. (1911, c. 57; C. S. 6556.)

§ 95-31. Acceptance by employer of assignment of wages. — No employer of labor shall be responsible for any assignment of wages to be earned in the future, executed by an employee, unless and until such assignment of wages is accepted by the employer in a written agreement to pay same. (1935, c. 410; 1937, c. 90.)

Editor's Note.—The 1937 amendment struck out the former proviso exempting Rowan, Iredell, Rockingham and Cabarrus counties from the provisions of this section.

Section Applies Only to Wages to Be Earned.—An assignment by an employee of wages earned and due him by the employer is valid without acceptance by the employer, and the assignee may sue the employer thereon, the provision of this section being applicable only to wages to be earned in the future. Rickman v. Holshouser, 217 N. C. 377, 8 S. E. (2d) 199.

It Is Constitutional.—The provisions of this section rendering an assignment invalid unless accepted in writing by the employer, does not deprive the assignee of due process of law or the equal protection of the laws. Morris v. Holshouser, 220 N. C. 293, 297, 17 S. E. (2d) 115, 137 A. L. R. 733.

When applied to contracts executed after its effective date this section cannot be held unconstitutional as impairing the obligations of contracts. Morris v. Holshouser, 220 N. C. 293, 17 S. E. (2d) 115, 137 A. L. R. 733.

This section is a regulation of contracts growing out of the relationship of employer and employee imposed for the general welfare and is a valid exercise of the police power of the state. Morris v. Holshouser, 220 N. C. 293, 17 S. E. (2d) 115, 137 A. L. R. 733.

The fact that this section permits an employer, at his election, to accept an assignment of unearned wages executed by his employee does not in itself constitute an unconstitutional discrimination, since in the absence of legislative restraint, one engaged in private business may exercise his own pleasure as to the parties with whom he will deal. Morris v. Holshouser, 220 N. C. 293, 17 S. E. (2d) 115, 137 A. L. R. 733.

Purpose.—The end in view was not only to relieve the employer of unnecesary responsibility, but also to restrain the activities of those who were engaged in the business of buying at a discount the unearned wages of employees. Morris v. Holshouser, 220 N. C. 293, 298, 17 S. E. (2d) 115, 137 A. L. R. 733.

Art. 4. Conciliation Service and Mediation of Labor Disputes.

§ 95-32. Declaration of policy.—It is hereby declared as the public policy of this state that the best interests of the people of the state are served by the prevention or prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected; and that the conciliation and voluntary mediation of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the state. To carry out such policy, the necessity for the enactment of the provisions of this article is hereby declared as a matter of legislative determination. (1941, c. 362, s. 1.)

§ 95-33. Scope of article.—The provisions of this article shall apply to all labor disputes in North Carolina. (1941, c. 362, s. 2.)

§ 95-34. Administration of article.—The administration of this article shall be under the general supervision of the commissioner of labor of North Carolina. (1941, c. 362, s. 3.)

§ 95-35. Conciliation service established; personnel; removal; compensation.—There is hereby established in the department of labor a conciliation service. The commissioner of labor may appoint such employees as may be required for the consummation of the work under this article, prescribe their duties and fix their compensation, subject to existing laws applicable to the appointment and compensation of employees of the state of North Carolina. Any member of or employee in the conciliation service may be removed from office by the commissioner of labor, acting in his discretion. (1941, c. 362, s. 4.)

§ 95-36. Powers and duties of commissioner and conciliator.—Upon his own motion in an existent or imminent labor dispute, the commissioner of labor may, and, upon the direction of the governor, must order a conciliator to take such steps as seem expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between employer and employees which have precipitated or culminated in or threaten to precipitate or culminate in such labor dispute.

The conciliator shall promptly put himself in communication with the parties to such controversy, and shall use his best efforts, by mediation, to bring them to agreement. (1941, c. 362, s. 5.)

Art. 5. Regulation of Employment Agencies.

§ 95-37. Employment agency defined. — Em-

ployment agency within the meaning of this article shall include any business operated by any person, firm or corporation for profit and engaged in procuring employment for any person, firm or corporation in the State of North Carolina and making a charge on the employee or employer for the service. (1929, c. 178, s. 1.)

§ 95-38. License from Commissioner of Labor; investigation of applicant.—No person, firm or corporation shall engage in the business of operating any employment agency, as designated in § 95-37, in North Carolina without first making a written application to the Commissioner of Labor and being licensed by him as herein provided, to engage in such business. Upon receiving an application from such person, firm or corporation it shall be the duty of the Commissioner of Labor to make an investigation into the character and moral standing of the person, firm or corporation. If after such investigation, the Commissioner of Labor shall be satisfied that such person, firm or corporation is of such character and moral standing as to warrant the issuance of a license to engage in the business covered by this article, he shall issue a license to such person, firm or corporation as provided herein. (1929, c. 178, s. 2; 1931, c. 312, s. 3.)

§ 95-39. Rules and regulations governing issuance of licenses.—The Commissioner of Labor is authorized and empowered to make general rules and regulations in relation to the licensing of such employment agencies and for the general supervision thereof in accordance with this article. (1929, c. 178, s. 3; 1931, c. 312, s. 3.)

§ 95-40. Investigation of records of agencies; hearing; rescission of licenses.—The Commissioner of Labor may investigate the books and records of any employment agency licensed under this article, and may rescind the license of the agency for cause if he finds that the agency is not complying with the terms and conditions of this article. No license shall be revoked until the Commissioner shall hold a hearing at the Court House of the County in which the licensee is doing business. The licensee shall be given ten days' notice to appear at the hearing and show cause why the license should not be revoked. At the hearing the result of the Commissioner's investigation shall be presented under oath, and the licensee may present evidence to show that the license should not be revoked. The licensee may appeal to the Superior Court within ten days after the Commissioner's decision. (1929, c. 178, s. 4; 1931, c. 312, s. 3.)

§ 95-41. Subpoenas; oaths.—The Commissioner of Labor, his Assistant or deputy shall be empowered to subpoena witnesses and administer oaths in making investigations and taking testimony to be presented at the hearing to be held before the Commissioner of Labor as hereinbefore provided for. (1929, c. 178, s. 5; 1931, c. 312, s. 3.)

§ 95-42. Service of subpoenas and fees for, governed by general law.—The County Sheriffs and their respective deputies shall serve all subpoenas of the Commissioner of Labor, and shall receive the same fees as are now provided by law for like services, and each witness who appears in obedience to such subpoena shall receive for attendance the fees and mileage for witnesses in civil cases of courts of the County in which the hearing is held. (1929, c. 178, s. 6; 1931, c. 312, s. 3.)

§ 95-43. Production of books, papers and records.—The Superior Court shall, on the application of the Commissioner of Labor, his assistant or duly authorized deputy, enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records. (1929, c. 178, s. 7; 1931, c. 312, s. 3.)

§ 95-44. License fee to be paid into special fund.—The license fee, charged under the provisions of this article, shall be paid into a special fund of the Department of Labor, and the proceeds of such license fees shall be used for the purpose of the supervision and regulation of the employment agencies, including costs of investigations or hearings to revoke licenses and the necessary traveling expenses and other expenditures incurred in administering this article. (1929, c. 178, s. 8; 1931, c. 312, s. 3.)

§ 95-45. Violations.—Any person, firm or corporation conducting an employment agency in the State of North Carolina, in violation of this article shall be guilty of a misdemeanor, and if a person punishable by a fine of not less than five hundred dollars, or imprisonment of not less than six months, or both; and if a corporation by a fine of not less than five hundred dollars and not more than one thousand dollars. (1929, c. 178, s. 9.)

§ 95-46. Government employment agencies unaffected.—This article shall not in any manner affect or apply to any employment agency operated by the State of North Carolina, the Government of the United States, or any City, County or Town, or any agency thereof. (1929, c. 178, s. 10.)

§ 95-47. License taxes placed upon agencies under Revenue Act, not affected.—This article shall in no wise conflict with or affect any license tax placed upon such employment agencies by the General Revenue Act of North Carolina but instead shall be construed as supplementary thereto in exercising the police powers of the State. (1929, c. 178, s. 11.)

Art. 6. Separate Toilets for Sexes and Races.

§ 95-48. When separate toilets required; penalty.—All persons and corporations employing males and females in any manufacturing industry, or other business employing more than two males and females in towns and cities having a population of one thousand persons or more, and where such employees are required to do indoor work chiefly, shall provide and keep in a cleanly condition separate and distinct toilet rooms for such employees, said toilets to be lettered and marked in a distinct manner, so as to furnish separate facilities for white males, white females, colored males and colored females: Provided, that the provisions of this section shall not apply to cases where toilet arrangements or facilities are furnished by said employer off the premises occupied by him. (1913, c. 83, s. 1; C. S. 6559.)

§ 95-49. Location; intruding on toilets misdemeanor.—It shall be the duty of the persons or corporations mentioned under this article to locate their toilets for males and females, white and colored, in separate parts of their buildings or grounds in buildings hereafter erected, and in those now erected all closets shall be separated by substantial walls of brick or timber, and any employee who shall wilfully intrude upon or use any toilet not intended for his or her sex or color shall be guilty of a misdemeanor and upon conviction shall be fined five dollars. (1913, c. 83, s. 4; C. S. 6560.)

§ 95-50. Punishment for violation of article.—If any person, firm, or corporation refuses to comply with the provisions of this article, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1913, c. 83, s. 2; 1919, c. 100, s. 12; C. S. 6561.)

§ 95-51. Police in towns to enforce article.—The police officers of any town or city shall investigate the places of business of any person or corporation employing males and females and see that the provisions of this article are put in force, and shall swear out a warrant before the mayor or other proper officer of any town or city and prosecute all persons, corporations, and managers of corporations violating any of the provisions of this article. (1913, c. 83, s. 3; C. S. 6562.)

§ 95-52. Sheriff in county to enforce article.—When any persons or corporations locate their manufacturing plant or other business outside of any city or town, the sheriff of the county shall investigate the condition of the toilets used by such manufacturing plant or business and see that the provisions of this article are complied with, and shall swear out a warrant before a justice of the peace and prosecute any one violating the provisions of this article. (1913, c. 83, s. 5; C. S. 6563.)

Local Modification.—Harnett, Lee, Johnston, Northampton, Sampson, Cleveland, Rutherford, Polk, and Henderson: C. S. 6564.

§ 95-53. Enforcement by department of labor.—The department of labor shall investigate the places of business of any person or corporation employing males and females, and shall make such rules and regulations for enforcing and carrying out this article as may be necessary. (1919, c. 100, s. 7; 1931, c. 312, ss. 12, 14; C. S. 6563(a).)

Art. 7. Board of Boiler Rules and Bureau of Boiler Inspection.

§ 95-54. Board of boiler rules created; members, appointment, and qualifications; terms of office; vacancies; meetings.—There is hereby created the North Carolina board of boiler rules consisting of five members, of whom four shall be appointed to the board by the governor, one for a term of one year, one for a term of two years, one for a term of three years and one for a term of four years. At the expiration of their respective terms of office, their successors shall be appointed for terms of four years each. Upon the death or incapacity of any member, the vacancy for the remainder of the term shall be filled with a representative of the same class. Of these four appointed members, one shall be a representative of the owners and users of steam boilers within the State of North Carolina, one a representative of the boiler manufacturers or a boiler maker who has had not less than five years practical experience as a boilermaker within the State of North Carolina, one a representative of a boiler inspection and insurance company licensed to do business within the State of North Carolina, and one a representative of the operating steam engineers in the State of North Carolina. The fifth member shall be the commissioner of labor, who shall be chairman of the board. The board shall meet at least twice yearly at the state capital or other place designated by the board. (1935, c. 326, s. 1.)

§ 95-55. Formulation of rules and regulations.—The board shall formulate rules and regulations for the safe and proper construction, installation, repair, use and operation of steam boilers in this State. The rules and regulations so formulated shall conform as nearly as possible to the boiler code of the American Society of Mechanical Engineers and amendments and interpretations thereto made and approved by the council of the society. (1935, c. 326, s. 1.)

§ 95-56. Approval of rules and regulations by governor. — The rules and regulations formulated by the board of boiler rules shall become effective upon approval by the governor, except that rules applying to the construction of new boilers shall not become effective to prevent the installation of such new boilers until six months after approval by the governor. Changes in the rules which would raise the standards governing the methods of construction of new boilers or the quality of material used in them shall not become effective until six months after approval by the governor. (1935, c. 326, s. 2.)

§ 95-57. Compensation and expenses of board.—The members of the board of boiler rules, exclusive of the chairman thereof, shall serve without salary and shall receive their actual expenses, not to exceed their actual railroad fare plus four dollars ($4.00) per day each, for not to exceed twenty days in any year while in the performance of their duties as members of the board, to be paid in the same manner as in case of other state officers. The chairman of the board of boiler rules shall countersign all vouchers for expenditures under this section. (1935, c. 326, s. 3.)

§ 95-58. Effect of article on boilers installed prior to enactment.—This article shall not be construed as in any way preventing the use or sale of steam boilers in this State which shall have been installed or in use in this State prior to the taking effect of this article and which shall have been made to conform to the rules and regulations of the board of boiler rules governing existing installations as provided in § 95-66. (1935, c. 326 s. 4.)

§ 95-59. Commissioner of labor empowered to appoint chief inspector; qualifications; salary.—After the passage of this article and at any time thereafter that the office may become vacant, the commissioner of labor shall appoint, and may remove for cause when so appointed, a citizen of this State who shall have had at the time of such appointment not less than five years' prac-

tical experience with steam boilers as a steam engineer, mechanical engineer, boilermaker or boiler inspector, or who has passed the same kind of examination as that prescribed for deputy or special inspectors in § 95-63, to be chief inspector for a term of two years or until his successor shall have been appointed, at an annual salary to be fixed by the commissioner of labor with the approval of the assistant director of the budget. (1935, c. 326, s. 5; 1943, c. 469.)

Editor's Note.—Prior to the 1943 amendment the salary was fixed at $2,000.

§ 95-60. Certain boilers excepted.—This article shall not apply to boilers under federal control or to stationary boilers used by railroads which are inspected regularly by competent inspectors, or to boilers used solely for propelling motor road vehicles; or to boilers of steam fire engines brought into the state for temporary use in times of emergency to check conflagrations; or to portable boilers used for agricultural purposes only or for pumping or drilling in the open field for water, gas or coal, gold, talc or other minerals and metals; or to steam heating boilers which carry pressures not exceeding fifteen pounds per square inch, built in accordance with the boiler code of the American Society of Mechanical Engineers. (1935, c. 326, s. 6; 1937, c. 125, s. 1.)

Editor's Note. — Prior to the 1937 amendment this section excepted boilers used for heating purposes.

§ 95-61. Powers of commissioner of labor; creation of bureau of boiler inspection. — The commissioner of labor is hereby charged, directed and empowered:

(a) To set up in the division of standards and inspections of the department of labor, a bureau of boiler inspection to be supervised by the chief inspector provided for in § 95-59 and one or more deputy inspectors of boilers, who shall have passed the examination provided for in § 95-63, at a salary not to exceed the salary of a senior factory inspector, and such office help as may be necessary.

(b) To have free access for himself and his chief boiler inspector and deputies, during reasonable hours, to any premises in the State where a steam boiler is built or where a steam boiler or power plant apparatus is being installed or operated, for the purpose of ascertaining whether such boiler is built, installed and operated in accordance with the provisions of this article.

(c) To prosecute all violators of the provisions of this article.

(d) To issue, suspend and revoke inspection certificates allowing steam boilers to be operated, as provided in this article.

(e) To enforce the laws of the State governing the use of steam boilers and to enforce the rules and regulations of the board of boiler rules.

(f) To keep a complete record of the type, dimensions, age, condition, pressure allowed upon, location and date of the last inspection of all steam boilers to which this article applies.

(g) To publish and distribute among boiler manufacturers and others requesting them, copies of the rules and regulations adopted by the board of boiler rules. (1935, c. 326, s. 7.)

§ 95-62. Provision for special inspectors; examination required. — In addition to the deputy boiler inspectors authorized by § 95-61, the commissioner of labor shall, upon the request of any company authorized to insure against loss from explosion of boilers in this State, issue to any boiler inspectors of said company commissions as special inspectors: Provided, that each such inspector before receiving his commission shall pass satisfactorily the examination provided for in § 95-63, or, in lieu of such examination, shall hold a certificate of competency as an inspector of steam boilers for a state that has a standard of examination equal to that of the State of North Carolina, or a certificate from the national board of boiler and pressure vessel inspectors. The fee for such commission shall be one dollar ($1.00) and one dollar ($1.00) for each annual renewal thereof. Such special inspectors shall receive no salary from, nor shall any of their expenses be paid by, the State, and the continuance of a special inspector's commission shall be conditioned upon his continuing in the employ of a boiler inspection and insurance company duly authorized as aforesaid and upon his maintenance of the standards imposed by this article. Such special inspectors shall inspect all steam boilers insured by their respective companies, and the owners of such insured boilers shall be exempt from the payment of the fees provided for in § 95-68. Each company employing such special inspectors shall, within thirty days following each annual internal inspection made by such inspectors, file a report of such inspection with the commissioner of labor. (1935, c. 326, s. 8.)

§ 95-63. Examination for inspectors; revocation of commission.—Examination for deputy or special inspectors shall be given by the board of boiler rules or by at least two examiners to be appointed by said board and must be written or part written and part oral recorded in writing and must be confined to questions the answers to which will aid in determining the fitness and competency of the applicant for the intended service and must be of uniform grade throughout the State. In case an applicant for an inspector's appointment or commission fails to pass this examination, he may appeal to the board of boiler rules for a second examination which shall be given by said board, or if by examiners appointed by said board, then by examiners other than those by whom the first examination was given and these examiners shall be appointed forthwith to give said second examination. Upon the result of this examination on appeal, the board shall determine whether the applicant be qualified. The record of any applicant's examination, whether original or on appeal, shall be accessible to him and his employer.

A commission may be revoked by the commissioner of labor upon the recommendation of the chief inspector of steam boilers, for the incompetence or untrustworthiness of the holder thereof or for wilful falsification of any matter or statement contained in his application or in a report of any inspection. A person whose commission is revoked may appeal from the revocation to the board of boiler rules which shall hear the appeal and either set aside or affirm the revocation and its decision shall be final. The person whose commission has been revoked shall

be entitled to be present in person and by counsel on the hearing of the appeal. If a certificate or commission is lost or destroyed, a new certificate or commission shall be issued in its place without another examination. A person who has failed to pass the examination for a commission or whose commission has been revoked shall be entitled to apply for a new examination and commission after ninety days from such failure or revocation. (1935, c. 326, s. 9.)

§ 95-64. Boiler inspections; fee; certificate; suspension.—On and after April first, nineteen hundred and thirty-five, each steam boiler used or proposed to be used within this State, except boilers exempt under § 95-60, shall be thoroughly inspected internally and externally while not under pressure by the chief inspector or by one of the deputy inspectors or special inspectors provided for herein, as to its design, construction, installation, condition and operation; and if it shall be found to be suitable, and to conform to the rules and regulations of the board of boiler rules, the owner or user of a steam boiler as required in this article to be inspected shall pay to the chief inspector the sum of one dollar ($1.00) for each inspection certificate issued, and the chief inspector shall issue to the owner or user thereof an inspection certificate specifying the maximum pressure which it may be allowed to carry. Such inspection certificate shall be valid for not more than fourteen months from its date, and it shall be posted under glass in the engine or boiler room containing such boiler, or an engine operated by it, or, in the case of a portable boiler, in the office of the plant where it is located for the time being. No inspection certificate issued for a boiler inspected by a special inspector shall be valid after the boiler for which it was issued shall cease to be insured by a duly authorized insurance company. The chief inspector or any deputy inspector may, at any time, suspend an inspection certificate when, in his opinion, the boiler for which it was issued may not continue to be operated without menace to the public safety, or when the boiler is found not to comply with the rules herein provided for and a special inspector shall have corresponding powers with respect to inspection certificates for boilers insured by the company employing him. Such suspension of an inspection certificate shall continue in effect until said boiler shall have been made to conform to the rules and regulations of the board of boiler rules and until said inspection certificate shall have been reinstated by a state inspector, if the inspection certificate was suspended by a state inspector, or by a special inspector, if it was suspended by a special inspector. Not more than fourteen months shall elapse between such inspections and there shall be at least four such inspections in thirty-seven consecutive months. Each such boiler shall also be inspected externally while under pressure with at least the same frequency, and at no greater intervals. (1935, c. 326, s. 10; 1937, c. 125, s. 2; 1939, c. 361, s. 1.)

Editor's Note.—The 1937 amendment, which struck out the fee provision in the first sentence, was repealed by the 1939 amendment.

§ 95-65. Operation of unapproved boiler prohibited.—On and after July first, nineteen hundred and thirty-five, it shall be unlawful for any person, firm, partnership or corporation to operate under pressure in this State a steam boiler to which this article applies without a valid inspection certificate as provided for in this article. The operation of a steam boiler without an inspection certificate, shall constitute a misdemeanor on the part of the owner, user or operator thereof and be punishable by a fine not exceeding one hundred dollars ($100) or imprisonment not to exceed thirty days, or both, in the discretion of the court. (1935, c. 326, s. 11.)

§ 95-66. Installation of boilers not conforming to requirements prohibited; boilers now in use to conform.—No steam boiler which does not conform to the rules and regulations formulated by the board of boiler rules governing new installations shall be installed in this State after six months from the date upon which the said rules and regulations shall become effective by the approval of the governor.

All steam boilers installed and ready for use, or being used, before the said six months shall have elapsed, shall be made to conform to the rules and regulations of the board of boiler rules governing existing installations and the formula therein prescribed shall be used in determining the maximum allowable working pressure for such boilers. (1935, c. 326, s. 12.)

§ 95-67. Inspection of boilers during construction in state; outside state.—All boilers to be installed after six months from the date upon which the rules and regulations of the board of boiler rules shall become effective by the approval of the governor shall be inspected during construction by an inspector authorized to inspect boilers in this State, or if constructed outside the State, by an inspector holding a certificate of authority from the commissioner of labor of this State, which certificate shall be issued by the said commissioner of labor to any inspector who holds a certificate of authority to inspect steam boilers issued by a State which shall have adopted boiler rules that require standards of construction and operation substantially equal to those of this State, or an inspector who holds a certificate of inspection issued by the national board of boiler and pressure vessel inspectors. (1935, c. 326, s. 12.)

§ 95-68. Fees for internal and external inspections.—The owner or user of a steam boiler, required by this article to be inspected by the chief boiler inspector or a deputy inspector, shall pay to the inspector six ($6.00) dollars for each fire tube boiler over thirty inches in diameter internally inspected and four ($4.00) dollars for each fire tube boiler over thirty inches in diameter externally inspected while under pressure and shall pay to the inspector four ($4.00) dollars for each fire tube boiler up to and including thirty inches in diameter internally inspected and three ($3.00) dollars for each fire tube boiler up to and including thirty inches in diameter externally inspected while under pressure. All water tube boilers shall be charged six ($6.00) dollars for each internal inspection and four ($4.00) dollars for each external inspection while under pressure.

Not more than ten ($10.00) dollars shall be collected for any one fire tube boiler over thirty inches in diameter for any one year. Not more than seven ($7.00) dollars shall be collected for any one fire tube boiler up to and including thirty inches in diameter for any one year. Not more than ten ($10.00) dollars shall be collected for any water tube boiler for any one year: Provided, that one ($1.00) dollar of each internal inspection fee shall be the fee for the certificate of inspection required by § 95-64. The inspector shall give receipts for said fees and shall pay all sums so received to the commissioner of labor, who shall pay the same to the treasurer of the state. The treasurer of the state shall hold the fees collected under this section and under § 95-64 in a special account to pay the salaries and expenses incident to the administration of this article, the surplus, with the approval of the director of the budget, to be added to the appropriation of the division of standards and inspections of the department of labor for its general inspectional service. (1935, c. 326, s. 13; 1937, c. 125, s. 3; 1939, c. 361, s. 2.)

Editor's Note.—The 1939 amendment struck out this section as amended and inserted the above in place thereof.

§ 95-69. Bonds of chief inspector and deputy inspectors.—The chief inspector shall furnish a bond in the sum of five thousand dollars ($5,000), and each of the deputy inspectors shall furnish a bond in the sum of one thousand dollars ($1,000), conditioned upon the faithful performance of their duties and upon a true account of moneys handled by them respectively, and the payment thereof to the proper recipient. The cost of said bonds shall be paid by the state treasurer out of the special fund provided for in § 95-68. (1935, c. 326, s. 14; 1937, c. 125, s. 4.)

Editor's Note.—Prior to the 1937 amendment this section excepted certain counties and ground sawmills.

Art. 8. Bureau of Labor for the Deaf.

§ 95-70. Creation.—There shall be created in the department of labor a division devoted to the deaf. (1923, c. 122, s. 1; 1931, c. 312, s. 3; C. S. 7312(j).)

§ 95-71. Appointment of chief of bureau; duties.—The commissioner of labor shall appoint a competent deaf man to take charge of such division, who shall devote his time to the special work of labor for the deaf under the supervision of the commissioner of labor, and who shall be designated chief of the bureau of labor for the deaf. He shall collect statistics of the deaf, ascertain what trades or occupations are most suitable for them and best adapted to promote their interest, and use his best efforts to aid them in securing such employment as they may be fitted to engage in. He shall study the methods in use in the education of the deaf as exemplified in the deaf themselves, with a view to determining their practicability and respective values in lifting them to become self-supporting, useful citizens and enabling them to obtain the greatest amount of happiness in life. He shall keep a census of the deaf and obtain facts, information and statistics as to their condition in life, with a view to the betterment of their lot. He shall endeavor to obtain statistics and information of the condition of labor and employment and education of the deaf in other states, with a view to promoting the general welfare of the deaf in this state. He shall make reports and recommendations from time to time as may be provided by law, and he shall also issue special reports or pamphlets as may be deemed necessary, giving results and information that may be helpful. (1923, c. 122, ss. 2, 3; 1931, c. 312, s. 3; C. S. 7312(k).)

§ 95-72. Assignment of other duties.—In case the duties herein enumerated should not occupy all of the time of such chief of the bureau of labor for the deaf, he shall perform such other duties in the department of labor as may be assigned him by the commissioner of labor. (1923, c. 122, s. 5; 1931, c. 312, s. 3; C. S. 7312(m).)

Art. 9. Earnings of Employees in Interstate Commerce.

§ 95-73. Collections out of state to avoid exemptions forbidden.—No resident creditor or other holder of any book account, negotiable instrument, duebill or other monetary demand arising out of contract, due by or chargeable against any resident wage-earner or other salaried employee of any railway corporation or other corporation, firm, or individual engaged in interstate business shall send out of the state, assign, or transfer the same, for value or otherwise, with intent to thereby deprive such debtor of his personal earnings and property exempt by law from application to the payment of his debts under the laws of the state of North Carolina, by instituting or causing to be instituted thereon against such debtor, in any court outside of this state, in such creditor's own name or in the name of any other person, any action, suit, or proceeding for the attachment or garnishment of such debtor's earnings in the hands of his employer, when such creditor and debtor and the railway corporation or other corporation, firm, or individual owing the wages or salary intended to be reached are under the jurisdiction of the courts of this state. (1909, c. 504, s. 1; C. S. 6568.)

§ 95-74. Resident not to abet collection out of state.—No person residing or sojourning in this state shall counsel, aid, or abet any violation of the provisions of § 95-73. (1909, c. 504, s. 2; C. S. 6569.)

§ 95-75. Remedies for violation of section 95-73 or 95-74; damages; indictment.—Any person violating any provision of § 95-73 or 95-74 shall be answerable in damages to any debtor from whom any book account, negotiable instrument, duebill, or other monetary demand arising out of contract shall be collected, or against whose earnings any warrant of attachment or notice of garnishment shall be issued, in violation of the provisions of § 95-73, to the full amount of the debt thus collected, attached, or garnisheed, to be recovered by civil action in any court of competent jurisdiction in this state; and any person so offending shall likewise be guilty of a misdemeanor, punishable by a fine of not more than two hundred dollars. (1909, c. 504, s. 3; C. S. 6570.)

§ 95-76. Institution of foreign suit, etc., evidence of intent to violate.—In any civil or criminal action instituted in any court of competent jurisdiction in this state for any violation of the provisions of §§ 95-73 and 95-74, proof of the in-

stitution or prosecution of any action, suit, or proceeding in violation of the provisions of § 95-73, or the issuance of service therein of any warrant of attachment, notice, or garnishment or other like writ for the garnishment of earnings of the defendant therein, or of the payment by the garnishee therein of any final judgment rendered in any such action, suit, or proceeding shall be deemed prima facie evidence of the intent of the creditor or other holder of the debt sued upon to deprive such debtor of his personal earnings and property exempt from application to the payment of his debts under the laws of this state, in violation of the provisions of this article. (1909, c. 504, s. 4; C. S. 6571.)

§ 95-77. Construction of article.—No provision of this article shall be so construed as to deprive any person entitled to its benefits of any legal or equitable remedy already possessed under the laws of this state. (1909, c. 504, s. 5; C. S. 6572.)

Chapter 96. Unemployment Compensation.

Art. 1. Unemployment Compensation Commission.

Art. 2. Unemployment Compensation Division.

Art. 3. Employment Service Division.

Art. 1. Unemployment Compensation Commission.

§ 96-1. Title. — This chapter shall be known and may be cited as the "Unemployment Compensation Law." (Ex. Sess., 1936, c. 1, s. 1.)

Editor's Note. — For article discussing unemployment compensation, see 15 N. C. Law Rev. 377.

For article on the 1939 amendments to this chapter, see 17 N. C. Law Rev. 415.

Weight to Be Given Federal Constructions.—Our state unemployment compensation act was passed pursuant to a plan national in scope, and therefore serious consideration is to be given to the construction placed upon similar language of the federal statute by the commissioner of internal revenue, but the interpretation of the act is finally for our courts, and neither the ruling of the commissioner nor that of the state unemployment compensation commission is conclusive. Unemployment Compensation Comm. v. Wachovia Bank, etc., Co., 215 N. C. 491, 2 S. E. (2d) 592.

§ 96-2. Declaration of state public policy. — As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own. (Ex. Sess., 1936, c. 1, s. 2.)

Construction.—The intent of the legislature to provide a wide scope in the application of this chapter to mitigate the economic evils of unemployment, and to bring within its provisions employments therein defined beyond the scope of existing definitions or categories, is apparent from the language used, and all doubts as to constitutionality should be resolved in favor of the validity of the chapter and all its provisions. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4.

The various compensation acts of the different states

should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation. Graham v. Wall, 220 N. C. 84, 90, 16 S. E. (2d) 691.

Provisions of this chapter seeking to maintain neutrality on the part of the state in labor disputes will be given effect, by the courts, since the matter of policy is in the exclusive province of the legislature and the courts will not interfere therewith unless the provisions relating thereto have no reasonable relation to the end sought to be accomplished. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929.

§ 96-3. Unemployment compensation commission.—(a) Organization.—There is hereby created a commission to be known as the unemployment compensation commission of North Carolina. The commission shall consist of seven (7) members to be appointed by the governor on or before July 1, 1941. The governor shall have the power to designate the member of said commission who shall act as the chairman thereof. The chairman of the commission shall not engage in any other business, vocation or employment, and no member of the commision shall serve as an officer or a committee member of any political party organization. Three (3) members of the commission shall be appointed by the governor to serve for a term of two (2) years. Three (3) members shall be appointed to serve for a term of four (4) years, and upon the expiration of the respective terms, the successors of said members shall be appointed for a term of four (4) years each, thereafter, and the member of said commission designated by the governor as chairman shall be appointed for a term of four (4) years from and after his appointment. Any member appointed to fill a vacancy occurring in any of the appointments made by the governor prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. The governor may at any time after notice and hearing, remove any commissioner for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

(b) Divisions.—The commission shall establish two co-ordinate divisions: the North Carolina state employment service division, created pursuant to § 96-20, and the unemployment compensation division. Each division shall be responsible for the discharge of its distinctive functions. Each division shall be a separate administrative unit with respect to personnel and duties, except in so far as the commission may find that such separation is impracticable.

(c) Salaries.—The chairman of the unemployment compensation commission of North Carolina, appointed by the governor, shall be paid from the unemployment compensation administration fund a salary payable on a monthly basis, which salary shall be fixed by the governor with the approval of the council of state; and the members of the commission, other than the chairman, shall each receive ten dollars ($10.00) per day including necessary time spent in traveling to and from their place of residence within the state to the place of meeting while engaged in the discharge of the duties of his office and his actual traveling expenses, the same to be paid from the aforesaid fund.

(d) Quorum.—The chairman and three (3) members of the commission shall constitute a quorum. (Ex. Sess., 1936, c. 1, s. 10; 1941, c. 108, s. 10, c. 279, ss. 1-3; 1943, c. 377, s. 15.)

Editor's Note.—The first 1941 amendment struck out the word "budget" from the last sentence of subsection (b). The second 1941 amendment, effective July 1, 1941, increased the membership of the commission from three to seven and made other changes in subsection (a). It also made changes in subsections (c) and (d).

Section 6 of the second amendatory act provides: "The unemployment compensation commission of North Carolina, created by this act, shall automatically succeed to all the rights, powers, duties, and obligations of the present unemployment compensation commission of North Carolina and of the state advisory council."

For comment on the 1941 amendment, see 19 N. C. Law Rev. 444.

The 1943 amendment inserted in subsection (c) the words "including necessary time spent in traveling to and from their place of residence within the state to the place of meeting."

Commission Is State Agency.—The commission is an agency created by statute for a public purpose and is an agency of the state. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619.

§ 96-4. Administration.—(a) Duties and Powers of Commission. — It shall be the duty of the commission to administer this chapter. The commission shall meet at least once in each sixty days and may hold special meetings at any time at the call of the chairman or any three (3) members of the commission, and the commission shall have power and authority to adopt, amend, or rescind such rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable in the administration of this chapter. Such rules and regulations shall be effective upon publication in the manner, not inconsistent with the provisions of this chapter, which the commission shall prescribe. The commission shall determine its own organization and methods of procedure in accordance with the provisions of this chapter, and shall have an official seal which shall be judicially noticed. The chairman of said commission shall, except as otherwise provided by the commission, be vested with all authority of the commission, including the authority to conduct hearings and make decisions and determinations, when the commission is not in session and shall execute all orders, rules and regulations established by said commission. Not later than November twentieth preceding the meeting of the general assembly, the commission shall submit to the governor, a report covering the administration and operation of this chapter during the preceding biennium, and shall make such recommendation for amendments to this chapter as the commission deems proper. Such report shall include a balance sheet of the moneys in the fund in which there shall be provided, if possible, a reserve against the liability in future years to pay benefits in excess of the then current contributions which reserve shall be set up by the commission in accordance with accepted actuarial principles on the basis of statistics of employment, business activity, and other relevant factors for the longest possible period. Whenever the commission believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, it shall promptly so inform the governor and the legislature, and make recommendations with respect thereto.

(b) Regulations and General and Special Rules. —General and special rules may be adopted, amended, or rescinded by the commission only after public hearing or opportunity to be heard thereon, of which proper notice has been given by

mail to the last known address in cases of special rules, or by publication as herein provided, and by one publication as herein provided as to general rules. General rules shall become effective ten days after filing with the secretary of state and publication in one or more newspapers of general circulation in this state. Special rules shall become effective ten days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the commission and shall become effective in the manner and at the time prescribed by the commission.

(c) Publication.—The commission shall cause to be printed for distribution to the public the text of this chapter, the commission's regulations and general rules, its biennial reports to the governor, and any other material the commission deems relevant and suitable, and shall furnish the same to any person upon application therefor.

(d) Personnel.—Subject to other provisions of this chapter, the commission is authorized to appoint, fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties. It shall provide for the holding of examinations to determine the qualifications of applicants for the positions so classified, and except for temporary appointments not to exceed six months in duration, shall appoint its personnel on the basis of efficiency and fitness as determined in such examinations. All positions shall be filled by persons selected and appointed on a nonpartisan merit basis. The commission shall not employ or pay any person who is an officer or committee member of any political party organization. The commission may delegate to any such person so appointed such power and authority as it deems reasonable and proper for the effective administration of this chapter, and may, in its discretion, bond any person handling moneys or signing checks hereunder.

(e) Advisory Councils.—The governor shall appoint a state advisory council and local advisory councils, composed in each case of an equal number of employer representatives and employee representatives who may fairly be regarded as representative because of their vocation, employment, or affiliations, and have such members representing the general public as the governor may designate. Such councils shall aid the commission in formulating policies and discussing problems related to the administration of this chapter, and in assuring impartiality and freedom from political influence in the solution of such problems. Such local advisory councils shall serve without compensation, but shall be reimbursed for any necessary expenses. The state advisory council shall be paid ten dollars per day per each member attending actual sitting of such council, including necessary time spent in traveling to and from their place of residence within the state to the place of meeting, and mileage and subsistence as allowed to state officials.

(f) Employment Stabilization. — The commission, with the advice and aid of its advisory councils, and through its appropriate divisions, shall take all appropriate steps to reduce and prevent unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining and vocational guidance; to investigate, recommend, advise, and assist in the establishment and operation, by municipalities, counties, school districts, and the state, of reserves for public works to be used in times of business depression and unemployment; to promote the re-employment of unemployed workers throughout the state in every other way that may be feasible; and to these ends to carry on and publish the results of investigations and research studies.

(g) Records and Reports. — Each employing unit shall keep true and accurate employment records, containing such information as the commission may prescribe. Such records shall be open to inspection and be subject to being copied by the commission or its authorized representatives at any reasonable time and as often as may be necessary. The commission may require from any employing unit any sworn or unsworn reports, with respect to persons employed by it, which the commission deems necessary for the effective administration of this chapter. Information thus obtained shall not be published or be open to public inspection (other than to public employees in the performance of their public duties) in any manner revealing the employing unit's identity, but any claimant at a hearing before an appeal tribunal or the commission shall be supplied with information from such records to the extent necessary for the proper presentation of his claims. Any individual may be supplied with information as to his potential benefit rights from such records. Any employee or member of the commission who violates any provision of this section shall be fined not less than twenty dollars ($20.00) nor more than two hundred dollars ($200.00), or imprisoned for not longer than ninety days, or both. All reports, statements, information and communications of every character so made or given to the commission, its deputies, agents, examiners and employees, whether same be written, oral or in the form of testimony at any hearing, or whether obtained by the commission from the employing unit's books and records shall be absolute privileged communications in any civil or criminal proceedings other than proceedings instituted pursuant to this chapter and proceedings involving the administration of this chapter: Provided, nothing herein contained shall operate to relieve any employing unit from disclosing any information required by this chapter or as prescribed by the commission involving the administration of this chapter.

(h) Oaths and Witnesses.—In the discharge of the duties imposed by this chapter, the chairman of an appeal tribunal and any duly authorized representative or member of the commission shall have power to administer oaths and affirmations, take depositions, certify to official acts, and issue subpœnas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a disputed claim or the administration of this chapter.

(i) Subpœnas.—In case of contumacy by, or refusal to obey a subpœna issued to any person, any court of this state within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts

business, upon application by the commission or its duly authorized representative, shall have jurisdiction to issue to such person an order requiring such person to appear before a commissioner, the commission, or its duly authorized representative, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof. Any person who shall without just cause fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records in obedience to a subpoena of the commission, shall be punished by a fine of not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00) or by imprisonment for not longer than sixty days, or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense.

(j) Protection against Self-Incrimination. — No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, and other records before the commission or in obedience to the subpœna of the commission or any member thereof, or any duly authorized representative of the commission, in any cause or proceeding before the commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(k) State-Federal Co-Operation.—In the administration of this chapter, the commission shall cooperate, to the fullest extent consistent with the provisions of this chapter, with the social security board, created by the Social Security Act, approved August fourteenth, one thousand nine hundred and thirty-five, as amended; shall make such reports, in such form and containing such information as the social security board may from time to time require, and shall comply with such provisions as the social security board may from time to time find necessary to assure the correctness and verification of such reports; and shall comply with the regulations prescribed by the social security board governing the expenditures of such sums as may be allotted and paid to this state under Title III of the Social Security Act for the purpose of assisting in the administration of this chapter. The commission shall further make its records available to the railroad retirement board, created by the Railroad Retirement Act and the Railroad Unemployment Insurance Act, and shall furnish to the railroad retirement board at the expense of the railroad retirement board, such copies thereof as the board shall deem necessary for its purposes in accordance with the provisions of section three hundred three (c) of the Social Security Act as amended.

Upon request therefor, the commission shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation, and employment status of each recipient of benefits, and such recipient's rights to further benefits under this chapter.

The commission is authorized to make such investigations, secure and transmit such information, make available such services and facilities and exercise such of the other powers provided herein with respect to the administration of this chapter as it deems necessary or appropriate to facilitate the administration of any unemployment compensation or public employment service law, and in like manner, to accept and utilize information, services and facilities made available to this state by the agency charged with the administration of such other unemployment compensation or public employment service law.

(l) Reciprocal Benefit Arrangements. — (1) The commission is hereby authorized to enter into reciprocal arrangements with appropriate and duly authorized agencies of other states or of the federal government, or both, whereby:

(A) Services performed by an individual for a single employing unit for which services are customarily performed in more than one state shall be deemed to be services performed entirely within any one of the states (i) in which any part of such individual's service is performed or (ii) in which such individual has his residence or (iii) in which the employing unit maintains a place of business, provided there is in effect, as to such services, an election by the employing unit, approved by the agency charged with the administration of such state's unemployment compensation law, pursuant to which the services performed by such individual for such employing unit are deemed to be performed entirely within such state;

(B) Potential rights to benefits accumulated under the unemployment compensation laws of one or more states or under one or more such laws of the federal government, or both, may constitute the basis for the payment of benefits through a single appropriate agency under terms which the commission finds will be fair and reasonable as to all affected interests and will not result in any substantial loss to the fund;

(C) Wages or services, upon the basis of which an individual may become entitled to benefits under an unemployment compensation law of another state or of the federal government, shall be deemed to be wages for insured work for the purpose of determining his rights to benefits under this chapter, and wages for insured work, on the basis of which an individual may become entitled to benefits under this chapter shall be deemed to be wages or services on the basis of which unemployment compensation under such law of another state or of the federal government is payable, but no such arrangement shall be entered into unless it contains provisions for reimbursements to the fund for such of the benefits paid under this chapter upon the basis of such wages or services, and provisions for reimbursements from the fund for such of the compensation paid under such other law upon the basis of wages for insured work, as the commission finds will be fair and reasonable as to all affected interests; and

(D) Contributions due under this chapter with respect to wages for insured work shall for the purposes of § 96-10 be deemed to have been paid to the fund as of the date payment was made as contributions therefor under another state or federal unemployment compensation law, but no such arrangement shall be entered into unless it contains provisions for such reimbursement to the fund of such contributions and the actual earnings thereon as the commission finds will be fair and reasonable as to all affected interests.

(2) Reimbursements paid from the fund pursuant to clause (C), of paragraph (1) of this subsection shall be deemed to be benefits for the purpose of §§ 96-6, 96-9 and 96-12. The commission is authorized to make to other states or federal agencies and to receive from such other state or federal agencies, reimbursements from or to the fund, in accordance with arrangements entered into pursuant to Paragraph (1) of this subsection.

(3) To the extent permissible under the laws and constitution of the United States, the commission is authorized to enter into or cooperate in arrangements whereby facilities and services provided under this chapter and facilities and services provided under the unemployment compensation law of any foreign government, may be utilized for the taking of claims and the payment of benefits under the employment security law of this state or under a similar law of such government.

(m) The commission after due notice shall have the right and power to hold and conduct hearings for the purpose of determining the rights, status and liabilities of any "employing unit" or "employer" as said terms are defined by § 96-8(e) and § 96-8(f) and subsections thereunder of this chapter. The commission shall have the power and authority to determine any and all questions and issues of fact or questions of law that may arise under the Unemployment Compensation Law that may affect the rights, liabilities and status of any employing unit or employer as heretofore defined by the Unemployment Compensation Law including the right to determine the amount of contributions, if any, which may be due the commission by any employer. All hearings shall be conducted and held at the office of the commission and shall be open to the public and shall be stenographically reported and the commission shall provide for the preparation of a record of all hearings and other proceedings. The commission may provide for the taking of evidence by a deputy in which event he shall swear or cause the witnesses to be sworn and shall transmit all testimony to the commission for its determination. From all decisions or determinations made by the commission any party affected thereby shall be entitled to an appeal to the superior court. Before such party shall be allowed to appeal, he shall within ten days after notice of such decision or determination, file with the commission exceptions to the decision or the determination of the commission, which exceptions will state the grounds of objection to such decision or determination. If any one of such exceptions shall be overruled then such party may appeal from the order overruling the exceptions, and shall, within ten days after the decision overruling the exceptions, give notice of his appeal. When an exception is made to the facts as found by the commission, the appeal shall be to the superior court in term time but the decision or determination of the commission upon such review in the superior court shall be conclusive and binding as to all questions of fact supported by any competent evidence. When an exception is made to any rulings of law, as determined by the commission, the appeal shall be to the judge of the superior court at chambers. The party appealing shall, within ten days after the notice of appeal has been served, file with the commission exceptions to the decision or determination overruling the exception which statement shall assign the errors complained of and the grounds of the appeal. Upon the filing of such statement the commission shall, within ten days, transmit all the papers and evidence considered by it, together with the assignments of errors filed by the appellant to a judge of the superior court holding court or residing in some district in which such appellant either resides, maintains a place of business or conducts business. If there be no exceptions to any facts as found by the commission the facts so found shall be binding upon the court and it shall be heard by the judge at chambers at some place in the district, above mentioned, of which all parties shall have ten days notice.

(n) The cause shall be entitled "State of North Carolina on Relationship of the Unemployment Compensation Commission of North Carolina against (here insert name of appellant)," and if there are exceptions to any facts found by the commission it shall be placed on the civil issue docket of such court and shall have precedence over other civil actions except those described in § 96-10(b), and such cause shall be tried under such rules and regulations as are prescribed for the trial of other civil causes. By consent of all parties the appeal may be held and determined at chambers before any judge of a district in which the appellant either resides, maintains a place of business or conducts business, or said appeal may be heard before any judge holding court therein, or in any district in which the appellant either resides, maintains a place of business or conducts business. Either party may appeal to the supreme court from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals, except that if an appeal shall be taken on behalf of the Unemployment Compensation Commission of North Carolina it shall not be required to give any undertaking or make any deposit to secure the cost of such appeal and such court may advance the cause on its docket so as to give the same a speedy hearing.

(o) The decision or determination of the commission when docketed in the office of the clerk of the superior court of any county and when properly indexed and cross indexed shall have the same force and effect as a judgment rendered by the superior court, and if it shall be adjudged in the decision or determination of the commission that any employer is indebted to the commission for contributions, penalties and interest or either of the same, then said judgment shall constitute a lien upon any realty owned by said employer in the county only from the date of

docketing of such decision or determination in the office of the clerk of the superior court and upon personalty owned by said employer in said county only from the date of levy on such personalty, and upon the execution thereon no homestead or personal property exemptions shall be allowed; provided, that nothing herein shall affect any rights accruing to the commission under § 96-10. The provisions of this section, however, shall not have the effect of releasing any liens for contributions, penalties or interest, or either of the same, imposed by other law, nor shall they have the effect of postponing the payment of said contributions, penalties or interest, or depriving the said Unemployment Compensation Commission of North Carolina of any priority in order of payment provided in any other statute under which payment of the said contributions, penalties and interest or either of the same may be required. The superior court or any appellate court shall have full power and authority to issue any and all executions, orders, decrees, or writs that may be necessary to carry out the terms of said decision or determination of the commission or to collect any amount of contribution, penalty or interest adjudged to be due the commission by said decision or determination. In case of an appeal from any decision or determination of the commission to the superior court or from any judgment of the superior court to the supreme court all proceedings to enforce said judgment, decision, or determination shall be stayed until final determination of such appeal but no proceedings for the collection of any amount of contribution, penalty or interest due on same shall be suspended or stayed unless the employer or party adjudged to pay the same shall file with the clerk of the superior court a bond in such amount not exceeding double the amount of contribution, penalty, interest or amount due and with such sureties as the clerk of the superior court deems necessary conditioned upon the payment of the contribution, penalty, interest or amount due when the appeal shall be finally decided or terminated.

(p) The conduct of hearings shall be governed by suitable rules and regulations established by the commission. The manner in which appeals and hearings shall be presented and conducted before the commission shall be governed by suitable rules and regulations established by it. The commission shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure but shall conduct hearings in such manner as to ascertain the substantial rights of the parties.

(q) All subpoenas for witnesses to appear before the commission, and all notices to employing units, employers, persons, firms or corporations shall be issued by the commission or its secretary and be directed to any sheriff, constable or to the marshal of any city or town, who shall execute the same and make due return thereof as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court. All bonds or undertakings required to be given for the purpose of suspending or staying execution shall be payable to the Unemployment Compensation Commission of North Carolina, and may be sued on as are other undertakings which are payable to the state.

(r) None of the provisions or sections herein set forth in this amendment shall have the force and effect nor shall the same be construed or interpreted as repealing any of the provisions of § 96-15 which provide for the procedure and determination of all claims for benefits and such claims for benefits shall be prosecuted and determined as provided by said § 96-15. (Ex. Sess., 1936, c. 1, s. 11; 1939, c. 2, c. 27, s. 8, c. 52, s. 5, cc. 207, 209; 1941, c. 279, ss. 4, 5; 1943, c. 377, ss. 16-23.)

Editor's Note.—The 1939 amendments inserted a proviso in subsection (d), added the last sentence and proviso to subsection (g), inserted the second sentence in subsection (k) and added subsections (m)-(r). The 1941 amendment made changes in subsections (a) and (e). Prior to the amendment subsection (e) provided also for a state advisory council.

The 1943 amendment inserted in the fifth sentence of subsection (a) the words "including the authority to conduct hearings and make decisions and determinations." Prior to the amendment the first clause of the sixth sentence read: "Not later than the first day of February of each year." The amendment substituted in said sixth sentence the word "biennium" for the words "calendar year." It changed "annual" in line four of subsection (c) to "biennial," and omitted the former proviso to the second sentence of subsection (d) which had been inserted by the 1939 amendment. Prior to the amendment subsection (e) provided for local advisory councils appointed by the commission. The amendment inserted the fifth sentence of subsection (g), added the third paragraph of subsection (k) and rewrote subsection (l). It also omitted the words "if it is in his power so to do" formerly appearing after the word "records" in line five of the second sentence of subsection (i).

Merits of Labor Disputes.—The commission is charged with administering the benefits provided in this chapter in accordance with the objective standards and criteria set up in the chapter, but the merits of labor disputes do not belong to the commission, these being matters properly pertaining to the field of labor relations. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929.

Scope of Review in Superior Court.—The mandatory provisions in subsection (m) of this section are controlling, and the trial in the superior court on appeal must be subject to the limitation that the decision or determination of the commission upon such review in the superior court "shall be conclusive and binding as to all questions of fact supported by any competent evidence." State v. Willis Barber, etc., Shop, 219 N. C. 709, 712, 15 S. E. (2d) 4.

When, in a proceeding under this chapter to determine the liability of a defendant for taxation as an employer, exceptions are taken to the findings of fact made by the commission in accordance with the procedure prescribed, defendant is not entitled to a trial de novo of the issues raised by his exceptions. Id.

Under this section the commission is made a fact-finding body. The finding of facts is one of its primary duties and it is the accepted rule that when the facts are found they are, when supported by competent evidence, conclusive on appeal and not subject to review by the superior court or by the supreme court. Graham v. Wall, 220 N. C. 84, 88, 16 S. E. (2d) 691.

Jury Trial.—The provisions of this section that the commission's findings of fact in a proceeding before it should be conclusive on appeal when supported by competent evidence is constitutional, and objection thereto on the ground that it deprives a defendant of his right to trial by jury is untenable, since the provision relates to the administrations of a tax law and the machinery for the collection of taxes, and further, since in addition to the remedy of appeal from the decision of the commission, the act provides that a defendant may pay the tax under protest and sue for its recovery. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4.

Appeal by Commission from Judgment of Superior Court.—The commission is not entitled to appeal from judgment of the superior court that employer does not come within this chapter, entered in a proceeding by an employee for compensation, and if the commission desires to have the liability of the employer for unemployment compensation con-

tributions judicially determined on its contentions that the employer and another concern controlled by the same interests constituted but a single employing unit, it must follow the procedure prescribed by section 96-10. In re Mitchell, 220 N. C. 65, 16 S. E. (2d) 476, 142 A. L. R. 931.

Cited in Raynor v. Commissioners, 220 N. C. 348, 17 S. E. (2d) 495. Unemployment Compensation Comm. v. National Life Ins. Co., 219 N. C. 576, 14 S. E. (2d) 689, 139 A. L. R. 895.

§ 96-5. Unemployment compensation administration fund.—(a) Special Fund.—There is hereby created in the state treasury a special fund to be known as the unemployment compensation administration fund. All moneys which are deposited or paid into this fund shall be continuously available to the commission for expenditure in accordance with the provisions of this chapter, and shall not lapse at any time or be transferred to any other fund. The unemployment compensation administration fund, except as otherwise provided in this chapter, shall be subject to the provisions of the Executive Budget Act (§ 143-1 et seq.) and the Personnel Act (§ 143-35 et seq.). All moneys in this fund which are received from the federal government or any agency thereof or which are appropriated by this state for the purpose described in § 96-20 shall be expended solely for the purposes and in the amounts found necessary by the Social Security Board for the proper and efficient administration of this chapter. The fund shall consist of all moneys appropriated by this state, all moneys received from the United States of America, or any agency thereof, including the Social Security Board, and all moneys received from any other source for such purpose, and shall also include any moneys received from any agency of the United States or any other state as compensation for services or facilities supplied to such agency, any amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the unemployment compensation administration fund or by reason of damage to equipment or supplies purchased from moneys in such fund, and any proceeds realized from the sale or disposition of any such equipment or supplies which may no longer be necessary for the proper administration of this chapter. All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the state treasury, and shall be maintained in a separate account on the books of the state treasury. The state treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the unemployment compensation administration fund provided for under this chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the unemployment compensation administration fund shall be deposited in said fund.

(b) Replacement of Funds Lost or Improperly Expended.—If any moneys received after June thirtieth, one thousand nine hundred and forty-one, from the Social Security Board under Title III of the Social Security Act, or any unencumbered balances in the unemployment compensation administration fund as of that date, or any moneys granted after that date to this state pursuant to the provisions of the Wagner-Peyser Act, or any moneys made available by this state or its political subdivisions and matched by such moneys granted to this state pursuant to the provisions of the Wagner-Peyser Act, are found by the Social Security Board, because of any action or contingency, to have been lost or been expended for purposes other than, or in amounts in excess of, those found necessary by the Social Security Board for the proper administration of this chapter, it is the policy of this state that such moneys shall be replaced by moneys appropriated for such purpose from the general funds of this state to the unemployment compensation administration fund for expenditure as provided in subsection (a) of this section. Upon receipt of notice of such a finding by the Social Security Board, the commission shall promptly report the amount required for such replacement to the governor and the governor shall at the earliest opportunity, submit to the legislature a request for the appropriation of such amount. This subsection shall not be construed to relieve this state of its obligation with respect to funds received prior to July first, one thousand nine hundred and forty-one, pursuant to the provisions of Title III of the Social Security Act. (Ex. Sess. 1936, c. 1, s. 13; 1941, c. 108, ss. 12, 13.)

§ 96-6. Unemployment compensation fund. — (a) Establishment and Control.—There is hereby established as a special fund, separate and apart from all public moneys or funds of this state, an unemployment compensation fund, which shall be administered by the commission exclusively for the purposes of this chapter. This fund shall consist of (1) all contributions collected under this chapter, together with any interest thereon collected pursuant to § 96-10; (2) all fines and penalties collected pursuant to the provisions of this chapter; (3) interest earned upon any moneys in the fund; (4) any property or securities acquired through the use of moneys belonging to the fund; and (5) all earnings of such property or securities. All moneys in the fund shall be mingled and undivided, except that within the unemployment compensation fund "reserve accounts" and a "partially pooled account" shall be maintained as provided in § 96-9. To the "reserve accounts" established under § 96-9 shall be credited such portion of the contributions computed as provided in § 96-9, and the "partially pooled account" to be credited with the balance of such contributions paid as well as the remaining portions and additions thereto of the unemployment compensation fund which have not heretofore been set aside as employer "reserve accounts" within the fund under prior amendments to this chapter. Provided, however, that the "partially pooled account" established hereunder and the "reserve accounts of employer," as defined by section one (a) of the Railroad Unemployment Insurance Act, shall be subject to such withdrawals and transfers as are provided for by this section.

(b) Accounts and Deposit.—The state treasurer shall be ex officio the treasurer and custodian of the fund who shall disburse such fund in accordance with the directions of the commission and in accordance with such regulations as the commission shall prescribe. He shall maintain within the

fund three separate accounts: (1) a clearing account, (2) an unemployment trust fund account, and (3) a benefit account. All moneys payable to the fund, upon receipt thereof by the commission, shall be forwarded immediately to the treasurer who shall immediately deposit them in the clearing account. Refunds payable pursuant to § 96-10 may be paid from the clearing account upon warrants issued upon the treasurer by the state auditor under the requisition of the commission. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the secretary of the treasury of the United States of America to the credit of the account of this state in the unemployment trust fund, established and maintained pursuant to section nine hundred and four of the Social Security Act, as amended, any provision of law in this state relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this state to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this state's account in the unemployment trust fund. Moneys in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the commission, in any bank or public depository in which general funds of the state may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. The treasurer shall give a separate bond, conditioned upon the faithful performance of those duties as custodian of the fund, in an amount fixed by the commission and in a form prescribed by law or approved by the attorney-general. Premiums for said bond shall be paid from the administration fund.

(c) Withdrawals. — Moneys shall be requisitioned from this state's account in the unemployment trust fund solely for the payment of benefits and in accordance with regulations prescribed by the commission. The commission shall, from time to time, requisition from the unemployment trust fund such amounts, not exceeding the amounts standing to its account therein, as it deems necessary for the payment of benefits for a reasonable future period. Upon receipt thereof the treasurer shall deposit such moneys in the benefit account and shall pay all warrants drawn thereon by the state auditor requisitioned by the commission for the payment of benefits solely from such benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to approval of the budget bureau or any provisions of law requiring specific appropriations or other formal release by state officers of money in their custody. All warrants issued upon the treasurer for the payment of benefits and refunds shall bear the signature of the state auditor, as requisitioned by a member of the commission or its duly authorized agent for that purpose. Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the commission, shall be re-deposited with the secretary of the treasury of the United States of America, to the credit of this state's account in the unemployment trust fund, as provided in subsection (b) of this section.

(d) Management of Funds upon Discontinuance of Unemployment Trust Fund.—The provisions of subsections (a), (b), and (c), to the extent that they relate to the unemployment trust fund, shall be operative only so long as such unemployment trust fund continues to exist, and so long as the secretary of the treasury of the United States of America continues to maintain for this state a separate book account of all funds deposited therein by this state for benefit purposes, together with this state's proportionate share of the earnings of such unemployment trust fund, from which no other state is permitted to make withdrawals. If and when such unemployment trust fund ceases to exist, or such separate book account is no longer maintained, all moneys, properties, or securities therein belonging to the unemployment compensation fund of this state shall be transferred to the treasurer of the unemployment compensation fund, who shall hold, invest, transfer, sell, deposit, and release such moneys, properties, or securities in a manner approved by the commission, in accordance with the provisions of this chapter: Provided, that such moneys shall be invested in the following readily marketable classes of securities: Bonds or other interest-bearing obligations of the United States of America or such investments as are now permitted by law for sinking funds of the state of North Carolina; and provided further, that such investment shall at all times be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of benefits. The treasurer shall dispose of securities or other properties belonging to the unemployment compensation fund only under the direction of the commission.

(e) Benefits shall be deemed to be due and payable under this chapter only to the extent provided in this chapter and to the extent that moneys are available therefor to the credit of the unemployment compensation fund, and neither the state nor the commission shall be liable for any amount in excess of such sums. (Ex. Sess. 1936, c. 1, ss. 9, 18; 1939, c. 27, s. 7, c. 52, s. 4, c. 208; 1941, c. 108.)

Editor's Note.—The 1941 amendment added that part of subsection (a) beginning with the word "except" in line sixteen. Public Laws 1939, c. 27, s. 7, which had added somewhat similar provisions at the same place, was not noticed by the amendemnt.

§ 96-7. Representation in court.—(a) In any civil action to enforce the provisions of this chapter, the commission and the state may be represented by any qualified attorney who is designated by it for this purpose.

(b) All criminal actions for violation of any provision of this chapter, or of any rules or regulations issued pursuant thereto, shall be prosecuted as now provided by law by the solicitor or by the prosecuting attorney of any county or city in which the violation occurs. (Ex. Sess. 1936, c. 1, s. 17; 1937, c. 150.)

Editor's Note.—The 1937 amendment omitted the requirement that the attorney be a regular salaried employee of the commission.

Art. 2. Unemployment Compensation Division.

§ 96-8. Definitions.—As used in this chapter, unless the context clearly requires otherwise:

(a) (1) On and after January first, one thousand nine hundred and forty-one, "annual pay roll" means the total amount of wages paid by an employer (regardless of the time of payment) for employment during a calendar year.

(2) "Average annual pay roll" means the average of the annual pay rolls of any employer for the last three or five preceding calendar years, whichever average is higher.

(b) "Benefits" means the money payments payable to an individual, as provided in this chapter, with respect to his unemployment.

(c) "Commission" means the unemployment compensation commission established by this chapter.

(d) "Contributions" means the money payments to the state unemployment compensation fund required by this chapter.

(e) "Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person which has, on or subsequent to January first, one thousand nine hundred and thirty-six, had in its employ one or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit which maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this chapter. Whenever any employing unit contracts with or has under it any contractor or subcontractor for any employment which is part of its usual trade, occupation, profession, or business, unless the employing unit as well as each such contractor or subcontractor is an employer by reason of subsection (f) of this section, or § 96-11 (c), the employing unit shall, for all the purposes of this chapter, be deemed to employ each individual in the employ of each such contractor or subcontractor for each day during which such individual is engaged in performing such employment, except that each such contractor or subcontractor who is an employer by reason of subsection (f) of this section or § 96-11 (c) shall alone be liable for the contributions measured by wages paid to individuals in his employ, and except that any employing unit who shall become liable for and pay contributions with respect to individuals in the employ of any such contractor or subcontractor who is not an employer by reason of subsection (f) of this section or § 96-11 (c), may recover the same from such contractor or subcontractor. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this chapter, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of such work: Provided, however, that nothing herein, on or after July first, one thousand nine hundred thirty-nine, shall be construed to apply to that part of the business of such "employers" as may come within the meaning of that term as it is defined in section one (a) of the Railroad Unemployment Insurance Act.

(f) "Employer" means (1) Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has, or had in employment, eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week): Provided, however, that for purposes of this subsection "employment" shall include services which would constitute "employment" but for the fact that such services are deemed to be performed entirely within another state pursuant to an election under and arrangement entered into by the commission pursuant to subsection (l) of § 96-4, and an agency charged with the administration of any other State or Federal Unemployment Compensation Law.

(2) Any employing unit which acquired the organization, trade or business or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this chapter;

(3) Any employing unit which acquired the organization, trade, or business, or substantially all the assets thereof, of another employing unit and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection;

(4) Any employing unit which, having become an employer under paragraphs (1), (2), or (3), has not, under § 96-11, ceased to be an employer subject to this chapter; or

(5) For the effective period of its election pursuant to § 96-11 (c) any other employing unit which has elected to become fully subject to this chapter.

(6) Any employing unit not an employer by reason of any other paragraph of this subsection, for which within either the current or preceding calendar year services in employment are or were performed with respect to which such employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund.

(g) (1) "Employment" means service, including service in interstate commerce, except "employment" as defined in the Railroad Retirement Act and the Railroad Unemployment Insurance Act, performed for remuneration or under any contract of hire, written or oral, express or implied.

(2) The term "employment" shall include an individual's entire service, performed within or both within and without this state if:

(A) The service is localized in this state; or

(B) The service is not localized in any state but some of the service is performed in this state, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this state; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(3) Services performed within this state but not covered under paragraph (2) of this subsection shall be deemed to be employment subject to this chapter, if contributions are not required and paid with respect to such services under an unemployment compensation law of any other state or of the federal government.

(4) Services not covered under paragraph (2) of this subsection, and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to this chapter if the individual performing such service is a resident of this state and the commission approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this chapter, and services covered by an election duly approved by the commission in accordance with an arrangement pursuant to subsection (l) of § 96-4 shall be deemed to be employment during the effective period of such election.

(5) Service shall be deemed to be localized within a state if

(A) The service is performed entirely within such state; or

(B) The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the state; for example, is temporary or transitory in nature or consists of isolated transactions.

(6) Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the commission that:

(A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession, or business.

(7) The term "employment" shall not include:

(A) Service performed in the employ of this state, or of any political subdivision thereof, or of any instrumentality of this state or its political subdivisions;

(B) Service performed in the employ of any other state or its political subdivisions, or of the United States government, or of an instrumentality of any other state or states or their political subdivisions or of the United States. From and after March 10, 1941, service performed in the employ of the United States government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by this chapter, except that to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a State Unemployment Compensation Law, all of the provisions of this Chapter shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services: Provided, that if this state shall not be certified for any year by the Social Security Board under section one thousand six hundred and three (c) of the Federal Internal Revenue Code, the payments required of such instrumentalities with respect to such year shall be refunded by the commission from the fund in the same manner and within the same period as is provided in § 96-10(e) with respect to contributions erroneously collected.

(C) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress: Provided, that the commission is hereby authorized and directed to enter into agreements with the proper agencies under such act of congress, which agreements shall become effective ten days after publication thereof in the manner provided in § 96-4 (b) for general rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this chapter, acquired rights to unemployment compensation under act of congress, or who have, after acquiring potential rights to unemployment compensation under such act of congress, acquired rights to benefits under this chapter;

(D) Agricultural labor;

(E) Domestic service in a private home;

(F) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

(G) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(H) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(I) Service performed on and after March 10, 1941 by an individual for an employing unit or an employer as an insurance agent or as an insurance solicitor or as a securities salesman if all such service performed by such individual for such employing unit or employer is performed for remuneration solely by way of commission;

(J) From and after March 10, 1941 service performed in any calendar quarter by any officer, individual or commiteeman of any building and loan association organized under the laws of this state, or any federal savings and loan association, where the remuneration for such service does not exceed forty-five dollars in any calendar quarter;

(K) From and after March 10, 1941 service in connection with the collection of dues or premiums for a fraternal benefit society, order or association performed away from the home office, or its ritulistic service in connection with any such society, order or associations;

(L) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution.

(M) Except as provided in paragraph (1) of subsection (f) of this section, service covered by

an election duly approved by the agency charged with the administration of any other State or Federal Unemployment Compensation Law in accordance with an arrangement pursuant to subsection (l) of § 96-4 during the effective period of such election.

(N) Notwithstanding any of the other provisions of this subsection, services shall be deemed to be in employment if with respect to such services a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund.

(h) "Employment office" means a free public employment office, or branch thereof, operated by this state or maintained as a part of a state-controlled system of public employment offices.

(i) "Fund" means the unemployment compensation fund established by this chapter, to which all contributions required and from which all benefits provided under this chapter shall be paid.

(j) "State" includes, in addition to the states of the United States of America, Alaska, Hawaii, and the District of Columbia.

(k) "Total and partial unemployment."

(1) An individual shall be deemed "totally unemployed" in any week with respect to which no remuneration is payable to him and during which he performs no services (other than odd jobs or subsidiary work for which no remuneration, as used in this subsection, is payable to him).

(2) An individual shall be deemed partially unemployed in any week in which, because of lack of work, he works less than sixty per cent of the customary scheduled full time hours of the industry or plant in which he is employed and in which he earns less than the ineligible amount shown in Column III of the table set forth in § 96-12 (b): Provided, however, that the commission may find the customary scheduled full time hours of any individual to be less or more than the customary scheduled full time hours of the industry or plant in which he is employed, if such individual customarily performs services in an occupation which requires that he customarily work a greater or smaller number of hours than the customary scheduled full time hours of the industry or plant in which he is employed.

(3) As used in this sub-section, the term "remuneration" shall include only that part of remuneration for odd jobs or subsidiary work, or both, which is in excess of $3.00 in any one week.

(4) An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the commission may by regulation otherwise prescribe.

(l) "Unemployment compensation administration fund" means the unemployment compensation administration fund established by this chapter, from which administrative expenses under this chapter shall be paid.

(m) From and after March 10, 1941, "wages" means all remuneration for services from whatever source.

(n) From and after March 10, 1941, "wages" shall include commissions and bonuses and the cash value of all remuneration in any medium other than cash. Gratuities customarily received by an individual in the course of his work from persons other than his employing unit shall be treated as wages received from his employing unit. The reasonable cash value of remuneration in any medium other than cash, and the reasonable amount of gratuities, shall be estimated and determined in accordance with rules prescribed by the commission: Provided, that the term "wages" shall not include the amount of any payment with respect to services performed from and after March 10, 1941 to, or on behalf of, an individual in its employ under a plan or system established by an employing unit which makes provision for individuals in its employ generally or for a class or classes of such individuals (including any amount paid by an employing unit for insurance or annuities, or into a fund, to provide for any such payment), on account of (A) retirement, or (B) sickness or accident disability, or (C) medical and hospitalization expenses in connection with sickness or accident disability, or (D) death: Provided, the individual in its employ (i) has not the option to receive, instead of provision for such death benefit, any part of such payment, or, if such death benefit is insured, any part of the premiums (or contributions to premiums) paid by his employing unit, and (ii) has not the right under the provisions of the plan or system or policy of insurance providing for such death benefit, to assign such benefit, or to receive cash consideration in lieu of such benefit either upon his withdrawal from the plan or system providing for such benefit or upon termination of such plan or system or policy of insurance or of his services with such employing unit.

(o) "Week" means such period or periods of seven consecutive calendar days ending at midnight as the commission may by regulations prescribe.

(p) "Calendar quarter" means the period of three consecutive calendar months ending on March thirty-first, June thirtieth, September thirtieth or December thirty-first, excluding, however, any calendar quarter or portion thereof which occurs prior to January first, one thousand nine hundred and thirty-seven, or the equivalent thereof as the commission may by regulation prescribe.

(q) "Weekly benefit amount." An individual's "weekly benefit amount" means the amount of benefits he would be entitled to receive for one week of total unemployment.

(r) "Benefit year" with respect to any individual means the one-year period beginning with the first day of the first week with respect to which such individual first registers for work and files a valid claim for benefits, and after the termination of such benefit year the next benefit year shall be the next one-year period beginning with the first day of the first week with respect to which such individual registers for work and files a valid claim for benefits; a valid claim shall be deemed to have been filed if such individual, at the time the claim is filed, is unemployed and has been paid wages for employment amounting to at least one hundred and thirty dollars in the applicable base period: Provided, however, that any individual whose employment under this chapter prior to July first, one thousand nine hundred and thirty-nine, shall have been for an employer subject after July first, one thousand nine hundred and thirty-nine, to the Railroad Unemployment

Insurance Act and some other employer subject to this chapter, such individual's benefit year, if established before July first, one thousand nine hundred and thirty-nine, shall terminate on that date and if again unemployed after July first, one thousand nine hundred and thirty-nine, he shall establish another benefit year after such date with respect to employment subject to this chapter.

(s) For benefit years beginning on or after February fifteenth, one thousand nine hundred thirty-nine, the term "base period" shall mean the completed calendar year immediately preceding the first day of an individual's benefit year as defined in subsection (r) of this section, if the benefit year begins subsequent to July first; and if the benefit year begins prior to July first, the base period shall be the next to the last completed calendar year, notwithstanding the fact that an otherwise eligible individual may have exhausted wage credits to his account prior to February fifteenth, one thousand nine hundred thirty-nine, for any such calendar year. Except that for weeks of unemployment of any individual after July first, one thousand nine hundred thirty-nine, who has worked in employment for an employer which after July first, one thousand nine hundred thirty-nine, is subject to the Railroad Unemployment Insurance Act, then only the wages payable to such an individual earned in employment during the base period for an employer other than one subject to the Railroad Unemployment Insurance Act shall be used in determining his weekly benefit amount after July first, one thousand nine hundred thirty-nine.

(t) Wages payable to an individual with respect to covered employment performed prior to January first, one thousand nine hundred and forty-one, shall, for the purpose of § 96-12 and § 96-9, be deemed to be wages paid within the calendar quarter with respect to which such wages were payable. (Ex. Sess. 1936, c. 1, s. 19; 1937, c. 448, s. 5; 1939, c. 27, ss. 11-13, c. 52, ss. 6, 7, c. 141; 1941, cc. 108, 198; 1943, c. 377, ss. 31-34; 1943, c. 552, ss. 1, 2.)

Editor's Note.—The 1939 amendments added the proviso to subsection (e), inserted the exception clause in paragraph (1) of subsection (g), and changed subsections (r) and (s).

The first 1941 amendment, effective March 10, 1941, substituted "paid" for "payable" in paragraph (1) of subsection (a), and also in line thirty-two of subsection (e); repealed former paragraph (4) of subsection (f) and struck out the reference thereto formerly appearing in paragraph (5); inserted the second sentence and proviso of clause (B) of paragraph (7) of subsection (g) and added clauses (I), (J) and (K) of said paragraph (7); rewrote subsections (m), (n) and (r) and added subsection (t).

The second 1941 amendment added clause (L) of paragraph (7) of subsection (g).

The first 1943 amendment added paragraph (6) of subsection (f), and the last clause of paragraph (4) of subsection (g) containing the reference to § 96-4. It also added the proviso and made other changes in paragraph (2) of subsection (k). That part of subsection (r) appearing before the proviso was also changed by the amendment.

The second 1943 amendment added the proviso to paragraph (1) of subsection (f), and clauses (M) and (N) to paragraph (7) of subsection (g).

The general assembly has power to determine scope of the unemployment compensation act, and the definitions and tests therein prescribed will be applied by the courts in accordance with the legislative intent. Unemployment Compensation Comm. v. City Ice, etc., Co., 216 N. C. 6, 3 S. E. (2d) 290.

Employments taxable under this chapter are not confined to the common-law relationship of master and servant, but the legislature, under its power to determine employments which shall be subject to the tax, has, by the definitions contained in the chapter and the administrational procedure set up therein for determining whether an employment is subject to the chapter, enlarged its coverage beyond the common-law definition of master and servant, and the scope of the chapter must be determined upon the facts of each particular case. Unemployment Compensation Comm. v. National Life Ins. Co., 219 N. C. 576, 14 S. E. (2d) 689, 139 A. L. R. 895.

This section is not violative of constitutional provisions when properly interpreted and applied. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4.

Subsection f(4) of this section, when properly interpreted and applied, is not open to successful attack on the ground that it would result in the deprivation of property without due process of law or constitute a denial of the equal protection of the laws. State v. Willis Barber, etc., Shop, 219 N. C. 709, 715 15 S. E. (2d) 4.

Liberal Construction.—The terms "employment," "employer," "employing unit," "wages," and "remuneration" as used in this chapter must be liberally construed to effectuate the purpose of the act to relieve the evils of unemployment, and the definition of the terms as contained in the act are controlling and are broader than the common law meaning of the terms, and the act includes in its scope relationships which might be excluded by a strict common law application of the definition of an independent contractor. Unemployment Compensation Comm. v. Jefferson Standard Life Ins. Co., 215 N. C. 479, 2 S. E. (2d) 584.

Employer.—An individual who operates three places of business, employing in the aggregate more than 8 employees, is an "employer" as defined in this section. State v. Willis Barber, etc., Shop, 219 N. C. 709, 15 S. E. (2d) 4.

Single Employing Unit.—Where the agreed statement of facts disclosed that the three defendant corporations have common officers and directors and substantially identical stockholders, and that they maintain a central business office where each keeps its records and handles all clerical matters, the three corporations are owned and controlled directly or indirectly by the same interest within the meaning of subdivision (f) (4) of this section and constitutes but a single employing unit within the meaning of the act. Unemployment Compensation Comm. v. City Ice, etc., Co., 216 N. C. 6, 3 S. E. (2d) 290.

The words in the provision of this section that enterprises "controlled" by the same "interests" shall be considered but a single employing unit will be given their distinct, definite, and commonly understood meaning. Id.

Services of Insurance Soliciting Agents Constitute Employment.—Soliciting agents and managers, in their capacity as soliciting agents, are subject to a high degree of control by the insurance company employing them under their written contract, and usually their services are rendered to the company in the offices of the company, and are directly related and contribute to the primary purpose for which the company is organized, and therefore their services constitute an "employment" within this chapter. Unemployment Compensation Comm. v. Jefferson Standard Life Ins. Co., 215 N. C. 479, 2 S. E. (2d) 584.

Burden of Proving Services Rendered for Remuneration Do Not Constitute Employment.—Where services are rendered for remuneration, this section provides that the burden is on the party for whose benefit the services are rendered to prove that they are rendered free from his control or direction over the performance of such services, that they are outside the usual course of the business for which the services are performed, and that the person performing the services is customarily engaged in an independently established trade, occupation, profession, or business, and since the matters of exemption are stated conjunctively, all three elements must be shown in order that exemption from the act be secured. Unemployment Compensation Comm. v. Jefferson Standard Life Ins. Co., 215 N. C. 479, 2 S. E. (2d) 584.

§ 96-9. Contributions. — (a) Payment.—(1) On and after January first, one thousand nine hundred and thirty-six, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this chapter, with respect to wages for employment (as defined in § 96-8 (g)). Such contributions shall become due and be paid by each employer to the commission for the fund in accordance with such regulations as the commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided that, on and after July first, one thousand

nine hundred and forty-one, contributions shall be paid for each calendar quarter with respect to wages paid in such calendar quarter for employment after December thirty-first, one thousand nine hundred and forty. Contributions shall become due on and shall be paid on or before the last day of the month following the close of the calendar quarter in which such wages are paid and such contributions shall be paid by each employer to the commission for the fund in accordance with such regulations as the commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided, further, that if the commission shall be advised by its duly authorized officers or agents that the collection of any contribution under any provision of this chapter will be jeopardized by delay, the commission shall, whether or not the time otherwise prescribed by law for making returns and paying such tax has expired, immediately assess such contributions (together with all interest and penalties, the assessment of which is provided for by law). Such contributions, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the commission for the payment thereof. Upon failure or refusal to pay such contributions, penalties, and interest, it shall be lawful to make collection thereof as provided by § 96-10 and subsections thereunder and such collection shall be lawful without regard to the due date of contributions herein prescribed, provided, further, that nothing in this paragraph shall be construed as permitting any refund of contributions heretofore paid under the law and regulations in effect at the time such contributions were paid.

(2) In the payment of any contributions a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent. For the purposes of this section, the term "wages" shall not include that part of the remuneration which, after remuneration equal to $3,000 has become payable to an individual by an employer with respect to employment during the calendar year 1940, becomes payable to such individual by such employer with respect to employment during such calendar year, and which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during the calendar year 1941, and during any calendar year thereafter, is paid to such individual by such employer with respect to employment occurring during such calendar year but after December 31, 1940.

(b) Rate of Contributions.—Each employer shall pay contributions equal to the following percentages of wages payable by him with respect to employment:

(1) Nine-tenths of one percentum with respect to employment during the calendar year one thousand nine hundred and thirty-six;

(2) One and eight-tenths percentum with respect to employment during the calendar year one thousand nine hundred and thirty-seven;

(3) Two and seven-tenths percentum with respect to employment during the calendar year one thousand nine hundred and thirty-eight, and each year thereafter: Provided, however, that each employer shall pay contributions equal to two and seven-tenths percentum of wages paid by him during the calendar year one thousand nine hundred and forty-one, and during each calendar year thereafter, with respect to employment occurring after December thirty-first, one thousand nine hundred and forty, which shall be deemed the standard rate of contributions payable by each employer except as provided herein.

(4) Variations from the standard rate of contributions shall be determined in accordance with the following requirements:

(A) If, as of any computation date, the commission finds that: Compensation has been payable from an employer's account throughout the year preceding the computation date; and the balance of such account amounts to not less than five times the largest amount of compensation paid from such account within any one of the three years preceding such date; and the balance of such account as of the computation date amounts to not less than two and one-half percentum of that part of the payroll or payrolls in the three years preceding such date by which contributions were measured; and such contributions were payable to such account with respect to the three years preceding the computation date, contribution rates for the calendar year following such computation date shall be determined pursuant to paragraph (B) of this subsection. The term "year" as used in this section (except when preceded by the word "calendar") means the twelve month period ending on June 30th of any calendar year.

(B) If, as of any computation date, the cumulative total of all an employer's contributions which were paid and accredited to his "reserve account" before such computation date exceeds the cumulative total benefits which were chargeable to his "reserve account" and were paid before such computation date; and if such excess of contributions over benefits paid and chargeable to such account exceeds that percentage of his wages by which contributions were measured, during the thirty-six consecutive calendar month period preceding such computation date, which percentage is shown in Column 1 of the table below, and does not exceed the percentage opposite thereto in Column 2 of the table below, his contribution rate in the ensuing calendar year shall be equal to that percentum of the wages for employment, paid by him during such ensuing year, which is shown in Column 3 of the table below. Of the payments so made, there shall be credited to the "partially pooled account" the percentage shown opposite thereto in Column 4 of the table below, and there shall be credited to the "reserve account" of the employer that percentage of the wages for employment, paid by him during such calendar year, which is shown opposite thereto in Column 5 of the table below:

Column 1 Over but	Column 2 not to exceed	Column 3 Rate of Contribution	Column 4 Cr. Pool Account	Column 5 Credit Reserve Account
2.5%	2.8%	2.50%	.27%	2.23%
2.8	3.1	2.13	.27	1.86
3.1	3.4	1.76	.27	1.49
3.4	3.8	1.39	.27	1.12
3.8	4.2	1.02	.27	.75
4.2	4.6	.65	.27	.38
4.6	5.	.27	.27	.0
5% & in excess thereof		.27	.27	.0

(C) The computation date for any contribution rates shall be July first of the calendar year preceding the calendar year with respect to which such rates are effective.

(D) Should the commission be of the opinion that the balance to the credit of the "partially pooled account" is insufficient to provide adequate security in the payment of all compensation to all eligible individuals, it shall direct such fact to the attention of the council of state, and, upon finding of the council that such a situation exists and a declaration that emergency steps are advisable, the commission is hereby authorized and empowered to require the payment by all employers of as much as 60% of the standard rate to be credited entirely to the "partially pooled account," and if such additional credit to the "partially pooled account" as required by this section exceeds the rate for any employer as fixed under § 96-9 (b) (4) (B), his rate shall be such percentage of the standard rate with no credit to his reserve account. If the additional credit to the "partially pooled account" as required by this subsection is less than the standard rate or rate for any employer as fixed under § 96-9 (b), (4), (B), such employer shall pay the standard rate or the rate of contributions as provided in § 96-9 (b), (4), (B) and his reserve account be credited with the balance of payment after crediting the "partially pooled account" with the additional credit as provided in this subsection. Any increased contribution rate thus required by the commission shall be applicable with respect to contributions on wages paid during the quarter in which such finding of the council of state occurred, and shall continue to be applicable with respect to contributions on wages paid up to the last day of the calendar quarter preceding the quarter in which, upon recommendation by the commission, the council of state shall find that the balance to the credit of the "partially pooled account" is sufficient to provide adequate security for the payment of all compensation to all eligible individuals.

(E) Any employer may at any time make voluntary contributions, additional to the contributions required under this chapter, to the fund to be credited to his reserve account and such voluntary contributions when made shall for all intents and purposes be deemed "contributions required" as said term is used in § 96-8 (i). The commission in accepting a voluntary contribution shall not be bound by any condition stipulated in or made a part of such voluntary contribution by any employer.

(F) If within the calendar month next following the computation date, the commission finds that any employing unit failed to file any report required in connection therewith, or has filed a report which the commission finds incorrect or insufficient, the commission shall make an estimate of the information required from such employing unit on the basis of the best evidence reasonably available to it at the time, and shall notify the employing unit thereof by registered mail addressed to its last known address. Unless such employing unit shall file the report or a corrected or sufficient report as the case may be, within fifteen days after the mailing of such notice, the commission shall compute such employing unit's rate of contributions on the basis of such estimates, and the rate as so determined shall be subject to increases but not to reduction, on the basis of subsequently ascertained information.

(c) (1) The commission shall maintain a separate fiscal account for each employer and shall credit his account with all the contributions which he has paid or is paid on his own behalf. On and after January 1, 1939, the commission shall establish and maintain an employer's "reserve account" for each employer subject to this chapter, to which account the commission shall credit out of the unemployment compensation fund an amount equal to fifty percent of the contributions paid by such employers pursuant to § 96-9 (b) with respect to employment during the calendar year 1938 for the purpose of paying out of such accounts compensation payable to all eligible individuals in accord with the provisions of paragraph (2) of this subsection. To these "reserve accounts" shall also be credited seventy-five per cent of all contributions paid each year pursuant to this act from and after January 1, 1939, the remaining twenty-five per cent of the contributions to be credited to the "partially pooled account" and for each calendar year, beginning January 1, 1941, to these "reserve accounts" shall be credited ninety percentum of all contributions paid each calendar year pursuant to the act, the remaining ten percentum to be credited to the "partially pooled account," except as provided in subsection (b) (4) hereof, and as hereinafter provided. Provided further, that no provision of this section shall in any way be subject to or affected by any provisions of the Executive Budget Act, as amended.

(2) All benefits for weeks of unemployment paid during the twelve months preceding June thirtieth of each year to any eligible individual shall be paid out of the reserve account of such individual's employer or employers by whom he was employed during his base period. In accordance with the regulations of the commission, such payments shall be charged against all employers of such individual during his base period in the same ratio that the wages paid to such individual by each base period employer bears to the total wages paid him by all his employers during the base period. In the event that an employer's credits in his reserve account become exhausted through the payment of benefits chargeable to such account, the benefit payments which are chargeable to such account shall be paid out of the "partially pooled account" and at the same time the reserve account of the employer shall be debited accordingly. Whenever through inadvertence or mistake erroneous charges or credits are found to have been made to reserve accounts, the same shall be readjusted as of the date of discovery and such readjustment shall not affect any computation made under this section prior to the date of discovery.

(3) As of June thirtieth of each year, and at least fifteen days prior to the effective date of any variation from standard rate of contributions, the commission shall determine the balance of each employer in his reserve account and shall furnish him with a statement of all charges and credits thereto. At the same time the commission shall notify each employer of his rate of contributions as determined for the succeeding calendar year pursuant to this section. Such determination shall become final unless the employer files

an application for review or redetermination within thirty days after the effective date of such rates.

(4) The commission may prescribe regulations for the establishment, maintenance, and dissolution of joint accounts by one or more employers having the relationship of parent and subsidiary companies. Any employer who is or becomes subject to the provisions of this chapter under the terms of § 96-8 (f), whose organization, trade or business, or substantially all the assets thereof are transferred by sale, lease or otherwise shall have the privilege of transferring to his successor or assignee the reserve account herein established for such employer except that the purchaser, lessee or assignee shall not be entitled to any credit as provided herein except where compensation has been payable from such account throughout one previous year, and that after such condition has been met the reserve account then meets all other conditions as prescribed hereinbefore. Notice of such transfers shall be given to the commission immediately. The commission may make regulations to govern such transfers of reserve accounts. In the event any employer subject to this chapter ceases to be such an employer through the termination of coverage as provided in § 96-11, the reserve account standing to the credit of such employer shall immediately upon such termination of coverage revert to the partially pooled (account) established herein and the reserve account shall be closed. In the event any employer subject to this chapter has not had any individuals in employment for a period of five consecutive years, the reserve account of such employer shall at the end of such five-year period revert to the partially pooled account established herein and the reserve account shall be closed.

(d) In order that the commission shall be kept informed at all times on the circumstances and conditions of unemployment within the state and as to whether the stability of the fund is being impaired under the operation and effect of the system provided in subsection (c) of this section, the actuarial study now in progress shall be continued and such other investigations and studies of a similar nature as the commission may deem necessary shall be made. (Ex. Sess. 1936, c. 1, s. 7; 1939, c. 27, s. 6; 1941, c. 108, ss. 6, 8, c. 320; 1943, c. 377, ss. 11-14.)

Editor's Note.—The first 1941 amendment substituted new paragraph (1) of subsection (a) and new subsections (b) and (c). It also re-enacted subsection (d) without change. The second 1941 amendment added paragraph (2) of subsection (a).

The 1943 amendment changed paragraph (1) of subsection (a) by substituting at the end of the second sentence the words "in such calendar quarter for employment after December thirty-first, one thousand nine hundred and forty" for the words "for employment in all pay periods ending within such calendar quarter." It also substituted near the beginning of the third sentence the words "last day" for the words "twenty-fifth day." The amendment changed paragraph (4) of subsection (b) by substituting "§ 96-8(i)" for "§ 96-8(d)," in line seven of clause (E), and by adding the second sentence of the clause. It also amended clause (F) thereof by substituting "it" for "him" in line nine. The amendment changed paragraph (4) of subsection (c) by omitting the word "calendar" which formerly appeared before the word "year" in line sixteen. It also added the last sentence of said paragraph and substituted, in the next to the last sentence, the words "partially pooled account" for the words "pooled fund."

Contributions Constitute a Tax.—Contributions imposed on employers within the purview of the unemployment compensation act are compulsory and therefore constitute a tax, and they are not rendered any less a tax by reason of the provision that they should be segregated in a special fund for distribution in furtherance of the purpose of the act. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619.

Payment of Contributions for Calendar Year 1936 Cannot Be Required.—Since the state unemployment compensation act, ch. 1, Public Laws of 1936, is in effect a tax upon an act or acts, and since the statute was not ratified until 16 December, 1936, and the determination of "employment" within the coverage of the act must be determined from records for the calendar year 1936, and since no benefits therefrom could be obtained by employees for the calendar year 1936, in so far as the act attempts to require the payment of contributions for the calendar year 1936, it is retroactive and void as being in conflict with Art. I. § 32, of the state Constitution. Unemployment Compensation Comm. v. Wachovia Bank, etc., Co., 215 N. C. 491, 2 S. E. (2d) 592.

State Bank Member of Federal Reserve System Not Exempt.—A bank organized under the laws of this state is not an instrumentality of the federal government so as to exempt it from the tax imposed by this chapter, notwithstanding that the bank may be a member of the federal reserve system, since its existence and powers are derived from its state charter and its membership in the federal reserve system is voluntary and may be relinquished by it without destroying its corporate existence. Unemployment Compensation Comm. v. Wachovia Bank, etc., Co., 215 N. C. 491, 2 S. E. (2d) 592.

A state bank which is a member of the federal reserve system is not exempt from taxation under this chapter because of its connection with the federal deposit insurance corporation nor may it claim such exemption because the tax would discriminate against it in favor of national member banks, since to relieve it from such taxation would discriminate in favor of it against nonmember state banks. Id.

Contributions Are Required for Services of Insurance Soliciting Agents.—Since the services of soliciting agents and managers, in their capacity as soliciting agents, constitute "employment" within the meaning of this chapter, the insurance company for which the services are performed is liable for contributions for such employment. Unemployment Compensation Comm. v. Jefferson Standard Life Ins. Co., 215 N. C. 479, 2 S. E. (2d) 584.

Declaratory Judgment as to Inclusion of Certain Salaries Cannot Be Obtained.—An action to determine whether salaries paid certain employees should be included in computing the contributions to be paid by an employer under the unemployment compensation act involves solely an issue of fact and does not involve any right, status or legal relation, and the employer may not maintain proceedings under the declaratory judgment act to determine the question. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619.

An action against the unemployment compensation commission seeking judgment that salaries paid to certain of plaintiff's employees should not be included in computing the amount of the contributions plaintiff should pay under the unemployment compensation act is an action against a state agency and directly affects the state, since the amount of tax it is entitled to collect is involved, and the action is properly dismissed upon demurrer, since there is no statutory provision authorizing such action. Id.

§ 96-10. Collection of contributions.—(a) Interest on Past-Due Contributions.—Contributions unpaid on the date on which they are due and payable, as prescribed by the commission, shall bear interest at the rate of one-half of one per centum per month from and after such date until payment plus accrued interest is received by the commission. Interest collected pursuant to this subsection shall be paid into the unemployment compensation fund. If any employer, in good faith, pays contributions to another state, prior to a determination of liability by this commission, which contributions were legally payable to this state, such contributions, when paid to this state, shall be deemed to have been paid by the due date under the law of this state if paid by the due date of such other state.

(b) Collection.—If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount due shall be collected by civil action in the name of the commission, and the employer adjudged in default shall pay the costs of such action. Civil actions brought under this section to collect contributions or interest thereon from an employer shall be heard by the court at the earliest possible date, and shall be entitled to preference upon the calendar of the court over all other civil actions except petitions for judicial review under this chapter and cases arising under the Workmen's Compensation Law of this state; or, if any contribution imposed by this chapter, or any portion thereof, and/or penalties duly provided for the nonpayment thereof shall not be paid within thirty days after the same become due and payable, and after due notice and reasonable opportunity for hearing, the commission under the hand of its chairman, may certify the same in duplicate and forward one copy thereof to the clerk of the superior court of the county in which the delinquent resides or has property, and additional copies for each county in which the commission has reason to believe such delinquent has property located, which copy so forwarded to the clerk of the superior court shall be immediately docketed by said clerk and indexed on the cross index of judgment, and from the date of such docketing shall constitute a preferred lien upon any property which said delinquent may own in said county, with the same force and effect as a judgment rendered by the superior court. The duplicate of said certificate shall be forwarded by the commission to the sheriff or sheriffs of such county or counties, or to a duly authorized agent of the commission, and in the hands of such sheriff or agent of the commission shall have all the force and effect of an execution issued to such sheriff or agent of the commission by the clerk of the superior court upon the judgment of the superior court duly docketed in said county. Provided, however, that notwithstanding any provision of this subsection, upon filing one written notice with the commission the sheriff of any county shall have the sole and exclusive right to serve all executions and make all collections mentioned in this subsection and in such case no agent of the commission shall have the authority to serve any executions or make any collections therein in such county. A return of such execution shall be made to the commission, together with all moneys collected thereunder, and when such order or execution is referred to the agent of the commission for service the said agent of the commission shall be vested with all the powers of the sheriff to the extent of serving such order or execution and levying or collecting thereunder. The agent of the commission to whom such order or execution is referred shall give a bond not to exceed two thousand dollars ($2,000.00) approved by the commission for the faithful performance of such duties. The liability of said agent shall be in the same manner and to the same extent as is now imposed on sheriffs in the service of executions. If any sheriff of this state or any agent of the commission who is charged with the duty of serving executions shall wilfully fail, refuse, or neglect to execute any order directed to him by the said commission and within the time provided by law, the official bond of such sheriff or of such agent of the commission shall be liable for the contributions, penalty, interest, and costs due by the employer.

(c) Priorities under Legal Dissolution or Distributions.—In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this state, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other claims except taxes, and claims for remuneration of not more than two hundred and fifty dollars to each claimant, earned within six months of the commencement of the proceeding. In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition, under the Federal Bankruptcy Act of one thousand eight hundred and ninety-eight, as amended, contributions then or thereafter due shall be entitled to such priority as is provided in section sixty-four (b) of that act (U. S. C., Title II, sec. 104 (b), as amended.

(d) Collections of Contributions upon Transfer or Cessation of Business.—The contribution or tax imposed by § 96-9, and subsections thereunder, of this chapter shall be a lien upon the assets of the business of any employer subject to the provisions hereof who shall lease, transfer or sell out his business, or shall cease to do business and such employer shall be required, by the next reporting date as prescribed by the commission, to file with the commission all reports and pay all contributions due with respect to wages payable for employment up to the date of such lease, transfer, sale or cessation of the business and such employer's successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said contributions due and unpaid until such time as the former owner or employer shall produce a receipt from the commission showing that the contributions have been paid, or a certificate that no contributions are due. If the purchaser of a business or a successor of such employer shall fail to withhold purchase money or any money due to such employer in consideration of a lease or other transfer and the contributions shall be due and unpaid after the next reporting date, as above set forth, such successor shall be personally liable to the extent of the assets of the business so acquired for the payment of the contributions accrued and unpaid on account of the operation of the business by the former owner or employer.

(e) Refund.—If not later than three years from the last day of the period with respect to which a payment of any contributions or interest thereon was made, or one year from the date on which such payment was made, whichever shall be the later, an employer who has paid such contributions or interest thereon shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund thereof because such adjustment cannot be made, and the commission shall determine that such contributions or interest or any portion thereof was erroneously collected, the commission shall allow such employer to make an adjustment thereof,

without interest, in connection with subsequent contribution payments by him, or if such adjustment cannot be made, the commission shall refund said amount, without interest, from the fund. For like cause and within the same period, adjustment or refund may be so made on the commission's own initiative: Provided, that nothing in this section or in any other section of this chapter shall be construed as permitting refund of moneys due and payable under the law and regulations in effect at the time such moneys were paid.

(f) No injunction shall be granted by any court or judge to restrain the collection of any tax or contribution or any part thereof levied under the provisions of this chapter nor to restrain the sale of any property under writ of execution, judgment, decree or order of court for the non-payment thereof. Whenever any employer, person, firm or corporation against whom taxes or contributions provided for in this chapter have been assessed, shall claim to have a valid defense to the enforcement of the tax or contribution so assessed or charged, such employer, person, firm or corporation shall pay the tax or contribution so assessed to the commission; but if at the time of such payment he shall notify the commission in writing that the same is paid under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the commission; and if the same shall not be refunded within ninety days thereafter, he may sue the commission for the amount so demanded; and if, upon the trial it shall be determined that such tax or contribution or any part thereof was for any reason invalid, excessive or contrary to the provisions of this chapter, the amount paid shall be refunded by the commission accordingly. The remedy provided by this subsection shall be deemed to be cumulative and in addition to such other remedies as are provided by other subsections of this chapter. No suit, action or proceeding for refund or to recover contributions or payroll taxes paid under protest according to the provisions of this subsection shall be maintained unless such suit, action or proceeding is commenced within one year after the expiration of the ninety days mentioned in this subsection, or within one year from the date of the refusal of said commissioner to make refund should such refusal be made before the expiration of said ninety days above mentioned. The one-year limitation here imposed shall not be retroactive in its effect, shall not apply to pending litigation nor shall the same be construed as repealing, abridging or extending any other limitation or condition imposed by this chapter.

(g) Any employer refusing to make reports required under this chapter, after ten days written notice sent by the commission to the employer's last known address by registered mail, may be enjoined from operating in violation of the provisions of this chapter upon the complaint of the commission, in any court of competent jurisdiction, until such reports shall have been made. When an execution has been returned to the commission unsatisfied, and the employer, after ten days written notice sent by the commission to the employer's last known address by registered mail, refuses to pay contributions covered by the execution, such employer may be enjoined from operating in violation of the provisions of this chapter upon the complaint of the commission, in any court of competent jurisdiction, until such contributions have been paid. (Ex. Sess. 1936, c. 1, s. 14; 1939, c. 27, ss. 9, 10; 1941, c. 108, ss. 14-16; 1943, c. 377, ss. 24-28.)

Editor's Note.—The 1939 amendment added subsections (c1) and (e). The 1941 amendment inserted the words "one-half of" in subsection (a), added the proviso to subsection (d) and added the last two sentences of subsection (e).

The 1943 amendment added the last sentence of subsection (a), rewrote subsection (b), and made changes in subsection (e). It reduced the limitation named in the last two sentences of subsection (f) from three years to one year, and added subsection (g).

This chapter provides remedies for an employer who claims a valid defense to the enforcement of the tax or to the collection of the contributions assessed. In addition to right of appeal from the decision of the commission, it is provided that he may pay the tax under protest and sue for its recovery. The remedy provided by this section must be pursued in the manner therein prescribed. State v. Willis Barber, etc., Shop, 219 N. C. 709, 714, 15 S. E. (2d) 4.

The remedies provided by this chapter are adequate and preclude an employer from maintaining suit in the superior court seeking judgment that salaries paid certain of its employees should not be included in computing the amount of contributions it should pay. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619.

Judgment That Certain Salaries Be Not Included Cannot Be Obtained.—A judgment that salaries paid to certain of plaintiff's employees should not be included in computing the amount of the contributions plaintiff should pay under the unemployment compensation act would in effect enjoin the commission from seeking further to collect the amount of contributions which it contends are justly due, and it being expressly provided in the act that injunction should not lie to restrain the collection of any tax or contribution levied under Public Laws of 1939, ch. 27, § 10, the court is without jurisdiction of an action seeking such relief, since it may not do indirectly what it is prohibited from doing directly. Prudential Ins. Co. v. Powell, 217 N. C. 495, 8 S. E. (2d) 619.

Single Employing Unit.—Where the commission contends that the employer and another concern controlled by the same interests jointly constitute a single employment unit liable for the payment of unemployment compensation contributions and it wishes to have this liability judicially adjudged, it must follow the procedure prescribed by this section. In re Mitchell, 220 N. C. 65, 67, 16 S. E. (2d) 476, 142 A. L. R. 931.

§ 96-11. Period, election, and termination of employer's coverage.—(a) Any employing unit which is or becomes an employer subject to this chapter within any calendar year shall be subject to this chapter during the whole of such calendar year; provided, however, that on and after July first, one thousand nine hundred thirty-nine, this section shall not be construed to apply to any part of the business of an employer as may come within the terms of section one (a) of the Federal Railroad Unemployment Insurance Act.

(b) Except as otherwise provided in subsections (a) and (c) of this section, an employing unit shall cease to be an employer subject to this act only as of the first day of January of any calendar year, if it files with the commission prior to the thirty-first day of January of such year a written application for termination of coverage and the commission finds that there were no twenty different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed eight or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individuals were em-

ployed in each such week). For the purpose of this subsection, the two or more employing units mentioned in paragraphs two or three of § 96-8, subsection (f), of this chapter shall be treated as a single employing unit.

(c) (1) An employing unit, not otherwise subject to this chapter, which files with the commission its written election to become an employer subject hereto for not less than two calendar years shall, with the written approval of such election by the commission, become an employer subject hereto to the same extent as all other employers, as of the date stated in such approval, and shall cease to be subject hereto as of January one of any calendar year subsequent to such two calendar years only if, at least thirty days prior to such first day of January, it has filed with the commission a written notice to that effect.

(2) Any employing unit for which services that do not constitute employment as defined in this chapter are performed may file with the commission a written election that all such services performed by individuals in its employ, in one or more distinct establishments or places of business, shall be deemed to constitute employment for all the purposes of this chapter for not less than two calendar years. Upon the written approval of such election by the commission such services shall be deemed to constitute employment subject to this chapter from and after the date stated in such approval. Such services shall cease to be deemed employment, subject hereto as of January one of any calendar year subsequent to such two calendar years only if, at least thirty days prior to such first day of January, such employing unit has filed with the commission a written notice to that effect. (Ex. Sess. 1936, c. 1, s. 8; 1939, c. 52, ss. 2, 3; 1941, c. 108, s. 9.)

Editor's Note.—The 1939 amendment added the proviso to subsection (a) and inserted the reference to subsection (a) in the second line of subsection (b). The 1941 amendment rewrote subsection (b).

§ 96-12. Benefits. — (a) Payment of Benefits. —Twenty-four months after the date when contributions first accrue under this chapter benefits shall become payable from the fund. All benefits shall be paid through employment offices, in accordance with such regulations as the commission may prescribe.

(b) Each eligible individual whose benefit year begins on or after March 10, 1941 and who is totally unemployed in any week (as defined by § 96-8 (k) (1)) shall be paid with respect to such week or weeks benefits at the rate per week appearing in the following table in Column II opposite which in Column I appear the wages paid to such individual during his base period with respect to "employment": Provided, however, after July first, one thousand nine hundred and thirty-nine, for any individual whose employment prior to such date was in employment for an employer who after such date was or is subject to the Railroad Unemployment Insurance Act, and who worked for some other employer subject to this act, only the wages paid to such individual for employment performed for an employer not subject to said Railroad Unemployment Insurance Act after July first, one thousand nine hundred and thirty-nine, shall be used in determining wages paid during his base period.

Column I Wages paid During base period Under $130.00	Column II Weekly benefit amount Ineligible	Column III Ineligible amount Ineligible
$ 130.00 to $ 139.99	$ 3.00	$ 3.60
140.00 to 154.99	3.50	4.20
155.00 to 174.99	4.00	4.80
175.00 to 204.99	4.50	5.40
205.00 to 244.99	5.00	6.00
245.00 to 294.99	5.50	6.60
295.00 to 354.99	6.00	7.20
355.00 to 444.99	6.50	7.80
445.00 to 554.99	7.00	8.40
555.00 to 599.99	7.50	9.00
600.00 to 649.99	8.00	9.60
650.00 to 694.99	8.50	10.20
695.00 to 744.99	9.00	10.80
745.00 to 794.99	9.50	11.40
795.00 to 844.99	10.00	12.00
845.00 to 894.99	10.50	12.60
895.00 to 944.99	11.00	13.20
945.00 to 994.99	11.50	13.80
995.00 to 1044.99	12.00	14.40
1045.00 to 1119.99	12.50	15.00
1120.00 to 1194.99	13.00	15.60
1195.00 to 1269.99	13.50	16.20
1270.00 to 1349.99	14.00	16.80
1350.00 to 1429.99	14.50	17.40
1430.00 and over	15.00	18.00

(c) Weekly Benefit for Partial Unemployment. —Each eligible individual who is partially unemployed (as defined in § 96-8 (k) (2)) in any week shall be paid with respect to such week a partial benefit. Such partial benefit shall be an amount, figured to the nearest multiple of fifty cents (0.50), equal to the difference between his weekly benefit amount (as defined in § 96-8 (q)) and five-sixths of his remuneration (as defined in § 96-8 (n)) for such week.

(d) Duration of Benefits.—The maximum benefits payable to any eligible individual whose benefit year begins after February fifteenth, one thousand nine hundred and thirty-nine, shall be sixteen times his weekly benefit amount during any benefit year. After February fifteenth, one thousand nine hundred and thirty-nine, the commission shall maintain accounts for each individual who earns wages in such manner and form as the commission may prescribe as being adequate to administer the provisions of this chapter.

(e) Benefit Rights of Trainees in Military Service.—(1) Notwithstanding any inconsistent provisions of this chapter, the benefit rights of trainees shall be determined in accordance with the following provisions of this subsection for the periods and with respect to the matters specified herein. Except as herein otherwise provided, all other provisions of this chapter shall continue to be applicable in connection with such benefits.

(2) The term "military service" as used in this subsection means active service in the land or naval forces of the United States, but the service of an individual in any reserve component of the land or naval forces of the United States who is ordered to active duty in any such force for a period of thirty days or less shall not be deemed to be active service in any such force during such period.

(3) The term "trainee" as used in this subsection means an individual who entered military

service after July first, one thousand nine hundred and forty, who continued in such service for not less than ninety consecutive days, and who files a claim within six months after the termination of his military service.

(4) With respect to any trainee, the first benefit year following the termination of his military service, shall be the one-year period beginning with the first day of the first week following the date of such termination; and the second benefit year following the termination of his military service shall be the next one-year period beginning with the first day of the first week following the termination of such first benefit year.

(5) With respect to the first benefit year defined in paragraph (4) of this subsection, the base period shall be the two completed calendar years preceding the date of the trainee's entry into military service; and with respect to the second benefit year defined in paragraph (4) of this subsection, the base period shall be the complete calendar year preceding the date of the trainee's entry into military service plus the portion of a calendar year intervening between the end of such completed calendar year and the date of the trainee's entry into military service, plus (but only in the event that the military service ends between July 1 and December 31 of any year) the portion of a calendar year intervening between the date of the trainee's termination of service and the last day of such calendar year; provided that for the purposes of this subsection such portion of a calendar year intervening between the date of a trainee's termination of service and the last day of such calendar year shall be deemed to be included in the calendar year in which the trainee entered military service.

(6) The provisions of § 96-13 (d) with respect to waiting period shall not be applicable to the first benefit year defined in paragraph (4) of this subsection.

(7) An otherwise eligible trainee shall be eligible to receive benefits with respect to any week beginning in either of the benefit years defined in paragraph (4) of this subsection only if he has earned wages in an amount of $130 or more in either of the two calendar years included within the base period for that benefit year in which occurs the week with respect to which benefits are claimed.

(8) A trainee's weekly benefits amount with respect to each of the two benefit years defined in paragraph (4) of this subsection shall be the amount appearing in Column II of the table of subsection (b) opposite which amount there appears in Column I of such table the wages payable to such individual with respect to "employment" during that calendar year of the base period of such benefit year in which such trainee's wages payable with respect to "employment" were greatest.

(9) An otherwise eligible trainee shall be entitled during the first benefit year defined in paragraph (4) of this subsection to a total amount of benefits equal to whichever is the lesser of (a) sixteen times his weekly benefit amount and (b) thirty-two times his weekly benefit amount less the amount of any benefits paid him under this act for unemployment prior to his entry into military service on the basis of his wages in any part of the base period of such benefit year.

(10) An otherwise eligible trainee shall be entitled during the second benefit year defined in paragraph (4) of this subsection to a total amount of benefits equal to whichever is the lesser of (a) sixteen times his weekly benefit amount, and (b) four times his weekly benefit amount times the number of calendar quarters (completed or uncompleted) in the base period of such benefit year and less the amount of any benefits paid him under this act for unemployment prior to his entry into military service on the basis of his wages in any part of the base period of such benefit year.

(11) With respect to any benefit year of a trainee as defined in § 96-8 (r) which begins subsequent to the second benefit year defined in paragraph (4) of this subsection and has a base period containing less than four completed calendar quarters in which no military service was performed, the term "wages payable during base period" as used in subsection (b) shall be deemed to mean the wages payable to such individual during such base period with respect to "employment" divided by the number of completed calendar quarters in such base period in which no military service was performed and multiplied by four.

(12) If under an Act of Congress, payments with respect to the unemployment of individuals who have completed a period of military service are payable by the United States, a trainee shall be disqualified for benefits with respect to any week beginning within a benefits year as defined in paragraph (4) of this subsection until he has exhausted all his rights to such payments from the United States. (Ex. Sess., 1936, c. 1, s. 3; 1937, c. 448, s. 1; 1939, c. 27, ss. 1-3, 14, c. 141; 1941, c. 108, s. 1; c. 276; 1943, c. 377, ss. 1-4.)

Editor's Note.—The 1937 amendment inserted at the end of the second sentence of subsection (e) the words "except where the commission may find other forms of reports adequate."

The 1939 amendments added the provisos to subsections (b), (d) and (e). It also inserted the words "figured to the nearest multiple of fifty cents" in the second sentence of subsection (c).

The first 1941 amendment directed that subsection (b) of this section be amended by adding and inserting a paragraph and table to be known as paragraph (b) (1). The second 1941 amendment added subsection (f).

The 1943 amendment substituted the word "paid" for the word "payable" in the sixth line from the end of the paragraph preceding the table in subsection (b). It also made changes in paragraphs (3) and (4) of subsection (e). The amendment called for further changes that had already been made in the section upon its codification.

§ 96-13. Benefit eligibility conditions.—An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that—

(a) He has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the commission may prescribe;

(b) He has made a claim for benefits in accordance with the provisions of § 96-15 (a);

(c) He is able to work, and is available for work: Provided, however, that no individual shall be considered able and available for work for any week during the three-month period immediately before the expected birth of a child to such individual, and for any week during the three-month period immediately following the birth of a child to such individual: Provided further, however, that no individual shall be considered available for

work for any week, not to exceed two in any benefit year, in which the commission finds that his unemployment is due to a customary and well established vacation. This provision shall apply only if it is found by the commission that employment will be available to him at the end of such vacation.

(d) Prior to any week for which he claims benefits he has been totally unemployed for a waiting period of one week (and for the purposes of this subsection two weeks of partial unemployment shall be deemed to be equivalent to one week of total unemployment. Such weeks of partial unemployment need not be consecutive.) No week shall be counted as a week of total unemployment for the purposes of this subsection;

(1) If benefits have been paid with respect thereto;

(2) Unless the individual was eligible for benefits with respect thereto in all respects except for the requirements of subsection (b) of this section.

Any individual whose benefit year begins on or after February fifteenth, one thousand nine hundred thirty-nine, who has served such one waiting period week within his benefit year, as provided in subsection (d) hereof, shall not be required to accumulate any more waiting period weeks during his benefit year. (Ex. Sess. 1936, c. 1, s. 4; 1939, c. 27, ss. 4, 5, c. 141; 1941, c. 108, s. 2; 1943, c. 377, s. 5.)

Editor's Note.—The 1939 amendment added a proviso to former subsection (e).

Prior to the 1941 amendment the waiting period prescribed by subsection (d) was two weeks.

The 1943 amendment added the part of subsection (c) beginning with the first proviso, and called for changes in subsection (d) which had already been made by the 1941 amendment and by the Division of Legislative Drafting and Codification of Statutes.

§ 96-14. Disqualification for benefits.—An individual shall be disqualified for benefits:

(a) For not less than four, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits (in addition to the waiting period) if it is determined by the commission that such individual is, at the time such claim is filed, unemployed because he left work voluntarily without good cause attributable to the employer, and the maximum benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount.

(b) For not less than five, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits (in addition to the waiting period) if it is determined by the commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work, and the maximum amount of benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount.

(c) For not less than four, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits (in addition to the waiting period) if it is determined by the commission that such individual has failed without good cause (i) to apply for available suitable work when so directed by the employment office of the commission; or (ii) to accept suitable work when offered him; or (iii) to return to his customary self-employment (if any) when so directed by the commission.

Provided, however, that no week or weeks of disqualification, as provided in subsections (a), (b) and (c) of this section, may be canceled unless an individual shows to the satisfaction of the commission that he is not unemployed.

(1) In determining whether or not any work is suitable for an individual, the commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

(2) Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (b) if the remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona-fide labor organization.

(d) For any week with respect to which the commission finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the commission that—

(1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute: Provided, for the purpose of this subsection (d), that if in any case separate branches of work which are commonly conducted as separate business in separate premises are conducted in separate departments of the same premises, each such department shall be deemed to be a separate factory, establishment, or other premises.

(e) For any week with respect to which he is receiving or has received remuneration in the form

of remuneration in lieu of notice: Provided, that if such remuneration is less than the benefits which would otherwise be due under this chapter he shall be entitled to receive for such week, if otherwise eligible, benefits reduced by the amount of such remuneration.

(f) If the commission finds he is customarily self-employed and can reasonably return to self-employment.

(g) For any week after June thirtieth, one thousand nine hundred thirty-nine with respect to which he shall have or assert any right to unemployment benefits under an unemployment compensation law of either the federal or a state government, other than the state of North Carolina. (Ex. Sess., 1936, c. 1, s. 5; 1937, c. 448, ss. 2, 3; 1939, c. 52, s. 1; 1941, c. 108, ss. 3, 4; 1943, c. 377, ss. 7, 8.)

Editor's Note.—The 1941 amendment struck out former subsections (a), (b), (c), (d) and (e) and inserted new subsections in lieu thereof. The amendment also struck out the former second and third paragraphs of subsection (f).

The 1943 amendment rewrote subsections (a) and (b), and all of subsection (c) except paragraphs (1) and (2). It omitted from subsection (e) a provision relating to remuneration in the form of primary insurance payments with respect to old age benefits under the Social Security Act.

This section prevails over the provision of section 96-2 stating the general policy of the act to provide for benefits to workers who are "unemployed through no fault of their own." In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929.

Labor Dispute.—The evidence tended to show that employee-claimants not only did not work during the period of stoppage of work at the employer's plant caused by a labor dispute, but also that they did not resume work after operations at the plant were resumed, and after notification by the employer that jobs were available. There was also evidence on behalf of claimants that they did not return to their jobs because of the labor dispute. The commission ruled that claimants were not entitled to benefits during the stoppage of work. It was held that the employer is not prejudiced by the further order of the commission that the eligibility of claimants to benefits subsequent to the resumption of operations at the plant should be determined, since it must be presumed the commission will determine eligibility of each claimant for such benefits in accordance with objective standards or criteria set up in the act, but the existence and effect of a labor dispute may have an essential bearing upon the eligibility of claimants, the suitableness of work offered, and the disqualifications for benefits. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929.

Under the provisions of this section employees who participate in, finance or who are directly interested in a labor dispute which results in stoppage of work, or who are members of a grade or class of workers which has members employed at the premises at which the stoppage occurs, any of whom, immediately before the stoppage occurs, participate in, finance or are directly interested in such labor dispute, are not entitled to unemployment compensation benefits during the stoppage of work, and each employee-claimant is required to show to the satisfaction of the commission that he is not disqualified under the terms of this section. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929.

Burden of Proof.—Each claimant is required to show to the satisfaction of the commission that he is not disqualified for benefits under this section. In re Steelman, 219 N. C. 306, 310, 13 S. E. (2d) 544, 135 A. L. R. 929.

§ 96-15. Claims for benefits. — (a) Filing. — Claims for benefits shall be made in accordance with such regulations as the commission may prescribe. Each employer shall post and maintain printed statements of such regulations in places readily accessible to individuals in his service, and shall make available to each such individual, at the time he becomes unemployed, a printed statement of such regulations. Such printed statements shall be supplied by the commission to each employer without cost to him.

(b) Initial Determination. — A representative designated by the commission and hereinafter referred to as a deputy shall promptly examine the claim and, on the basis of the facts found by him, shall either determine whether or not such claim is valid, and if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof, or shall refer such claim or any question involved therein to an appeal tribunal or to the commission, which shall make its determination with respect thereto in accordance with the procedure described in subsection (c) of this section. The deputy shall promptly notify the claimant and any other interested party of his decision and the reason therefor. Unless the claimant or any such interested party, within five calendar days after such notification was mailed to his last known address, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith, and for the purpose of this subsection, the commission shall be deemed an interested party: Provided, however, that any individual who files his claim outside of this state shall have eight calendar days from the date of mailing such notification to his last known address in which to perfect his appeal. If an appeal is duly filed, benefits with respect to the period prior to the final determination of the commission shall be paid only after such determination: Provided further, however, that if an appeal tribunal affirms a decision of a deputy, or the commission affirms a decision of an appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's reserve account shall be charged with benefits so paid and such payments shall be charged to the pooled account.

(c) Appeals.—Unless such appeal is withdrawn, an appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the deputy. The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision of the commission, unless within ten days after the date of notification or mailing of such decision further appeal is initiated pursuant to subsection (e) of this section.

(d) Appeal Tribunals.—To hear and decide disputed claims, the commission shall establish one or more impartial appeal tribunals consisting in each case of either a salaried examiner or a body consisting of three members, one of whom shall be a salaried examiner, who shall serve as chairman, one of whom shall be a representative of employers and the other of whom shall be a representative of employees; each of the latter two members shall serve at the pleasure of the commission and be paid a fee of not more than five dollars per day of active service on such tribunal plus necessary expenses. No person shall participate on behalf of the commission in any case in which he is an interested party. The commission may designate alternates to serve in the absence or disqualification of any member of an appeal tribunal. The chairman shall act alone in the ab-

sence or disqualification of any other member and his alternates. In no case shall the hearings proceed unless the chairman of the appeal tribunal is present.

(e) Commission Review.—The commission may on its own motion affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it, or may provide for group hearings in such cases as the commission may deem expedient. The commission shall permit such further appeal by any of the parties interested in a decision of an appeal tribunal which is not unamimous. The commission may remove to itself or transfer to another appeal tribunal the proceedings on any claim pending before an appeal tribunal. Any proceedings so removed to the commission shall be heard by a quorum thereof in accordance with the requirements in subsection (c) of this section. The commission shall promptly notify the interested parties of its findings and decision.

(f) Procedure.—The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with rules prescribed by the commission for determining the rights of the parties, whether or not such rules conform to common law or statutory rules of evidence and other technical rules of procedure. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing upon a disputed claim shall be recorded, but need not be transcribed unless the disputed claim is further appealed.

(g) Witness Fees.—Witnesses subpœnaed pursuant to this section shall be allowed fees at a rate fixed by the commission. Such fees and all expenses of proceedings involving disputed claims shall be deemed a part of the expense of administering this chapter.

(h) Appeal to Courts.—Any decision of the commission, in the absence of an appeal therefrom as herein provided, shall become final ten days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his remedies before the commission as provided by this chapter. The commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney who has been designated by it for that purpose.

(i) Appeal Proceedings. — The decision of the commission shall be final, subject to appeal as herein provided. Within ten days after the decision of the commission has become final, any party aggrieved thereby may appeal to the superior court of the county of his residence. In case of such appeal, the court shall have power to make party-defendant any other party which it may deem necessary or proper to a just and fair determination of the case. In every case in which appeal is demanded, the appealing party shall file a statement with the commission within the time allowed for appeal, in which shall be plainly stated the grounds upon which a review is sought and the particulars in which it is claimed the commission is in error with respect to its decision. The commission shall make a return to the notice of appeal, which shall consist of all documents and papers necessary to an understanding of the appeal, and a transcript of all testimony taken in the matter, together with its findings of fact and decision thereon, which shall be certified and filed with the superior court to which appeal is taken within thirty days of said notice of appeal. The commission may also, in its discretion, certify to such court questions of law involved in any decision by it. In any judicial proceeding under this section the findings of the commission as to the facts, if there is evidence to support it, and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law. Such actions and the questions so certified shall be heard in a summary manner, and shall be given precedence over all civil cases, except cases arising under the Workmen's Compensation Law of this state. An appeal may be taken from the decision of the superior court, as provided in civil cases. No bond shall be required upon such appeal. Upon the final determination of the case or proceeding the commission shall enter an order in accordance with such determination. Such an appeal shall not act as a supersedeas or stay of any judgment, order, or decision of the court below, or of the commission unless the commission or the court shall so order as to the decision rendered by it. (Ex. Sess. 1936, c. 1, s. 6; 1937, cc. 150, 448, s. 4; 1941, c. 108, s. 5; 1943, c. 377, ss. 9, 10.)

Editor's Note.—The first 1937 amendment omitted the requirement that attorneys representing the commission as mentioned in subsection (h) be regular employees of the commission. The second 1937 amendment inserted the words beginning "or may provide" at the end of the first sentence of subsection (e).

The 1941 amendment rewrote subsection (b).

The 1943 amendment added to the third sentence of subsection (b) the provision that the commission shall be deemed an interested party. It also added the proviso to said sentence. The amendment omitted the words "and by the deputy whose decision has been overruled or modified by an appeal tribunal" formerly appearing at the end of the second sentence of subsection (e).

Appeal by Commission.—Under this section the exact status of the commission as a party to an action is not defined and the part it is to play as such is left somewhat in the realm of speculation, and there is nothing in the provision which constitutes the commission guardian or trustee for a claimant or which would warrant the conclusion that it is authorized to prosecute an appeal from a judgment against a claimant when the claimant is content. Nor may it do so for the purpose of adjudicating issues which are merely incidental to the claimant's cause of action. In re Mitchell, 220 N. C. 65, 67, 16 S. E. (2d) 476, 142 A. L. R. 931.

Finding of Fact on Appeal.—Upon appeal to the superior court from any final decision of the commission, the findings of the commission as to the facts, if supported by evidence, and in the absence of fraud, are conclusive, the jurisdiction of the superior court on appeal being limited to questions of law. In re Steelman, 219 N. C. 306, 13 S. E. (2d) 544, 135 A. L. R. 929.

Cited in Unemployment Compensation Comm. v. National Life Ins. Co., 219 N. C. 576, 14 S. E. (2d) 689, 139 A. L. R. 895.

§ 96-16. Seasonal industries. — Whenever the commission finds that on account of seasonal conditions it is highly impracticable or impossible for an employer in a particular industry or branch thereof to operate for a period or periods of not less than four weeks nor more than thirty-six weeks in a calendar year and the employer cus-

tomarily operates entirely or in a branch of his industry only during a regularly recurring period or periods of not less than four weeks nor more than thirty-six weeks in a calendar year, then the rights to benefits payable to an otherwise eligible individual engaged in such a seasonal industry, or branch thereof, who earned as much as ten ($10.00) dollars during the preceding seasonal period, shall be limited in each calendar year to weeks of unemployment during the longest seasonal period or periods as determined by the commission, upon application by the employer, to be customary in such industry or branch of such industry; provided only that the employer tenders at the beginning of each season, and makes available during the season, employment equivalent to employment during the preceding seasonal period to each individual employed by him who earned as much as ten ($10.00) dollars during the preceding seasonal period. The employer shall tender work to such individual prior to the commencement of the seasonal period at such time and in such manner as the commission may by regulation prescribe. Notice when given in accordance with such regulations shall be conclusive as to the fact of tender of work by the employer to the employee; and provided further, that if such individual fails without good cause to report for and accept such work at the time when tendered his right to compensation shall be barred for the duration of the season, but no individual shall be disqualified for benefits for failing to report for or refuse to accept work if such work is not suitable work as provided in § 96-14 (c) of this chapter. It shall be the duty of the commission, upon request and application of each employer, to ascertain and determine, or re-determine, such seasonal period or periods for each such seasonal employer. During a current season an otherwise eligible individual previously employed in a prior season and unemployed during such subsequent season through no fault of his own, shall be paid benefits for each week of such unemployment within the seasonal period, in accordance with the provisions of this chapter, and all such benefits thus paid for unemployment during the current season shall be paid out of and charged against the "reserve" account of the employer by whom he was employed during the previous season. The maximum benefits payable to an otherwise eligible individual whose employment is only in a seasonal industry shall be limited to sixteen times his weekly benefit amount in a benefit year; however, any individual who during a current calendar year is eligible for payment of compensation during any week or weeks other than weeks of the calendar year embracing the seasonal period, and who, during the preceding calendar year was employed in a seasonal industry or branch thereof, shall only be entitled to maximum benefit payments as follows:

If for any weeks of total unemployment which occur and for which benefits are payable during any period not within the seasonal period as prescribed by the commission the maximum benefit amount shall be an amount equal to sixteen times his weekly benefit amount divided by his total wages in the base period and multiplied by the wages paid in his base period in covered employment not within the seasonal period, and the maximum benefits payable for such individual during the seasonal period shall be an amount equal to sixteen times the individual's weekly benefit amount divided by the wages paid in the base period and multiplied by the wages paid within the seasonal period in covered employment in the base period. The earnings of a worker who has earned wages in seasonal employment shall be taken into consideration together with all other wages earned in employment subject to this chapter in determining his qualifications and eligibility for benefits. Where an employer in its branches or divisions carries on both seasonal and full-time operations, this section shall apply only to that portion of such industry or occupation as is determined by the commission to be seasonal after application for such determination has been made by the employer, and notice thereof posted conspicuously by the employer in his seasonal establishments. (1939, c. 28; 1941, c. 108, s. 7; 1943, c. 377, s. 14½.)

Editor's Note.—The 1943 amendment changed the proviso to the first sentence.

§ 96-17. Protection of rights and benefits.—(a) Waiver of Rights Void.—Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this chapter shall be void. Any agreement by any individual in the employ of any person or concern to pay all or any portion of an employer's contributions, required under this chapter from such employer, shall be void. No employer shall directly or indirectly make or require or accept any deduction from the remuneration of individuals in his employ to finance the employer's contributions required from him, or require or accept any waiver of any right hereunder by any individual in his employ. Any employer or officer or agent of an employer who violates any provision of this subsection shall, for each offense, be fined not less than one hundred dollars nor more than one thousand dollars or be imprisoned for not more than six months, or both.

(b) Limitation of Fees.—No individual claiming benefits shall be charged fees of any kind in any proceeding under this chapter by the commission or its representatives or by any court or any officer thereof. Any individual claiming benefits in any proceeding before the commission or a court may be represented by counsel; but no such counsel shall either charge or receive for such services more than an amount approved by the commission. Any person who violates any provision of this subsection shall, for each such offense, be fined not less than fifty dollars nor more than five hundred dollars or imprisoned for not more than six months, or both.

(c) No Assignment of Benefits; Exemptions.—Any assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under this chapter shall be void; and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debt; and benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred for necessaries furnished to such individual or his spouse or dependents during the time when such

individual was unemployed. Any waiver of any exemption provided for in this subsection shall be void. (Ex. Sess. 1936, c. 1, s. 15; 1937, c. 150.)

Editor's Note.—Prior to the 1937 amendment the individual mentioned in subsection (b) could be represented by a duly authorized agent as well as by counsel.

§ 96-18. Penalties. — (a) Whoever makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under this chapter, either for himself or for any other person, shall be punished by a fine of not less than twenty dollars ($20.00) nor more than fifty dollars ($50.00), or by imprisonment for not longer than thirty days; and each such false statement or representation or failure to disclose a material fact shall constitute a separate offense.

(b) Any employing unit or any officer or agent of an employing unit or any other person who makes a false statement or representation knowing it to be false, or who knowingly fails to disclose a material fact, to prevent or reduce the payment of benefits to any individual entitled thereto, or to avoid becoming or remaining subject hereto, or to avoid or reduce any contribution or other payment required from an employing unit under this chapter, or who wilfully fails or refuses to furnish any reports required hereunder, or to produce or permit the inspection or copying of records as required hereunder, shall be punished by a fine of not less than twenty dollars nor more than two hundred dollars or by imprisonment for not longer than sixty days, or by both such fine and imprisonment; and each such false statement or representation or failure to disclose a material fact, and each day of such failure or refusal, shall constitute a separate offense.

(c) Any person who shall wilfully violate any provision of this chapter or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this chapter, and for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be punished by a fine of not less than twenty dollars nor more than two hundred dollars, or by imprisonment for not longer than sixty days, or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense.

(d) Any person who, by reason of the non-disclosure or misrepresentation by him or by another of a material fact (irrespective of whether such non-disclosure or misrepresentation was known or fraudulent), has received any sum as benefits under this chapter while any conditions for the receipt of benefits imposed by this chapter were not fulfilled in his case, or while he was disqualified from receiving benefits, shall, in the discretion of the commission, either be liable to have such sum deducted from any future benefits payable to him under this chapter, or shall be liable to repay to the commission for the unemployment compensation fund a sum equal to the amount so received by him, and such sum shall be collectible in the manner provided in § 96-10 (b) for the collection of past-due contributions.

(e) An individual shall not be entitled to receive benefits for the remainder of any benefit year during which he has been found to have received any sum as benefits under this chapter by reason of the intentional non-disclosure or misrepresentation by him, or by another with his knowledge, of a material fact.

(f) Any individual discharged for larceny or embezzlement in connection with his employment, if such individual is convicted thereof in a court of competent jurisdiction, or if the commission finds that he has made a voluntary confession of guilt, shall not be entitled to receive any benefits based on wages earned in the base period applicable at the time of such discharge. (Ex. Sess. 1936, c. 1, s. 16; 1943, c. 319; 1943, c. 377, ss. 29, 30.)

Editor's Note.—The first 1943 amendment struck out the words "to make any such contributions or other payments or" formerly appearing after the word "refuses" in line ten of subsection (b). The second 1943 amendment added subsections (e) and (f), and omitted the words "or by both such fine and imprisonment" formerly appearing after the word "days" in line nine of subsection (a).

§ 96-19. Enforcement of unemployment compensation law discontinued upon repeal or invalidation of federal acts.—It is the purpose of this chapter to secure for employers and employees the benefits of Title III and Title IX of the Federal Social Security Act, approved August fourteenth, one thousand nine hundred thirty-five, as to credit on payment of federal taxes, of state contributions, the receipt of federal grants for administrative purposes, and all other provisions of the said Federal Social Security Act; and it is intended as a policy of the state that this chapter and its requirements for contributions by employers shall continue in force only so long as such employers are required to pay the federal taxes imposed in said Federal Social Security Act by a valid act of congress. Therefore, if Title III and Title IX of the said Federal Social Security Act shall be declared invalid by the United States supreme court, or if such law be repealed by congressional action so that the federal tax cannot be further levied, from and after the declaration of such invalidity by the United States supreme court, or the repeal of said law by congressional action, as the case may be, no further levy or collection of contributions shall be made hereunder. The enactment by the Congress of the United States of the Railroad Retirement Act and the Railroad Unemployment Insurance Act shall in no way affect the administration of this law except as herein expressly provided.

All federal grants and all contributions theretofore collected, and all funds in the treasury by virtue of this chapter, shall, nevertheless, be disbursed and expended, as far as may be possible, under the terms of this chapter: Provided, however, that contributions already due from any employer shall be collected and paid into the said fund, subject to such distribution; and provided further, that the personnel of the state unemployment commission shall be reduced as rapidly as possible.

The funds remaining available for use by the North Carolina unemployment commission shall be expended, as necessary, in making payment of all such awards as have been made and are fully approved at the date aforesaid, and the payment of the necessary costs for the further administration of this chapter, and the final settlement of all affairs connected with same. After complete pay-

ment of all administrative costs and full payment of all awards made as aforesaid, any and all moneys remaining to the credit of any employer shall be refunded to such employer, or his duly authorized assignee: Provided, that the state employment service, created by chapter one hundred six, Public Laws of one thousand nine hundred thirty-five, and transferred by chapter one, Public Laws of one thousand nine hundred thirty-six, Extra Session, and made a part of the unemployment compensation commission of North Carolina, shall in such event return to and have the same status as it had prior to enactment of chapter one, Public Laws of one thousand nine hundred thirty-six, Extra Session, and under authority of chapter one hundred six, Public Laws of one thousand nine hundred thirty-five, shall carry on the duties therein prescribed; but, pending a final settlement of the affairs of the unemployment compensation commission of North Carolina, the said state employment service shall render such service in connection therewith as shall be demanded or required under the provisions of this chapter or the provisions of chapter one, Public Laws of one thousand nine hundred thirty-six, Extra Session. (1937, c. 363; 1939, c. 52, s. 8.)

Editor's Note.—The 1939 amendment added the last sentence to the first paragraph.

Art. 3. Employment Service Division.

§ 96-20. Duties of division; conformance to Wagner-Peyser Act; organization; director; employees.—The employment service division of the Unemployment Compensation Commission shall establish and maintain free public employment offices in such number and in such places as may be necessary for the proper administration of this article, and for the purpose of performing such duties as are within the purview of the act of Congress entitled "An act to provide for the establishment of a national employment system and for cooperation with the states in the promotion of such system and for other purposes," approved June sixth, one thousand nine hundred and thirty-three (48 Stat., 113; U. S. C., Title 29, sec. 49(c)), as amended. The said division shall be administered by a full-time salaried director, who shall be charged with the duty to cooperate with any official or agency of the United States having powers or duties under the provisions of the said act of congress, as amended, and to do and perform all things necessary to secure to this state the benefits of the said act of congress, as amended, in the promotion and maintenance of a system of public employment offices. The provisions of the said act of congress, as amended, are hereby accepted by this state, in conformity with section four of said act, and this state will observe and comply with the requirements thereof. The state employment service division is hereby designated and constituted the agency of this state for the purpose of said act. The commission is directed to appoint the director, other officers, and employees of the state employment service. Such appointments shall be made in accordance with regulations prescribed by the director of the United States employment service. (Ex. Sess. 1936, c. 1, s. 12; 1941, c. 108, s. 11.)

§ 96-21. Cooperation with federal board for vocational education.—The employment service division shall cooperate with the federal board for vocational education, division for rehabilitation of crippled soldiers and sailors, in endeavoring to secure suitable employment and fair treatment of the veterans of the world war. (1921, c. 131, s. 3; Ex. Sess. 1936, c. 1, s. 12; C. S. 7312(c).)

§ 96-22. Employment of minors; farm employment; promotion of Americanism.—The employment service division shall have jurisdiction over all matters contemplated in this article pertaining to securing employment for all minors who avail themselves of the free employment service. The employment service division shall have power to so conduct its affairs that at all times it shall be in harmony with laws relating to child labor and compulsory education; to aid in inducing minors over sixteen, who cannot or do not for various reasons attend day school, to undertake promising skilled employment; to aid in influencing minors who do not come within the purview of compulsory education laws, and who do not attend day school, to avail themselves of continuation or special courses in existing night schools, vocational schools, part-time schools, trade schools, business schools, library schools, university extension courses, etc., so as to become more skilled in such occupation or vocation to which they are respectively inclined or particularly adapted; to aid in securing vocational employment on farms for town and city boys who are interested in agricultural work, and particularly town and city high school boys who include agriculture as an elective study; to cooperate with various social agencies, schools, etc., in group organization of employed minors, particularly those of foreign parentage, in order to promote the development of real, practical Americanism through a broader knowledge of the duties of citizenship; to investigate methods of vocational rehabilitation of boys and girls who are maimed or crippled and ways and means for minimizing such handicap. (1921, c. 131, s. 4; Ex. Sess. 1936, c. 1, s. 12; C. S. 7312(d).)

Editor's Note.—This section is summarized in 1 N. C. Law Rev. 308.

§ 96-23. Job placement; information; research and reports.—The employment service division shall make public, through the newspapers and other media, information as to situations it may have applicants to fill, and establish relations with employers for the purpose of supplying demands for labor. The division shall collect, collate, and publish statistical and other information relating to the work under its jurisdiction; investigate economic developments, and the extent and causes of unemployment and remedies therefor within and without the state, with the view of preparing for the information of the general assembly such facts as in its opinion may make further legislation desirable. (1921, c. 131, s. 5; Ex. Sess. 1936, c. 1, s. 12; C. S. 7312(e).)

§ 96-24. Local offices; cooperation with United States service; financial aid from United States.—The employment service division is authorized to enter into agreement with the governing authorities of any municipality, county, township, or school corporation in the state for such period of time as may be deemed desirable for the purpose of establishing and maintaining local free employment offices, and for the extension of vocational

guidance in cooperation with the United States employment service, and under and by virtue of any such agreement as aforesaid to pay, from any funds appropriated by the state for the purposes of this article, any part or the whole of the salaries, expenses or rent, maintenance, and equipment of offices and other expenses. (1921, c. 131, s. 6; 1935, c. 106, s. 4; 1931, c. 312, s. 3; Ex. Sess. 1936, c. 1, s. 12; C. S. 7312(f).)

Editor's Note.—Prior to the amendment of 1935, this section applied to vocational guidance of minors. The section was extended by the amendment.

§ 96-25. Acceptance and use of donations.—It shall be lawful for the employment service division to receive, accept, and use, in the name of the people of the state, or any community or municipal corporation, as the donor may designate, by gift or devise, any moneys, buildings, or real estate for the purpose of extending the benefits of this article and for the purpose of giving assistance to deserving maimed or crippled boys and girls through vocational rehabilitation. (1921, c. 131, s. 7; 1931, c. 312, s. 3; Ex. Sess. 1936, c. 1, s. 12; C. S. 7312(g).)

§ 96-26. Cooperation of towns, townships, and counties with division.—It shall be lawful for the governing authorities of any municipality, county, township, or school corporation in the state to enter into cooperative agreement with the employment service division and to appropriate and expend the necessary money upon such conditions as may be approved by the employment service division and to permit the use of public property for the joint establishment and maintenance of such offices as may be mutually agreed upon, and which will further the purpose of this article. (1921, c. 131, s. 8; 1931, c. 312, s. 3; 1935, c. 106, s. 5; Ex. Sess. 1936, c. 1, s. 12; C. S. 7312(h).)

Editor's Note.—The amendment of 1935 inserted the clause reading "upon such conditions as may be approved by the commissioner of labor."

§ 96-27. Method of handling employment service funds.—All federal funds received by this state under the Wagner-Peyser Act (48 Stat. 113; Title 29, U. S. C., § 49) as amended, and all state funds appropriated or made available to the employment service division shall be paid into the unemployment compensation administration fund, and said moneys are hereby made available to the state employment service to be expended as provided in this article and by said act of Congress. For the purpose of establishing and maintaining free public employment offices, said division is authorized to enter into agreements with any political subdivision of this state or with any private, nonprofit organization, and as a part of any such agreement the commission may accept moneys, services, or quarters as a contribution to the unemployment compensation administration fund. (1935, c. 106, s. 7; Ex. Sess. 1936, c. 1, s. 12; 1941, c. 108, s. 11.)

Editor's Note.—The 1941 amendment struck out the words "the special employment service account in" formerly appearing after the word "into" in line five of the text of this section.

§ 96-28. Annual appropriation.—There is hereby appropriated to the unemployment compensation commission seventy-five thousand dollars annually, for the purpose of paying the state's contribution towards the expenses of the employment service division. (Ex. Sess. 1936, c. 1, s. 13; 1941, c. 108, s. 12.)

Chapter 97. Workmen's Compensation Act.

Sec. **Art. 1. Workmen's Compensation Act.**

Art. 1. Workmen's Compensation Act.

§ 97-1. Official title.—This article shall be known and cited as "The North Carolina Workmen's Compensation Act." (1929, c. 120, s. 1.)

In General.—It was the purpose of the General Assembly in providing for compensation for an employee, that the North Carolina Industrial Commission, created by the act for that purpose, shall administer its provisions to the end that both employee and employer shall receive the benefits and enjoy the protection of the act. The act contemplates mutual concessions by employee and employer; for that reason, its validity has been upheld, and its policy approved. Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 578, 191 S. E. 403.

It is not the purpose of the Workmen's Compensation Act to exculpate or absolve employers from the consequences of their negligent conduct. Tscheiller v. National Weaving Co., 214 N. C. 449, 452, 199 S. E. 623.

Judicial Notice.—Our courts will take judicial notice of a public statute of the state, which therefore need not be

pleaded, and the North Carolina Workmen's Compensation Act is a public statute. Miller v. Roberts, 212 N. C. 126, 193 S. E. 286.

Construction.—The Workmen's Compensation Act is to be construed liberally to effectuate the broad intent of the act to provide compensation for employees sustaining an injury arising out of and in the course of the employment, and no technical or strained construction should be given to defeat this purpose. Johnson v. Asheville Hosiery Company, 199 N. C. 38, 153 S. E. 591. See Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438; Barbour v. State Hospital, 213 N. C. 515, 516, 196 S. E. 812.

However, the rule of liberal construction cannot be extended beyond the clearly expressed language of the act. Gilmore v. Hoke County Board of Education, 222 N. C. 358, 23 S. E. (2d) 292.

Nor can the rule of liberal construction be carried to the point of applying it to employments not within its stated scope, or not within its intent or purpose. Wilson v. Mooresville, 222 N. C. 283, 290, 22 S. E. (2d) 907.

The provisions of the Workmen's Compensation Act are to be liberally construed to effectuate the legislative intent as gathered from the act to award compensation for the injury or death of an employee arising out of and in the course of his employment, irrespective of the question of negligence. Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 154 S. E. 66.

The various provisions of the Workmen's Compensation Act are to be construed in their relations to each other as a whole to effectuate the intent of the Legislature to provide compensation to an employee for injury arising out of and in the course of his employment. Rice v. Denny Roll & Panel Co., 199 N. C. 154, 154 S. E. 69.

The Workmen's Compensation Act must be liberally construed and liberally applied. Thomas v. Raleigh Gas Co., 218 N. C. 429, 11 S. E. (2d) 297.

The Workmen's Compensation Act will be construed as a whole to effectuate the intent of the general assembly. Morris v. Laughlin Chevrolet Co., 217 N. C. 428, 8 S. E. (2d) 484, 128 A. L. R. 132.

Constitutionality.—The Workmen's Compensation Act of North Carolina has been held to be constitutional by the supreme court of that state, and the supreme court of the United States has upheld the constitutionality of similar compensation acts. Jenkins v. American Enka Corp., 95 F. (2d) 755.

The contention that the workmen's compensation act is unconstitutional on the ground that it destroys the right of trial by jury is untenable. McCune v. Rhodes-Rhyne Mfg. Co., 217 N. C. 351, 8 S. E. (2d) 219.

Basis of Liability.—The Workmen's Compensation Act takes into consideration certain elements of a mutual concession between the employer and employee by which the question of negligence is eliminated, and liability under the act rests upon the employer upon the condition precedent of an injury by accident occurring in the course of employment and arising out of it. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266.

State Statute Governs Rights of Parties.—The rights of employer, employee, and insurance carrier under a workmen's compensation statute are governed by the law of the state of the statute. Betts v. Southern Ry. Co., 71 F. (2d) 787, 789.

The Industrial Commission has exclusive jurisdiction of the rights and remedies herein afforded. Hedgepeth v. Lumbermen's Mut. Cas. Co., 209 N. C. 45, 47, 182 S. E. 704.

Jurisdiction.—Findings of fact of the industrial commission, supported by competent evidence, were to the effect that defendant's employee was temporarily employed in pumping water from a barge which was being loaded with logs on a navigable river, that the barge careened, that the employee fell or jumped from the shore side of the barge and was actually killed on land as a result of the barge crushing him. It further appeared that the barge was without means of propulsion and was at the time incapable of navigation, and that both the employee and the defendant had accepted, and were amenable to this chapter. Held: The N. C. industrial commission had jurisdiction to hear and determine the claim for compensation for the employee's death, its jurisdiction not being ousted by the admiralty and maritime jurisdiction of the United States. Johnson v. Foreman-Blades Lbr. Co., 216 N. C. 123, 4 S. E. (2d) 334.

It must appear affirmatively by evidence or by admission of record that a defendant sought to be held liable under this chapter had in his employ five or more employees in order to sustain the jurisdiction of the commission, and when this fact is not made to appear, the award of compensation against such defendant must be reversed. Chadwick v. North Carolina Department of Conservation, etc., 219 N. C. 766, 14 S. E. (2d) 842.

Proceeding Should Not Be in Name of Deceased Employee.—A proceeding under the Workmen's Compensation Act to determine liability of defendants to the next of kin of a deceased employee should not be brought in the name of the deceased employee. Slade v. Willis Hosiery Mills, 209 N. C. 823, 184 S. E. 844.

Applied in Davis v. Mecklenburg County, 214 N. C. 469, 199 S. E. 604.

§ 97-2. Definitions.—When used in this article, unless the context otherwise requires—

(a) Employment.—The term "employment" includes employment by the State and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employments in which five or more employees are regularly employed in the same business or establishment, except agriculture and domestic services and sawmills and logging operators in which less than fifteen employees are regularly employed.

(b) Employee.—The term "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and as relating to those so employed by the State, the term "employee" shall include all officers and employees of the State, except only such as are elected by the people, or by the General Assembly, or appointed by the Governor, either with or without the confirmation of the Senate; as relating to municipal corporations and political subdivisions of the State, the term "employee" shall include all officers and employees thereof, except such as are elected by the people or elected by the council or other governing body of said municipal corporation or political subdivision, who act in purely administrative capacities, and to serve for a definite term of office. The term "employee" shall include members of the North Carolina National Guard, except when called into the service of the United States, and members of the North Carolina State Guard, and members of these organizations shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duty under orders of the Governor. The term "employee" shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full time basis or a part time basis, and including deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation of the emergency. The sheriff shall furnish to the board of county commissioners a complete list of all deputy sheriffs named or appointed by him immediately after their appointment, and notify the board of commissioners of any changes made therein promptly after such changes are made. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representative, dependents, and other persons to whom compensation may be payable: Provided, that the third and fourth sentences herein shall not apply to Pender, Cherokee, Avery, Perqui-

mans, Gates, Macon, Watauga, Ashe, Union, Wilkes, Hyde, Caswell, Bladen and Carteret Counties.

(c) Employer.—The term "employer" means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person. The board of commissioners of each county of the state, for the purposes of this law, shall be considered as "employer" of all deputy sheriffs serving within such county, or persons serving or performing the duties of a deputy sheriff, whether such persons are appointed by the sheriff or by the board of commissioners and whether serving on a fee basis or salary basis. Each county is authorized to insure its compensation liability for deputy sheriffs to the same extent it is authorized to insure other compensation liability for employees thereof: Provided, that the last two sentences herein shall not apply to Pender, Cherokee, Avery, Perquimans, Gates, Macon, Watauga, Ashe, Union, Wilkes, Hyde, Caswell, Bladen and Carteret Counties.

(d) Person.—The term "person" means individual, partnership, association or corporation.

(e) Average Weekly Wage.—"Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury,divided by fifty-two; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such fifty-two weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impracticable to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the fifty-two weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract they shall be deemed a part of his earnings.

(f) Injury.—"Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident.

(g) Carrier.—The term "carrier" or "insurer" means any person or fund authorized under § 97-93 to insure under this article, and includes self-insurers.

(h) Commission. — The term "commission" means the North Carolina Industrial Commission, to be created under the provisions of this article.

(i) Disability.—The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(j) Death.—The term "death" as a basis for a right to compensation means only death resulting from an injury.

(k) Compensation.—The term "compensation" means the money allowance payable to an employee or to his dependents as provided for in this article, and includes funeral benefits provided herein.

(l) Child, Grandchild, Brother, Sister. — The term "child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother," and "sister" include only persons who at the time of the death of the deceased employee are under eighteen years of age.

(m) Parent.—The term "parent" includes stepparents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(n) Widow.—The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

(o) Widower.—The term "widower" includes only the decedent's husband who at the time of her death lived with her and was dependent for support upon her.

(p) Adoption.—The term "adoption" or "adopted" means legal adoption prior to the time of the injury.

(q) Singular.—The singular includes the plural and the masculine includes the feminine and neuter.

(r) Hernia.—In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:

First. That there was an injury resulting in hernia or rupture.

Second. That the hernia or rupture appeared suddenly.

Third. That it was accompanied by pain.

Fourth. That the hernia or rupture immediately followed an accident.

Fifth. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

All hernia or rupture, inguinal, femeral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by a radical operation. If death results from such operation, the death shall be considered as a result of the injury, and compensation paid in accordance with the provisions of § 97-38. In non-fatal cases, if it is shown by special examination, as provided in § 97-27, that the injured employee has a disability resulting after the operation, compensation for such disability shall be paid in accordance with the provisions of this article.

In case the injured employee refuses to undergo the radical operation for the cure of said hernia or rupture, no compensation will be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease, or is otherwise in such physical condition that the Commission considers it unsafe for the employee to undergo said operation, the employee shall be paid compensation in accordance with the provisions of this article. (1929, c. 120, s. 2; 1933, c. 448; 1939, c. 277, s. 1; 1943, cc. 543, 672, s. 1.)

Cross Refreence.—As to jurisdiction of commission dependent on showing of employment of five or more, see note to § 97-1.

Editor's Note.—Public Laws of 1933, c. 448, added, to subsection (a) of this section, the clause applicable to saw-mills and logging operators.

The 1939 amendment inserted the second and third sentences in subsection (b) and added the second and third sentences to subsection (c).

The first 1943 amendment added the proviso at the end of subsection (b) and the proviso at the end of subsection (c). The second 1943 amendment inserted the second sentence in subsection (b).

The condition antecedent to compensation is the occurrence of an injury (1) by accident (2) arising out of and (3) in the course of employment. Wilson v. Mooresville, 222 N. C. 283, 22 S. E. (2d) 907.

Injury Arising out of and in the Course of Employment.—Under the Compensation Act injuries by accident arising out of and in the course of the employment are compensable (Love v. Lumberton, 215 N. C. 28, 1 S. E. (2d) 121) regardless of whether the accident was the result of the employer's negligence, but injuries not resulting from an accident arising out of and in the course of the employment, and diseases which do not result naturally and unavoidably from an accident are not compensable. Lee v. American Enka Corp., 212 N. C. 455, 193 S. E. 809.

In construing this act the words "out of and in the course of the employment," used in connection with injuries compensable thereunder, is not to be determined by the rules controlling in negligent default cases at common law, but an accidental injury is compensable thereunder if there is a causal relation between the employment and injury, if the injury is one which, after the event, may be seen to have had its origin in the employment, and it need not be shown that it is one which ought to have been foreseen or expected. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266; Ashley v. F.-W. Chevrolet Co., 222 N. C. 25, 21 S. E. (2d) 834.

This definition presents a double aspect. "In the course of" refers to the time, place and circumstances under which the accident occurred. This is, in most cases, a fairly simple question. The real difficulty arises in determining whether the accident is one "arising out of the employment." That this is considered as a mixed question of law and fact makes the problem all the more difficult. In the final analysis it means that there must be apparent "to the rational mind, upon consideration of all the circumstances, a casual connection between the conditions under which the work is required to be performed and the resulting injury." For instance, an injury occasioned by an assault of a co-employee and growing out of differences in regard to the employment was held to be within the definition. But where the assault grew out of personal malice unconnected with the employment, no compensation was awarded. In the further case of an unprovoked assault by a third person upon an employee, the risk having arisen out of the employment, a recovery was allowed. Moreover, if the injury occurs from a prank played by a fellow workman, compensation is given. But if the injured employee engaged in the play, no recovery is permitted. 8 N. C. L. Rev. 418.

The words "out of" refer to the origin or cause of the accident. The words "in the course of" refer to the time, place, and circumstances under which an accident occurs. Plemmons v. White's Service, 213 N. C. 148, 195 S. E. 370; Wilson v. Mooresville, 222 N. C. 283, 22 S. E. (2d) 907.

These terms have been so often defined by the supreme court that they now have an established and well recognized meaning. Bryan v. Loving Co., 222 N. C. 724, 24 S. E. (2d) 751.

This chapter does not contemplate compensation for every injury an employee may receive during the course of his employment but only those from accidents arising out of, as well as, in the course of employment. Where an injury cannot fairly be traced to the employment as a contributing proximate cause, or comes from a hazard to which the workman would have been equally exposed apart from the employment or from a hazard common to others, it does not arise out of the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. Bryan v. Loving Co., 222 N. C. 724, 24 S. E. (2d) 751.

The definition of injury given in § 97-2(f) also provides that it "shall not include a disease in any form, except where it results naturally and unavoidably from the accident." In applying this to the following case the Commission evinced a willingness to construe definitions liberally. Plaintiff, a truck driver, sustained an injury to his eye while cleaning a carburetor. The injury irritated his eye and resulted in ulcer. Seven days after the accident the plaintiff was treated by a doctor, who gave the plaintiff some lotion to use. He visited the doctor three times. Then gonorrhea opthalmia showed up, which was on the thirteenth day after the accident. As a result of the infection the plaintiff lost one eye and suffered a partial loss of use in the other eye. Compensation was allowed. The Commission said that the disease was "natural" because one infection opened the way for other infections. There was more trouble with the word "unavoidably." The Commission quotes from the opinions rendered in other jurisdictions to illustrate that "unavoidably" does not mean "absolutely inescapable," but that "a thing is generally considered unavoidable when common prudence and foresight cannot prevent it." And since no evidence was presented that the plaintiff had been careless, and since the plaintiff had no reason to suspect a possible infection of this nature, the disease was found to have resulted unavoidably from the accident. This liberal construction tends to effectuate the general purpose of the Workmen's Compensation Act. 8 N. C. L. Rev. 421.

In construing sub-section (f) of this section the words "arising out of the employment" in regard to injuries compensable are broad and comprehensive, and must be determined in the light and circumstances of each case, and the act, applying only to industries employing more than five workmen, contemplates the gathering together of workmen of varying characteristics, and the risks and hazards of such close contact, joking and pranks by the workmen, are incidents to the business and grow out of it, and are ordinary risks assumed by the employer under the act. Chambers v. Union Oil Co., 199 N. C. 28, 153 S. E. 594. See also, Wilson v. Mooresville, 222 N. C. 283, 22 S. E. (2d) 907.

The question of whether compensation is recoverable under this act depends upon whether the accident complained of arises out of and in the course of the employment of the one injured, and its determination depends largely upon the facts of each particular case as matters of fact and conclusions of law, and general definitions are unsatisfactory. Harden v. Thomasville Furniture Co., 199 N. C. 733, 155 S. E. 728.

If one employee assault another solely from anger, hatred, revenge, or vindictiveness, not growing out of or as an incident to the employment, the injury is to be attributed to the voluntary act of the assailant, and not as an incident of the employment. But if the assault be incidental to some duty of the employment, the injuries suffered thereby may properly be said to arise out of the employment. Ashley

v. F-W. Chevrolet Co., 222 N. C. 25, 21 S. E. (2d) 834, wherein finding held to sustain award.

Where in a proceeding under this act the evidence tends to show that the employee was a moulder in the employer's foundry, and that he struck his negro assistant with a shovel after the assistant had spoken words to him he deemed insulting, whereupon the assistant left the employment and returned and shot the claimant while he was doing his work, causing permanent injury, is sufficient within the intent and meaning of the terms "injury by accident arising out of and in the course of the employment." Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266.

In order for compensation to be recovered for the death of an employee under this act it is required that the injury causing death result from an accident arising out of and in the course of the employment, as a proximate cause, and where compensation is sought for the killing of one employee by another for purely personal and unrelated grounds, or when one was employed at night and the other by day, and the killing at night was a result of personal enmity alone, and these facts are found by the Commission and approved by the trial judge, the judgment denying the right of compensation will be affirmed on appeal. Harden v. Thomasville Furniture Co., 199 N. C. 733, 155 S. E. 728.

An injury compensable under subsection (f) of this section, is one by accident arising out of and in the course of the employment, the words "out of" referring to the origin or cause of the accident, and the words "in the course of" to the time, place and circumstances under which the accident occurred. Ridout v. Rose's 5-10-25c. Stores, 205 N. C. 423, 171 S. E. 642.

Whether an accident arises "out of the employment" is a mixed question of law and fact to be determined in the light of the facts and circumstances of each case, but the term requires that there be some causal connection between injury and the employment or that the risk be incidental to the employment. Id.

Where intestate died of hydrophobia resulting from a dog bite received by him while engaged in his duties as attendant in a filling station, it was held that claimant was not entitled to compensation for the employees's death, since there was no causal connection between the employment and the bite of a dog running at large, and the accident was not from a risk incidental to the employment. Plemmons v. White's Service, 213 N. C. 148, 195 S. E. 370.

Where a deliveryman was driving a truck in the course of his employment and, while passing a group of boys playing baseball, a baseball struck the windshield and a piece of glass from the windshield struck him in the eye, resulting in serious injury, it was held that the injury resulted from an accident arising out of and in the course of the employment, within the meaning of this section. Perkins v. Sprott, 207 N. C. 462, 177 S. E. 404.

Evidence that claimant was not sure that the mill in which he was employed would be operated on the day in question and that he rode to work with another employee, requesting his son to follow in his car to ride him home in case the mill was not operated, and that upon getting to work and ascertaining that the mill would be operated, he put his lunch in the room where he worked and went to a platform at the front of the mill to tell his son not to wait for him, and that he there slipped on ice and fell to his injury is sufficient to support the finding that the injury resulted from an accident arising out of and in the course of his employment. Gordon v. Thomasville Chair Co., 205 N. C. 739, 172 S. E. 485.

Plaintiff while about his employer's business, was struck on the back of the head by hides he was jerking from hooks about 10 feet from the floor, and had to stop work for a very short time. As a result of the blow plaintiff contracted hemorrhagic pachymeningitis which caused his total disability. It was held to be an injury by accident, arising out of and in the course of his employment within this section. Eller v. Lawrence Leather Co., 222 N. C. 23, 21 S. E. (2d) 809.

The evidence before the industrial commission tended to show that the deceased employee, for whose death compensation was sought, had been in exceptionally good health up to the time of the accident, that he fell from a platform, breaking his leg, and lay where he fell for about half-hour, exposed to the cool weather, that he was then discovered and carried into the office, where he had to wait some two hours for medical attention. There was expert opinion testimony to the effect that the exposure was a contributing factor causing acute nephritis resulting in death, and that the accident and exposure accelerated the employee's death. It was held that the evidence is sufficient to support the finding of the industrial commission that the disease resulted naturally and unavoidably from the accident. Doggett v. South Atlantic Warehouse Co., 212 N. C. 599, 194 S. E. 111.

In Plyler v. Charlotte Country Club, 214 N. C. 453, 199 S. E. 622, the evidence was insufficient to support finding that injury arose out of employment.

Injury Arising Out of and in the Course of Employment.—Evidence tending to show that a night watchman employed to watch over one section of a highway under construction came over to a night watchman employed to watch over another section thereof, and engaged in an altercation relating to matters foreign to the employment, and that one of them killed the other as a result thereof, is sufficient to support the finding of the industrial commission that the deceased's death was not the result of an accident arising out of and in the course of the employment, and therefore such finding is conclusive on the courts. McNeill v. Ragland Const. Co., 216 N. C. 744, 6 S. E. (2d) 491.

The findings of fact of the industrial commission, supported by the evidence, were to the effect that deceased employee was a night watchman, that his duties were to make periodic inspection and to attend the furnaces and to get up steam, that on the night in question he procured his son to help him, that he instructed his son to do certain of his duties in the boiler room, that he placed a small box and plank on a walkway eight or nine feet high, with one end of the plank resting on the box, and lay down on the plank, that his son called him in time to make a periodic inspection some thirty minutes later, and that in getting up from his recumbent position, while his son was engaged in the performance of the employee's active duties in the boiler room, the employee fell from the walkway and was fatally injured. The facts do not compel the conclusion, as a matter of law, that at the time of injury the employee had not deviated from, or abandoned his employment, and therefore the award of the industrial commission denying compensation must be upheld. Stallcup v. Carolina Wood Turning Co., 217 N. C. 302, 7 S. E. (2d) 550.

Injury to Salesman on Week-End Trip.—Evidence that plaintiff, a traveling salesman, used his employer's car for week-end trip and was injured in a wreck in returning is held to support the finding of the industrial commission that the accident did not arise out of and in the course of the employment, notwithstanding that the injured employee, at the destination of the trip, met and conversed with a representative of the employer without appointment or direction of the employer, primarily in regard to a personal matter. Porter v. Noland Co., 215 N. C. 724, 2 S. E. (2d) 853.

As a general rule an injury suffered by an employee while going to or returning from his work does not arise out of and in the course of his employment. Bray v. Weatherly & Co., 23 N. C. 160, 165 S. E. 332.

Where the evidence showed that a policeman was killed in an accident, while returning to work from a leave of absence, the conclusion that he did not sustain injury by accident arising out of and in the course of his employment was sustained. McKenzie v. Gastonia, 222 N. C. 328, 22 S. E. (2d) 712.

Where the evidence tended to show that plaintiff's intestate, a civilian guard of a construction company, stationed at a main gate of a Marine Base to direct traffic and parking about such gate and on the highway immediately adjoining, was at the time of the accident on his way to his place of employment to report for work and was killed, after alighting from a bus, on the public highway immediately in front of such main gate, as he attempted to cross the highway ahead of an oncoming car, an award was error, as deceased was not on the premises of his employer and his injury and death did not arise out of and in the course of his employment. Bryan v. Loving Co., 222 N. C. 724, 24 S. E. (2d) 751.

While ordinarily an employer is not liable under this chapter for an injury suffered by an employee while going to or returning from work, the employer may be held liable when he furnishes the means of transportation as an incident to the contract of employment. Smith v. Gastonia, 216 N. C. 517, 5 S. E. (2d) 540.

Where an employer was under obligation to transport its employees from the woods where they worked to a camp, and provided for that purpose a safety car attached to its railroad train, having forbidden its employees to use the more hazardous log train, and deceased was killed in attempting to get on the log train and thus return to camp, the employee was killed as result of injury by accident arising out of and in the course of his employment. Archie v. Greene Bros. Lbr. Co., 222 N. C. 477, 23 S. E. (2d) 834.

The evidence tended to show that defendant's employees

were required to check in at the office in the morning, were then transported to the job, and after completion of the day's work were transported back to the office where they received instructions as to the next day's work before checking out, their working time being computed from the time of checking in until the time of checking out, that on the date in question they were carried to the job in a truck, but that the president's car was sent to bring them back because of rain, that when the employee in question started to get in the car there were already six persons, including the driver, in the car, that the foreman said he could crowd in the car or ride in with another employee who was driving his own car, and that the employee was fatally injured in an accident occurring after they had reached the city in which plaintiff's place of business was maintained and while they were on their way to defendant's office to check out. The evidence is sufficient to support the finding of the industrial commission that death resulted from an accident arising out of and in the course of the employment, the general rule of nonliability for an accident occurring while an employee is being transported to or from work in a conveyance of a third person over which the employer has no control, not being applicable upon the evidence. Mion v. Atlantic Marble, etc., Co., 217 N. C. 743, 9 S. E. (2d) 501.

A compensable death is one which results from an injury by accident arising out of and in the course of the employment. There must be an accident followed by an injury by such accident which results in harm to the employee before it is compensable under our statute. Slade v. Willis Hosiery Mills, 209 N. C. 823, 825, 184 S. E. 844. See also, Gilmore v. Hoke County Board of Education, 222 N. C. 358, 23 S. E. (2d) 292; Ashley v. F-W. Chevrolet Co., 222 N. C. 25, 21 S. E. (2d) 834.

In order for the death of an employee to be compensable it must result from an injury by accident arising out of and in the course of the employment. McGill v. Lumberton, 215 N. C. 752, 3 S. E. (2d) 324.

Claimant was in the plant of his employer when it was struck by a tornado and was injured as a result of the partial collapse of the building. It was held that the accident resulting in the injury did not arise out of the employment, there being no casual relation between the employment and the accident. Walker v. Wilkins, 212 N. C. 627, 194 S. E. 89.

Casual Employment.—Section 97-13 of this act providing that the act shall not apply to casual employees, is not totally repugnant to this section providing for compensation for an injury to an employee while "in the course of the trade, business," etc., and an employee is entitled to compensation even if the employment is casual if he is injured in the course of the trade, business, etc. Johnson v. Asheville Hosiery Co., 199 N. C. 38, 153 S. E. 591.

The restriction of this act excluding injuries sustained in casual employment will not exclude an applicant under the provisions of the act when he sustains injuries in the course of the general trade, business, etc., of the employer and material or expedient therein, and the painting of the interior of a machine room to give the employees therein a better light or for the protection of the permanent structure is not a casual employment and is one in the general course of business, and the Workmen's Compensation Act applies to an injury received by a workman engaged in such painting. Johnson v. Asheville Hosiery Company, 199 N. C. 38, 153 S. E. 591.

Employment is not casual because intermittent. The Commission has said: ". . . we must conclude that the legislature did not contemplate an employment to be continuous in order to bring it within the act, as they certainly would not enact a statute with such requirements that common knowledge would show to be a nullity under such construction." Employment that is definite, whether for a day or for a year, is not casual. 8 N. C. L. Rev. 422.

This chapter excludes persons whose employment is casual and not in the course of the trade, business, profession or occupation of the employer, and specifically excepts from its provisions casual employees, farm laborers and domestic servants. Burnett v. Palmer-Lipe Paint Co., 216 N. C. 204, 4 S. E. (2d) 507.

An "accident" within the meaning of this act is an unlooked for and untoward event which is not expected or designed by the injured employee. Love v. Lumberton, 215 N. C. 28, 1 S. E. (2d) 121; Slade v. Willis Hosiery Mills, 209 N. C. 823, 825, 184 S. E. 844; Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266; McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. E. 509.

The mere fact that the injury is the result of a wilful and criminal assault of a fellow-servant does not of itself prevent the injury from being accidental. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266.

The word "accident" within the meaning of this act should be construed in its wide and practical sense to give effect to the intent of the act, and an injury produced by inhaling asbestos dust for a period of five months is an accidental injury within the terms of this section, the test being not the amount of time taken to produce the injury but whether it was produced by unexpected and unforeseen, and therefore, accidental means. McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. E. 509.

An "accident" within the contemplation of this chapter is an unusual and unexpected or fortuitous occurrence, there being no indication that the legislature intended to put upon the usual definition of this term any further refinements. Smith v. Cabarrus Creamery Co., 217 N. C. 468, 8 S. E. (2d) 231.

An injury, in order to be compensable under this chapter, must result from an accident, and injuries which are not the result of any fortuitous occurrence but are the natural and probable result of the employment are not compensable. Id.

The industrial commission found, upon supporting evidence, that claimant became temporarily sick and blind while performing usual manual labor in the usual manner, that his condition improved and he went back to work and that shortly thereafter he again suffered a similar disability. The findings support the conclusion that the injury did not result from an accident arising out of and in the course of claimant's employment within the purview of this chapter. Buchanan v. State Highway, etc., Comm., 217 N. C. 173, 7 S. E. (2d) 382.

Death from injury by accident implies a result produced by a fortuitous cause. Slade v. Willis Hosiery Mills, 209 N. C. 823, 825, 184 S. E. 844.

If an employee is injured as a result of the horse-play of a fellow-workman the injured employee is not precluded from recovering his damages under this act if he did not participate therein. Chambers v. Union Oil Co., 199 N. C. 28, 153 S. E. 594.

A newsboy engaged in selling papers is held not to be an employee of the newspaper within the meaning of that term as used in this section, the newsboy not being on the newspaper's payroll and being without authority to solicit subscriptions and being free to select his own methods of effecting sales, although some degree of supervision was exercised by the newspaper. Creswell v. Charlotte News Pub. Co., 204 N. C. 380, 168 S. E. 408.

The secretary and treasurer of a automobile sales company who was injured while traveling to collect accounts due the company was an employee of the company within the intent and meaning of this section at the time of the injury. Hunter v. Hunter Auto Co., 204 N. C. 723, 169 S. E. 648.

A municipal corporation is subject to the Workmen's Compensation Act, even though it employs less than five employees, under this section, the legislative intent to classify municipal corporations with the state and its political subdivisions being consonant with reason and being indicated by § 97-13, which does not include municipal corporations employing less than five employees in listing employers exempt from the act, and § 97-7, which provides that neither the state nor any municipal corporation nor any subdivision of the state, nor employees of the same, shall have the right to reject the provisions of the act, and it being required that these sections be construed in pari materia to determine the legislative intent. Rape v. Huntersville, 214 N. C. 505, 199 S. E. 736.

A worker employed by a city under a contract stipulating the wages to be received by the worker is an employee of the city within the meaning of this section, and the fact that the city obtains the money to pay the wages from the Reconstruction Finance Corporation is immaterial on the question of the relationship between the worker and the city. Mayze v. Forest City, 207 N. C. 168, 176 S. E. 270.

A county board of education is the sole employer of one under contract to teach vocational agriculture in a county school, where such teacher's salary is paid in part from funds furnished as a gift to such board by the state and federal governments, and, as such sole employer, is liable, with its insurance carrier, under this chapter for the death of such teacher from an injury by accident arising out of and in the course of his employment. Callihan v. Board of Education, 222 N. C. 381, 23 S. E. (2d) 297.

Death of a fireman from heart failure brought on by excitement and exhaustion in fighting a fire, is not the result of an accident within the meaning of the Workmen's Compensation Act, heat, smoke, excitement, and physical exer-

tion being the ordinary and expected incidents of the employment. Neely v. Statesville, 212 N. C. 365, 193 S. E. 664.

Person Receiving Federal Relief Not an Employee.—A person furnished work for the relief of himself and family and paid with funds provided by the Federal Relief Administration is not an "employee" of the relief administrative agencies within the meaning of this section. Jackson v. North Carolina Emergency Relief Administration, 206 N. C. 274, 173 S. E. 580. See Barnhardt v. Concord, 213 N. C. 364, 196 S. E. 310.

An employee of the state engaged in the cultivation of food crops on lands of the state used by the state hospital is an employee of the state within the coverage of this and § 97-13, and his death from an accident arising out of and in the course of his employment is compensable. Barbour v. State Hospital, 213 N. C. 515, 196 S. E. 812.

A person employed by a graded school district as teacher and director of athletics is an employee of a political subdivision of the State, and is entitled to the benefits of the Compensation Act under this section. Perdue v. State Board of Equalization, 205 N. C. 730, 172 S. E. 396.

Whether an injured person is an executive officer or an employee within the meaning of this section, is to be determined by the nature of the act performed by him at the time of the injury, but mere desultory, disconnected, and infrequent acts of manual labor not reasonably required by the exigencies of the situation will not classify an executive officer as an employee in the performance of such acts. Nissen v. Winston-Salem, 206 N. C. 888, 175 S. E. 310.

Deputy Sheriff as Employee.—Where a deputy sheriff acting upon his own responsibility and contrary to the instructions of the sheriff received a fatal injury from a person whom he had arrested, he was not an employee of the county within the meaning of this act. Saunders v. Allen, 208 N. C. 189, 179 S. E. 754.

Deputies sheriff are not employees of the sheriff within the meaning of the North Carolina Workmen's Compensation Act, and are not entitled to compensation for injuries resulting from an accident arising out of and in the course of the discharge of their duties, since they occupy a public office and their compensation is fixed and paid as prescribed by statute and not by the sheriff, and the discharge of their duties is not an "employment" within the meaning of that term as used in this section. Borders v. Cline, 212 N. C. 472, 193 S. E. 826.

The provision of ch. 277, Public Laws of 1939, providing that deputy sheriffs should be deemed employees of the county for the purpose of determining the rights of the parties under the Workmen's Compensation Act does not apply to accidents occurring prior to the enactment of the amendment. Clark v. Sheffield, 216 N. C. 375, 5 S. E. (2d) 133.

The evidence tended to show that defendant civic association was incorporated to further the interest of the community, and that its charter specifically empowered it to employ deputy sheriffs to act as police in the community under the provisions of law, that intestate was appointed deputy by the sheriff of the county, but was paid by the association, that the association obtained a compensation policy specifically covering intestate, and that intestate was killed while serving a warrant in the community in the performance of his duties. Held: The evidence is sufficient to support the finding of the industrial commission that at the time intestate was an employee of the civic association, and the association and its insurance carrier are liable for the payment of the award rendered in favor of intestate's dependants. Id.

Employment as Deputy Sheriff or as Jailer.—Where the evidence tended to show that the deceased employee had been appointed by the sheriff as a deputy and had been employed by the county as jailer, that while in the jail he was advised that a man in the vicinity of the jail had shot his wife, that he left the jail and was killed while attempting to arrest the man as he was preparing to flee, the employee, in attempting to make the arrest, was acting in his capacity as deputy sheriff, such act being outside the scope of his employment as jailer, and the evidence is insufficient to support a finding by the industrial commission that he was fatally injured in an accident arising out of and in the course of his employment as jailer. Gowens v. Alamance County, 216 N. C. 107, 3 S. E. (2d) 339.

Injury to Chief of Police.—Where claimants' evidence tended to show that deceased was employed as chief of police of defendant municipality and that deceased died as a result of a shot from a pistol while he was in office, proof of death by violence raises a presumption of accidental death, casting the burden of going forward with the evidence upon the employer and insurance carrier to show that deceased killed himself, when relied on by them, and claimants' evidence is sufficient to support the finding of the industrial commission that death resulted from an accident arising out of and in the course of the employment. McGill v. Lumberton, 218 N. C. 586, 11 S. E. (2d) 873.

Injury to Deputized Policeman Aiding in Arrest.—Evidence that claimant was injured while attempting to aid a policeman in serving a warrant for breach of the peace, and that claimant had been duly deputized by the policeman to aid in making the arrest, is held sufficient to support the finding of the Industrial Commission that at the time of injury claimant was an employee of defendant town under a valid appointment. Tomlinson v. Norwood, 208 N. C. 716, 182 S. E. 659.

Injury to Policeman Pursuing Offender Beyond Jurisdiction.—Where a policeman, in an effort to arrest without warrant a person who has in his presence committed an offense less than a felony, pursues such person beyond the boundaries of the town or district in which by statute he is authorized to act and, in such pursuit, is injured by accident outside of such boundaries, injuries so suffered did not arise out of and in the course of his employment. Wilson v. Mooresville, 222 N. C. 283, 22 S. E. (2d) 907.

Employee Collecting Accounts. — Where there is evidence that it was the employee's duty to collect accounts of his employer for goods sold upon the installment plan and that the employee endeavored to collect an account from a debtor and was struck by another also owing an account to the employer, the injury resulting in death, the evidence is sufficient to sustain a finding by the Industrial Commission that the injury was the result of an accident arising out of and in the course of the employment, and such a finding of fact is conclusive and binding. Winberry v. Farley Stores, 204 N. C. 79, 167 S. E. 475.

Salesman as Employee.—Deceased, at the time of his fatal injury, was engaged in selling the products of defendant. Letters to him from defendant's home office were introduced in evidence which contained instructions for the collection of an account which, as an exception, had been charged directly to the purchaser by defendant, and also a letter stating that defendant would fill his orders C. O. D. without deducting commissions and at the end of the week would then figure his commissions and send him check therefor plus any difference "to make up the $25.00 salary" and also stating that a certain sum was due for social security and asking for his social security number. Held: The evidence, with other evidence in the case, was sufficient to support the finding of the industrial commission that the deceased was an employee of the defendant, and not a jobber or independent contractor. Cloninger v. Ambrosia Cake Bakery Co., 218 N. C. 26, 9 S. E. (2d) 615.

Employee Mowing Employer's Lawn.—When a compensation insurance policy provides coverage solely in connection with the employer's business having a definite location, the policy does not cover injury to an employee sustained while mowing the lawn at the employer's residence. Burnett v. Palmer-Lipe Paint Co., 216 N. C. 204, 4 S. E. (2d) 507.

Hernia.—It is sufficient for the Commission to find the facts required under this section and award compensation if the pain immediately followed the accident although the hernia was not discovered until diagnosis by a physician some days thereafter. Ussery v. Erlanger Cotton Mills, 201 N. C. 688, 161 S. E. 307.

In Moore v. Engineer, etc., Co., 214 N. C. 424, 199 S. E. 605, it was held that claimant's injury resulted from an accident within the contemplation of the compensation act and that the evidence justified the Industrial Commission in finding that hernia appeared "suddenly" within the meaning of this section.

The evidence tended to show that the injured employee was employed to deliver milk, that in delivering milk to a cafe in the regular course of his employment he attempted to lift a box containing chipped ice, and weighing from 125 to 150 pounds, out of a larger box in order to place the milk he was delivering beneath it, that while lifting the box he felt a sharp pain and that it was later determined that he had suffered a hernia. The evidence is sufficient to sustain the finding of the industrial commission that the injury resulted from an accident, since it resulted from an unusual and fortuitous occurrence happening within the body of the employee, which was not a natural and probable result of his employment. Smith v. Cabarrus Creamery Co., 217 N. C. 468, 8 S. E. (2d) 231.

Employee Contracting Pneumonia. — Where an employee got wet in washing certain machines, although furnished with special clothes, and while removing ashes, was in the sunshine and open air, and the sudden change in tempera-

ture caused him to contract pneumonia, from which he died: Held, not accidental injury. Slade v. Willis Hosiery Mills, 209 N. C. 823, 184 S. E. 844.

Injury from Occupational Disease. — Where claimant worked in an asbestos plant for six or seven years, and a dust removing system was not installed until about a year before claimant's discharge when a medical examination disclosed that he was suffering from asbestosis, the evidence shows the injury was the result of an occupational disease not compensable under the Workmen's Compensation Act prior to its amendment by ch. 123, Public Laws of 1935. Swink v. Carolina Asbestos Co., 210 N. C. 303, 186 S. E. 258.

Compensation for Disease Resulting from Accident Not Precluded.—Section 97-80 providing that only the occupational diseases therein specified should be compensable, relates only to occupational diseases, which are those resulting from long and continued exposure to risks and conditions inherent and usual in the nature of the employment, and this section does not preclude compensation for a disease not inherent in or incident to the nature of the employment when it results from an accident arising out of and in the course of the employment. MacRae v. Unemployment Comm., 217 N. C. 769, 9 S. E. (2d) 595.

Executive Performing Manual Labor.—Where evidence showed claimant went to another city to inspect a job which defendant employer was completing, and did manual labor on the job in installing radiators, and was injured in an automobile accident occurring while he was returning home from the job, it was held that the claimant, at the time of his accidental injury, had not been off on a mission of a purely executive nature, but at the time was doing the work of an ordinary laborer or employee. Rowe v. Rowe-Coward Co., 208 N. C. 484, 181 S. E. 254.

Under the dual capacity doctrine executive officers of a corporation will not be denied compensation merely because they are executive officers if, as a matter of fact, at the time of the injury they are engaged in performing manual labor or the ordinary duties of a workman. To come within this doctrine it is not sufficient to show that an executive officer sustained injuries while performing manual or mechanical labor which was no part of his duties. Nor are desultory, disconnected, infrequent acts of manual labor performed by an executive sufficient to classify him as a workman when so engaged. The test is, was he at the time of his injury, as a part of his duties, engaged in performing ordinary, detail, mechanical or manual labor or other ordinary duties of a workman? Gassaway v. Gassaway, 220 N. C. 694, 696, 18 S. E. (2d) 120.

Employee Injured in Alighting from Moving Truck.—Where employer hired two employees to ride on truck to help the driver unload and, on the last trip, the driver consented to let the employees off at the place on his route nearest their homes, in accordance with established custom, and one of the employees attempted to alight before the truck had completely stopped, contrary to express orders, and fell to his mortal injury, the evidence was sufficient to sustain the finding that the accident arose out of and in the course of the employment. Latham v. Southern Fish, etc., Co., 208 N. C. 505, 181 S. E. 640.

A proceeding before the industrial commission for compensation is not a lawsuit in the strict sense, and many of the prerequisites of an action at law are not required. Thus, an infant employee may prosecute his claim directly without the appointment of a next friend or guardian. Lineberry v. Mebane, 218 N. C. 737, 12 S. E. (2d) 252.

Review of Decision.—If there was no conflicting evidence and the Industrial Commission decided as a matter of law that there was no sufficient competent evidence that the injury to plaintiff was "by accident arising out of and in the course of employment", the question is one of law and is reviewable by the court upon appeal. Massey v. Board of Education, 204 N. C. 193, 167 S. E. 695.

Where there is any competent evidence in support of the finding of the Industrial Commission that the accident in question arose out of and in the course of the employment, the finding is conclusive on the courts upon appeal. Latham v. Southern Fish, etc., Co., 208 N. C. 505, 181 S. E. 640.

The finding of fact of the industrial commission that the disease causing an employee's death resulted naturally and unavoidably from an accident is conclusive on appeal when supported by competent evidence. Doggett v. South Atlantic Warehouse Co., 212 N. C. 599, 194 S. E. 111.

Where Record Silent as to Material Fact at Issue.—Where in proceedings under this act there is no finding or adjudication in reference to the contention of the employer that the claimant's injury was occasioned by his wilful intention to injure his assailant, a fellow-servant, the cause will be remanded for a definite determination of the question. Conrad v. Cook-Lewis Foundry Co., 198 N. C. 723, 153 S. E. 266.

Average Weekly Wages.—When, in determining the amount to be awarded the dependents of a deceased employee, the methods of computing the "average weekly wage" enumerated in the first paragraph of subsection "e," of this section, would be unfair because of exceptional circumstances, the industrial commission is authorized by the second paragraph of said subsection to use such other method of computation as would most nearly approximate the amount which the employee would be earning if living, and the provisions of the second paragraph of the subsection apply to all three of the methods of computation enumerated in the first paragraph, and such other method of computation may be invoked for exceptional reasons even though the employee had been constantly employed by the employer for fifty-two weeks prior to the time of the injury causing death. Early v. Basnight & Co., 214 N. C. 103, 198 S. E. 577.

Claimant was employed as janitor, his compensation for such work being paid in part by the state school commission, and was also employed in school maintenance work, his compensation for the maintenance work being paid exclusively by the municipal board of education. He was injured while engaged in duties pertaining exclusively to school maintenance work. It was held that an award computed on the basis of the total compensation customarily earned by claimant, rather than the compensation earned solely in school maintenance work, upon the commission's finding of exceptional conditions was proper. Casey v. Board of Education, 219 N. C. 739, 14 S. E. (2d) 853.

The industrial commission found upon supporting evidence that the deceased employee had been employed by defendant employer for a number of years, that he had been promoted successively from truck driver to stock clerk to salesman with increased wages from time to time, and that he had been given a raise in the last position less than three months prior to the time of injury resulting in death, part of the supporting evidence being testimony by the employee's superior that "with the business he was getting" he would have had further increases. It was held that the findings are sufficient in law to constitute "exceptional reasons" within the meaning of subsection "e," of this section, and the employee's "average weekly wage" was properly fixed at the amount he was earning weekly at the time of the injury, it being patent that the wages he was then receiving were not temporary and uncertain, but constituted a fair basis upon which to compute the award to his dependents. Id.

Plaintiff was employed practically continuously for thirty-three weeks prior to the injury resulting in death, but during that period his wages were twice increased. In the absence of a finding supported by evidence that the average weekly wage for the entire period of employment would be unfair, compensation should have been based thereon, and the computation of the average weekly wage on the basis of the wage during the period after the last increase in pay is not supported by the evidence. Mion v. Atlantic Marble, etc., Co., 217 N. C. 743, 9 S. E. (2d) 501.

Applied in Miller v. Roberts, 212 N. C. 126, 193 S. E. 286.

Quoted, sub-sec. (a), in the dissenting opinion of Clarkson, J., in Thompson's Dependents v. Johnson Funeral Home, 205 N. C. 801, 804, 172 S. E. 500.

Cited in Murphy v. American Enka Corp., 213 N. C. 218, 195 S. E. 536; Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429, 142 A. L. R. 1033.

§ 97-3. Presumption that all employers and employees have come under provisions of chapter. —From and after July 1, 1929, every employer and employee, except as herein stated, shall be presumed to have accepted the provisions of this article respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner herein provided. (1929, c. 120, s. 4.)

Presumption of Acceptance.—In Pilley v. Greenville Cotton Mills, 201 N. C. 426, 160 S. E. 479, it is said: "Under the Workmen's Compensation Act every employer and employee, except as therein stated, is presumed to have accepted the provisions of the act and to pay and accept compensation for personal injury or death as therein set forth. The plaintiff, not being in the excepted class, is bound by the presumption." Miller v. Roberts, 212 N. C. 126, 131, 193

S. E. 286. See Lee v. American Enka Corp., 212 N. C. 455, 193 S. E. 809.

An allegation that the intestate had not accepted the provisions of the Workmen's Compensation Act is immaterial for the reason that this section provides in substance that every employer and employee coming within the purview of the act is presumed to have accepted the provisions thereof. Hanks v. Southern Public Utilities Co., 204 N. C. 155, 156, 167 S. E. 560.

Where the evidence does not show that the employer has regularly in service as many as five employees in the same business within this State, the presumption under this section is not operative. Thompson's Dependents v. Johnson Funeral Home, 205 N. C. 801, 803, 172 S. E. 500.

Notwithstanding the presumption contained in this section, there are provisions in the act whereby employers, as well as employees, may except themselves from the operation thereof, and the presumption of acceptance may be rebutted by proof of nonacceptance. Calahan v. Roberts, 208 N. C. 768, 182 S. E. 657.

Plaintiff and his employer were bound by the provisions of the Workmen's Compensation Act. Plaintiff's injury occurred while he was allowed by his employer to use certain machinery for his own personal ends. Compensation was denied since the accident did not arise out of and in the course of the employment. Thereafter plaintiff sued alleging negligence on the part of the employer. But it was held that, conceding the evidence established negligence of defendant employer, the Compensation Act barred all other rights and remedies of defendant employee except those provided in the act. Francis v. Carolina Wood Turning Co., 208 N. C. 517, 181 S. E. 628.

An infant employee is bound by the terms of the North Carolina Workmen's Compensation Act regardless of his age. Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429.

Ordinarily, the parties may not by agreement or conduct extend the provisions of this chapter, but continued and definite recognition of the relationship of employer and employee, based on knowledge of the work performed, and acceptance of benefits of that status, may work an estoppel after loss. Pearson v. Pearson, 222 N. C. 69, 21 S. E. (2d) 879.

Applied in Arp v. Wood & Co., 207 N. C. 41, 175 S. E. 719; McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. E. 509; Tscheiller v. National Weaving Co., 214 N. C. 449, 199 S. E. 623; Lee v. American Enka Corp., 212 N. C. 455, 193 S. E. 809.

Cited in Murphy v. American Enka Corp., 213 N. C. 218, 195 S. E. 536; Odum v. National Oil Co., 213 N. C. 478, 196 S. E. 823; Cooke v. Gillis, 218 N. C. 726, 12 S. E. (2d) 250; McCune v. Rhodes-Rhyne Mfg. Co., 217 N. C. 351, 8 S. E. (2d) 219.

§ 97-4. Notice of non-acceptance and waiver of exemption.—Either an employer or an employee, who has exempted himself by proper notice from the operation of this article, may at any time waive such exemption, and thereby accept the provisions of this article by giving notice as herein provided.

The notice of non-acceptance of the provisions of this article and notice of waiver of exemption heretofore referred to shall be given thirty days prior to any accident resulting in injury or death: Provided, that if any such accident occurred less than thirty days after the date of employment, notice of such exemption or acceptance given at the time of employment shall be sufficient notice thereof. The notice shall be in writing or print, in substantially the form prescribed by the Industrial Commission, and shall be given by the employer by posting the same in a conspicuous place in the shop, plant, office, room, or place where the employee is employed, or by serving it personally upon him; and shall be given by the employee by sending the same in registered letter, addressed to the employer at his last known residence or place of business, or by giving it personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State. A copy of the notice in prescribed form shall also be filed with the Industrial Commission.

In any suit by an employer or an employee who has exempted himself by proper notice from the application of this article, a copy of such notice duly certified by the Industrial Commission shall be admissible in evidence as proof of such exemption. (1929, c. 120, s. 5.)

Where, under the facts alleged, the parties were presumed to have accepted the provisions of the Compensation Act, but the complaint further alleged that in respect to the employee's work defendants "were not operating under the Compensation Act," the allegation that defendants were not operating under the act involves both law and fact, and the allegation is sufficient to admit of proof of nonacceptance of the provisions of the act, and it was error for the court to sustain defendants' demurrer on the ground that the industrial commission had exclusive jurisdiction, it being a question of law for the court, when the plaintiff introduces his evidence, to determine whether defendant employer was not operating under the act. Cooke v. Gillis, 218 N. C. 726, 12 S. E. (2d) 250.

Applied in Miller v. Roberts, 212 N. C. 126, 193 S. E. 286.
Cited in Calahan v. Roberts, 208 N. C. 768, 182 S. E. 657.

§ 97-5. Presumption as to contract of service.—Every contract of service between any employer and employee covered by this article, written or implied, now in operation or made or implied prior to July 1, 1929, shall, after that date, be presumed to continue, subject to the provisions of this article; and every such contract made subsequent to that date shall be presumed to have been made subject to the provisions of this article, unless either party shall give notice, as provided in § 97-4, to the other party to such contract that the provisions of this article other than §§ 97-14, 97-15, 97-16, and 97-92 are not intended to apply.

A like presumption shall exist equally in the case of all minors, unless notice of the same character be given by or to the parent or guardian of the minor. (1929, c. 120, s. 6.)

Applied in Miller v. Roberts, 212 N. C. 126, 193 S. E. 286.

§ 97-6. No special contract can relieve an employer of obligations.—No contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer, in whole or in part, of any obligation created by this article, except as herein otherwise expressly provided. (1929, c. 120, s. 7.)

§ 97-7. State or subdivision and employees thereof.—Neither the State nor any municipal corporation within the State, nor any political subdivision thereof, nor any employee of the State or of any such corporation or subdivision, shall have the right to reject the provisions of this article relative to payment and acceptance of compensation, and the provisions of §§ 97-4, 97-5, 97-14, 97-15, and 97-16 shall not apply to them: Provided, however, that any county or special school district may, at its option, by action of the governing body of such county or school district at a regular meeting of such governing body, exempt itself entirely from the operation of this article: Provided, however, that such action on the part of such governing body shall not become effective until thirty days after such action is taken, and notice thereof filed with the Industrial Commission: and, Provided further, that such action on the part of any county or special school district exempting itself from the operation of this article shall not have the effect of relieving such county or school dis-

trict in any degree from any liability against such county or school district already accrued prior to the taking of such action, or accruing during the said thirty-day period after the taking of such action. (1929, c. 120, s. 8; 1931, c. 274, s. 1.)

Editor's Note.—The Act of 1931 added the provisos to this section.

Applied in Perdue v. State Board of Equalization, 205 N. C. 730, 172 S. E. 396; Barnhardt v. Concord, 213 N. C. 364, 196 S. E. 310; Rape v. Huntersville, 214 N. C. 505, 199 S. E. 736.

§ 97-8. Prior injuries and deaths unaffected. — The provisions of this article shall not apply to injuries or deaths, nor to accidents which occurred prior to July 1, 1929. (1920, c. 120, s. 9.)

Applied in Hafleigh & Co. v. Crossingham, 206 N. C. 333, 173 S. E. 619.

§ 97-9. Employer to secure payment of compensation. — Every employer who accepts the compensation provisions of this article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee who elects to come under this article for personal injury or death by accident to the extent and in the manner herein specified. (1929, c. 120, s. 10.)

§ 97-10. Other rights and remedies against employer excluded; employer or insurer may sue third party tort-feasor; attorney's fees; subrogation; amount of compensation as evidence; minors illegally employed.—The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this article, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, as against his employer at common law, or otherwise, on account of such injury, loss of service, or death: Provided, however, that in any case where such employee, his personal representative, or other person may have a right to recover damages for such injury, loss of service, or death from any person other than the employer, compensation shall be paid in accordance with the provisions of this chapter: Provided, further, that after the industrial commission shall have issued an award, or the employer or his carrier has admitted liability in writing and filed same with the industrial commission, the employer or his carrier shall have the exclusive right to commence an action in his own name and/or in the name of the injured employee or his personal representative for damages on account of such injury or death, and any amount recovered by the employer shall be applied as follows: First to the payment of actual court costs, then to the payment of attorneys' fees when approved by the industrial commission; the remainder or so much thereof as is necessary shall be paid to the employer to reimburse him for any amount paid and/or to be paid by him under the award of the industrial commission; if there then remain any excess, the amount thereof shall be paid to the injured employee or other person entitled thereto: Provided further that the amount of attorney's fees paid out in the distribution of the above recovery shall be a charge against the amount due and payable to the employer and employee in proportion to the amount each shall receive out of the recovery. If, however, the employer does not commence such action within six months from the date of such injury or death, the employee, or his personal representative, shall thereafter have the right to bring the action in his own name, and any amount recovered shall be paid in the same manner as if the employer had brought the action.

The amount of compensation paid by the employer, or the amount of compensation to which the injured employee or his dependents are entitled, shall not be admissible as evidence in any action against a third party.

When any employer is insured against liability for compensation with any insurance carrier, and such insurance carrier shall have paid any compensation for which the employer is liable or shall have assumed the liability of the employer therefor, it shall be subrogated to all rights and duties of the employer, and may enforce any such rights in the name of the injured employee or his personal representative; but nothing herein shall be construed as conferring upon the insurance carrier any other or further rights than those existing in the employer at the time of the injury to or death of the employee, anything in the policy of insurance to the contrary notwithstanding.

In all cases where an employer and employee have accepted the workmen's compensation act, any injury to a minor while employed contrary to the laws of this state shall be compensable under this article the same and to the same extent as if said minor were an adult. (1929, c. 120, s. 11; 1933, c. 449, s. 1; 1943, c. 622.)

Editor's Note.—Public Laws of 1933, c. 449, struck out this section as it formerly appeared and inserted the above in lieu thereof. A comparison of the old with the new is necessary to determine the changes.

The 1943 act added the third proviso to the first sentence. it also struck out in the second proviso thereto the words "the employer may" and inserted in place thereof the words "or the employer or his carrier has admitted liability in writing and filed same with the industrial commission, the employer or his carrier shall have the exclusive right to."

In General.—This section assigns the injured person's right of action against a tort-feasor to the employer or to the employer's insurer and enables the assignee to maintain the action which the employee could have maintained had no such assignment been made. Phifer v. Berry, 202 N. C. 388, 392, 163 S. E. 119.

The remedy under the Workmen's Compensation Act is exclusive and under the express terms of this section an employer is relieved of all further liability for injury to or death of an employee, and where the administrator of a deceased employee brings action against third persons for the employee's wrongful death, the motion of the defendants that the deceased's employer be made a party as a joint tort-feasor with them should be denied. Brown v. Southern R. Co., 202 N. C. 256, 162 S. E. 613.

Manifestly the statute was designed primarily to secure prompt and reasonable compensation for an employee, and at the same time to permit an employer or his insurance carrier, who had made a settlement with the employee, to recover the amount so paid from a third party causing the injury to such employee. Moreover, the statute was not designed as a city of refuge for a negligent third party. Brown v. Southern R. Co., 204 N. C. 668, 671, 169 S. E. 419.

The insurance carrier who has paid compensation to an injured employee for which the employer was liable under this chapter may maintain an action against a third person upon allegations that the negligence of such third person caused the injury, but the rights and liabilities of such third person are in nowise affected by the chapter. Hinson v. Davis, 220 N. C. 380, 17 S. E. (2d) 348.

When an action is maintained by the insurance carrier in the name of the injured employee against the third person tort-feasor causing the injury, the tort-feasor is liable for

the amount ascertained by the jury as sufficient to compensate the employee for the injuries sustained, which the statute prescribes shall be first applied to the actual court costs, then to the payment of attorneys' fees when approved by the commission, then to the reimbursement of the insurance carrier for money paid by it under the award, and any remaining excess to the injured employee, and an instruction on the issue of damages that defendant would be liable for such sum as would reimburse the insurance carrier and would fairly compensate the injured employee is error. Rogers v. Southeastern Construction Co., 214 N. C. 269, 199 S. E. 41.

The meaning of this section is both clear and logical, namely, that if after the expiration of six months from the date of the injury or death, the employer has not commenced an action, the employee, or his personal representative, shall thereafter have the right to bring an action in his own name, and that any amount recovered shall be paid in the same manner as if the employer had brought the action. Ikerd v. North Carolina R. Co., 209 N. C. 270, 272, 183 S. E. 402.

Employee's Action against Tort-Feasor Is Not a Prior Action Pending.—Where it appears that an injured employee's action against the third person tort-feasor is instituted prior to the institution of an action by the compensation insurance carrier against the tort-feasor, defendant's plea in abatement in the employee's action on the ground of the pendency of a prior action cannot be sustained. Thompson v. Virginia, etc., R. Co., 216 N. C. 554, 6 S. E. (2d) 38. For comment on this case, see 18 N. C. Law Rev. 375.

Words "and the employer" in First Paragraph Are Surplusage.—The words "and the employer," appearing near the end of the first paragraph, have no proper grammatical place in the sentence, and render the whole sentence ambiguous and doubtful. So we are impelled to hold, in construing the sentence, that these words are surplusage, and as such must be disregarded. Ikerd v. North Carolina R. Co., 209 N. C. 270, 272, 183 S. E. 402.

Joinder of Insurance Carrier Properly Denied.—More than six months after the injury complained of, the original defendants filed a petition and moved that the employer's insurance carrier also be made a party defendant, the motion was denied, and defendants appealed. The motion for joinder of the insurance carrier was properly denied under the provisions of this section, the statute giving the right to an employee to maintain an action against a third person tort-feasor if the employer fails to institute such action within six months from date of the injury. Peterson v. McManus, 208 N. C. 802, 182 S. E. 483.

Intent of Section.—After filing proceedings for compensation claimant filed a counterclaim in a suit at law instituted against him by a third person, which suit involved the same accident resulting in the injuries for which he sought compensation. Claimant was not barred by filing the counterclaim from thereafter prosecuting his claim before the Industrial Commission, since he recovered no judgment, and the intent of this section, being that an injured employee should be compensated either by an award or by the "procurement of a judgment in an action at law," the rights of the parties being determined by the act prior to the 1933 amendment. Rowe v. Rowe-Coward Co., 208 N. C. 484, 181 S. E. 254.

Employer Is Not Relieved of Liability by Insurer's Insolvency after Recovery against Third Person.—An administratrix was only a nominal party to a suit against a third person tort-feasor and had no control over the recovery and could not safeguard it for the purpose of paying the award, and the employer, who selected the insurance carrier for his own protection, is not relieved of his primary obligation to the dependents of the employee by reason of the insurer's recovery from the third person and default in payment because of insolvency, nor does the fact that the employer had no notice of the suit, by the insurer against the third person alter this result. Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438.

Remedy Is Exclusive.—Where the allegations and evidence in an action for damages at common law show that the injury in suit was caused by an accident arising out of and in the course of plaintiff's employment, defendant's motion of nonsuit will be granted, as plaintiff's remedy under this act is exclusive of all other remedies. McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. E. 509. See Tscheiller v. National Weaving Co., 214 N. C. 449, 199 S. E. 623; Miller v. Roberts, 212 N. C. 126, 193 S. E. 286; Lee v. American Enka Corp., 212 N. C. 455, 193 S. E. 809; Champion v. Vance County, Board of Health, 221 N. C. 96, 99, 19 S. E. (2d) 239.

Under the 1933 amendment an injured employee may pursue his remedies against the employer under the workmen's compensation act and also maintain action against the third person whose tortious act caused his injury. Whitehead v. Branch, 220 N. C. 507, 17 S. E. (2d) 637.

It was said in Thompson v. Virginia, etc., R. Co., 216 N. C. 554, 6 S. E. (2d) 38, referring to this section, that the rights and remedies granted by the act to an employee to secure compensation for an injury by accident, as against his employer, were exclusive, but that the provision making the remedy exclusive did not appear in the clause relating to suits against third persons. This statement of the law was cited with approval in Mack v. Marshall Field & Co., 217 N. C. 55, 6 S. E. (2d) 889. Whitehead v. Branch, 220 N. C. 507, 509, 17 S. E. (2d) 637.

But the right of the administrator to maintain an action for death by wrongful act is not defeated, in view of this section, as a result of the widow's acceptance of compensation. Betts v. Southern Ry. Co., 71 F. (2d) 787.

However in Bright v. N. B., etc., Motor Lines, 212 N. C. 384, 193 S. E. 391, it was held that an award by the industrial commission to the widow of an employee excludes all other rights and remedies, and the administrator of the employee may not maintain an action against the employer for wrongful death, and the fact that the injury resulted from negligence in the violation by the employer of a criminal statute does not alter this result.

Deceased was an employee of a subcontractor in the construction of a building, and was killed while performing his duties in the structural steel work when a steel beam came into contact with an uninsulated, highly charged electric wire. This action was instituted by the administrator of the employee against defendants upon allegations that defendants were negligent in permitting the uninsulated, highly charged wire to remain where it would likely cause injury to the structural steel workers and in failing to give proper warning of the danger. The employer of plaintiff's intestate was not a party to the action. Defendants demurred on the ground that upon the face of the complaint it appeared that the superior court was without jurisdiction and that the industrial commission had exclusive original jurisdiction. Under § 28-173 only the personal representative may maintain an action for wrongful death and the complaint alleged a cause of action therefor against defendants, and their demurrer was properly overruled, defendants having no interest in the disposition of any recovery in accordance with the provisions of this section. Mack v. Marshall Field & Co., 217 N. C. 55, 6 S. E. (2d) 889.

In an action instituted by an administratrix to recover for wrongful death of intestate, defendant's answer alleged facts upon which it contended that the cause alleged was within the exclusive jurisdiction of the industrial commission, that an award had been made under the compensation act and any right of action against defendant assigned, and that plaintiff did not have the right, or sole right, to maintain the action. Plaintiff moved to strike such allegations from the complaint. Upon the record as constituted plaintiff's motion to strike should have been granted. Sayles v. Loftis, 217 N. C. 674, 9 S. E. (2d) 393.

Right under Death by Wrongful Act Statute of Another State Not Affected.—The acceptance of compensation under this act cannot affect the right to pursue a remedy against a third person under the wrongful death statute of another state, unless there is something in the law of the latter state which so provides. Betts v. Southern Ry. Co., 71 F. (2d) 787, 789.

But Assignment of Such Claim Is Governed by Law of This State.—The assignment of the right of recovery against a third person under the wrongful death statute of one state as the result of acceptance by the beneficiary of compensation from the employer under the compensation act of this state, in the absence of any provision to the contrary in the law of the state of the injury, is governed by the law of this state. Betts v. Southern Ry. Co., 71 F. (2d) 787, 789.

Action by Insurer to Be in Name of Employee or Personal Representative.—The reference in this section to the right of subrogation accruing to the insurance carrier upon payment of the compensation awarded is coupled with the designation that the enforcement of such right be in the name of the injured employee or his personal representative. Whitehead v. Branch, 220 N. C. 507, 509, 17 S. E. (2d) 637.

Necessity for New Action against Third Person.—Whether the employer or insurance carrier who has paid compensation may proceed in the action which has been instituted against a third person by an injured employee or his personal representative, or must institute a new and independent action, is a question of procedure and under the law of this state it is proper to proceed in the action which has

been instituted. Betts v. Southern Ry. Co., 71 F. (2d) 787, 791.

Because of the provisions of this section, the employer is not a joint tort-feasor, and an acceptance of an award against said employer for compensation would not discharge a third person whose negligence had contributed to the injury or death of the employee. Id.

Employee of Subcontractor May Maintain Action against Main Contractor.—An employee of a subcontractor is not precluded by the workmen's compensation act from maintaining an action at common law against the main contractor for injuries resulting from alleged negligence on the part of the main contractor, since the action is not against plaintiff's employer but against a third person. Cathey v. Southeastern Const. Co., 218 N. C. 525, 11 S. E. (2d) 571.

Punitive Damages.—Where both the plaintiff and corporate defendant are presumed to have accepted the provisions of the workmen's compensation act they are bound thereby, and the rights and remedies therein granted are exclusive, and the contention that since the compensation act does not provide for the award of punitive damages, plaintiff had not waived his right to trial by jury for the ascertainment thereof, is untenable. McCune v. Rhodes-Rhyne Mfg. Co., 217 N. C. 351, 8 S. E. (2d) 219.

Setting up Employer's Negligence.—In an action begun under this section a third person tort-feasor may set up the employer's negligence in bar of recovery, since the employer will not be allowed to profit by his own wrong in causing the employee's death. Brown v. Southern R. Co., 204 N. C. 668, 169 S. E. 419.

Acts of Employer as Affecting Rights of Insurer Subrogee.—A collision between a bus and a car caused the death of the driver of the car and injury to the driver of the bus. The insurance carrier paid compensation to the driver of the bus for which the bus driver's employer was liable under the Workmen's Compensation Act, and instituted an action in the name of the employee against the administrator of the estate of the driver of the car. Thereafter the employer paid the administrator a certain sum in full settlement for the death of intestate. The administrator set up this accord as a bar in the action instituted by the insurance carrier in the name of the employee. It was held that the insurance carrier had been subrogated to the right to maintain the action, and that the employer could not affect that right by any act to which the insurance carrier was not a party, and that an accord to which neither the employee nor the insurance carrier were parties could not bar their right of action. Hinson v. Davis, 220 N. C. 380, 17 S. E. (2d) 348.

Double Recovery.—See article entitled, "Settlement with a Third Party," 8 N. C. L. Rev. 424.

Applied in Lincoln v. Atlantic Coast Line R. Co., 207 N. C. 787, 178 S. E. 601; Jones v. Raney Chevrolet Co., 217 N. C. 693, 9 S. E. (2d) 395.

Quoted in Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 402.

Cited in Francis v. Carolina Wood Turning Co., 208 N. C. 517, 181 S. E. 628; Murphy v. American Enka Corp., 213 N. C. 218, 195 S. E. 536; Cooke v. Gillis, 218 N. C. 726, 12 S. E. (2d) 250.

§ 97-11. Employer not relieved of statutory duty. — Nothing in this article shall be construed to relieve any employer or employee from penalty for failure or neglect to perform any statutory duty. (1929, c. 120, s. 12.)

§ 97-12. Intoxication or willful neglect of employee; willful disobedience of statutory duty, safety regulation or rule.—No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the wilful intention of the employee to injure or kill himself or another. When the injury or death is caused by the wilful failure of the employer to comply with any statutory requirement or any lawful order of the Commission, compensation shall be increased ten per cent. When the injury or death is caused by the wilful failure of the employee to use a safety appliance or perform a statutory duty or by the wilful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury, compensation shall be reduced ten per cent. The burden of proof shall be upon him who claims an exemption or forfeiture under this section. (1929, c. 120, s. 13.)

The negligence of the employee does not disbar him from compensation, except only in cases where the injury is occasioned by his intoxication or willful intention to injure himself or another. Archie v. Greene Bros. Lbr. Co., 222 N. C. 477, 23 S. E. (2d) 834.

Use of Safety Appliances and Observation of Rules.—This section does not deny compensation when it appears that an injury was caused by the willful failure of an employee to use a safety appliance, or by the willful breach of a rule or regulation adopted by the employer and approved by the industrial commission but only subjects the injured employee to the penalty of a reduction in the compensation to be awarded. Archie v. Greene Bros. Lbr. Co., 222 N. C. 477, 481, 23 S. E. (2d) 834.

Evidence Sufficient.—In Brooks v. Carolina Rim, etc., Co., 213 N. C. 518, 196 S. E. 835, it was held that the evidence was sufficient to support finding of industrial commission that the accident causing injury was not the result of the employee's intoxication, although defendants introduced evidence in conflict therewith.

Where the dependents of a deceased employee show that his death resulted from a bullet wound, such showing raises a prima facie case only of death by accident, placing upon the employer the burden of going forward with evidence to show that the employee killed himself within the exemption or forfeiture under this section. McGill v. Lumberton, 215 N. C. 752, 3 S. E. (2d) 324.

§ 97-13. Exceptions from provisions of article.—(a) Employees of Certain Railroads.—This article shall not apply to railroads or railroad employees nor in any way repeal, amend, alter or affect article eight (8) of chapter sixty (60), or any section thereof, relating to the liability of railroads for injuries to employees; nor, upon the trial of any action in tort for injuries not coming under the provisions of this article, shall any provision herein be placed in evidence or be permitted to be argued to the jury: Provided, however, that the foregoing exemption to railroads and railroad employees shall not apply to electric street railroads or employees thereof; and this article shall apply to electric street railroads and employees thereof, and to this extent the provisions of article eight (8) of chapter sixty (60) are hereby amended.

(b) Casual Employment, Domestic Servants, Farm Laborers, Federal Government, Employer of Less than Five Employees.—This article shall not apply to casual employees, farm laborers, federal government employees in North Carolina, and domestic servants, nor to employees of such persons, nor to any person, firm or private corporation that has regularly in service less than five employees in the same business within this state, unless such employees and their employers voluntarily elect, in the manner hereinafter specified, to be bound by this article: Provided, however, that when an employee files a claim with the North Carolina industrial commission and it shall appear that the employer has insured his liability under the Workmen's Compensation Act in any authorized corporation, association, or in any mutual insurance association formed by a group of employers so authorized, this shall be prima facie evidence that such employer and his employees have elected to be bound by this article, and, in such cases upon failure of the defendant and/or the insurance carrier to show by competent and sufficient evidence that the defendant employer was not bound by, or subject to the provisions of, the Workmen's Compensation Act at the time of the injury, compensation may be awarded by the industrial commis-

sion without any express findings in their award as to acceptance of the article by the parties.

(c) Prisoners.—This article shall not apply to prisoners being worked by the State or any subdivision thereof, except to the following extent: Whenever any prisoner assigned to the State Highway and Public Works Commission shall suffer accidental injury arising out of and in the course of the employment to which he had been assigned, if the results of such injury continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability as defined in this article, then such discharged prisoner may have the benefit of this article by applying to the Industrial Commission as any other employee; provided, such application is made within twelve months from the date of discharge; and provided, further, that the maximum compensation to any prisoner shall not exceed fifteen dollars per month and the period of compensation shall relate to the date of his discharge rather than to the date of the accident, and prisoners who have been discharged prior to March 15, 1941, who are covered by the terms of the subsection may have twelve months from March 15, 1941, in which to apply for its benefits, but as to such prisoners their compensation shall be computed only from the date of their application and shall not be cumulative for any prior period; and no award shall be made for facial disfigurement, and no award other than burial expenses shall be made for any prisoner whose accident results in death; and no award shall be made for any injury where there is no apparent or outward physical evidence of such injury, unless it is clearly established by medical opinion and supporting testimony that the matter complained of results solely from the accident arising out of and in the course of employment. If any person who has been awarded compensation under the provisions of this section shall be recommitted to prison upon conviction for an offense committed subsequent to the award, such compensation shall immediately cease and determine. Any awards made under the terms of this subsection shall be paid by the State Highway and Public Works Commission from the funds available for the operation of the Prison Department.

(d) Sellers of Agricultural Products.—This article shall not apply to persons, firms or corporations engaged in selling agricultural products for the producers thereof on commission or for other compensation, paid by the producers, provided the product is prepared for sale by the producer. (1929, c. 120, s. 14; 1933, c. 401; 1935, c. 150; 1941, c. 295; 1943, c. 543.)

Local Modification.—Mecklenburg: 1933, c. 401.

Editor's Note. — Public Laws of 1933, c. 401, inserted the provisos at the end of subsection (a) of this section.

The proviso to subsection (b) was added by the 1935 amendment.

The 1941 amendment rewrote subsection (c). For comment on this amendment, see 19 N. C. Law Rev. 545.

The 1943 amendment substituted "eight (8)" for "seven (7)" in lines four and sixteen of subsection (a).

Services Rendered Out of State.—When the contract of employment is for services to be rendered exclusively outside the state and such services in fact are performed in their entirety elsewhere than in this state this chapter has no application. Mallard v. Bohannon, 221 N. C. 227, 19 S. E. (2d) 880.

Number of Regular Employees.—Where in a hearing before the Industrial Commission the employer testifies that he employed three men other than himself, and another witness testifies that at the time of the injury in suit there were two men working besides the employer and that the other employees were on vacation, the evidence is insufficient to support the finding that the parties were bound by this act, since the evidence tends to show that the employer regularly employed less than five employees. Thompson's Dependents v. Johnson Funeral Home, 205 N. C. 801, 172 S. E. 500.

Where the findings of fact of the Industrial Commission that the deceased was an employee of the defendant and that the defendant employed more than five workers, are not supported by any evidence in the hearing before it, the findings are jurisdictional, and upon appeal to the Superior Court the award should be set aside and vacated. Poole v. Sigmon, 202 N. C. 172, 162 S. E. 198. See also, Chadwick v. North Carolina Department of Conservation, etc., 219 N. C. 766, 14 S. E. (2d) 842.

A demurrer to an action for death of an employee, on the ground that the action is cognizable only by the Industrial Commission, is properly overruled when it does not appear on the face of the complaint that the defendant employed more than five men in this State. Hanks v. Southern Public Utilities Co., 204 N. C. 155, 167 S. E. 560. See also Allen v. American Cotton Mills, 206 N. C. 704, 175 S. E. 98.

Prima Facie Evidence.—This section merely facilitates proof that the employer and its employees are subject to the terms of the workmen's compensation act. Proof that the employer obtained insurance and a claim was filed is, under this section, prima facie evidence that the employer and the employee have elected to be bound by the act. Gassaway v. Gassaway, 220 N. C. 694, 698, 18 S. E. (2d) 120.

The provisions of this section that proof that the employer obtained insurance and filed claim should be prima facie evidence that the employer and employee have elected to be bound by the act does not have the effect of raising a presumption that an executive officer injured in the course of his duties was at the time engaged in the duties of an employee rather than those of an executive. Gassaway v. Gassaway, 220 N. C. 694, 18 S. E. (2d) 120.

Applied in Aycock v. Cooper, 202 N. C. 500, 163 S. E. 569; Rape v. Huntersville, 214 N. C. 505, 199 S. E. 736; Young v. Mayland Mica Co., 212 N. C. 243, 193 S. E. 285.

Cited in Borders v. Cline, 212 N. C. 472, 193 S. E. 826.

§ 97-14. Employers not bound by article may not use certain defenses in damage suit.—An employer who elects not to operate under this article shall not, in any suit at law instituted by an employee subject to this article to recover damages for personal injury or death by accident, be permitted to defend any such suit at law upon any or all of the following grounds:

(a) That the employee was negligent.

(b) That the injury was caused by the negligence of a fellow employee.

(c) That the employee has assumed the risk of the injury. (1929, c. 120, s. 15.)

This section cannot be held to have abolished the simple tool doctrine as a ground of defense. Newbern v. Great Atlantic, etc., Tea Co., 68 F. (2d) 523, 526, 91 A. L. R. 781.

Contributory Negligence.—Where it is admitted that defendant employer had a sufficient number of employees to bring him under this chapter, but that he had elected not to do so, the defense of contributory negligence is properly excluded. Lee v. Roberson, 220 N. C. 61, 16 S. E. (2d) 459.

Cited in Calahan v. Roberts, 203 N. C. 768, 182 S. E. 657.

§ 97-15. Electing employer may use such defenses against non-electing employee.—An employee who elects not to operate under this article shall, in any action to recover damages for personal injury or death brought against an employer accepting the compensation provisions of this article, proceed at common law, and the employer may avail himself of the defenses of contributory negligence, negligence of a fellow servant, and assumption of risk, as such defenses exist at common law. (1929, c. 120, s. 16.)

§ 97-16. Defenses denied to non-electing employer as against non-electing employee.—When both the employer and employee elect not to

operate under this article, the liability of the employer shall be the same as though he alone rejected the terms of this article, and in any suit brought against him by such employee the employer shall not be permitted to avail himself of any of the common-law defenses cited in § 97-14. Provided, however, that in Pender, Cherokee, Avery, Perquimans, Gates, Macon, Watauga, Ashe, Union, Wilkes, Hyde, Caswell, Bladen and Carteret Counties any sheriff may exempt himself and any and all deputies appointed by him from the provisions of this article by notice in writing to the industrial commission, such notice to be made on forms prescribed by the industrial commission. (1929, c. 120, s. 17; 1931, c. 274, s. 2; 1939, c. 277, s. 2; 1943, c. 543.)

Editor's Note.—The 1931 amendment added a proviso permitting sheriffs to exempt themselves and their deputies from the act. The 1939 amendment deleted the proviso. The cases treated below were decided prior to the 1939 amendment.

The 1943 amendment added the proviso.

The amendment permitting a sheriff to exempt himself from the operation of the act by giving the notice prescribed, cannot have the effect of bringing deputies sheriff within the intent and meaning of the act, nor may the fact that a sheriff purchases insurance to cover his compensation liability have the effect of enlarging or extending the language of the act. Borders v. Cline, 212 N. C. 472, 193 S. E. 826.

Cited in Calahan v. Roberts, 208 N. C. 768, 182 S. E. 657.

§ 97-17. Settlements allowed in accordance with article. — Nothing herein contained shall be construed so as to prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this article. A copy of such settlement agreement shall be filed by employer with and approved by the Industrial Commission. (1929, c. 120, s. 18.)

§ 97-18. Prompt payment of compensation required; installments; notice to commission; penalties.—Compensation under this article shall be paid periodically, promptly and directly to the person entitled thereto unless otherwise specifically provided.

(a) The first installment of compensation payable under the terms of an agreement shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments weekly except where the Commission determines that payment in installments should be made monthly or at some other period.

(b) The first installment of compensation payable under the terms of an award by the Commission, or under the terms of a judgment of the court upon an appeal from such an award, shall become due seven days from the date of such an award or from the date of such a judgment of the court, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments weekly, except where the Commission determines that payment in installments shall be made monthly or in some other manner.

(c) Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the Commission, in accordance with the form prescribed by the Commission, that payment of compensation has begun or has been suspended, as the case may be.

(d) If any installment of compensation payable in accordance with the terms of an agreement approved by the Commission without an award is not paid within fourteen days after it becomes due, as provided in sub-division (a) of this section, or if any installment of compensation payable in accordance with the terms of an award by the Commission is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless such non-payment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(e) Within sixteen days after final payment of compensation has been made, the employer shall send to the Commission a notice, in accordance with a form prescribed by the Commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the Commission within such time, the Commission shall assess against such employer a civil penalty in the amount of $25.00. (1929, c. 120, s. 18½.)

§ 97-19. Liability of principal contractors; certificate that sub-contractor has complied with law; right to recover compensation of those who would have been liable; order of liability.—Any principal contractor, intermediate contractor, or sub-contractor who shall sublet any contract for the performance of any work without requiring from such sub-contractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such sub-contractor has complied with § 97-93 hereof, shall be liable, irrespective of whether such sub-contractor has regularly in service less than five employees in the same business within this state, to the same extent as such sub-contractor would be if he had accepted the provisions of this article for the payment of compensation and other benefits under this article on account of the injury or death of any employee of such sub-contractor, due to an accident arising out of and in the course of the performance of the work covered by such sub-contract. If the principal contractor, intermediate contractor, or sub-contractor shall obtain such certificate at the time of sub-letting such contract to sub-contractor, he shall not thereafter be held liable to any employee of such sub-contractor for compensation or other benefits under this article. The Industrial Commission, upon demand, shall furnish such certificate, and may charge therefor the cost thereof, not to exceed twenty-five (25) cents.

Any principal contractor, intermediate contractor, or sub-contractor paying compensation or other benefits under this article, under the foregoing provisions of this section, may recover

the amount so paid from any person, persons, or corporation who, independently of such provision, would have been liable for the payment thereof.

Every claim filed with the Industrial Commission under this section shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer. (1929, c. 120, s. 19; 1941, c. 358, s. 1.)

Editor's Note.—The 1941 amendment added the words "irrespective of whether such sub-contractor has regularly in service less than five employees in the same business within the state" in the first sentence.

In General.—This section is not in reality an amendment in the sense that it changed an existing law, but really amounts to an amendment for the purpose of expressing the full legislative intent under the existing law. Graham v. Wall, 220 N. C. 84, 90, 16 S. E. (2d) 691.

This section relates to contractors and subcontractors and not to employers and independent contractors. Beach v. McLean, 219 N. C. 521, 14 S. E. (2d) 515.

Cited in Sayles v. Loftis, 217 N. C. 674, 9 S. E. (2d) 393.

§ 97-20. Priority of compensation claims against assets of employer.—All rights of compensation granted by this article shall have the same preference or priority for the whole thereof against the assets of the employer as is allowed by law for any unpaid wages for labor. (1929, c. 120, s 20.)

§ 97-21. Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation, void; unlawful deduction by employer.—No claim for compensation under this article shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors and from taxes.

No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this article shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $500.00. No agreement by an employee to waive his right to compensation under this chapter shall be valid. (1929, c. 120, s. 21.)

Editor's Note.—For a discussion of this section, see 8 N. C. Law Rev. 477, et seq. And see 15 N. C. Law Rev. 286.

§ 97-22. Notice of accident to employer. — Every injured employee or his representative shall immediately on the occurence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this article prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; but no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice, and the Commission is satisfied that the employer has not been prejudiced thereby. (1929, c. 120, s. 22.)

Finding That Employer Not Prejudiced.—A finding by the commission that the employer has not been prejudiced by the failure of the plaintiff to give notice of the injury within 30 days after the accident, suffices to sustain the award from and after such notice; but not for benefits which may have accrued prior thereto. Eller v. Lawrence Leather Co., 222 N. C. 604, 24 S. E. (2d) 244.

A finding by the commission that plaintiff was not capable of coherent, normal thought at the time of his examination by physicians falls short of a finding that he was prevented from giving written notice of his injury by reason of physical or mental incapacity so as to entitle him to the benefits which may have accrued prior to the giving of such notice. Eller v. Lawrence Leather Co., 222 N. C. 604, 24 S. E. (2d) 244.

It is not required that an injured employee, or the dependents of a deceased employee, file claim with the industrial commission, it being incumbent on the employer to file a written report of the accident with the industrial commission upon notice given by the injured employee, or his representative, and where the employer has filed a report with the commission within the prescribed time upon verbal information elicited from the representative of the employee by its claim agent, the representative being unable to read or write, and, the employer admitting liability, the report has been filed with the industrial commission as a claim within one year from date of the accident and contains all facts necessary to make an award. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252.

Applied in Lilly v. Belk Bros., 210 N. C. 735, 188 S. E. 319.

Cited in Wilson v. Clement Co., 207 N. C. 541, 542, 177 S. E. 797.

§ 97-23. What notice is to contain; defects no bar; notice personally or by registered letter. —The notice provided in the foregoing section shall state in ordinary language the name and address of the employee, the time, place, nature, and cause of the accident, and of the resulting injury or death; and shall be signed by the employee or by a person on his behalf, or, in the event of his death, by any one or more of his dependents, or by a person in their behalf.

No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove that his interest was prejudiced thereby, and then only to such extent as the prejudice.

Said notice shall be given personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State, or may be sent by registered letter addressed to the employer at his last known residence or place of business. (1929, c. 120, s. 23.)

Applied in Lilly v. Belk Bros., 210 N. C. 735, 188 S. E. 319.

Cited in Wilson v. Clement Co., 207 N. C. 541, 542, 177 S. E. 797.

§ 97-24. Right to compensation barred after one year.—(a) The right to compensation under this article shall be forever barred unless a claim be filed with the industrial commission within one year after the accident, and if death results from the accident, unless a claim be filed with the commission within one year thereafter.

(b) If any claim for compensation is hereafter made upon the theory that such claim or the injury upon which said claim is based is within the jurisdiction of the industrial commission under the provisions of this article, and if the

commission, or the supreme court on appeal, shall adjudge that such claim is not within the article, the claimant, or if he dies, his personal representative, shall have one year after the rendition of a final judgment in the case within which to commence an action at law. (1929, c. 120, s. 24; 1933, c. 449, s. 2.)

Editor's Note. — Public Laws of 1933, c. 449, added subsection (b) to this section.

When the employer has filed with the Commission a report of the accident and claim of the injured employee, the claim is filed with the Commission within the meaning of this section. Hardison v. Hampton, 203 N. C. 187, 188, 165 S. E. 355.

Implied Agreement Not to Plead Statute.—Where the injured party was led to believe that his wages were accruing to his benefit, and he delayed filing his claim for more than twelve months, it was held that the facts do not bring the case within the principle of equitable estoppel, there being no request by defendant that claimant delay the pursuit of his rights, nor an express or implied agreement not to plead the statute. Wilson v. Clement Co., 207 N. C. 541, 177 S. E. 797.

Effect of Dismissal on Rights of Dependents.—Where the claim of an employee under the Compensation Act is dismissed because not filed within one year of the accident, as provided by this section, and pending appeal the employee dies as a result of the accidental injury, his dependents' claim for compensation for his death brought one month after his death is not barred, the dependents not being parties in interest in the prior proceeding, and their claim being an original right enforceable only after his death. Wray v. Carolina Cotton, etc., Co., 205 N. C. 782, 172 S. E. 487. Note.—This case was decided under this section as it stood prior to the 1933 amendment.

The provisions of this section constitute a condition precedent to the right to compensation, and not a statute of limitation. For this reason, where a claim for compensation under the provisions of the North Carolina Workmen's Act has not been filed with the Industrial Commission within one year after the date of the accident which resulted in the injury for which compensation is claimed, or where the Industrial Commission has not acquired jurisdiction of such claim within one year after the date of such accident, the right to compensation is barred. Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 582, 191 S. E. 403.

The requirement that an injured employee file notice of his claim within twelve months from the date of injury, is not a statute of limitations, but a condition precedent to the right to compensation. Lineberry v. Mebane, 218 N. C. 737, 12 S. E. (2d) 252.

Report Filed on Verbal Information Is Proper.—Where an employer files a report with the Commission within the prescribed time upon verbal information given by the representative of the employee, the representative not being able to read or write, and the employer admits liability, the report has been properly filed with the Industrial Commission as a claim and it acquires jurisdiction. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252.

Prosecuting Common Law Action and Failing to File Application for Hearing Is Not Abandonment of Filed Claim. —The prosecution of a suit at common law and the failure to file application for a hearing when requested did not amount to an abandonment of the claim for compensation, and no final award having been made at the time of the filing of formal petition for an award, the matter was pending at that time before the Commission, and it was error to deny compensation on the ground that claimant was barred by failure to file claim within one year after the death of the deceased employee. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252.

Claim Not Filed within Time Prescribed.—Where an employee did not file a claim until more than twelve months after injury, and the employer did not file a report of the accident because it did not have knowledge thereof, although it delivered claimant's wages to him after the disability resulting from the injury, but thought the disability was due to a prior injury, had no knowledge of the subsequent injury, and made no representations that the wages delivered to the claimant were in lieu of compensation, the evidence supports the findings that the claim was not filed within the time prescribed by this section. Lilly v. Belk Bros., 210 N. C. 735, 188 S. E. 319.

Limitation Tolled as to Employee under Eighteen and without Guardian.—The limitation of time provided by this section as against an employee under 18 years of age, who is without guardian or other legal representative, is tolled until he arrives at the age of 18. Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429.

§ 97-25. Medical treatment and supplies. — Medical, surgical, hospital, and other treatment, including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from date of injury to effect a cure or give relief and for such additional time as in the judgment of the commission will tend to lessen the period of disability, and in addition thereto such original artificial members as may be reasonably necessary at the end of the healing period shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the industrial commission may order such further treatments as may in the discretion of the commission be necessary.

The commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

The refusal of the employee to accept any medical, hospital, surgical or other treatment when ordered by the industrial commission, shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the industrial commission the circumstances justified the refusal, in which case, the industrial commission may order a change in the medical or hospital service.

If in an emergency on account of the employer's failure to provide the medical or other care as herein specified, a physician other than provided by the employer is called to treat the injured employee, the reasonable cost of such service shall be paid by the employer if so ordered by the industrial commission: Provided, however, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the industrial commission. (1929, c. 120, s. 25; 1931, c. 274, s. 4; 1933, c. 506.)

Editor's Note.—The Act of 1931 amended this section by striking out all of the provisions on voluntary treatment furnished by the employer and inserting a sentence empowering the commission on request of the employee to order a change of treatment at the employer's expense. 9 N. C. Law Rev. 405.

Public Laws of 1933, c. 506, inserted the proviso at the end of this section relating to the selection of a physician.

Insurer's Obligation to Furnish Medical Attention.—An employee brought action against the insurance carrier and its agent, alleging that after his injury the agent, on behalf of insurer, induced him to dispense with the services of his physician and consult physicians selected by insurer, and that insurer promised to provide hospitalization and surgical service recommended by insurer's physicians, but failed to do so to plaintiff's permanent injury. It was held that insurer's obligation to furnish medical attention necessary to plaintiff's complete recovery was founded on this section, and the Industrial Commission has exclusive jurisdiction of plaintiff's claim. Hedgepeth v. Lumbermen's Mut. Cas. Co., 209 N. C. 45, 182 S. E. 704.

Medical, etc., Expenses Not Included in Maximum Amount Recoverable for One Injury.—See Morris v. Laugh-

lin Chevrolet Co., 217 N. C. 428, 8 S. E. (2d) 484, 128 A. L. R. 132.

Additional Medical Treatment to Lessen Period of Disability.—The provision of this section that the employer should be liable for additional medical treatment to effect a cure or give relief is limited by the provision of this section to cases in which such additional medical treatment would tend to lessen the period of the employee's disability, and the discretionary power to award such additional medical treatment is also subject to this limitation; nor may liability for medical attention be extended upon the ground that public policy demands that the care of a permanently disabled employee should not be cast upon the state, the extent of liability under the act being definitely prescribed by its provisions. Millwood v. Firestone Cotton Mills, 215 N. C. 519, 2 S. E. (2d) 560.

§ 97-26. Liability for medical treatment measured by average cost in community; malpractice of physician.—The pecuniary liability of the employer for medical, surgical, hospital service or other treatment required, when ordered by the Commission, shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person, and the employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident, and shall be compensated for as such. (1929, c. 120, s. 26.)

Injury or suffering sustained by an employee in consequence of the malpractice of a physician or surgeon furnished by the employer or carrier is not ground for an independent action; under this section it is a constituent element of the employee's injury for which he is entitled to compensation. In such event the employer and the carrier are primarily liable and the question of secondary liability is eliminated. Hoover v. Globe Indemnity Co., 202 N. C. 655, 657, 163 S. E. 758.

§ 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.—After an injury, and so long as he claims compensation, the employee, if so requested by his employer or ordered by the Industrial Commission, shall submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Industrial Commission. The employee shall have the right to have present at such examination any duly qualified physician or surgeon provided and paid by him. No fact communicated to or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this article or any action at law brought to recover damages against any employer who may have accepted the compensation provisions of this article. If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute any proceedings under this article shall be suspended until such refusal or objection ceases, and no compensation shall at any time be payable for the period of obstruction, unless in the opinion of the Industrial Commission the circumstances justify the refusal or obstruction. The employer, or the Industrial Commission, shall have the right in any case of death to require an autopsy at the expense of the party requesting the same. (1929, c. 120, s. 27.)

§ 97-28. Seven-day waiting period; exceptions. — No compensation shall be allowed for the first seven calendar days of disability resulting from an injury, except the benefits provided for in § 97-25. Provided, however, that in the case the injury results in disability of more than twenty-eight (28) days, the compensation shall be allowed from the date of the disability. (1929, c. 120, s. 28.)

§ 97-29. Compensation rates for total incapacity. — Where the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total disability, a weekly compensation equal to 60 per centum of his average weekly wages, but not more than twenty-one dollars, nor less than seven dollars, a week; and in no case shall the period covered by such compensation be greater than four hundred weeks, nor shall the total amount of all compensation exceed six thousand dollars. In case of death the total sum paid shall be six thousand dollars less any amount that may have been paid as partial compensation during the period of disability, payable in one sum to the personal representative of deceased. The basis for compensation of members of the North Carolina national guard and the North Carolina state guard shall be the maximum amount of eighteen dollars per week as fixed herein. The basis for compensation of deputy sheriffs, or those acting in the capacity of deputy sheriffs, who serve upon a fee basis shall be the minimum amount of seven dollars a week as fixed herein. Provided, that the last sentence herein shall not apply to Pender, Cherokee, Avery, Perquimans, Gates, Macon, Watauga, Ashe, Union, Wilkes, Hyde, Caswell, Bladen and Carteret Counties. (1929, c. 120, s. 29; 1939, c. 277, s. 1; 1943, c. 502, s. 3; 1943, cc. 543, 672, s. 2.)

Editor's Note.—For a discussion of this section, see 8 N. C. L. Rev. 427, et seq.

The 1939 amendment added the last sentence, the proviso to which was added by the second 1943 amendment.

The first 1943 amendment increased the maximum weekly compensation from eighteen to twenty-one dollars. The third 1943 amendment, inserting the third sentence, ignored this increase. The second 1943 amendment added the proviso at the end.

Construction.—Construing this act as a whole to effectuate the intent and purpose of the Legislature, it is held that the purpose of the act is to provide compensation for the employee injured in case the injury is not fatal, and for those dependent upon him in case the injury is fatal, and the clause of this section purporting to provide for the personal representative of the deceased is construed to be repugnant to and irreconcilable with the other provisions of the act, and should be disregarded in giving effect to its other provisions, §§ 97-38 and 97-40 providing in clear language and comprehensive detail for a full legal method of determining compensation for fatal injuries, and where a dependent has been awarded compensation under said sections she is not entitled to the maximum award as administratrix under this section. Smith v. Carolina Power & Light Co., 198 N. C. 614, 152 S. E. 805.

This section should be construed in pari materia with § 97-31 allowing compensation for the loss of members, and so construed it is held that where an employee has suffered an injury to his hand arising out of and in the course of his employment, and the injury causes him total temporary disability in the course of its healing, and renders it necessary to amputate certain parts of certain fingers of the hand, he is entitled to receive compensation under § 97-29 for total temporary disability, and in addition thereto compensation for the loss of the parts of his fingers under § 97-31, there being no provision in the act that the latter should preclude the former, compensation for the latter to begin upon expiration of the compensation

for the former. Rice v. Denny Roll & Panel Co., 199 N. C. 154, 154 S. E. 69.

Quoted in Murray v. Nebel Knitting Co., 214 N. C. 437, 199 S. E. 609.

Cited in Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570.

§ 97-30. Partial incapacity. — Except as otherwise provided in § 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to 60 per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than twenty-one dollars a week, and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability. (1929, c. 120, s. 30; 1943, c. 502, s. 4.)

Editor's Note.—The 1943 amendment increased the maximum weekly compensation from eighteen to twenty-one dollars.

The employee sustained injuries resulting in disability of a general nature such as would entitle him to compensation under this section. In addition to such injuries, he had also sustained injuries of a specific nature such as to entitle him to compensation under section 97-31. He is entitled to compensation for the specific injuries under section 97-31, and then, if still disabled as a result of the other injuries, compensation will be paid under this section. Morgan v. Norwood, 211 N. C. 600, 601, 191 S. E. 345, citing Baughn v. Richmond Forging Co., Claim No. 70-597 which latter case gives a construction of the corresponding sections of the Virginia law by the Virginia Industrial Commission.

When an award has been entered for total disability for certain length of time, and for partial disability thereafter for a total of three hundred weeks, under this section, the industrial commission may not increase the award of compensation to that allowed for total disability, upon its finding that at the time of the review of the award claimant's condition was unchanged and that he was at the time only 50 per cent disabled. Murray v. Nebel Knitting Co., 214 N. C. 437, 199 S. E. 609, distinguishing Smith v. Swift & Co., 212 N. C. 608, 194 S. E. 106.

Applied in Smith v. Swift & Co., 212 N. C. 608, 194 S. E. 106.

§ 97-31. Schedule of injuries; rate and period of compensation.—In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the periods specified, and shall be in lieu of all other compensation, including disfigurement, to-wit:

(a) For the loss of a thumb, sixty per centum of the average weekly wages during sixty-five weeks.

(b) For the loss of a first finger, commonly called the index finger, sixty per centum of the average weekly wages during forty weeks.

(c) For the loss of a second finger, sixty per centum of the average weekly wages during thirty-five weeks.

(d) For the loss of a third finger, sixty per centum of the average weekly wages during twenty-two weeks.

(e) For the loss of a fourth finger, commonly called the little finger, sixty per centum of the average weekly wages during sixteen weeks.

(f) The loss of the first phalange of the thumb or any finger shall be considered to be equal to the loss of one-half of such thumb or finger, and the compensation shall be for one-half of the periods of time above specified.

(g) The loss of more than one phalange shall be considered the loss of the entire finger or thumb: Provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

(h) For the loss of a great toe, sixty per centum of the average weekly wages during thirty-five weeks.

(j) For the loss of one of the toes other than a great toe, sixty per centum of the average weekly wages during ten weeks.

(k) The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of such toe, and the compensation shall be for one-half of the periods of time above specified.

(l) The loss of more than one phalange shall be considered as the loss of the entire toe.

(m) For the loss of a hand, sixty per centum of the average weekly wages during one hundred and seventy weeks.

(n) For the loss of an arm, sixty per centum of the average weekly wages during two hundred and twenty weeks.

(o) For the loss of a foot, sixty per centum of the average weekly wages during one hundred and forty-four weeks.

(p) For the loss of a leg, sixty per centum of the average weekly wages during two hundred weeks.

(q) For the loss of an eye, sixty per centum of the average weekly wages during one hundred and twenty weeks.

(r) The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of § 97-29.

(s) For the complete loss of hearing in one ear, sixty per centum of the average weekly wages during seventy weeks; for the complete loss of hearing in both ears, sixty per centum of the average weekly wages during one hundred and fifty weeks.

(t) Total loss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye. The compensation for partial loss of or for partial loss of use of a member or for partial loss of vision of an eye shall be such proportion of the payments above provided for total loss as such partial loss bears to total loss, except that in cases where there is eighty-five per centum, or more, loss of vision in an eye, this shall be deemed "industrial blindness" and compensated as for total loss of vision of such eye.

(u) The weekly compensation payments referred to in this section shall all be subject to the same limitations as to maximum and minimum as set out in § 97-29.

(v) In case of serious facial or head disfigurement, the industrial commission shall award proper and equitable compensation not to exceed two thousand five hundred dollars. In case of enucleation where an artificial eye cannot be fitted and used, the industrial commission may award compensation as for serious facial disfigurement.

(w) In case of serious bodily disfigurement, including the loss or permanent injury to any important organ of the body for which no compensation is payable under the preceding subsections, but excluding the disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the above schedule, the industrial commission may award proper and equitable compensation not to exceed two thousand five hundred dollars. (1929, c. 120, s. 31; 1931, c. 164; 1943, c. 502, s. 2.)

Editor's Note.—The Act of 1931 added a proviso making serious or permanent injury to any member or organ of the body, not provided for, disfigurement, in an apparent effort to meet the decisions in the cases of Henninger v. Industrial Commission, 1 N. C. I. C. 3; Porter v. Jennings Cotton Mills, 1 N. C. I. C. 218. See 8 N. C. Law Rev. 423-424, 9 N. C. Law Rev. 405.

The 1943 amendment rewrote the section.

The cases treated below were decided under former provisions of this section.

Prior Astigmatism Does Not Bar Recovery.—In Schrum v. Catawba Upholstering Co., 214 N. C. 353, 199 S. E. 385, claimant was held entitled to full compensation for total loss of vision of eye by this section. It was held error to first deduct forty per cent loss due to astigmatism and award claimant only sixty per cent of the amount recoverable for total loss of vision, and this result was not altered by § 97-33.

The effect of the proviso in subsec. (t) of this section relating to serious disfigurement is to exclude the compensation for facial and head disfigurement only from the "weekly compensation payments" contained in the "foregoing schedule of compensation," and does not exclude such compensation from the limitation upon total compensation under the act. Arp v. Wood & Co., 207 N. C. 41, 42, 175 S. E. 719.

Section Is Constitutional.—This section, authorizing the industrial commission to award compensation for bodily disfigurement, is sufficiently certain and prescribes the standard for the computation of an award thereunder with sufficient definiteness, and the provision is valid and constitutional and not void as a delegation of legislative power in contravention of Art. I, § 8 of the state Constitution. Baxter v. Arthur Co., 216 N. C. 276, 4 S. E. (2d) 621.

Determining Award for Serious Disfigurement.—In awarding compensation for serious disfigurement the commission, in arriving at the consequent diminution of earning power, should consider the natural physical handicap resulting, the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570.

Such Award Is Separate.—Weekly compensation under the schedules cannot be increased by the inclusion of compensation for disfigurement. Compensation for disfigurement, if allowed, must be a separate award and the aggregate awards in no case may exceed the total compensation fixed in this section. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 261, 22 S. E. (2d) 570.

And No Award if One Made for Total Permanent Disability.—No award can be made for disfigurement where an award has been made for total permanent disability. Likewise, disfigurement must be serious in order that compensation may be allowed therefor. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 265, 22 S. E. (2d) 570.

Disfigurement and Partial Loss of Arm.—Under this section the industrial commission has authority to award compensation for facial and bodily disfigurement, in this case resulting from scar tissue from burns, and to award compensation for partial loss of the use of the arm resulting from such scar tissue, when such awards are supported by competent evidence, provided the award for the disfigurement does not exceed the $2,500 maximum provided by the act, and provided further that the aggregate of all awards does not exceed the $6,000 maximum prescribed by § 97-29. Baxter v. Arthur Co., 216 N. C. 276, 4 S. E. (2d) 621.

Loss of Eye and Loss of Vision.—In construing this chapter, the words of the statute must be taken in their natural or ordinary meaning, and upon such construction the phrases "the loss of an eye" and "total . . . loss of vision of an eye" in prescribing the amount of compensation to be allowed for injury thereto, mean the state or fact of loss of an eye or total destruction of the vision of an eye as distinguished from the partial loss of such vision. Logan v. Johnson, 218 N. C. 200, 10 S. E. (2d) 653.

The evidence before the industrial commission was to the effect that plaintiff has "slight peripheral vision but only slight perception in center of cornea" of one eye, and that he had only a small percentage of normal vision in the eye. Held: The evidence does not support a finding that claimant had total loss of vision in the eye, and such finding and the award of compensation based thereon, is set aside and the cause remanded to the industrial commission for a proper finding from the evidence as to the extent or percentage of loss of vision claimant had sustained. Id.

Enumeration of Total Permanent Disabilities Is Not Exclusive.—The fact that this section states that certain injuries shall be deemed permanent and total disabilities does not mean that permanent and total disabilities can be found only in those cases enumerated, but that such injuries are conclusively presumed to be permanent total disabilities, and the commission shall so find. Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570.

Quoted in Maley v. Thomasville Furniture Co., 214 N. C. 589, 200 S. E. 438.

Cited in Smith v. Swift & Co., 212 N. C. 608, 194 S. E. 106.

§ 97-32. Refusal of injured employee to accept suitable employment as suspending compensation. —If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified. (1929, c. 120, s. 32.)

§ 97-33. Prorating permanent disability received in other employment. — If any employee has a permanent disablity or has sustained a permanent injury in service in the Army or Navy of the United States, or in another employment other than that in which he received a subsequent permanent injury by accident, such as specified in § 97-31 he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed. (1929, c. 120, s. 33.)

Applied in Schrum v. Catawba Upholstering Co., 214 N. C. 353, 199 S. E. 385.

§ 97-34. Employee receiving an injury when being compensated for former injury.—If an employee receives an injury for which compensation is payable, while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries, unless the later injury be a permanent injury such as specified in § 97-31; but he shall be entitled to compensation for that injury and from the time of that injury which will cover the longest period and the largest amount payable under this article. (1929, c. 120, s. 34.)

§ 97-35. How compensation paid for two injuries; employer liable only for subsequent injury. — If any employee receives a permanent injury as specified in § 97-31 after having sustained another permanent injury in the same employment, he shall be entitled to compensation for both injuries, but the total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation, and in no case exceeding five hundred weeks.

If an employee has previously incurred permanent partial disability through the loss of a hand, arm, foot, leg, or eye, and by subsequent accident incurs total permanent disability through the loss of another member, the employ-

er's liability is for the subsequent injury only. (1929, c. 120, s. 35.)

§ 97-36. Accidents taking place outside state; employee receiving compensation from another state.—Where an accident happens while the employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if the contract of employment was made in this State, if the employer's place of business is in this State, and if the residence of the employee is in this State; provided his contract of employment was not expressly for service exclusively outside of the State; provided, however, if an employee shall receive compensation or damages under the laws of any other State nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this article. (1929, c. 120, s. 36.)

Editor's note.—For a discussion of this section, see 8 N. C. L. Rev. 427, et seq.

Temporary Removal from State Not Bar to Recovery.—Claimant testified that he was injured in an automobile accident while he was returning from a salesman's meeting in this State, which he was required to attend, to his home in Florence, S. C.; that he had moved his family to Florence temporarily so he could take them to a nearby beach occasionally; that his headquarters were in Charlotte, N. C., and that he had not given up his residence in this state. It was held that the evidence supports the finding of the industrial commission that the employee was a resident of the state at the time of the accident, and that he was covered by the Compensation Act. Brooks v. Carolina Rim, etc., Co., 213 N. C. 518, 196 S. E. 835.

Exclusion of Non-Resident Employees Involves No Unconstitutional Discrimination.—The provision of the North Carolina compensation act excluding from its coverage nonresident employees involves no unconstitutional discrimination, the inadvisability of attempting to give the act extraterritorial effect being a sufficient basis for the provision. Reaves v. Earle-Chesterfield Mill Co., 216 N. C. 462, 5 S. E. (2d) 305.

Concurrence of Three Factors Is Requisite for Jurisdiction.—In order to give the industrial commission jurisdiction of the rights of the parties arising out of an injury received by the employee while out of the state, it must appear that the contract of employment was made in this state, that the employee's place of business is in this state, and that the residence of the employee is in this state, and the concurrence of all three facts is prerequisite to its jurisdiction of such injury. Reaves v. Earle-Chesterfield Mill Co., 216 N. C. 462, 5 S. E. (2d) 305; Mallard v. Bohannon, 220 N. C. 536, 543, 18 S. E. (2d) 189.

Whether a contract of emplyoment is expressly for service exclusively outside the state is a question of fact for the determination of the industrial commsision. Mallard v. Bohannon, 220 N. C. 536, 18 S. E. (2d) 189.

Burden of Proof.—Where claimant establishes the jurisdictional facts, the burden is upon the employer and the insurance carrier to show that the contract of employment was expressly for service exclusively outside the state and thus bring themselves within the proviso of this section. Mallard v. Bohannon, 220 N. C. 536, 18 S. E. (2d) 189.

§ 97-37. Where injured employee dies before total compensation is paid.—When an employee receives or is entitled to compensation under this article for an injury covered by § 97-31 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived.

Provided, however, that if the death is due to a cause that is compensable under this article, and the dependents of such employee are awarded compensation therefor, all right to unpaid compensation provided by this section shall cease and determine. (1929, c. 120, s. 37.)

An award inadvertently entered by the Industrial Commission after the death of the claimant on appeal from the award is irregular, but not void, and the proceedings do not abate, this section providing that payment of the unpaid balance should be made to his next of kin dependent upon him at the time of his death. Butts v. Montague, 204 N. C. 389, 168 S. E. 215.

§ 97-38. Where death results proximately from the accident; dependents; burial expenses; compensation to aliens; election by partial dependdents.—If death results proximately from the accident and within two years thereafter, or while total disability still continues, and within six years after the accident, the employer shall pay for or cause to be paid, subject, however, to the provisions of the other sections of this article in one of the methods hereinafter provided, to the dependents of the employee, wholly dependent upon his earnings for support at the time of accident, a weekly payment equal to 60 per centum of his average weekly wages, but not more than twenty-one dollars, nor less than seven dollars, a week for a period of three hundred and fifty weeks from the date of the injury, and burial expenses not exceeding two hundred dollars. If the employee leaves dependents only partly dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid, as aforesaid, shall equal the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury: Provided, when the partial dependents are all next of kin as defined in § 97-40, and all so elect, they may receive benefits under § 97-40 instead of under this section. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred and fifty weeks from the date of the injury. Compensation under this article to aliens not residents (or about to become non-residents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child, or children, to surviving father or mother whom the employee has supported, either wholly or in part for the period of one year prior to the date of the injury, and except that the Commission may, at its option, or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Commission. (1929, c. 120, s. 38; 1943, cc. 163, 502, s. 5.)

Cross Reference.—For definitions of terms, see § 97-2.

Editor's Note.—The first 1943 amendment added the proviso to the second sentence, and the second 1943 amendment increased the maximum weekly payment specified in the first sentence from eighteen to twenty-one dollars.

For a discussion of this section, see 8 N. C. Law Rev. 427, et seq.

Proximate Cause.—The employer is required to pay com-

pensation for death of employee only when the death results proximately from injury by accident arising out of and in the course of employment. Gilmore v. Hoke County Board of Education, 222 N. C. 358, 23 S. E. (2d) 292.

Total Dependency.—Where the evidence tended to show that the mother of the deceased employee lived with him, that he paid the rent, bought groceries and supported her for a period of years, but that for two months prior to his death she did washing and nominal services for, and stayed with, an aged bedridden person and earned $5.75 per week thereby, which she deposited in a bank or used to buy small luxuries, the fact that the mother earned small amounts of money in temporary and casual employment does not indicate any dependable source of income other than that she received from her son and the conclusion of the industrial commission that she was totally dependent upon her son within the meaning of the compensation act is sustained. Thomas v. Raleigh Gas Co., 218 N. C. 429, 11 S. E. (2d) 297.

Finding as to Dependency Binding on Appeal.—While it may be admitted that in some instances the question of dependency may be a mixed question of fact and of law, where the facts admitted or found by the commission upon competent evidence support the conclusion of the commission in regard thereto, its award is binding on the court. Thomas v. Raleigh Gas Co., 218 N. C. 429, 11 S. E. (2d) 297.

Cited in Smith v. Collins-Aikman Corp., 198 N. C. 621, 152 S. E. 809; Early v. Basnight & Co., 214 N. C. 103, 198 S. E. 577.

§ 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent. — A widow, a widower, and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be at the time of the accident; but no allowance shall be made for any payment made in lieu of board and lodging or services, and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident. If there is more than one person wholly dependent, the death benefit shall be divided among them; the persons partly dependent, if any, shall receive no part thereof. If there is no one wholly dependent, and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

The widow, or widower and all children of deceased employees shall be conclusively presumed to be dependents of deceased and shall be entitled to receive the benefits of this article for the full periods specified herein. (1929, c. 120, s. 39.)

Cross Reference.—For definition of terms "widow", "widower", and "child", see § 97-2.

Editor's Note.—The determination of the extent of the dependency of partial dependents has proven troublesome. See 8 N. C. L. Rev. 426.

The common-law wife of a deceased employee is not entitled to compensation under the provisions of this act. Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 237, 154 S. E. 66.

An illegitimate child, born after the death of its father, who before his death had acknowledged his paternity of the child, is a dependent of its deceased father within the meaning of this section, and such child is entitled to share with children of its deceased father who were born of his marriage to their mother, from whom their father had been divorced prior to his death, in compensation awarded under this act to his dependents. Lippard v. Southeastern Exp. Co., 207 N. C. 507, 177 S. E. 801.

Cited in Smith v. Collins-Aikman Corp., 198 N. C. 621, 152 S. E. 809.

§ 97-40. Commutation of benefit and payment on absence of dependents; second injury fund. — If the deceased employee leaves no dependents the employer shall pay to the next of kin as herein defined the commuted amount provided for in § 97-38 for whole dependents; but if the deceased left no next of kin as herein defined, then said commuted amount shall be paid to the Industrial Commission to be held and disbursed by it in the manner hereinafter provided; one-half of said commuted amount shall be retained by the Industrial Commission and the other one-half paid to the personal representative of the deceased to be by him distributed to the next of kin as defined in the Statutes of Distribution; but if there be no next of kin as defined in the Statutes of Distribution, then the personal representative shall pay the same to the Industrial Commission after payment of costs of administration. For the purpose of this section the term "next of kin" shall include only the father, mother, widow, child, brother or sister of the deceased.

Amounts paid to the Industrial Commission under this section shall constitute a Second Injury Fund, to be held by the commission and disbursed by it in unusual cases of second injuries as follows: (1) To provide additional compensation in case of second injuries referred to in § 97-33: Provided, however, such additional compensation when added to the compensation awarded under said section shall not exceed the amount which would have been payable for both injuries had both been sustained in the subsequent accident. (2) To provide for an injured employee who has sustained permanent total disability, in the manner referred to in § 97-35, compensation in addition to the compensation which shall be awarded under said section; such additional compensation, however, when added to the compensation awarded under said section shall not exceed the compensation for permanent total disability as provided in § 97-29.

The additional compensation herein provided for is to be paid out of the Second Injury Fund exclusively and only to the extent which the assets of said fund shall permit. (1929, c. 120, s. 40; 1931, c. 274, s. 5; 1931, c. 319.)

Editor's Note.—This section formerly provided for a payment to the personal representative of a deceased employee who left no dependents. It was amended by the Act of 1931 so as to direct payment to a narrow class of next of kin specially defined by the section. Failing such persons, a more complicated arrangement is provided. The original Act was criticised as providing an unjustifiable windfall for non-dependent next of kin. The present amendment makes a half-hearted move toward cutting off this bounty for relatives at the expense of the employer, the industry and eventually the public, by turning a part of the money over to the Commission in some cases. A clerical error in the amending Act was corrected by Public Laws 1931, c. 319. 9 N. C. Law Rev. 406.

For a discussion of this section, see 8 N. C. L. Rev. 427, et seq.

While there is no commuted amount provided by this section for payment to the personal representative of a deceased employee for death resulting from an injury compensable thereunder, the act provides the method by which such amount can be commuted, which is payable to the personal representative for the benefit of the heirs at law of the deceased employee. Reeves v. Parker-Graham-Sexton, Inc., 199 N. C. 236, 237, 154 S. E. 66.

When a deceased employee leaves no dependents, an award of compensation should be made to his next of kin, under this section, the employee's mother in this case, and the evidence is held sufficient in this case to support the

finding that the employee left no dependent or dependents. Hamby v. Cobb, 214 N. C. 813, 1 S. E. (2d) 101.

§ 97-41. Total compensation not to exceed $6,000.—The total compensation payable under this article shall in no case exceed Six Thousand ($6,000) Dollars. (1929, c. 120, s. 41.)

The amount allowed by the Industrial Commission for serious facial or head disfigurement is to be included with other amounts allowed an injured employee in determining the total compensation allowed such employee, which in no case may exceed six thousand dollars. Arp. v. Wood & Co., 207 N. C. 41, 175 S. E. 719.

In computing the $6,000.00 maximum amount recoverable for any one injury, the amount paid by the employer or insurance carrier for medical and surgical treatment and/or hospitalization or other treatment, including medical and surgical supplies, should not be included, since the compensation act does not include such medical and hospital expense in defining the word "compensation" but defines compensation as to the money allowance payable to an employee or his dependents, including funeral benefits provided by the act. Morris v. Laughlin Chevrolet Co., 217 N. C. 428, 8 S. E. (2d) 484, 128 A. L. R. 132.

§ 97-42. Deduction of payments. — Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this article were not due and payable when made, may, subject to the approval of the Industrial Commission, be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment. (1929, c. 120, s. 42.)

§ 97-43. Commission may prescribe monthly or quarterly payments.—The Industrial Commission, upon application of either party, may, in its discretion, having regard to the welfare of the employee and the convenience of the employer, authorize compensation to be paid monthly or quarterly instead of weekly. (1929, c. 120, s. 43.)

§ 97-44. Lump sums.—Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, in unusual cases, where the parties agree and the Industrial Commission deems it to be to the best interest of the employee or his dependents, or where it will prevent undue hardships on the employer or his insurance carrier, without prejudicing the interests of the employee or his dependents, be redeemed, in whole or in part, by the payment by the employer of a lump sum which shall be fixed by the Commission, but in no case to exceed the commutable value of the future installments which may be due under this article. The Commission, however, in its discretion, may at any time in the case of a minor who has received permanently disabling injuries, either partial or total, provide that he be compensated, in whole or in part, by the payment of a lump sum, the amount of which shall be fixed by the Commission, but in no case to exceed the commutable value of the future installments which may be due under this article. (1929, c. 120, s. 44.)

Editor's Note.—For a discussion of this section, see 8 N. C. L. Rev. 427, et seq.

§ 97-45. Reducing to judgment outstanding liability of insurance carriers withdrawing from state. — Upon the withdrawal of any insurance carrier from doing business in the state that has any outstanding liability under the workmen's compensation act, the insurance commissioner shall immediately notify the North Carolina industrial commission, and thereupon the said North Carolina industrial commission shall issue an award against said insurance carrier and commute the installments due the injured employee, or employees, and immediately have said award docketed in the superior court of the county in which the claimant resides, and the said North Carolina industrial commission shall then cause suit to be brought on said judgment in the state of the residence of any such insurance carrier, and the proceeds from said judgment after deducting the cost, if any, of the proceeding, shall be turned over to the injured employee, or employees, taking from such employee, or employees, the proper receipt in satisfaction of his claim. (1933, c. 474.)

§ 97-46. Lump sum payments to trustee; receipt to discharge employer. — Whenever the Industrial Commission deems it expedient, any lump sum, subject to the provisions of § 97-45, shall be paid by the employer to some suitable person or corporation appointed by the Superior Court in the county wherein the accident occurred, as trustee, to administer the same for the benefit of the person entitled thereto, in the manner provided by the Commission. The receipt of such trustee for the amount as paid shall discharge the employer or any one else who is liable therefor. (1929, c. 120, s. 45.)

§ 97-47. Change of condition; modification of award. — Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this article, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no such review shall be made after twelve months from the date of the last payment of compensation pursuant to an award under this article. (1929, c. 120, s. 46; 1931, c. 274, s. 6.)

Editor's Note.—The Act of 1931 struck out the words "last award" formerly ending this section and inserted in lieu thereof the words "last payment of compensation pursuant to an award under this chapter."

Change in Condition.—The industrial commission is given authority to review an award and end, diminish or increase the compensation previously awarded only when there has been a "change in condition" of the claimant. Murray v. Nebel Knitting Co., 214 N. C. 437, 199 S. E. 609.

Where there is ample evidence to support a finding of a change in claimant's condition as contemplated by this section, and evidence which would support a contrary finding, the finding of the industrial commission from the conflicting evidence is conclusive. Knight v. Ford Body Co., 214 N. C. 7, 197 S. E. 563.

Delay in Seeking Review.—Where the findings of the Industrial Commission, supported by evidence, are to the effect that a review of the award of compensation is sought by an employee more than twelve months from the date of the last payment, the order of the Commission denying further compensation will be upheld by the courts in view of this section. Lee v. Rose's 5-10-25c. Stores, 205 N. C. 310, 171 S. E. 87.

Applied in Smith v. Swift & Co., 212 N. C. 608, 194 S. E. 106; Knight v. Ford Body Co., 214 N. C. 7, 197 S. E. 563.

Stated in Russell v. Western Oil Co., 206 N. C. 341, 346, 174 S. E. 101.

Cited in Butts v. Montague Bros., 208 N. C. 186, 188, 179 S. E. 799.

§ 97-48. Receipts relieving employer; payment to minors; when payment of claims to dependents subsequent in right discharges employer.—(a) Whenever payment of compensation is made to a widow or widower for her or his use, or for her or his use and the use of the child or children, the written receipt thereof of such widow or widower shall acquit the employer: Provided, however, that in order to protect the interests of minors or incompetents the Industrial Commission may at its discretion change the terms of any award with respect to whom compensation for the benefit of such minors or incompetents shall be paid.

(b) Whenever payment is made to any person eighteen years of age or over, the written receipt of such person shall acquit the employer.

(c) Payment of death benefits by an employer in good faith to a dependent subsequent in right to another or other dependents shall protect and discharge the employer, unless and until such dependent or dependents prior in right shall have given notice of his or their claims. In case the employer is in doubt as to the respective rights of rival claimants, he may apply to the Industrial Commission to decide between them. (1929, c. 120, s. 47; 1931, c. 274, s. 7.)

Editor's Note.—The Act of 1931 struck out the former section and substituted the above.

Cited in Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429.

§ 97-49. Benefits of mentally incompetent or minor employees under 18 may be paid to a trustee, etc.—If an injured employee is mentally incompetent or is under eighteen years of age at the time when any right or privilege accrues to him under this article, his guardian, trustee, or committee may in his behalf claim and exercise such right or privilege. (1929, c. 120, s. 48.)

This section is a mere declaration of the common law rule. Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429.

§ 97-50. Limitation as against minors or mentally incompetent.—No limitation of time provided in this article for the giving of notice or making claim under this article shall run against any person who is mentally incompetent, or a minor dependent, as long as he has no guardian, trustee, or committee. (1929, c. 120, s. 49.)

This section is applicable only to the mentally incompetent and the minor dependent. Lineberry v. Mebane, 219 N. C. 257, 13 S. E. (2d) 429.

Cited in Lineberry v. Mebane, 218 N. C. 737, 12 S. E. (2d) 252.

§ 97-51. Joint employment; liabilities.—Whenever an employee, for whose injury or death compensation is payable under this article, shall at the time of the injury be in joint service of two or more employers subject to this article, such employers shall contribute to the payment of such compensation in proportion to their wages liability to such employee; provided, however, that nothing in this section shall prevent any reasonable arrangement between such employers for a different distribution as between themselves of the ultimate burden of compensation. (1929, c. 120, s. 50.)

§ 97-52. Occupational disease made compensable; "accident" defined.—Disablement or death of an employee resulting from an occupational disease described in § 97-53 shall be treated as the happening of an injury by accident within the meaning of the North Carolina Workmen's Compensation Act and the procedure and practice and compensation and other benefits provided by said act shall apply in all such cases except as hereinafter otherwise provided. The word "accident," as used in the Workmen's Compensation Act, shall not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment, over extended periods of time, whether such events may or may not be attributable to fault of the employer, and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this article: Provided, however, no compensation shall be payable for asbestosis and/or silicosis as hereinafter defined if the employee, at the time of entering into the employment of the employer by whom compensation would otherwise be payable, falsely represented himself in writing as not having previously been disabled or laid off because of asbestosis or silicosis. (1935, c. 123.)

The rights and remedies of an employee under the Compensation Act exclude all other rights and remedies, and an employee bound by the act, may not maintain an action at common law against the employer and his foreman to recover for injuries caused by an occupational disease not enumerated in this and the following section, even though the disease is the result of negligence. Murphy v. American Enka Corp., 213 N. C. 218, 195 S. E. 536.

This section, providing that only the occupational diseases therein specified should be compensable, relates only to occupational diseases, which are those resulting from long and continued exposure to risks and conditions inherent and usual in the nature of the employment, and does not preclude compensation for a disease not inherent in or incident to the nature of the employment when it results from an accident arising out of and in the course of the employment. MacRae v. Unemployment Compensation Comm., 217 N. C. 769, 9 S. E. (2d) 595. See also, Blassingame v. Southern Asbestos Co., 217 N. C. 223, 7 S. E. (2d) 478.

§ 97-53. Occupational diseases enumerated; when due to exposure to chemicals.—The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this article:

1. Anthrax.
2. Arsenic poisoning.
3. Brass poisoning.
4. Zinc poisoning.
5. Manganese poisoning.
6. Lead poisoning. Provided the employee shall have been exposed to the hazard of lead poisoning for at least thirty days in the preceding twelve months' period, and; provided further only the employer in whose employment such employee was last injuriously exposed shall be liable.
7. Mercury poisoning.
8. Phosphorus poisoning.
9. Poisoning by carbon bisulphide, methanol, naphtha or volatile halogenated hydrocarbons.
10. Chrome ulceration.
11. Compressed-air illness.
12. Poisoning by benzol, or by nitro and amido derivatives of benzol (dinitrol-benzol, anilin, and others).
13. Infection or inflammation of the skin or eyes or other external contact surfaces or oral or nasal cavities due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors.

14. Epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound, product, or residue of any of these substances.

15. Radium poisoning or injury by X-rays.

16. Blisters due to use of tools or appliances in the employment.

17. Bursitis, of the knee or elbow, due to intermittent pressure in the employment.

18. Miner's nystagmus.

19. Bone felon due to constant or intermittent pressure in employment.

20. Synovitis, caused by trauma in employment.

21. Tenosynovitis, caused by trauma in employment.

22. Carbon monoxide poisoning.

23. Poisoning by sulphuric, hydrochloric or hydrofluoric acid.

24. Asbestosis.

25. Silicosis.

Occupational diseases caused by chemicals shall be deemed to be due to exposure of an employee to the chemicals herein mentioned only when as a part of the employment such employee is exposed to such chemicals in such form and quantity, and used with such frequency as to cause the occupational disease mentioned in connection with such chemicals. (1935, c. 123.)

Conflicting expert testimony on the question of whether the deceased employee died as a result of an occupational disease, caused by exposure to benzol poisoning, arising out of and in the course of his employment, was sufficient to sustain the commission's award of compensation to the employee's dependent. Tindall v. American Furniture Co., 216 N. C. 306, 4 S. E. (2d) 894.

§ 97-54. "Disablement" defined. — The term "disablement" as used in this article as applied to cases of asbestosis and silicosis means the event of becoming actually incapacitated, because of such occupational disease, from performing normal labor in the last occupation in which remuneratively employed; but in all other cases of occupational disease shall be equivalent to "disability" as defined in § 97-2, paragraph (i). (1935, c. 123.)

§ 97-55. "Disability" defined.—The term "disability" as used in this article means the state of being incapacitated as the term is used in defining "disablement" in § 97-54. (1935, c. 123.)

§ 97-56. Limitation on compensable diseases. —The provisions of this article shall apply only to cases of occupational disease in which the last exposure in an occupation subject to the hazards of such diseases occurred on or after March 26, 1935. (1935, c. 123.)

§ 97-57. Employer liable.—In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable. (1935, c. 123.)

This section makes no provision for a partnership in responsibility, has nothing to say as to the length of the last employment or the degree of injury which the deleterious exposure must inflict to merit compensation. It takes the breakdown practically where it occurs—with the last injurious exposure. Haynes v. Feldspar Producing Co., 222 N. C. 163, 170, 22 S. E. (2d) 275.

§ 97-58. Claims for certain diseases restricted; time limit for filing claims.—An employer shall not be liable for any compensation for asbestosis, silicosis or lead poisoning unless disablement or death results within three years after the last exposure to such disease, or, in case of death, unless death follows continuous disability from such disease, commencing within the period of three years limited herein, and for which compensation has been paid or awarded or timely claim made as hereinafter provided and results within seven years after such last exposure. Claims for all other occupational diseases shall be barred unless claims shall be filed with the industrial commission within one year from the disablement or death caused by such occupational disease. (1935, c. 123.)

§ 97-59. Employer to provide treatment. — In the event of disability from an occupational disease, the employer shall provide reasonable medical and/or other treatment for such time as in the judgment of the industrial commission will tend to lessen the period of disability or provide needed relief; provided, however, medical and/or other treatment for asbestosis and/or silicosis shall not exceed a period of three years nor cost in excess of three hundred thirty-four ($334.00) dollars in any one year; and, provided further, all such treatment shall be first authorized by the industrial commission after consulting with the advisory medical committee. (1935, c. 123.)

§ 97-60. Examination of employees by advisory medical committee; designation of industries with dust hazards. — The compulsory examination of employees and prospective employees as herein provided applies only to persons engaged or about to engage in an occupation which has been found by the industrial commission to expose them to the hazards of asbestosis and/or silicosis. The industrial commission shall designate by order each industry found subject to any such hazard and shall notify the employers therein before such examinations are required. On and after March 26, 1935, it shall be the duty of every employer, in the conduct of whose business his employees or any of them are subjected to the hazards of asbestosis and/or silicosis, to provide prior to employment necessary examinations of all new employees for the purpose of ascertaining if any of them are in any degree affected by asbestosis and/or silicosis or peculiarly susceptible thereto; and every such employer shall from time to time, as ordered by the industrial commission, provide similar examinations for all of his employees whose employment exposes them to the hazards of asbestosis and/or silicosis. At least one member of the advisory medical committee or other physician designated by the industrial commission shall make such examinations or be present when any such examination is made. The refusal of an employee to submit to any such examination shall bar such employee from compensation or other benefits provided by this article in the event of disablement and/or death resulting from exposure to the hazards of asbestosis and/or silicosis subsequent to such refusal. It shall be the duty of the industrial commission to make and/or order inspections of employments and to keep a record of all employments subjecting employees to the hazards of asbestosis and/or silicosis, and

to notify the employer in any case where such hazard shall have been found to exist. The unreasonable failure of an employer to provide for any examination or his unreasonable refusal to permit any inspection herein authorized shall constitute a misdemeanor and shall be punishable as such. (1935, c. 123.)

§ 97-61. Compensation for employee temporarily removed from hazardous employment; payment for training for readjustment to other work; waiver of right to compensation.—Where an employee, though not actually disabled, is found by the industrial commission to be affected by asbestosis and/or silicosis, and it is also found by the industrial commission that such employee would be benefited by being taken out of his employment and that such disease with such employee has progressed to such a degree as to make it hazardous for him to continue in his employment and is in consequence removed therefrom by order of the industrial commission, he shall be paid compensation as for temporary total or partial disability, as the case may be, until he can obtain employment in some other occupation in which there are no hazards of such occupational disease: Provided, however, compensation in no such case shall be paid for a longer period than twenty weeks to an employee without dependents, nor for a longer period than forty weeks to an employee with dependents, and in either case said period shall begin from the date of removal from the employment, unless actual disablement from such disease results later and within the time limited in § 97-58. When in any such case the forced change of occupation shall in the opinion of the industrial commission require that the employee be given special training in order to properly readjust himself there shall be paid for such training and incidental traveling and living expenses an additional sum which shall not exceed three hundred ($300.00) dollars, in the case of an employee without dependents, and which shall not exceed five hundred ($500.00) dollars in the case of an employee with dependents, such payment to be made for the benefit of the employee to such person or persons as the industrial commission may direct; provided, however, no such payment shall be made unless the employee accepts the special training herein provided, nor shall payment be made for a longer period of time than the employee shall accept such special training. If an employee has been so compensated, and whether or not specially trained for another occupation, and he thereafter engages in any occupation which exposes him to hazards of silicosis and/or asbestosis without first having obtained the written approval of the industrial commission, neither he, his dependents, personal representative nor any other person shall be entitled to any compensation for disablement or death from silicosis and/or asbestosis: Provided, however, that an employee so affected, as an alternative to forced change of occupation, may, subject to the approval of the industrial commission, waive in writing his right to compensation for any aggravation of his condition that may result from his continuing in his hazardous occupation; but in the event of total disablement and/or death as a result of asbestosis and/or silicosis with which the employee was so affected compensation shall nevertheless be payable, but in no case, whether for disability or death or both, for a longer period than one hundred (100) weeks. Such written waiver must be filed with the industrial commission, and the commission shall keep a record of each waiver, which record shall be open to the inspection of any interested person. (1935, c. 123.)

§ 97-62. "Silicosis" and "abestosis" defined.—The word "silicosis" shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of dust of silica or silicates. "Asbestosis" shall mean a characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust. (1935, c. 123.)

§ 97-63. Period necessary for employee to be exposed. — Compensation shall not be payable for disability or death due to silicosis and/or asbestosis unless the employee shall have been exposed to the inhalation of dust of silica or silicates or asbestos dust in employment for a period of not less than two years in this state, provided no part of such period of two years shall have been more than ten years prior to the last exposure. (1935, c. 123.)

§ 97-64. General act to control as regards benefits. — Except as herein otherwise provided, in case of disablement or death from silicosis and/or asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workmen's Compensation Act. (1935, c. 123.)

§ 97-65. Reduction of rate where tuberculosis develops.—In case of disablement or death due primarily from silicosis and/or asbestosis and complicated with tuberculosis of the lungs compensation shall be payable as hereinbefore provided, except that the rate of payments may be reduced one-sixth. (1935, c. 123.)

§ 97-66. Requirement as to written notice of disease to employer or industrial commission; waiver of notice and claim where payments are made; claim where benefits are discontinued. — Unless written notice of the first distinct manifestation of an occupational disease shall be given to the employer in whose employment the employee was last injuriously exposed to the hazards of such disease or to the industrial commission within thirty (30) days after such manifestation and, in case of death, unless also written notice of such death shall be given by the beneficiary hereunder to the employer or the industrial commission within ninety (90) days after occurrence, and unless claim for disability and/or death shall be made within one (1) year after the disablement or death, respectively, all rights to compensation for disability or death from an occupational disease shall be forever barred: Provided, however, that notice and/or claim shall be deemed waived in case of disability or death where the employer or insurance carrier voluntarily makes compensation payments therefor, or, within the time above limited, has actual knowledge of the incurrence of the disease or of the death and its cause, or by his or its

conduct misleads the injured employee or claimant reasonably to believe that notice and/or claim has or have been waived; and, Provided further, that where compensation payments have been made and discontinued, and further compensation is claimed, whether for disability or death from asbestosis, silicosis or lead poisoning, the claim for such further compensation shall be made within two years after the last payment, but in all other cases of occupational disease claim for further compensation shall be made within one year after the last payment. (1935, c. 123.)

"Distinct Manifestation."—When an employee dies as a result of an occupational disease, but had no knowledge that he had contracted or was suffering from the disease, he has no "distinct manifestation" of the disease within the purview of this section, and his failure to give notice thereof to his employer does not bar his dependents from recovering compensation for his death. Blassingame v. Southern Asbestos Co., 217 N. C. 223, 7 S. E. (2d) 478.

This section does not provide that notice to employer should be a condition precedent to recovery of compensation, the provision that the claim "shall be forever barred" applying only to the requirement that claim for disability or death should be made within one year after the disablement or death, and not to the requirement of notice to the employer within 90 days from the date of death. Blassingame v. Southern Asbestos Co., 217 N. C. 223, 7 S. E. (2d) 478.

Claim Filed witbin Ninety Days after Autopsy Reports Sufficient under Circumstances.—When a widow does not know that her husband had an occupational disease resulting in death until after the autopsy reports, almost two months after his death, notice and claim filed with the employer by her within 90 days after the report is sufficient, since under the circumstances it would be humanly impossible for her to have given notice and filed claim within 90 days of her husband's death. Blassingame v. Southern Asbestos Co., 217 N. C. 223, 7 S. E. (2d) 478.

§ 97-67. Post-mortem examinations; notice to next of kin and insurance carrier.—Upon the filing of a claim for death from an occupational disease where in the opinion of the industrial commission a post-mortem examination is necessary to accurately ascertain the cause of death, such examination shall be ordered by the industrial commission. A full report of such examination shall be certified to the industrial commission. The surviving spouse or next kin and the employer or his insurance carrier, if their identity and whereabouts can be reasonably ascertained, shall be given reasonable notice of the time and place of such post-mortem examination, and, if present at such examination, shall be given an opportunity to witness the same. Any such person may be present at and witness such examination either in person or through a duly authorized representative. If such examination is not consented to by the surviving husband or wife or next of kin, all right to compensation shall cease. (1935, c. 123.)

§ 97-68. Controverted medical questions. — If on the hearing of a claim for compensation for asbestosis and/or silicosis, any controverted medical question or questions shall arise, the industrial commission shall reserve its decision and award until it shall have received a report from the advisory medical committee; and the industrial commission may in its discretion refer to said committee controverted medical questions arising out of other occupational disease claims. (1935, c. 123.)

§ 97-69. Examination by advisory medical committee; inspection of medical reports.—The advisory medical committee, upon reference to it of a case of occupational disease shall notify the employee, or, in case he is dead, his dependents or personal representative, and his employer to appear before the advisory medical committee at a time and place stated in the notice. If the employee be living, he shall appear before the advisory medical committee at the time and place specified then or thereafter and he shall submit to such examinations including clinical and x-ray examinations as the advisory medical committee may require. The employee, or, if he be dead, the claimant and the employer shall be entitled to have present at all such examinations, a physician admitted to practice medicine in the state who shall be given every reasonable facility for observing every such examination whose services shall be paid for by the claimant or by the employer who engaged his services. If a physician admitted to practice medicine in the state shall certify that the employee is physically unable to appear at the time and place designated by the advisory medical committee, such committee may, upon the advice of the industrial commission, and on notice to the employer, change the place and/or time of the examination so as to reasonably facilitate the examination of the employee, and in any such case the employer shall furnish transportation and provide for other reasonably necessary expenses incidental to necessary travel. The claimant and the employer shall produce to the advisory medical committee all reports of medical and x-ray examinations which may be in their respective possession or control showing the past or present condition of the employee to assist the advisory medical committee in reaching its conclusions. (1935, c. 123.)

§ 97-70. Report of committee to industrial commission.—The advisory medical committee, shall, as soon as practicable after it has completed its consideration of a case, report to the industrial commission its opinion regarding all medical questions involved in the case. The advisory medical committee shall include in its report a statement of what, if any, physician or physicians were present at the examination on behalf of the claimant or employer and what, if any, medical reports and x-rays were produced by or on behalf of the claimant or employer. (1935, c. 123.)

§ 97-71. Filing report; right of hearing on report.—The advisory medical committee shall file its report in triplicate with the industrial commission, which shall send one copy thereof to the claimant and one copy to the employer by registered mail. Unless within thirty days from receipt of the copy of said report the claimant and/or employer shall request the industrial commission in writing to set the case for further hearing for the purpose of examining and/or cross-examining the members of the advisory medical committee respecting the report of said committee, said report shall become a part of the record of the case and shall be accepted by the industrial commission as expert medical testimony to be considered as such in connection with all the evidence in the case in arriving at its decision. (1935, c. 123.)

§ 97-72. Appointment of advisory medical committee; terms of office; duties and functions;

salaries and expenses.—There shall be an advisory medical committee consisting of three members, who shall be licensed physicians in good professional standing and peculiarly qualified in the diagnosis and/or treatment of occupational diseases. They shall be appointed by the industrial commission with the approval of the governor, and one of them shall be designated as chairman of the committee by the industrial commission. The members of committee shall be appointed to serve terms as follows: One for a term of two years, one for a term of four years, and one for a term of six years. Upon the expiration of each term as above mentioned the industrial commission shall appoint a successor for a term of six years; except that the terms of the members first appointed shall expire June thirtieth, one thousand nine hundred thirty-six. The function of the committee shall be to conduct examinations and make reports as required by §§ 97-68 to 97-71, and to assist in any post-mortem examinations provided for in § 97-67 when so directed by the industrial commission. Members of the committee shall devote to the duties of the office so much of their time as may be required in the conducting of examinations with reasonable promptness, and they shall attend hearings as scheduled by the industrial commission when their attendance is desired for the purpose of examining and cross-examining them respecting any report or reports made by them.

The members of the advisory medical committee shall be paid such salaries and/or fees and expenses, and in monthly installments or in such other manner as may be determined by the governor and approved by the advisory budget commission. (1935, c. 123.)

§ 97-73. Expenses of making examinations.—The industrial commission shall establish a schedule of reasonable charges to defray expenses incurred in making examinations pursuant to §§ 97-60 and 97-67, such charges to be collected in accordance with rules and regulations which shall be adopted by the industrial commission. Said charges shall be collected from employers who by order of the industrial commission are determined to be subject to the hazards of asbestosis and/or silicosis. (1935, c. 123.)

§ 97-74. Expense of hearings taxed as costs in compensation cases; fees collected directed to general fund.—In hearings arising out of claims for disability and/or death resulting from occupational diseases the industrial commission shall tax as a part of the costs in cases in which compensation is awarded a reasonable allowance for the services of members of the advisory medical committee attending such hearings and reasonable allowances for the services of members of the advisory medical committee for making investigations in connection with all claims for compensation on account of occupational diseases, including uncontested cases, as well as contested cases, and whether or not hearings shall have been conducted in connection therewith. All such charges, fees and allowances to be collected by the industrial commission shall be paid into the general fund of the state treasury to constitute a fund out of which to pay the expenses of the advisory medical committee. (1935, c. 123.)

§ 97-75. Making up deficiency by assessment upon employers in hazardous industries; provision for annual fund.—In the event the amount appropriated by the general assembly and the charges, fees and allowances so assessed and collected and paid into the state treasury shall not be sufficient to pay the full cost incurred by the advisory medical committee in making examinations of employees, and conducting post-mortem examinations, and in making investigations of claims arising under this article, and in testifying before the industrial commission, the industrial commission shall assess against the employers found by the industrial commission to be subject to the hazards of asbestosis and/or silicosis an amount sufficient to pay such cost, said amount to be assessed against such employers pro rata on the basis of annual payroll. The industrial commission is authorized to assess and collect in advance in the beginning of any year from the employers subject to such hazard an amount estimated as necessary to pay such cost. Said amount when so assessed shall be paid by such employers within ten days after the notice of assessment, and when collected by the industrial commission shall be paid into the state treasury as a part of the fund out of which to pay the expenses of the advisory medical committee. In the event such amount so assessed shall be found to be in excess of the cost incurred by such advisory medical committee in the performance of its duties under this article, such excess shall be credited against the estimate of the cost to be incurred by said committee for the succeeding year. In case the amount so assessed shall be insufficient to pay such cost the industrial commission is authorized to make an additional assessment to be made at the end of the regular assessment period and to be collected from the employers subject to the hazards of asbestosis and/or silicosis. (1935, c. 123.)

§ 97-76. Inspection of hazardous employments; refusal to allow inspection made misdemeanor.—The industrial commission shall make inspections of employments for the purpose of ascertaining whether such employments, or any of them, are subject to the hazards of asbestosis and/or silicosis, and for the purpose of making studies and recommendations with a view to reducing and/or eliminating such hazards. The industrial commission, and/or any person selected by it, is authorized to enter upon the premises of employers where employments covered by this article are being carried on to make examinations and studies as aforesaid. Any employer, or any officer or agent of an employer, who unreasonably prevents or obstructs any such examinations or study shall be guilty of a misdemeanor. (1935, c. 123.)

§ 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.—There is hereby created a commission to be known as the North Carolina Industrial Commission, consisting of three commissioners who shall devote their entire time to the duties of the Commission. The Governor shall appoint the members of the Commission, one for a term of two years, one for a term of four years, and one for a term of six years. Upon the expiration of each term as above

mentioned, the Governor shall appoint a successor for a term of six years, and thereafter the term of office of each commissioner shall be six years. Not more than one appointee shall be a person who, on account of his previous vocation, employment or affiliations, can be classed as a representative of employers, and not more than one appointee shall be a person who, on account of his previous vocation, employment or affiliations, can be classed as a representative of employees. One member, to be designated by the Governor, shall act as chairman. (1929, c. 120, s. 51; 1931, c. 274, s. 8.)

Editor's Note.—The Act of 1931 struck out the following words formerly appearing at the end of this section: "And such member so selected as chairman shall not be one who, on account of his previous vocation, employment or affiliations, can be classed either as representative of employers or as representative of employees."

The Industrial Commission is primarily an administrative agency of the state, charged with the duty of administering the provisions of the North Carolina Workmen's Compensation Act. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 319, 186 S. E. 252, citing In re Hayes, 200 N. C. 133, 156 S. E. 791.

But Is Special Tribunal When Considering Claims.—When a claim for compensation has been filed and the employer and employee have failed to reach an agreement, the statute authorizes the Commission to hear and determine all matters in dispute. Thereupon, the Commission is constituted a special or limited tribunal, and is invested with certain judicial functions, and possesses the powers and incidents of a court, within the provisions of the act, and necessary to determine the rights and liabilities of employees and employers. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 319, 186 S. E. 252.

§ 97-78. Salaries and expenses; secretary and other clerical assistance; annual report.—(a) The salaries of the chairman and each of the other Commissioners shall be fixed by the Governor, subject to the approval of the Advisory Budget Commission, such salaries to be payable in monthy installments.

(b) The Commission may appoint a secretary whose duties shall be prescribed by the Commission, and whose salary shall be fixed by the Governor and Council of the State and who, upon entering upon his duties, shall give bond in such sum as may be fixed by the Commission, and who may be removed at the will of the Commission. The Commission may also employ such clerical or other assistance as it may deem necessary, and fix the compensation of all persons so employed, such compensation to be in keeping with the compensation paid to the persons employed to do similar work in other State departments.

(c) The members of the Commission and its assistants shall be entitled to receive from the State their actual and necessary expenses while traveling on the business of the Commission, but such expenses shall be sworn to by the person who incurred the same, and shall be approved by the chairman of the Commission before payment is made.

(d) All salaries and expenses of the Commission shall be audited and paid out of the State Treasury, in the manner prescribed for similar expenses in other departments or branches of the State service, and to defray such salaries and expenses a sufficient appropriation shall be made under the general appropriation act as made to other departments, commissions and agencies of the State government.

(e) The Commission shall publish annually for free distribution a report of the administration of this article, together with such recommendations as the Commission deems advisable. (1929, c. 120, s. 52; 1931, c. 274, s. 9; 1941, c. 358, s. 2.)

Editor's Note.—Prior to the 1931 amendment the salary of the chairman was fixed at $4500 a year and each of the other commissioners received $4000.

Prior to the 1941 amendment the salary of the secretary was to be not more than $3,600 a year.

§ 97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.—(a) The Commission shall be provided with adequate offices in which the records shall be kept and its official business transacted during regular business hours; it shall also be provided with necessary office furniture, stationery, and other supplies.

(b) The Commission may appoint deputies, who shall have the power to subpoena witnesses and administer oaths, and who may take testimony in such cases as the Commission may deem proper. Such testimony shall be transmitted in writing to the Commission, and the Commission shall fix the compensation of such deputies.

(c) The Commission or any member thereof may hold sessions at any place within the State as may be deemed necessary by the Commission.

(d) Hearings before the Commission shall be open to the public and shall be stenographically reported, and the Commission is authorized to contract for the reporting of such hearings. The Commission shall by regulation provide for the preparation of a record of the hearings and other proceedings. (1929, c. 120, s. 53; 1931, c. 274, s. 10.)

Editor's Note.—The Act of 1931 amended subsection (a) of this section by striking out after the word "offices" the following: "in the capitol, or some other suitable building in the City of Raleigh."

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.—(a) The Commission may make rules, not inconsistent with this article, for carrying out the provisions of this article. Processes and procedure under this article shall be as summary and simple as reasonably may be. The Commission or any member thereof, or any person deputized by it, shall have the power, for the purpose of this article, to subpoena witnesses, administer or cause to have administered oaths, and to examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute. Any party to a proceeding under this article may, upon application to the Commission, which application shall set forth the materiality of the evidence to be given, cause the depositions of witnesses residing within or without the State to be taken, the costs to be taxed as other costs by Commission. Such depositions shall be taken after giving the notice and in the manner prescribed by law for depositions in actions at law, except that they shall be directed to the Commission, the Commissioner, or the Deputy Commissioner before whom the proceedings may be pending.

(b) The County Sheriffs and their respective deputies shall serve all subpoenas of the Commission or its deputies, and shall receive the same fees as are now provided by law for like services; each witness who appears in obedience to such subpoena of the Commission shall receive for attend-

ance the fees and mileage for witnesses in civil cases in courts of the county where the hearing is held.

(c) The Superior Court shall, on application of the Commission or any member or deputy thereof, enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and records. (1929, c. 120, s. 54.)

Editor's Note.—For a discussion of this section, see 8 N. C. L. Rev. 427, et seq.

Rehearing.—While there is no direct statutory provision giving the Industrial Commission power to order a rehearing of an award made by it for newly discovered evidence, the Commission has such power in proper instances in accordance with its rules and regulations, as provided by this section, it being the intent of the Legislature, as gathered from the whole act, to give the Industrial Commission continuing jurisdiction of all proceedings begun before it with appellate jurisdiction in the Superior Court on matters of law only. Butts v. Montague Bros., 208 N. C. 186, 179 S. E. 799.

Construction of Rules.—Under this section the North Carolina Industrial Commission has the power not only to make rules governing its administration of the act, but also to construe and apply such rules. Its construction and application of its rules, duly made and promulgated, in proceedings pending before the said Commission, ordinarily are final and conclusive and not subject to review by the courts of this state, on an appeal from an award made by said Industrial Commission. Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 579, 191 S. E. 403.

Rule of industrial commission requiring notice to it of cancellation of policy does not become a part of the policy contract. Motsinger v. Perryman, 218 N. C. 15, 9 S. E. (2d) 511.

The rules of the industrial commission, adopted pursuant to this section, relative to the introduction of new evidence at a review by the full commission, are in accord with the decisions of the supreme court as to granting new trials for newly discovered evidence. Tindall v. American Furniture Co., 216 N. C. 306, 4 S. E. (2d) 894.

Procedure before the industrial commission need not necessarily conform strictly to judicial procedure in courts of law unless the statute so requires or the court of last resort shall consider such procedure indispensable to the preservation of the essentials of justice and the principles of due process of law, and procedure adopted by the commission with respect to the reception and consideration of evidence will be given liberal treatment by the courts, since this section empowers the commission to make rules for carrying out the provisions of the act, and requires processes and procedure to be summary and simple. Maley v. Thomasville Furniture Co., 214 N. C. 589, 200 S. E. 438.

Jurisdiction Limited.—In its functions as a court, the jurisdiction of the industrial commission is limited, and jurisdiction cannot be conferred on it by agreement or waiver. Chadwick v. North Carolina Department of Conservation, etc., 219 N. C. 766, 14 S. E. (2d) 842.

§ 97-81. Blank forms and literature; statistics; safety provisions; accident reports; studies and investigations and recommendations to General Assembly; to co-operate with other agencies for prevention of injury.—(a) The Commission shall prepare and cause to be printed, and upon request furnish, free of charge to any employee or employer, such blank forms and literature as it shall deem requisite to facilitate or prompt the efficient administration of this article.

(b) The Commission shall tabulate the accident reports received from employers in accordance with § 97-92 and shall publish the same in the annual report of the Commission and as often as it may deem advisable, in such detailed or aggregate form as it may deem best. The name of the employer or employee shall not appear in such publications, and the employers' reports shall be private records of the Commission, and shall not be open for public inspection except for the inspection of the parties directly involved, and only to the extent of such interest. These reports shall not be used as evidence against any employer in any suit at law brought by any employee for the recovery of damages.

(c) The Commission shall make studies and investigations with respect to safety provisions and the causes of injuries in employments covered by this article, and shall from time to time make to the General Assembly and to employers and carriers such recommendations as it may deem proper as to the best means of preventing such injuries.

(d) In making such studies and investigations the Commission is authorized (1) to co-operate with any agency of the United States charged with the duty of enforcing any law securing safety against injury in any employment covered by this article, or with any State agency engaged in enforcing any laws to assure safety for employees, and (2) to permit any such agency to have access to the records of the Commission. In carrying out the provisions of this section the Commission or any officer or employee of the Commission is authorized to enter at any reasonable time upon any premises, tracks, wharf, dock, or other landing place, or to enter any building, where an employment covered by this article is being carried on, and to examine any tool, appliance, or machinery used in such employment. (1929, c. 120, s. 55.)

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval.— If after seven days after the date of the injury, or at any time in case of death, the employer and the injured employee or his dependents reach an agreement in regard to compensation under this article, a memorandum of the agreement in the form prescribed by the Industrial Commission, accompanied by a full and complete medical report, shall be filed with and approved by the Commission; otherwise such agreement shall be voidable by the employee or his dependents.

If approved by the Commission, thereupon the memorandum shall for all purposes be enforceable by the court's decree as hereinafter specified. (1929, c. 120, s. 56.)

§ 97-83. In event of disagreement, Commission is to make award after hearing.—If the employer and the injured employee or his dependents fail to reach an agreement, in regard to compensation under this article within fourteen days after the employee has knowledge of the injury or death, or if they have reached such an agreement which has been signed and filed with the Commission, and compensation has been paid or is due in accordance therewith, and the parties thereto then disagree as to the continuance of any weekly payment under such agreement, either party may make application to the Industrial Commission for a hearing in regard to the matters at issue, and for a ruling thereon.

Immediately after such application has been received the Commission shall set the date for a hearing, which shall be held as soon as practicable, and shall notify the parties at issue of the time and place of such hearing. The hearing shall be held in the city or county where the injury occurred, unless otherwise agreed to by the

parties and authorized by the Industrial Commission. (1929, c. 120, s. 57.)

Cited in Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252.

§ 97-84. Determination of disputes by Commission.—The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, and a copy of the award shall immediately be sent to the parties in dispute. The parties may be heard by a deputy, in which event he shall swear or cause the witnesses to be sworn, and shall transmit all testimony to the Commission for its determination and award. (1929, c. 120, s. 58.)

Fact-Finding Body.—Under this section the commission is made a fact-finding body. The finding of facts is one of its primary duties. Beach v. McLean, 219 N. C. 521, 525, 14 S. E. (2d) 515.

Cited in Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239.

§ 97-85. Review of award.—If application is made to the Commission within seven days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award. (1929, c. 120, s. 59.)

Objection to the admission of incompetent evidence should be made before the hearing commissioner, and objection taken for the first time at the hearing before the full commission on appeal is too late. Maley v. Thomasville Furniture Co., 214 N. C. 589, 200 S. E. 438.

An appellant to the full commission has no substantive right to require it to hear new or additional testimony, but the commission's duty to do so applies only if good ground therefor be shown, and its rules in regard thereto, adopted pursuant to § 97-80, are in accord with the decision of the supreme court relating to the granting of new trials for newly discovered evidence. Tindall v. American Furniture Co., 216 N. C. 306, 4 S. E. (2d) 894.

Cited in Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239.

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.—The award of the Commission, as provided in § 97-84, if not reviewed in due time, or an award of the Commission upon such review, as provided in § 97-85, shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within thirty days from the date of such award, or within thirty days after receipt of notice to be sent by registered mail of such award, but not thereafter, appeal from the decision of said Commission to the Superior Court of the county in which the alleged accident happened, or in which the employer resides or has his principal office, for errors of law, under the same terms and conditions as govern appeals in ordinary civil actions. The Commission, of its own motion, may certify questions of law to the Supreme Court, for decision and determination by the said Court. In case of an appeal from the decision of the Commission, or of a certification by said Commission of questions of law, to the Supreme Court, said appeal or certification shall operate as a supersedeas, and no employer shall be required to make payment of the award involved in said appeal or certification until the questions at issue therein shall have been fully determined in accordance with the provisions of this article. (1929, c. 120, s. 60.)

Jurisdictional Facts Not Conclusive on Appeal.—Both a proper construction of the language of this section, and well-settled principles of law lead to the conclusion that where the jurisdiction of the Industrial Commission to hear and consider a claim for compensation under the provisions of the Workmen's Compensation Act, is challenged by an employer, on the ground that he is not subject to the provisions of the act, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the Superior Court, and that said court has both the power and the duty, on the appeal of either party to the proceeding, to consider all the evidence in the record, and find therefrom the jurisdictional facts, without regard to the finding of such facts by the Commission. Aycock v. Cooper, 202 N. C. 500, 505, 163 S. E. 569.

Evidence Not Considered on Appeal.—Under this section an award of the Industrial Commission is conclusive and binding as to all questions of fact when supported by sufficient, competent evidence, and neither the Supreme Court nor the Superior Court can consider the evidence for the purpose of determining the facts on appeal. Reed v. Lavender Bros., 206 N. C. 898, 172 S. E. 877. See Walker v. Wilkins, 212 N. C. 627, 194 S. E. 89.

The findings of fact by the Industrial Commission as to whether injury to an employee was by accident arising out of and in the course of his employment are conclusive on the courts upon appeal when the findings are supported by competent evidence of sufficient probative force. Perdue v. State Board of Equalization, 205 N. C. 730, 172 S. E. 396.

The jurisdiction of the Superior Court is limited to questions of law only. Byrd v. Gloucester Lbr. Co., 207 N. C. 253, 176 S. E. 572.

On appeal from the North Carolina Industrial Commission, the Superior Court has no power to review the findings of fact by the Commission. It can consider only errors of law appearing in the record, as certified by the Industrial Commission. Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403.

Where there is evidence that the driver of the employer's oil truck habitually carried a pistol in order to protect his employer's property, and that the employer acquiesced therein, and that the plaintiff was injured while filling a fuel tank in the course of his employment by the accidental explosion of the pistol carried by the driver when the driver threw it back into his truck after he and the plaintiff had joked about whether the pistol would shoot, the evidence discloses that the injury arose out of the employment and is sufficient to support the finding of fact by the Industrial Commission to that effect, which is conclusive and binding on appeal. Chambers v. Union Oil Co., 199 N. C. 28, 153 S. E. 594.

Findings Supported by Competent Evidence Are Conclusive on Appeal.—Where each of the essential facts found by the Industrial Commission is supported by competent evidence, the findings are conclusive on appeal, even though some incompetent evidence was also admitted upon the hearing. Carlton v. Bernhardt-Seagle Co., 210 N. C. 655, 188 S. E. 77. See also, Tomlinson v. Norwood, 208 N. C. 716, 182 S. E. 659; Swink v. Carolina Asbestos Co., 210 N. C. 303, 186 S. E. 258. See Porter v. Noland Co., 215 N. C. 724, 2 S. E. (2d) 853; Baxter v. Arthur Co., 216 N. C. 276, 4 S. E. (2d) 621; Tindall v. American Furniture Co., 216 N. C. 306, 4 S. E. (2d) 894; Stallcup v. Carolina Wood Turning Co., 217 N. C. 302, 7 S. E. (2d) 550; MacRae v. Unemployment Compensation Comm., 217 N. C. 769, 9 S. E. (2d) 595; Miller v. Caudle, 220 N. C. 308, 17 S. E. (2d) 487; Archie v. Greene Brothers Lbr. Co., 222 N. C. 477, 23 S. E. (2d) 834; Stanley v. Hyman-Michaels Co., 222 N. C. 257, 22 S. E. (2d) 570; Haynes v. Feldspar Producing Co., 222 N. C. 163, 22 S. E. (2d) 275; Kearns v. Biltwell Chair, etc., Co., 222 N. C. 438, 23 S. E. (2d) 310; Blevins v. Teer, 220 N. C. 135, 16 S. E. (2d) 659.

The findings of fact of the industrial commission are conclusive on the courts when the findings are supported by any competent evidence, notwithstanding that the court, if it had been the fact-finding body, might have reached a different conclusion, the finding of facts from the evidence being the exclusive function of the industrial commission. McGill v. Lumberton, 218 N. C. 586, 11 S. E. (2d) 873.

The findings of fact of the industrial commission, when supported by competent evidence, are binding upon the courts upon appeal, but findings not supported by compe-

tent evidence are not conclusive and must be set aside. Logan v. Johnson, 218 N. C. 200, 10 S. E. (2d) 653.

The findings of the industrial commission that deceased was an employee of defendant at the time of his fatal injury is conclusive on the courts if supported by competent evidence, notwithstanding that the court might have reached a different conclusion if it had been the fact finding body. Cloninger v. Ambrosia Cake Bakery Co., 218 N. C. 26, 9 S. E. (2d) 615.

When the record contains evidence to support either a finding that the accident did or did not arise out of and in the course of employment, the findings of the industrial commission are conclusive on appeal. Ashley v. F-W. Chevrolet Co., 222 N. C. 25, 21 S. E. (2d) 834.

The industrial commission has the exclusive duty and authority to find the facts relative to controverted claims, and its findings of fact, with exception of jurisdictional findings, are conclusive on the courts when supported by any competent evidence. Buchanan v. State Highway, etc., Comm., 217 N. C. 173, 7 S. E. (2d) 382; Mallard v. Bohannon, 220 N. C. 536, 18 S. E. (2d) 189.

The statutes regulating appeals from a justice of the peace are applicable and control in appeals from the Industrial Commission to the Superior Court, this section failing to provide the procedure for such appeals. Higdon v. Nantahala Power, etc., Co., 207 N. C. 39, 175 S. E. 710.

But see Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 191 S. E. 403, wherein it is said that statutory provisions with respect to appeals from judgments of justices of the peace to the Superior Court, where the trial must be de novo, are not controlling with respect to appeals from awards of the Industrial Commission to the Superior Court, where only errors of law appearing in the record may be considered.

Since the workmen's compensation act does not provide any specific machinery governing appeals to the superior court, resort may be had to statutes regulating appeals in analogous cases, ordinarily those regulating appeals from a justice of the peace, so far as same are reasonably applicable and consonant with the language of the statute and the legislative intent. Summerell v. Chilean Nitrate Sales Corp., 218 N. C. 451, 11 S. E. (2d) 304.

An appellant from an award of the industrial commission is required to docket his appeal at the next term of the superior court, civil or criminal, beginning after the expiration of the 30 days from the award, or receipt of notice of the award by registered mail, allowed by this section for appeal, this being consonant with the legislative intent and the language of the section, and with the analogous statute requiring appeals from a justice of the peace to be taken to the next term of the superior court beginning after the expiration of the 10 days allowed for service of notice of appeal, § 7-179, and the fact that notice of appeal from the award of the industrial commission is given prior to a term of the superior court beginning prior to the expiration of 30 days after appellant's receipt of notice of the award by registered mail, does not vary this result, and the appeal is improperly dismissed for failure to docket same before or during such intervening term of court. Id.

Time within Which Transcript of Record Must Be Filed.—In the absence of any requirement of the statute as to the time within which a transcript of the record in a proceeding before the Industrial Commission must be docketed in the Superior Court, when there has been an appeal from the award of the Commission, such docketing at any time before the convening of the next ensuing regular term of the Superior Court, or before said time has expired, is sufficient to perfect the appeal. Winslow v. Carolina Conference Ass'n, 211 N. C. 571, 581, 191 S. E. 403.

Newly Discovered Evidence.—When a proceeding for compensation under the provisions of this act has been duly docketed in the Superior Court, upon an appeal from an award of the Industrial Commission, the Superior Court has the power in a proper case to order a rehearing of the proceeding by the Industrial Commission on the ground of newly discovered evidence, and to that end to remand the proceeding to the Commission. Byrd v. Gloucester Lbr. Co., 207 N. C. 253, 255, 176 S. E. 572.

Remand.—Where it appears that the industrial commission has found the facts under a misapprehension of the law the cause will be remanded for findings by the commission upon consideration of the evidence in its true legal light. McGill v. Lumberton, 215 N. C. 752, 3 S. E. (2d) 324.

When the findings of the industrial commission are insufficient for a proper determination of the question involved, the proceeding will be remanded to the industrial commission for additional findings. Farmer v. Bemis Lbr. Co., 217 N. C. 158, 7 S. E. (2d) 376.

Right to Reverse and Remand Cause.—Where all the facts are admitted and the Industrial Commission denies compensation on the facts as a matter of law, the Superior Court, on appeal, has jurisdiction, in view of this section, to reverse the Industrial Commission and remand the cause. Perkins v. Sprott, 207 N. C. 462, 177 S. E. 404.

Applied in Smith v. Hauser & Co., 206 N. C. 562, 174 S. E. 455; Latham v. Southern Fish, etc., Co., 208 N. C. 505, 181 S. E. 640.

Cited in Early v. Basnight & Co., 214 N. C. 103, 198 S. E. 577; Raynor v. Louisburg Com'rs, 220 N. C. 348, 17 S. E. (2d) 495; Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239.

§ 97-87. Agreement approved by Commission or awards may be filed as judgments; discharge or restoration of lien. — Any party in interest may file in the Superior Court of the county in which the injury occurred a certified copy of a memorandum of agreement approved by the Commission, or of an order or decision of the Commission, or of an award of the Commission unappealed from or of an award of the Commission affirmed upon appeal; whereupon said court shall render judgment in accordance therewith, and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by said court: Provided, if the judgment debtor shall file a certificate duly issued by the Industrial Commission, showing compliance with § 97-93, with the Clerk of the Superior Court in the county or counties where such judgment is docketed, then such clerk shall make upon the judgment roll an entry showing the filing of such certificate, which shall operate as a discharge of the lien of the said judgment, and no execution shall be issued thereon; provided, further, that if at any time there is default in the payment of any installment due under the award set forth in said judgment the court may, upon application for cause and after ten days' notice to judgment debtor, order the lien of such judgment restored, and execution may be immediately issued thereon for past due installments and for future installments as they may become due. (1929, c. 120, s. 61.)

Where No Appeal Taken.—The procedure for the enforcement of an award of the industrial commission when no appeal is taken therefrom is by filing a certified copy of the award in the superior court, whereupon said court shall render judgment in accordance therewith and notify the parties. Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239.

Mandamus to Compel County Board of Health to Pay Award.—Mandamus to compel a municipal corporation, governmental agency or public officer to pay a claim is equivalent to execution, and therefore a suit to compel a county board of health to pay an award rendered against it by the industrial commission from which no appeal was taken will not lie until judgment on the award has been rendered by the superior court in accordance with the procedure outlined by this section. Champion v. Vance County Board of Health, 221 N. C. 96, 19 S. E. (2d) 239.

§ 97-88. Expenses of appeals brought by insurers.—If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this article, shall find that such hearing or proceedings were brought by the insurer, and the Commission or court by its decision orders the insurer to make, or to continue, payments of compensation to the injured employee, the Commission or court may further order that the cost to the in-

jured employee of such hearing or proceedings, including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs. (1929, c. 120, s. 62; 1931, c. 274, s. 11.)

Editor's Note.—This section was radically changed by the Act of 1931. It formerly allowed costs in any proceeding found to have been prosecuted or defended without reasonable grounds to be thrown on the party so acting unreasonably. 9 N. C. Law Rev. 407.

This section is valid. Russell v. Western Oil Co., 206 N. C. 341, 174 S. E. 101.

Discretion of Court.—The power given the court under this section to order that the cost to the injured employee of such proceedings, including a reasonable attorney's fee to be determined by the Commission, shall be paid by the insurer as part of the bill of costs is within the discretion of the court, and an order appearing in the judgment will not be reviewed by this Court. Perdue v. State Board of Equalization, 205 N. C. 730, 735, 172 S. E. 396.

The allowance of attorneys' fee to claimant's attorneys in a proceeding under the Compensation Act, held, authorized by this section, and defendants' assignment of error thereto is untenable. Brooks v. Carolina Rim, etc., Co., 213 N. C. 518, 196 S. E. 835.

Applied in Williams v. Thompson, 203 N. C. 717, 166 S. E. 906.

§ 97-89. Commission may appoint qualified physician to make necessary examinations; expenses; fees. — The Commission or any member thereof may, upon the application of either party, or upon its own motion, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination of the employee, and to testify in respect thereto. Said physician or surgeon shall be allowed traveling expenses and a reasonable fee to be fixed by the Commission, not exceeding ten dollars for each examination and report, but the Commission may allow additional reasonable amounts in extraordinary cases. The fees and expenses of such physician or surgeon shall be paid by the employer. (1929, c. 120, s. 63; 1931, c. 274, s. 12.)

Editor's Note.—The Act of 1931 substituted the word "employer" for the word "state" formerly ending this section.

§ 97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims.—(a) Fees for attorneys and physicians and charges of hospitals for services under this article shall be subject to the approval of the Commission; but no physician shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Industrial Commission in connection with the case.

(b) Any person (1) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the Commission or such court, or (2) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a misdemeanor, and upon conviction thereof shall, for each offense, be punished by a fine of not more than $500 or by imprisonment not to exceed one year, or by both such fine and imprisonment. (1929, c. 120, s. 64.)

§ 97-91. Commission to determine all questions.—All questions arising under this article if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided. (1929, c. 120, s. 65.)

§ 97-92. Employer's record and report of accidents; records of Commission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier liable.—(a) Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment on blanks approved by the Commission. Within ten days after the occurrence and knowledge thereof, as provided in § 97-22, of an injury to an employee, causing his absence from work for more than three days, a report thereof shall be made in writing and mailed to the Industrial Commission on blanks to be procured from the Commission for this purpose.

(b) The records of the Commission, in so far as they refer to accidents, injuries, and settlements, shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them.

(c) Upon the termination of the disability of the injured employee, or if the disability extends beyond a period of sixty days, then, also, at the expiration of such period the employer shall make a supplementary report to the Commission on blanks to be procured from the Commission for the purpose.

(d) The said report shall contain the name, nature, and location of the business of the employer, and name, age, sex, and wages and occupation of the injured employee; and shall state the date and hour of the accident causing injury, the nature and cause of the injury, and such other information as may be required by the Commission.

(e) Any employer who refuses or neglects to make the report required by this section shall be liable for a penalty of not less than five dollars and not more than twenty-five dollars for each refusal or neglect. The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. In the event the employer has transmitted the report to the insurance carrier for transmission by such insurance carrier to the Industrial Commission, the insurance carrier wilfully neglecting or failing to transmit the report shall be liable for the said penalty. (1929, c. 120, s. 66.)

Report as Evidence.—The report signed by the manager of an incorporated employer and filed with the industrial commission as required by this section, is competent upon the hearing and statements contained therein not within the personal knowledge of the manager are competent as an admission against interest. Carlton v. Bernhardt-Seagle Co., 210 N. C. 655, 188 S. E. 77, wherein the instant section was inadvertently referred to as § 8181(vvv).

Report as Claim.—Where the employer has filed a report with the commission within the prescribed time upon verbal information elicited from the representative of the employee by its claim agent, the representative being unable to read or write, and, the employer admitting liability, the report has been filed with the industrial commission as a claim within one year from date of the accident and contains all facts necessary to make an award. Hanks v. Southern Public Utilities Co., 210 N. C. 312, 186 S. E. 252.

§ 97-93. Employers required to carry insurance or prove financial ability to pay for benefits.—Every

employer who accepts the provisions of this article relative to the payment of compensation shall insure and keep insured his liability thereunder in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized, or shall furnish to the Industrial Commission satisfactory proof of his financial ability to pay direct the compensation in the amount and manner and when due, as provided for in this article. In the latter case the Commission may require the deposit of an acceptable security, indemnity or bond to secure the payment of the compensation liabilities as they are incurred. (1929, c. 120, s. 67; 1943, c. 543.)

Editor's Note.—The 1943 amendment changed the word "ability" to the word "liability."

For comment on the provisions of this and other sections in relation to the law of contracts, see 13 N. C. Law Rev. 102.

Employer Primarily Liable.—An award was entered in favor of the dependents of a deceased employee for payment of compensation in weekly installments for the death of the employee. After the insurance carrier had paid several installments, it defaulted in the payment of the balance because of insolvency. Under the provisions of the Compensation Act the employer is primarily liable to the employee, which obligation is unimpaired by its contract with an insurer for insurance protection, or by the insurer's subrogation to the rights of the employer upon paying or assuming the payment of an award, and the employer is not relieved of its liability to the dependents of the deceased employee for the balance of the weekly payments because of the insolvency of the insurer. Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438.

The employer, held liable for the balance of an award after the insolvency of the insurer, is not entitled to a credit for the amount paid the dependents out of the judgment against the third person tort-feasor or for the amount paid plaintiff's attorneys in that action, the amount paid the dependents out of the judgment being an amount in addition to the award, and the award not being subject to reduction by such amount. Id.

Stated in Thompson's Dependents v. Johnson Funeral Home, 205 N. C. 801, 807, 172 S. E. 500.

§ 97-94. Employers required to give proof within 30 days that they have complied with preceding section; fine for not keeping liability insured; review; liability for compensation.—(a) Every employer accepting the compensation provisions of this article shall, within thirty days, after this article takes effect, file with the Commission, in form prescribed by it, and thereafter, annually or as often as may be necessary, evidence of his compliance with the provisions of § 97-93 and all others relating thereto.

(b) Any employer required to secure the payment of compensation under this article who refuses or neglects to secure such compensation shall be punished by a fine of ten cents for each employee at the time of the insurance becoming due, but not less than one dollar nor more than fifty dollars for each day of such refusal or neglect, and until the same ceases; and he shall be liable during continuance of such refusal or neglect to an employee either for compensation under this article or at law in the same manner as provided in § 97-14.

The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. (1929, c. 120, s. 68.)

Quoted in Roberts v. City Ice, etc., Co., 210 N. C. 17, 185 S. E. 438.

§ 97-95. Actions against employers failing to effect insurance or qualify as self-insurer.—As to every employer subject to the provisions of this article who shall fail or neglect to keep in effect a policy of insurance against compensation liability arising hereunder with some insurance carrier, as provided in § 97-93, or who shall fail to qualify as a self-insurer as provided in the article, in addition to other penalties provided by this article, such employer shall be liable in a civil action which may be instituted by the claimant for all such compensation as may be awarded by the industrial commission in a proceeding properly instituted before said commission, and such action may be brought by the claimant in the county of his residence or in any county in which the defendant has any property in this state; and in said civil action, ancillary remedies provided by law in civil actions of attachment, receivership, and other appropriate ancillary remedies shall be available to the plaintiff therein. Said action may be instituted before the award shall be made by the industrial commission in such case for the purpose of preventing the defendant from disposing of or removing from the state of North Carolina for the purpose of defeating the payment of compensation any property which the defendant may own in this state. In said action, after being instituted, the court may, after proper amendment to the pleadings therein, permit the recovery of a judgment against the defendant for the amount of compensation duly awarded by the North Carolina industrial commission, and subject any property seized in said action for payment of the judgment so awarded. The institution of said action shall in no wise interfere with the jurisdiction of said industrial commission in hearing and determining the claim for compensation in full accord with the provisions of this article. That nothing in this section shall be construed to limit or abridge the rights of an employee as provided in subsection (b) of § 97-94. (1941, c. 352.)

This section affects procedure only and does not disturb any vested rights. Byrd v. Johnson, 220 N. C. 184, 16 S. E. (2d) 843.

The provisions of this section, in force from its ratification on 15 March, 1941, are available to claimants who instituted a civil action alleging that the industrial commission had awarded them compensation in a stipulated sum, that defendant employer had failed and neglected to keep in effect a policy of compensation insurance and had failed to qualify as a self-insurer, that defendant was disposing of and removing all his property from the state, and prayed that a writ of attachment issue against defendant's property, and defendant's exception to the refusal of the court to vacate the writ of attachment theretofore issued in the cause was without error. It appeared that the award of the industrial commission was entered 24 March, 1941. Byrd v. Johnson, 220 N. C. 184, 16 S. E. (2d) 843.

§ 97-96. Certificate of compliance with law; revocation and new certificate. — Whenever an employer has complied with the provisions of § 97-93, relating to self-insurance, the Industrial Commission shall issue to such employer a certificate, which shall remain in force for a period fixed by the Commission, but the Commission may, upon at least sixty days' notice and a hearing to the employer, revoke the certificate upon satisfactory evidence for such revocation having been presented. At any time after such revocation the Commission may grant a new certificate to the employer upon his petition. (1929, c. 120, s. 69.)

§ 97-97. Insurance policies must contain clause

that notice to employer is notice to insurer; etc. —All policies insuring the payment of compensation under this article must contain a clause to the effect that, as between the employer and the insurer, the notice to or acknowledgment of the occurrence of the injury on the part of the insured employer shall be deemed notice or knowledge as the case may be, on the part of the insurer; that jurisdiction of the insured for the purposes of this article shall be jurisdiction of the insurer, that the insurer shall in all things be bound by and subject to the awards, judgments, or decrees rendered against such insured employer, and that insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the insurer from the payment of compensation for disability or death sustained by an employee during the life of such policy or contract. (1929, c. 120, s. 70.)

§ 97-98. Policy must contain agreement promptly to pay benefits; continuance of obligation of insurer in event of default.—No policy of insurance against liability arising under this article shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to same all benefits conferred by this article, and all installments of the compensation that may be awarded or agreed upon, and that the obligation shall not be affected by any default of the insured after the injury or by any default in giving notice required by such policy or otherwise. Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name. (1929, c. 120, s. 71.)

§ 97-99. Law written into each insurance policy; form of policy to be approved by Insurance Commissioner; single catastrophe hazards. —(a) Every policy for the insurance of the compensation herein provided, or against liability therefor, shall be deemed to be made subject to the provisions of this article. No corporation, association, or organization shall enter into any such policy of insurance unless its form shall have been approved by the Insurance Commissioner.

(b) This article shall not apply to policies of insurance against loss from explosion of boilers or fly-wheels or other similar single catastrophe hazards: Provided, that nothing herein contained shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe. (1929, c. 120, s. 72.)

§ 97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; returned or canceled premiums; reports of premiums collected; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices to carrier; employer who carries own risk shall make report on payroll.—(a) The rates charged by all carriers of insurance, including the parties to any mutual insurance association writing insurance against the liability for compensation under this article, shall be fair, reasonable, and adequate, with due allowance for merit rating; and all risks of the same kind and degree of hazard shall be written at the same rate by the same carrier. No policy of insurance against liability for compensation under this article shall be valid until the rate thereof has been approved by the Commissioner of Insurance; nor shall any such carrier of insurance write any such policy or contract until its basic and merit rating schedules have been filed with, approved, and not subsequently disapproved by the Commissioner of Insurance.

(b) Each such insurance carrier shall report to the Commissioner of Insurance, in accordance with such reasonable rules as the Commissioner of Insurance may at any time prescribe, for the purpose of determining the solvency of the carrier and the adequacy of its rates; for such purpose the Commissioner of Insurance may inspect the books and records of such insurance carrier, and examine its agents, officers, and directors under oath.

(c) Every person, partnership, association, corporation, whether organized under the laws of this or any other state or country, every mutual company or association and every other insurance carrier insuring employers in this State against liability for personal injuries to their employees, or death caused thereby, under the provisions of this article, shall, as hereinafter provided, pay a tax upon the premium received, whether in cash or notes, in this State, or on account of business done in this State, for such insurance in this State, at the rate provided in the Revenue Act then in force, which tax shall be in lieu of all other taxes on such premiums, which tax shall be assessed and collected as hereinafter provided; provided, however, that such insurance carriers shall be credited with all canceled or returned premiums actually refunded during the year on such insurance.

(d) Every such insurance carrier shall, for the six months ending December thirty-first, nineteen hundred and twenty-nine, and semi-annually thereafter, make a return, verified by the affidavit of its president and secretary, or other chief officers or agents, to the Commissioner of Insurance, stating the amount of all such premiums and credits during the period covered by such return. Every insurance carrier required to make such return shall file the same with the Commissioner of Insurance within thirty days after the close of the period covered thereby, and shall at the same time pay to the State Insurance Commissioner the tax provided in the Revenue Act then in force on such premium ascertained, as provided in sub-section (c) hereof, less returned premium on canceled policies.

(e) If any such insurance carrier shall fail or refuse to make the return required by this article, the said Commissioner of Insurance shall assess the tax against such insurance carrier at the rate herein provided for, on such amount of premium as he may deem just, and the proceedings thereon shall be the same as if the return had been made.

(f) If any such insurance carrier shall withdraw from business in this State before the tax shall fall due, as herein provided, or shall fail or neglect to pay such tax, the Commissioner of Insurance shall at once proceed to collect the same; and he is hereby empowered and authorized to employ such legal process as may be necessary for that purpose, and when so collected he shall pay the same into the State

Treasury. The suit may be brought by the Commissioner of Insurance, in his official capacity, in any court of this State having jurisdiction. Reasonable attorney's fees may be taxed as costs therein, and process may issue to any county of the State, and may be served as in civil actions, or in case of unincorporated associations, partnerships, inter-indemnity contracts, upon any agent of the parties thereto upon whom process may be served under the laws of this State.

(g) Any person or persons who shall in this State act or assume to act as agent for any such insurance carrier whose authority to do business in this State has been suspended, while such suspension remains in force, or shall neglect or refuse to comply with any of the provisions of this section obligatory upon such person or party, or who shall wilfully make a false or fraudulent statement of the business or condition of any such insurance carrier, or false or fraudulent return as herein provided, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment for not less than ten nor more than ninety days, or both such fine and imprisonment in the discretion of the court.

(h) Whenever by this article, or the terms of any policy contract, any officer is required to give any notice to an insurance carrier, the same may be given by delivery, or by mailing by registered letter properly addressed and stamped, to the principal office or general agent of such insurance carrier within this State, or to its home office, or to the secretary, general agent, or chief officer thereof in the United States, or the State Insurance Commissioner.

(i) Any insurance carrier liable to pay a tax upon premiums under this article shall not be liable to pay any other or further tax upon such premiums, under any other law of this State.

(j) Every employer carrying his own risk under the provisions of § 97-93 shall, under oath, report to the Commission his payroll, subject to the provisions of this article. Such report shall be made in form prescribed by the Commission, and at the times herein provided for premium reports by insurer. The Commission shall assess against such payroll a maintenance fund tax computed by taking such per cent of the basic premiums charged against the same or most similar industry or business taken from the manual insurance rate then in force in this State as is assessed in the Revenue Act against the insurance carriers for premiums collected on compensation insurance policies. (1929, c. 120, s. 73; 1931, c. 274, s. 13.)

Construction.—The moneys received under sub-section (j) of this section is a special fund available to the Industrial Commission for its maintenance, but comes within the statute creating the Budget Bureau, and the two statutes should be construed in pari materia, and the Budget Bureau is authorized and required to allocate to the Industrial Commission so much of the special fund created by said sub-section as is necessary to carry out its function efficiently, and also allocate additional money from funds of a similar nature to the extent and amount necessary to the Industrial Commission for this purpose. North Carolina Industrial Commission v. O'Berry, 197 N. C. 595, 150 S. E. 44.

§ 97-101. Collection of fines and penalties.—The Industrial Commission shall have the power by civil action brought in its own name to enforce the collection of any fines or penalties provided by this article, and fines or penalties collected by the Commission shall become a part of the maintenance fund referred to in sub-section (j) of § 97-100. (1931, c. 274, s. 14.)

Art. 2. Compensation Rating and Inspection Bureau.

§ 97-102. Compensation Rating and Inspection Bureau created; objects, functions, etc.—There is hereby created a Bureau to be known as the Compensation Rating and Inspection Bureau of North Carolina, with the following objects, functions and sources of income:

(a) To maintain rules and regulations and fix premium rates for Workmen's Compensation Insurance and equitably adjust the same as far as practicable, in accordance with the hazards of individual risks by inspection by the Bureau.

(b) To furnish upon request of any employer in the State of North Carolina or to any member of the compensation rating and Inspection Bureau of North Carolina, upon whose risk a compensation rate has been promulgated, information as to the rating, including the method of its compilation, and to encourage employers to reduce the number and severity of accidents by offering reduced premium rates for improved working conditions under such uniform system of merit or schedule rating as may be approved by the Insurance Commissioner of the State of North Carolina.

(c) The Bureau shall make a rating survey of each risk inspected which survey shall clearly show the location of all ratable items: Provided, however, that the Bureau shall not describe the items or make any recommendations for accident prevention, such service being reserved as a proper and essential field for the competitive enterprise of its individual members. (1931, c. 279, s. 1.)

Cross Reference.—As to automobile rate administrative office established in the bureau created by this section, see §§ 58-246 et seq.

§ 97-103. Membership in Bureau of carriers of insurance; acceptance of rejected risks; rules and regulations for maintenance; Insurance Commissioner or deputy ex-officio Chairman. — Before the Insurance Commissioner shall grant permission to any mutual association, reciprocal or stock company, or any other insurance organization to write compensation or employers' liability insurance in this State, it shall be a requisite that they shall subscribe to and become members of the Compensation Rating and Inspection Bureau of North Carolina.

It shall be the duty of all companies underwriting workmen's compensation insurance in this State and being members of the compensation rating and inspection bureau of North Carolina, as defined in this section, to insure and accept any workmen's compensation insurance risk which shall have been tendered to and rejected by any three members of said bureau in the manner hereinafter provided. When any such rejected risk is called to the attention of the compensation rating and inspection bureau of North Carolina and it appearing that said risk is in good faith entitled to such coverage, the bureau shall fix the initial premium therefor, (subject to the

approval of the insurance commissioner), and upon its payment said bureau shall designate a member whose duty it shall be to issue a standard workmen's compensation policy of insurance containing the usual and customary provisions found in such policies therefor. Before any such risk shall be assigned under the provisions of this section such risk shall, if demanded, furnish the bureau a certificate of the division of standards and inspection of the department of labor that he is complying with the rules and regulations of that department. The bureau shall within thirty days after March 8, 1935, make and adopt such rules as may be necessary to carry this article into effect, subject to final approval of the insurance commissioner. As a prerequisite to the transaction of workmen's compensation insurance in this State every member of said bureau shall file with the insurance commissioner written authority permitting said bureau to act in its behalf as provided in this section, and an agreement to accept such risks as are assigned to said insurance by said bureau, as provided in this section.

(a) Each member of the Compensation Rating and Inspection Bureau writing compensation insurance in the State of North Carolina shall, as a requisite thereto, be represented in the aforesaid Bureau and shall be entitled to one representative and one vote in the administration of the affairs of the Bureau. They shall, upon organization, elect a governing committee, which governing committee shall be composed of equal representation by participating and non-participating members.

(b) The Bureau, when created, shall adopt such rules and regulations for its procedure as may be necessary for its maintenance and operation. The expense of such bureau shall be borne by its members by quarterly contributions to be made in advance, such necessary expense to be advanced by prorating such expense among the members in accordance with the amount of gross Workmen's Compensation premiums written in North Carolina during the preceding year ending December the thirty-first, one thousand nine hundred and thirty, and members entering since that date to advance an amount to be fixed by the governing committee. After the first fiscal year of operation of the bureau the necessary expenses of the bureau shall be advanced by the members in accordance with rules and regulations to be established and adopted by the governing committee.

(c) The Insurance Commissioner of the State of North Carolina, or such deputy as he may appoint, shall be ex officio chairman of the Compensation Rating and Inspection Bureau of North Carolina, and the Insurance Commissioner or such deputy designated by him shall preside over all meetings of the governing committee or other meetings of the Bureau and it shall be his duty to determine any controversy that may arise by reason of a tie vote between the members of the governing committee. (1931, c. 279, s. 2; 1935, c. 76.)

Editor's Note.—All of this section preceding subsection (a) except the first sentence was inserted by the 1935 amendment.

§ 97-104. Governing committee; production of books and records for compilation of appropriate statistics; rates subject to approval of Insurance Commissioner.—In order to carry into effect the objects of this article the Bureau members shall immediately elect its governing committee who shall employ and fix the salaries of such personnel and assistance as is necessary, subject to the approval of the Insurance Commissioner, and the Insurance Commissioner is hereby authorized to compel the production of books, data, papers, and records relating to or bearing upon such data as is necessary to compile statistics for the purpose of determining the pure cost and expense loading of Workmen's Compensation Insurance in North Carolina and this information shall be available and for the use of the Compensation Rating and Inspection Bureau, for the compilation and promulgation of rates on Workmen's Compensation Insurance. All such rates compiled and promulgated by such Bureau shall be submitted to the Insurance Commissioner for approval as provided in § 97-100. (1931, c. 279, s. 3.)

Art. 3. Security Funds.

§ 97-105. Title of article.—This article shall be known as the Workmen's Compensation Security Fund Act. (1935, c. 228, s. 1.)

§ 97-106. Definitions.—As hereafter used in this article, unless the context or subject matter otherwise requires:

"Stock fund" means the stock workmen's compensation security fund created by this article.

"Mutual fund" means the mutual workmen's compensation security fund created by this article.

"Funds" means the stock fund and the mutual fund.

"Fund" means either the stock fund or the mutual fund as the context may require.

"Fund year" means the calendar year.

"Stock carrier" means any stock corporation authorized to transact the business of workmen's compensation insurance in this State, except an insolvent stock carrier.

"Mutual carrier" means any mutual corporation or association and any reciprocal or inter-insurance exchange authorized to transact the business of workmen's compensation insurance in this State, except an insolvent mutual carrier.

"Carrier" means either a stock carrier or a mutual carrier, as the context may require.

"Insolvent stock carrier" or "insolvent mutual carrier" means a stock carrier or a mutual carrier, as the case may be, which has been determined to be insolvent, or for which or for the assets of which a receiver has been appointed by a court or public officer of competent jurisdiction and authority.

"Commissioner" means the Insurance Commissioner of this State.

"Workmen's compensation act" means the workmen's compensation act of the State of North Carolina, being §§ 97-1 to 97-101 as amended and supplemented. (1935, c. 228, s. 2; 1941, c. 298, s. 1.)

Editor's Note.—The 1941 amendment inserted the words "and any reciprocal or inter-insurance exchange" in the paragraph defining "mutual carrier."

§ 97-107. Stock workmen's compensation security fund created.—There is hereby created a fund to be known as "The Stock Workmen's

Compensation Security Fund," for the purpose of assuring to persons entitled thereto the compensation provided by the workmen's compensation act for employments insured in insolvent stock carriers. Such fund shall be applicable to the payment of valid claims for compensation or death benefits heretofore or hereafter made pursuant to the workmen's compensation act, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this article, of an insolvent stock carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by stock carriers, as herein defined, all property and securities acquired by and through the use of moneys belonging to the fund, and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the commissioner of this State in accordance with the provisions of this article. (1935, c. 228, s. 3.)

§ 97-108. Verified report of premiums to be filed by stock carrier.—Every stock carrier shall, on or before the first day of September, nineteen hundred and thirty-five, file with the treasurer of the State and with the commissioner identical returns, under oath, on a form to be prescribed and furnished by the commissioner, stating the amount of net written premiums for the six months' period ending June thirtieth, nineteen hundred thirty-five on policies issued, renewed or extended by such carrier, to insure payment of compensation pursuant to the workmen's compensation act. For the purposes of this article "net written premiums" shall mean gross written premiums less return premiums on policies returned not taken, and on policies canceled. Thereafter, on or before the first day of March and September of each year, each such carrier shall file similar identical returns, stating the amount of such net written premiums for the six months' period ending, respectively, on the preceding December thirty-first and June thirtieth, on policies issued, renewed or extended by such carrier. (1935, c. 228, s. 4.)

§ 97-109. Contributions by stock carriers of 1% of net written premiums.—For the privilege of carrying on the business of workmen's compensation insurance in this State, every stock carrier shall pay into the stock fund on the first day of September, nineteen hundred thirty-five, a sum equal to one per centum (1%) of its net written premiums as shown by the return hereinbefore prescribed for the period ending June thirtieth, nineteen hundred thirty-five, and thereafter each such stock carrier, upon filing each semi-annual return, shall pay a sum equal to one per centum (1%) of its net written premiums for the period covered by such return. (1935, c. 228, s. 5.)

§ 97-110. Contributions to stop when stock fund equals 5% of loss reserves; resumption of contributions. — When the aggregate amount of all such payments into the stock fund, together with accumulated interest thereon, less all its expenditures and known liabilities, becomes equal to five per centum (5%) of the loss reserves of all stock carriers for the payment of benefits under the workmen's compensation act as of December thirty-first, next preceding, no further contributions to said fund shall be required to be made; provided, however, that whenever, thereafter, the amount of said fund shall be reduced below five per centum (5%) of such loss reserves as of said date by reason of payments from and known liabilities of said stock fund, then such contribution to said fund shall be resumed forthwith, and shall continue until said fund, over and above its known liabilities, shall be equal to five per centum (5%) of such reserves. (1935, c. 228, s. 6.)

§ 97-111. Rules and regulations for administration of stock fund; examination of books and records; penalty for failure to file report or pay assessment; revocation of license.—The commissioner may adopt, amend and enforce rules and regulations necessary for the proper administration of said stock fund. In the event any stock carrier shall fail to file any return or make any payment required by this article, or in case the commissioner shall have cause to believe that any return or other statement filed is false or inaccurate in any particular, or that any payment made is incorrect, he shall have full authority to examine all the books and records of the carrier for the purpose of ascertaining the facts and shall determine the correct amount to be paid and may proceed in any court of competent jurisdiction to recover for the benefit of the fund any sums shown to be due upon such examination and determination. Any stock carrier which fails to make any statement as required by this article, or to pay any contribution to the stock fund when due, shall thereby forfeit to said fund a penalty of five per centum (5%) of the amount of unpaid contribution determined to be due as provided by this article plus one per centum (1%) of such amount for each month of delay, or fraction thereof, after the expiration of the first month of such delay, but the commissioner may upon good cause shown extend the time for filing of such return or payment. The commissioner shall revoke the certificate of authority to do business in this State of any carrier which shall fail to comply with the provisions of this article or to pay any penalty imposed in accordance with this article. (1935, c. 228, s. 7.)

§ 97-112. Separation of stock fund; disbursements; investment; sale of securities.—The stock fund created by this article shall be separate and apart from any other fund so created and from all other state moneys. The state treasurer shall be the custodian of said fund; and all disbursements from said fund shall be made by the state treasurer upon vouchers signed by the commissioner as hereinafter provided. The moneys of said fund may be invested by the state treasurer only in the bonds or securities which are the direct obligations of or which are guaranteed as to principal and interest by the United States or this State. The state treasurer may sell any of the securities in which said fund is invested, if advisable for its proper administration or in the best interests of such fund, and all earnings from the investments of such fund shall be credited to such fund. (1935, c. 228, s. 8.)

§ 97-113. Payment of claim from stock fund when carrier insolvent; subrogation of employer paying claim; recovery against employer or receiver of insolvent carrier.—A. A valid claim for compensation or death benefits, or installments thereof, heretofore or hereafter made pursuant to the workmen's compensation act, which has remained or shall remain due and unpaid for sixty days, by reason of default by an insolvent stock carrier, shall be paid from the stock fund in the manner provided in this section. Any person in interest may file with the commissioner an application for payment of compensation or death benefits from the stock fund on a form prescribed and furnished by the commissioner. If there has been an award, final or otherwise, a certified copy thereof shall accompany the application. The commissioner shall thereupon certify to the state treasurer such award for payment according to the terms of the same, whereupon payment shall be made by the state treasurer.

B. Payment of compensation from the stock fund shall give the fund no right of recovery against the employer.

C. An employer may pay such award or part thereof in advance of payment from the stock fund and shall thereupon be subrogated to the rights of the employee or other party in interest against such fund to the extent of the amount so paid.

D. The state treasurer as custodian of the stock fund shall be entitled to recover the sum of all liabilities of such insolvent carrier assumed by such fund from such carrier, its receiver, liquidator, rehabilitator or trustee in bankruptcy and may prosecute an action or other proceedings therefor. All moneys recovered in any such action or proceedings shall forthwith be placed to the credit of the stock fund by the state treasurer to reimburse the stock fund to the extent of the moneys so recovered and paid. (1935, c. 228, s. 9.)

§ 97-114. Mutual workmen's compensation security fund created. — There is hereby created a fund to be known as "The Mutual Workmen's Compensation Security Fund," for the purpose of assuring to persons entitled thereto the compensation provided by the workmen's compensation act for employments insured in insolvent mutual carriers. Such fund shall be applicable to the payment of valid claims for compensation or death benefits heretofore or hereafter made pursuant to the workmen's compensation act, and remaining unpaid, in whole or in part, by reason of the default, after the effective date of this article, of an insolvent mutual carrier. Expenses of administration also shall be paid from the fund as herein provided. Such fund shall consist of all contributions received and paid into the fund by mutual carriers, as herein defined, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys deposited or invested as herein provided. The fund shall be administered by the commissioner in accordance with the provisions of this article. (1935, c. 228, s. 10.)

§ 97-115. Verified report of premiums to be filed by mutual carrier; equalization of payments by reciprocal or inter-insurance exchanges.—Every mutual carrier shall, on or before the first day of September, nineteen hundred thirty-five, file with the treasurer of the State and with the commissioner identical returns, under oath, on a form to be prescribed and furnished by the commissioner of insurance, stating the amount of net written premiums for the six months' period ending June thirtieth, nineteen hundred thirty-five, on policies issued, renewed or extended by such carrier, to insure payment of compensation pursuant to the workmen's compensation act during said period. For the purpose of this article "net written premiums" shall mean gross written premiums less return premiums on policies returned not taken and on policies cancelled. Thereafter, on or before the first day of March and September, of each year, each such carrier shall file similar identical returns, stating the amount of such net written premiums for the six months' periods ending, respectively, on the preceding December thirty-first and June thirtieth, on such policies issued, renewed or extended by such carrier.

Any reciprocal or inter-insurance exchange writing workmen's compensation insurance in North Carolina on September first, one thousand nine hundred and thirty-five and continuing to underwrite this class of insurance shall, upon the fund reaching its maximum contribution and the discontinuance of any collection thereof, continue to pay into said mutual fund as provided in this section for a period of six years after the other members of the mutual fund have discontinued said payments in order to equalize the contribution of all members of the mutual fund, and thereafter such reciprocal or inter-insurance exchanges shall be subject to the provisions of this section. (1935, c. 228, s. 11; 1941, c. 298, s. 2.)

Editor's Note.—The 1941 amendment added the last sentence to this section.

§ 97-116. Contributions by mutual carriers of 1% of net written premiums.—For the privilege of carrying on the business of workmen's compensation insurance in this State, every mutual carrier shall pay into the mutual fund on the first day of September, nineteen hundred thirty-five, a sum equal to one per centum (1%) of its net written premiums, as shown by the return hereinbefore prescribed for the period ending June thirtieth, nineteen hundred thirty-five, and thereafter each such mutual carrier, upon filing each semi-annual return, shall pay a sum equal to one per centum (1%) of its net written premiums, as shown for the period covered by such return. (1935, c. 228, s. 12.)

§ 97-117. Distribution of excess when mutual fund equals to 5% of loss reserves; distribution of fund when liabilities liquidated. — Whenever the mutual fund, less all its known liabilities, shall exceed five percentum (5%) of the loss reserves of all mutual carriers for the payments of losses under the workmen's compensation act, as of December thirty-first next preceding, distribution of such excess shall be made as repayments for successive fund years, commencing with the first fund year, to the mutual carriers in the proportion in which they respectively made contributions for such fund year: Provided, however, no such distribution shall reduce the fund, less all its known liabilities, below an amount equal to five per centum (5%) of such loss reserves as

of said date. Such repayments shall be made from time to time until the mutual carriers for the first fund year shall have received their proportionate shares of the contributions for the first fund year including interest, if any. Such repayments for succeeding fund years in their order shall be made on the same basis. The insolvency of any mutual carrier shall automatically terminate its right to such repayments and the withdrawal of any mutual carrier from the transaction of workmen's compensation insurance business in this State shall automatically suspend its right to such repayments until all its liabilities for workmen's compensation losses in this State shall have been fully liquidated. If and when all liabilities of all mutual carriers for workmen's compensation losses in this State shall have been fully liquidated, distribution shall be made of the remaining balance of the mutual fund in the proportion in which each such mutual carrier made contributions to the mutual fund. (1935, c. 228, s. 13.)

§ 97-118. Administration, custody, etc., of mutual fund. — The provisions of §§ 97-111, 97-112, and 97-113 shall apply to the administration, custody and investment of and payments from the mutual fund and to this end those sections shall be read with the necessary changes in detail to adopt their provisions to mutual funds. (1935, c. 228, s. 14.)

§ 97-119. Notice of insolvency; report of claims and unpaid awards.—Forthwith upon any carrier becoming an insolvent stock carrier, or an insolvent mutual carrier, as the case may be, the commissioner shall so notify the North Carolina industrial commission, and the North Carolina industrial commission shall immediately advise the commissioner (a) of all claims for compensation pending or thereafter made against an employer insured by such insolvent carrier, or against such insolvent carrier; (b) of all unpaid or continuing agreements, awards or decisions made upon claims prior to or after the date of such notice from the commissioner; and (c) of all appeals from or applications for modifications or rescission or review of such agreements, awards or decisions. (1935, c. 228, s. 15.)

§ 97-120. Right of commissioner to defend claims against insolvent carriers; arrangement with other carriers to pay claims.—The commissioner or his duly authorized representative may investigate and may defend before the North Carolina industrial commission or any court any or all claims for compensation against an employer insured by an insolvent carrier or against such insolvent carrier and may prosecute any pending appeal or may appeal from or make application for modification or rescission or review of an agreement, award or decision against such employer or insolvent carrier. Until all such claims for compensation are closed and all such awards thereon are paid, the commissioner, the administrator of the funds, shall be a party in interest in respect to all such claims, agreements and awards. For the purposes of this article the commissioner shall have exclusive power to select and employ such counsel, clerks and assistants as may be deemed necessary and to fix and determine their powers and duties, and he may also, in his discretion, arrange with any carrier or carriers to investigate and defend any or all such claims and to liquidate and pay such as are valid and the commissioner may from time to time reimburse, from the appropriate fund, such carrier or carriers for compensation payments so made, together with reasonable allowance for the services so rendered. (1935, c. 228, s. 16.)

§ 97-121. Expenses of administering funds.— The expense of administering the stock fund shall be paid out of the stock fund and the expense of administering the mutual fund shall be paid out of the mutual fund. The commissioner shall serve as administrator of each fund without additional compensation, but may be allowed and paid from either fund expenses incurred in the performance of his duties in connection with that fund. The compensation of those persons employed by the commissioner shall be deemed administration expenses payable from the fund in the manner provided in § 97-112. The commissioner shall include in his regular report to the legislature a statement of the expense of administering each of such funds for the preceding year. (1935, c. 228, s. 17.)

§ 97-122. Contributions relieving carrier of posting bond or making special deposit.—Contributions made by any stock or mutual carrier to the funds created by this article shall relieve such carriers from filing any surety bond or making any deposit of securities required under the provisions of any law of this State for the purpose of securing the payment of workmen's compensation benefits only. (1935, c. 228, s. 18.)

Division XIV. Miscellaneous Provisions.

Chapter 98. Burnt and Lost Records.

§ 98-1. Copy of destroyed record as evidence; may be recorded.—When the office of any registry is destroyed by fire or other accident, and the records and other papers thereof are burnt or destroyed, the copies of all such proceedings, instruments and papers as are of record or registry, certified by the proper officer, though without the seal of office, shall be received in evidence whenever the original or duly certified exemplications would be. Such copies, when the court is satisfied of their genuineness, may be ordered to be recorded or registered. (Rev., s. 327; Code, s. 55; C. S. 365.)

Admissibility of Parol Evidence.—As this chapter constitutes an enabling Act where it is attempted to prove by oral evidence and by copy the contents of the original report, the oral evidence is not excluded by its provisions. Hughes v. Pritchard, 153 N. C. 23, 63 S. E. 906. Varner v. Johnston, 112 N. C. 570, 576, 17 S. E. 483; Mobley v. Watts, 98 N. C. 284, 286, 3 S. E. 677.

But when a deed is lost or destroyed a copy must be produced if there be one, but if none, parol evidence may be admitted to prove its contents. Cowles v. Hardin, 91 N. C. 233; Dumas v. Powell, 14 N. C. 103; Baker v. Webb, 2 N. C. 43.

Same—Statements of One Not a Party.—A statement that he owned no interest in the property made by one not a party to the suit, and under whom the plaintiff does not claim, is not admissible under this section. Jones v. Ballou, 139 N. C. 526, 52 S. E. 254.

Same—Not Admissible to Change Certified Copy.—This section does not permit parol evidence to be introduced to show that the lost or destroyed original had a different description and thus correct a recorded certified copy of a deed. Hopper v. Justice, 111 N. C. 420, 16 S. E. 626.

§ 98-2. Originals may be again recorded.—All original papers, once admitted to record or registry, whereof the record or registry is destroyed, may, on motion, be again recorded or registered, on such proof as the court shall require. (Rev., s. 328; Code, s. 56; C. S. 366.)

Original Recorded upon Sufficient Evidence to Clerk. — Where the registry of partition is destroyed and a paper purporting to be the original is presented to the clerk, it is his duty, after satisfying himself upon evidence that the paper is the original one, to record it. Hill v. Lane, 149 N. C. 267, 62 S. E. 1067.

Effect of Failure to Re-register.—In Waters v. Crabtree, 105 N. C. 394, 402, 11 S. E. 240 the court said, in referring to this section: "This statutory provision, at least, admonished all persons having such original papers to prove and register them anew in the way prescribed, and good faith required that they should do so. It, moreover, gave the public reason to expect that it would be faithfully observed by persons interested. However where the plaintiff has been negligent in again registering or recording a deed, such re-registration will not defeat the rights of bona fide purchasers."

§ 98-3. Establishing boundaries and interest, where conveyance and copy lost. — When any conveyance of real estate, or of any right or interest therein, is lost, the registry thereof being also destroyed, any person claiming under the same may cause the boundaries thereof to be established in the manner provided in the chapter entitled Boundaries, or he may proceed in the following manner to establish both the boundaries and the nature of his estate:

He shall file his petition before the clerk of the superior court, setting forth the whole substance of the conveyance as truly and specifically as he can, the location and boundaries of his land, whose land it adjoins, the estate claimed therein, and a prayer to have his own boundaries established and the nature of his estate declared.

All persons claiming any estate in the premises, and those whose lands adjoin, shall be notified of the proceedings. Unless they or some of them, by answer on oath, deny the truth of all or some of the matters alleged, the clerk shall order a surveyor to run and designate the boundaries of the petitioner's land, and return his survey, with a plot thereof, to the court. This, when confirmed, shall, with the declaration of the court as to the nature of the estate of the petitioner, be registered and have, as to the persons notified, the effect of a deed for the same, executed by the person possessed of the same next before the petitioner. But in all cases, however, wherein the process of surveying is disputed, and the surveyor is forbidden to proceed by any person interested, the same proceedings shall be had as under the chapter entitled Boundaries.

If any of the persons notified deny by answer the truth of the conveyance, the clerk shall transfer the issues of fact to the superior court at term, to be tried as other issues of fact are required by law to be tried; and on the verdict and the pleadings the judge shall adjudge the rights of the parties, and declare the contents of the deed, if any deed is found by the jury, and allow the registration of such judgment and declaration, which

shall have the force and effect of a deed. (Rev., s. 328; Code, s. 56; C. S. 367.)

Cross Reference.—As to boundaries, see chapter 38.

Remedy Additional and Not Exclusive.—This section is an enabling statute providing, not an exclusive remedy, but merely an additional one. Jones v. Ballou, 139 N. C. 526, 52 S. E. 254; Mobley v. Watts, 98 N. C. 284, 3 S. E. 677.

It does not repeal but aids the common law rules for establishing deeds, and a party may choose either mode. Cowles v. Hardin, 91 N. C. 233.

Evidence Must Show Existence, Nature, and Loss.—Before the deed can be made, the plaintiff must clearly prove that a deed did exist, its legal operation, and the loss thereof. Plummer v. Baskerville, 36 N. C. 252; Loftin v. Loftin, 96 N. C. 94, 1 S. E. 837.

Judgment has Only Force of Original.—A judgment under this section has only such force as the original conveyance would have as evidence had it not been destroyed. McNeely v. Laxton, 149 N. C. 327, 63 S. E. 278.

Private Acts.—In a special proceeding under a private act, similar to this section, to restore certain records lost by fire or other casualty, it is necessary to conform exactly to all the terms prescribed by the statute. Cowles v. Hardin, 79 N. C. 577.

§ 98-4. Copy of lost will may be probated.—In counties where the original wills on file in the office of the clerk of superior court, and will-books containing copies, are lost or destroyed, if the executor or any other person has preserved a copy of a will (the original being so lost or destroyed) with a certificate appended, signed by a clerk of the court in whose office the will was, or is required to be filed, stating that said copy is a correct one, this copy may be admitted to probate, under the same rules and in the same manner as now prescribed by law for proving wills. The proceedings in such cases shall be the same as though such copy was the original offered for the first time for probate, except that the clerk who signed such certificate shall, on oath, acknowledge his signature, or in case it appears that he has died or left the state, then his signature shall be proved by a competent witness; and the witness or witnesses to the original, who may be examined, shall be required to swear that he or they signed in the presence of the testator and by his direction a paper-writing purporting to be his last will and testament. (Rev., s. 329; Code, s. 57; C. S. 368.)

Cross Reference.—As to probate of wills generally, see §§ 31-12 et seq.

Probated before Clerk.—The probate of a lost will must be made before the clerk of the Superior Court, he alone having jurisdiction. McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971.

Statute of Limitation Does Not Apply.—The statute of limitation does not apply to the simple taking probate of a will, hence it has no application to proceedings under this section. McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971.

§ 98-5. Copy of lost will as evidence; letters to issue.—In any action or proceeding at law, where it becomes necessary to introduce such will to establish title, or for any other purpose, a copy of the will and of the record of the probate, with a certificate signed by the clerk of the superior court for the county where the will may be recorded, stating that said record and copy are full and correct, shall be admitted as competent evidence; and when a copy of a will is admitted to probate, the clerk shall thereupon issue letters testamentary. (Rev., s. 330; Code, s. 58; C. S. 369.)

§ 98-6. Establishing contents of will, where original and copy destroyed.—Any person desirous of establishing the contents of a will destroyed as aforesaid, there being no copy thereof, may file his petition in the office of the clerk of the superior court, setting forth the entire contents thereof, according to the best of his knowledge, information and belief. All persons having an interest under the same shall be made parties, and if the truth of such petition is denied, the issues of fact shall be transferred to the superior court at term for trial by a jury, whether the will was recorded, and if so recorded, the contents thereof, and the declarations of the judge shall be recorded as the will of the testator. Any devisee or legatee is a competent witness as to the contents of every part of said will, except such as may concern his own interest in the same. (Rev., s. 331; Code, s. 59; C. S. 370.)

Parol Evidence.—Parol evidence may be introduced to show the contents of a will which has been lost or destroyed. Cox v. Lumber Co., 124 N. C. 78, 32 S. E. 381; Varner v. Johnston, 112 N. C. 570, 17 S. E. 483.

And such evidence is also admissible to show existence of such a will, its probate and registration. Cox v. Lumber Co., 124 N. C. 78, 32 S. E. 381.

§ 98-7. Perpetuating destroyed judgments and proceedings.—Every person desirous of perpetuating the contents of destroyed judgments, orders or proceedings of court, or any paper admitted to record or registration, or directed to be filed for safe keeping, other than wills or conveyances of real estate, or some right or interest therein, or any deed or other instrument of writing, required to be recorded or registered, but not having been recorded or registered, it being competent to register or record said deed or other instrument at the time of its loss or destruction, may file his petition in the court having jurisdiction of like matters with the original proceeding, setting forth the substance of the whole record, deed, proceeding, or paper, which he desires to perpetuate. If, on the hearing, the court shall declare the existence of such record, deed, or proceeding, or paper at the time of the burning of the office wherein the same was lodged or kept, or other destruction thereof, and that the same was there destroyed, and shall declare the contents thereof, such declaration shall be recorded or registered, or filed, according to the nature of the paper destroyed. (Rev., s. 332; Code, s. 60; C. S. 371.)

Restored Record Free from Collateral Attack. — Where the destroyed record has been restored, the record so restored cannot be collaterally attacked. Branch v. Griffin, 99 N. C. 173, 5 S. E. 393, 398.

§ 98-8. Color of title under destroyed instrument.—Every person who has been in the continual, peaceable and quiet possession of land, tenements, or hereditaments, situated in the county, claiming, using and occupying them as his own, for the space of seven years, under known boundaries, the title thereto being out of the state, is deemed to have been lawfully possessed, under color of title, of such estate therein as has been claimed by him during his possession, although he may exhibit no conveyance therefor: Provided, that such possession commenced before the destruction of the registry office, or other destruction as aforesaid, and also that any such person, or any person claiming by, through or under him, makes affidavit and produces such proof as is satisfactory to the court that the possession was rightfully taken; and if taken under a written

conveyance, that the registry thereof was destroyed by fire or other means, or was destroyed before registry as aforesaid, and that neither the original nor any copy thereof is in existence: Provided further, that such presumption shall not arise against infants, persons of nonsane memory, and persons residing out of the state, who were such at the time of possession taken, and were not therefore barred, nor were so barred at the time of the burning of the office or other destruction. (Rev., s. 333; Code, s. 61; C. S. 372.)

Cross Reference.—As to title by adverse possession generally, see §§ 1-35 et seq.

Adverse Possession — Presumption of Grant. — In an action to recover land under this section, the plaintiff showed title out of the State by a thirty years' possession, it was held, that this statute did not make it necessary to show seven years' adverse possession in addition to the thirty years. The lapse of seven years' adverse possession concurrently with the thirty years is sufficient. Hill v. Overton, 81 N. C. 393.

§ 98-9. Action on destroyed bond.—Actions on official or other bonds lodged in any office which are destroyed with the registry thereof may be prosecuted by petition against the principal and sureties thereto, and the proceedings shall be as in the former courts of equity. (Rev., s. 334; Code, s. 62; C. S. 373.)

Nature of Proceedings Is Equitable. — The nature of the proceedings under this section is equitable. McCormick v. Jernigan, 110 N. C. 406, 14 S. E. 971.

§ 98-10. Destroyed witness tickets; duplicates may be filed.—The court having jurisdiction of the action may allow other witness tickets to be filed in place of such as may be destroyed, upon the oath of the witness or other satisfactory proof. (Rev., s. 335; Code, s. 63; C. S. 374.)

§ 98-11. Replacing lost official conveyances.—Where any conveyance executed by any person, sheriff, clerk and master, or commissioner of court has been lost, and registry thereof destroyed as aforesaid, and there is no copy thereof, such persons, whether in or out of office, may execute another of like tenor and date, reciting therein that the same is a duplicate, and such deed shall be evidence of the facts therein recited, in all cases wherein the parties thereto are dead, or are incompetent witnesses to prove the same, to the extent as if it was the original conveyance. (Rev., s. 336; Code, s. 64; C. S. 375.)

§ 98-12. Court records as proof of destroyed instruments set out therein.—The records of any court in or out of the state, and all transcripts of such records, and the exhibits filed therewith in any case, are admissible to prove the existence and contents of all deeds, wills, conveyances, depositions and other papers, copies whereof are therein set forth or exhibited, in all cases where the records and registry of such as were or ought to have been recorded and registered, or the originals of such as were not proper to be recorded or registered, have been destroyed as aforesaid, although such transcripts or exhibits have been informally certified; and when offered in evidence have the like effect as though the transcript or record was the record of the court whose records are destroyed, and the deeds, wills and conveyances, depositions and other papers therein copied or therewith exhibited were original. (Rev., s. 337; Code, s. 65; C. S. 376.)

Evidence of Court Records as Proof. — When papers have been lost and under competent evidence and instructions, the jury has found their contents to be as contended by the plaintiff, the plaintiff prevails. Fain v. Gaddis, 144 N. C. 765, 57 S. E. 1111.

§ 98-13. Copies contained in court records may be recorded.—The copies aforesaid of all such deeds, wills, conveyances and other instruments proper to be recorded or registered, as are mentioned in § 98-12, may be recorded or registered on application to the clerk of the superior court and due proof that the original thereof was genuine. (Rev., s. 338; Code, s. 66; C. S. 377.)

§ 98-14. Rules for petitions and motions.—The following rules shall be observed in petitions and motions under this chapter:

1. The facts stated in every petition or motion shall be verified by affidavit of the petitioner that they are true according to the best of his knowledge, information, and belief.

Affidavit by Agent Not Sufficient. — In a proceeding under this section an affidavit by the agent of the petitioner that the facts set forth in the complaint "are true to the best of his knowledge, information and belief," is an insufficient verification. Cowles v. Hardin, 79 N. C. 577.

2. The instrument or paper sought to be established by any petition shall be fully set forth in its substance, and its precise language shall be stated when the same is remembered.

3. All persons interested in the prayers of the petition or decree shall be made parties.

Parties.—It seems that all persons whose estate may be effected by a proceeding to restore lost records, should be made parties. Cowles v. Hardin, 79 N. C. 577.

4. Petitions to establish a record of any court shall be filed at term in the superior court of the county where the record is sought to be established. Other petitions may be filed in the office of the clerk.

5. The costs shall be paid as the court may decree.

6. Appeals shall be allowed as in all other cases, and where the error alleged shall be a finding by the superior court at term, of a matter of fact, the same may be removed on appeal to the supreme court, and the proper judgments directed to be entered below.

7. It shall be presumed that any order or record of the court of pleas and quarter sessions, which was made and has been lost or destroyed, was made by a legally constituted court, and the requisite number of justices, without naming said justices. (Rev., s. 339; Code, s. 67; 1893, c. 295; C. S. 378.)

§ 98-15. Records allowed under this chapter to have effect of original records.—The records and registries allowed by the court in pursuance of this chapter shall have the same force and effect as original records and registries. (Rev., s. 340; Code, s. 68; C. S. 379.)

No More Effect than Originals.—The copies have only the same force and effect as the lost or destroyed deeds would have had, if produced. McNeely v. Laxton, 149 N. C. 327, 63 S. E. 278.

Bona Fide Purchaser—True Purpose of Original. — But it would seem that if the true purpose of the deed was to serve as a mortgage, and the plaintiff has been negligent in registering it, it will not have that effect against one who subsequently purchases without notice and for value. Waters v. Crabtree, 105 N. C. 402, 11 S. E. 240.

§ 98-16. Destroyed court records proved prima facie by recitals in conveyances executed before their destruction.—The recitals, reference to, or

mention of any decree, order, judgment or other record of any court of record of any county in which the courthouse, or records of said courts, or both, have been destroyed by fire or otherwise, contained, recited or set forth in any deed of conveyance, paper-writing, or other bona fide written evidence of title, executed prior to the destruction of the courthouse and records of said county, by any executor or administrator with a will annexed, or by any clerk and master, superior court clerk, clerk of the court of pleas and quarter sessions, sheriff, or other officer, or commissioners appointed by either of said courts, and authorized by law to execute said deed or other paper-writing, are deemed, taken and recognized as true in fact, and are prima facie evidence of the existence, validity and binding force of said decree, order, judgment or other record so referred to or recited in said deed or paper-writing, and are to all intents and purposes binding and valid against all persons mentioned or described in said instrument of writing, deed, etc., as purporting to be parties thereto, and against all persons who were parties to said decree, judgment, order or other record so referred to or recited, and against all persons claiming by, through or under them or either of them. (Rev., s. 341; Code, s. 69; C. S. 380.)

Constitutionality.—This section, making recitals in deeds, etc., of judgments, records, etc., evidence, etc., upon condition that the courthouse, records, etc., have been destroyed by fire, etc., is constitutional. Barefoot v. Musselwhite, 153 N. C. 208, 209, 69 S. E. 71.

Evidence Must Show Destruction of Records. — The fact of the destruction by fire or otherwise of the records must be shown before the recitals, reference to, or mention of any decree, judgment, or other record recited in a deed of conveyance, etc., shall have the effect of evidence under this section. Barefoot v. Musselwhite, 153 N. C. 208, 69 S. E. 71. See also Dail v. Suggs, 85 N. C. 104.

Application of Section. — This section was applied where a deed made in compliance to a decree of court was destroyed, the recitals in the decree being taken as prima facie evidence of facts and authority. Irvin v. Clark, 98 N. C. 444, 4 S. E. 30. See also Isler v. Isler, 88 N. C. 576.

Conversely, the recitals in a deed, which refer to the decree, so as to identify it, are of themselves prima facie evidence of its binding force and validity as against all persons who were parties to said decree. Pinnell v. Burroughs, 172 N. C. 182, 183, 90 S. E. 218; Everett v. Newton, 118 N. C. 925, 23 S. E. 961; Hare v. Hollomon, 94 N. C. 14; Pinnell v. Burroughs, 168 N. C. 315, 84 S. E. 364.

Where the original papers of the judgment roll have been lost, the minute docket of the court may be introduced to prove the contents thereof. Everett v. Newton, 118 N. C. 925, 23 S. E. 961; Hare v. Hollomon, 94 N. C. 14.

§ 98-17. Conveyances reciting court records prima facie evidence thereof.—Such deed of conveyance, or other paper-writing, executed as aforesaid, and registered according to law, may be read in any suit now pending or which may hereafter be instituted in any court of this state, as prima facie evidence of the existence and validity of the decree, judgment, order, or other record upon which the same purports to be founded, without any other or further restoration or reinstatement of said decree, order, judgment, or record than is contained in this chapter. (Rev., s. 342; Code, s. 70; C. S. 381.)

Constitutionality. — The constitutionality and validity of this section cannot now be open to dispute. Barefoot v. Musselwhite, 153 N. C. 208, 211, 69 S. E. 71.

§ 98-18. Court records and conveyances to which chapter extends.—This chapter shall extend to records of any court which have been or may be destroyed by fire or otherwise, and to any deed of conveyance, paper-writing, or other bona fide evidence of title executed before the destruction of said records. (Rev., s. 343; Code, s. 71; C. S. 382.)

Local Modification.—Moore: C. S. 383; Cherokee, Graham, Haywood, and Madison: C. S. 384; 1935, c. 25.

§ 98-19. Replacement of stolen, lost or destroyed state or municipal bonds; indemnity bond. —The State Treasurer of the State of North Carolina, by and with the consent and approval of the governor and council of State, and the governing boards of the several counties, cities and political sub-divisions of the State, is hereby authorized and empowered to make settlement for or issue new bonds for bonds of the State or any of the political sub-divisions thereof, which have been stolen, lost or destroyed: Provided, that there is furnished an indemnity bond in double the amount of the said bonds, said indemnity bond to be approved by the State Treasurer or the governing boards of any political sub-division of the State issuing said replacement bonds: Provided further, that said indemnity bond shall clearly designate the bonds which have been stolen, lost or destroyed. (1935, c. 292, s. 1.)

§ 98-20. Expenses borne by applicant. — All expenses in connection with printing and issuing any replacement bonds provided for in this article shall be borne by the person making application therefor. (1935, c. 292, s. 2.)

Chapter 99. Libel and Slander.

§ 99-1. Libel against newspaper; defamation by or through radio or television station; notice before action.—(a) Before any action, either civil or criminal, is brought for the publication, in a newspaper or periodical, of a libel, the plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant, specifying the article and the statements therein which he alleges to be false and defamatory.

(b) Before any action, either civil or criminal, is brought for the publishing, speaking, uttering,

or conveying by words, acts or in any other manner of a libel or slander by or through any radio or television station, the plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant, specifying the time of and the words or acts which he or they allege to be false and defamatory. (Rev., s. 2012; 1901, c. 557; 1943, c. 238, s. 1; C. S. 2429.)

Cross References.—As to criminal statutes on libel and slander, see §§ 14-47 and 14-48. As to the making of derogatory reports concerning banks, see § 53-128. Concerning building and loan associations, see § 54-44. As to pleadings in libel and slander, see § 1-158. As to statute of limitations for libel, see § 1-54; for slander, see § 1-55. As to allowance of costs in an action for libel and slander, see § 6-18.

Editor's Note.—The 1943 amendment added subsection (b).

Definition.—The accepted definition of a libel is expressed, in White v. Nicholls, 3 How. 266, 11 L. Ed. 591 as follows: "Every publication, either by writing, printing or pictures, which charges upon or imputes to, any person that which renders him liable to punishment, or which is calculated to make him infamous or odious, or ridiculous is prima facie a libel."

Constitutionality.—This and the two following sections providing that a newspaper publishing a libel may avoid, under certain conditions, the payment of punitive damages is not discriminatory, but a constitutional enactment. Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A. L. R. 626.

This and section 1-585 have no relation one to the other. The provision for service of notice in this section refers to an act to be performed as a condition precedent to the institution of the action, whereas the provision as to service of notices in section 1-585 refers to acts to be performed after an action is instituted. Roth v. Greensboro News Co., 214 N. C. 23, 24, 197 S. E. 569.

Complaint Must Allege Notice.—Under this section a complaint in an action for libel must allege the giving of five days' notice to the defendant in writing, specifying the article and the statements therein alleged to be false. Williams v. Smith, 134 N. C. 249, 46 S. E. 502.

Same—Failure Demurrable.—In an action against a newspaper for libel, the failure of the complaint to allege the five days' notice renders it demurrable. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

Same—Same—Amendment.—Where a demurrer was sustained to a complaint for libel against a newspaper because it failed to appear that notice of the action had been given, the trial court may permit an amendment showing that fact. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

Letter as Sufficient Notice.—A letter written by plaintiff and received by defendant, in which demand is made for a retraction and apology for a clearly specified article, in which the alleged false and defamatory statements are plainly indicated, is a sufficient notice in writing as required by this section, the provisions of section 1-585 relating to notice in judicial proceedings after suit has been instituted, not being applicable. Roth v. Greensboro News Co., 214 N. C. 23, 197 S. E. 569.

When Notice Unnecessary.—In an action for libel, where the newspaper publishes a retraction, no notice need be given. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

As to whether this section and the following sections of this chapter, as to notice to the defendant in an action for libel, looking to retraction and apology, applies to individuals having no connection with a newspaper publishing the libel, Query? Paul v. National Auction Co., 181 N. C. 1, 105 S. E. 881.

Failure of Notice.—In an action for libel against a newspaper the failure to give notice of the action as required only relieves the paper of punitive damages. Osborne v. Leach, 135 N. C. 628, 47 S. E. 811.

Compensatory Damages.—This section and the following sections in this chapter, having significance only on the question of punitive damages, do not include compensatory damages for "pecuniary loss, physical pain, mental suffering, and injury to reputation." Paul v. National Auction Co., 181 N. C. 1, 105 S. E. 881.

Applied in Harrell v. Goerch, 209 N. C. 741, 184 S. E. 489.

§ 99-2. Effect of publication or broadcast in good faith and retraction.—(a) If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicious place and type as was said original article, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of "guilty" is rendered on such a state of facts, the defendant shall be fined a penny and the costs, and no more.

(b) If it appears upon the trial that such words or acts were conveyed and broadcast in good faith, that their falsity was due to an honest mistake of the facts, or without prior knowledge or approval of such station, and if with prior knowledge or approval that there were reasonable grounds for believing that the words or acts were true, and that within ten days after the service of said notice a full and fair correction, apology and restraction was conveyed or broadcast by or over such radio or television station at approximately the same time of day and by the same sending power so as to be as visible and audibile as the original acts or words complained of, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of "guilty" is rendered on such state of facts, the defendant shall be fined a penny and costs, and no more. (Rev., s. 2013; 1901, c. 557; 1943, c. 238, s. 2; C. S. 2430.)

Editor's Note.—The 1943 amendment added subsection (b).

Section Constitutional.—This section taking away from a person the right to recover punitive damages in case of libel is constitutional. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

A recovery of actual damages does not abridge the freedom of the press, as inhibited by our Constitution, Art. 1, sec. 20. Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A. L. R. 626.

Same—Applies Equally to All.—Where a statute for libel applies equally to all newspapers and periodicals, it does not amount to unconstitutional discrimination. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

Form of Retraction.—While this section does not prescribe any particular form of retraction, it does require a categorical retraction and apology, and the mere statement that defendant had come into possession of information contra to that theretofore published is insufficient to meet the requirements of this section, nor was it incumbent on plaintiff to approve or disapprove thereof, and his failure to do so does not exculpate defendant or preclude the submission of an issue of punitive damages. Roth v. Greensboro News Co., 217 N. C. 13, 6 S. E. (2d) 882.

"Actual Damages."—The "actual damages" recoverable in a suit for libelous publication by a newspaper in the event of a retraction, allowed by the statute, is for pecuniary loss, direct or indirect, or for physical pain and inconvenience. Pentuff v. Park, 194 N. C. 146, 138 S. E. 616, 53 A. L. R. 626. Actual damages also include mental suffering and injury to reputation. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

Damages When Defendants Do Not Comply.—Where the defendants did not avail themselves of the privilege given them under this section, the damages that may be awarded would include punitive as well as actual damages. Pentuff v. Park, 194 N. C. 146, 158, 138 S. E. 616, 53 A. L. R. 626.

Damages as "Property."—The right to have punitive damages assessed is not property, but the right to recover actual or compensatory damages is property. Osborn v. Leach, 135 N. C. 628, 633, 47 S. E. 811.

Only Actual Damages Where Publication Is Made in Good Faith and There Has Been a Correction.—Where plaintiff's evidence establishes a false publication, and defendant's evidence shows that the publication was made in good faith through error, and that a correction and retraction was published upon defendant's ascertaining the facts, plaintiff is entitled to recover the actual damage sustained by him. Lay v. Gazette Pub. Co., 209 N. C. 134, 183 S. E. 416.

And No Punitive Damages in the Absence of Malice, or Wantonness and Recklessness.—Lay v. Gazette Pub. Co., 209 N. C. 134, 183 S. E. 416.

When Malice May Not Be Inferred by Jury.—Malice may not be inferred by the jury from a false publication when defendant's uncontradicted evidence rebuts the presumption by showing that the publication was made in good faith through error, and that a correction and retraction was published upon defendant's ascertaining the facts. Lay v. Gazette Pub. Co., 209 N. C. 134, 183 S. E. 416.

Defendant's Pleading.—In an action for libel against a newspaper, the paper having pleaded a retraction of the publication, it is necessary for the defendant to show that the publication was made in good faith, and with reasonable ground to believe it to be true, in order to relieve the paper from punitive damages. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

§ 99-3. Anonymous communications.—The two preceding sections shall not apply to anonymous communications and publications. (Rev., s. 2014; 1901, c. 557, s. 3; C. S. 2431.)

An article signed "Smith" is not an anonymous publication under this section. Williams v. Smith, 134 N. C. 249, 46 S. E. 502.

§ 99-4. Charging innocent woman with incontinency.—Whereas doubts have arisen whether actions of slander can be maintained against persons who may attempt, in a wanton and malicious manner, to destroy the reputation of innocent and unprotected women, whose very existence in society depends upon the unsullied purity of their character, therefore any words written or spoken of a woman, which may amount to a charge of incontinency, shall be actionable. (Rev., s. 2015; Code, s. 3763; R. C., c. 106; 1808, c. 478; C. S. 2432.)

Cross Reference.—As to criminal liability for slandering innocent women, see § 14-48.

Editor's Note.—See 12 N. C. Law Rev. 120.

Positive Terms.—This section in the operative part is explicit and positive. Bowden v. Bailes, 101 N. C. 612, 616, 8 S. E. 342.

Meaning of "Innocent Woman."—There is a manifest reason why the words "an innocent woman," in sec. 14-48 and "innocent and unprotected woman" in this section, should be construed to mean innocent of illicit sexual intercourse, as affecting her reputation when the slanderous words are spoken, for the purpose of those sections is to protect women who, however imprudent they may have been in other respects, have not so far "stooped to folly" as to surrender their chastity and become incontinent, or who have regained their characters if a "slip has been made," from "the wanton and malicious slander" of persons who may attempt to destroy their reputations and blast and ruin their characters. State v. Ferguson, 107 N. C. 841, 849, 12 S. E. 574; State v. Johnson, 182 N. C. 883, 886, 109 S. E. 786.

Must Charge Adultery or Fornication.—Words which impute to a female a wanton and lascivious disposition only are not actionable. Lucas v. Nichols, 52 N. C. 32.

The words, which amount to a charge of incontinency, must import not merely a lascivious disposition, but the criminal act of adultery or fornication. McBrayer v. Hill, 26 N. C. 136.

Same—May Be Question for Jury.—When the words are ambiguous and admit of a slanderous interpretation, it becomes a question for the jury to determine whether they amounted to the slanderous charge in the reasonable apprehension of the hearers. State v. Howard, 169 N. C. 312, 84 S. E. 807.

Where a telegraph company sends a message containing words that amount to a charge of incontinency against a woman, demurrer to the evidence, as in case of nonsuit, is properly denied. Parker v. Edwards, 222 N. C. 75, 21 S. E. (2d) 876.

Complaint.—It is not necessary that the complaint should allege that the words were "wantonly and maliciously" uttered. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342.

Action by Husband.—An action by a husband for slander of his wife, the wife not being a party and the complaint alleging no special damage to the husband, will be dismissed on motion of the defendant, or ex mero motu, for failure of the complaint to state a cause of action. Harper v. Pinkston, 112 N. C. 293, 17 S. E. 161.

Evidence.—Testimony by the witnesses of statements made by defendant charging in effect that plaintiff had been guilty of illicit sexual intercourse, is competent although not in the exact words alleged in the bill of particulars, it being sufficient if the testimony is confined in substance to the bill of particulars. Bryant v. Reedy, 214 N. C. 748, 200 S. E. 896.

Damages.—In an action by a woman for slander, for words alleged to have been spoken, amounting to a charge of incontinency, the plaintiff may, in the absence of proof of actual special damages, recover compensatory damages; and upon proof that the words were spoken with malice, or that the conduct of the defendant was marked by gross and wilful wrong, or was oppressive, vindictive damages may be awarded. Bowden v. Bailes, 101 N. C. 612, 8 S. E. 342.

Words charging an innocent women with conduct amounting to incontinency are actionable per se, under this section, and the law will presume damages in such cases which naturally, proximately and necessarily result therefrom, including mental suffering, humiliation and embarrassment, and testimony of such mental suffering, humiliation and embarrassment is competent without specific allegation thereof. Bryant v. Reedy, 214 N. C. 748, 200 S. E. 896.

As under this section the charge of incontinency made against an innocent woman, in whatever words written or spoken, conveyed to the hearer, is per se actionable, their utterance must be followed by the same consequence as to damages as the publishing of other defamatory imputations. Bowden v. Bailes, 101 N. C. 612, 616, 8 S. E. 342.

Examples.—Sec. 14-48 is the criminal statute making it a misdemeanor to slander an innocent woman. The wording is similar to this section and the following expressions which were held to amount to a charge of incontinency, though decided in criminal cases, apply equally here.

Charging a woman with having had sexual intercourse with a male dog amounts to a charge of incontinency. State v. Hewlin, 128 N. C. 571, 37 S. E. 952.

The words: "If the plaintiff (an unmarried woman) did not give birth to a child, she missed a good chance of having it," themselves imply an illicit sexual intercourse. Sowers v. Sowers, 87 N. C. 303.

Calling an innocent woman "a d—d whore," in a loud and angry manner in the hearing alone of the wife of the speaker, is a charge of incontinency within the meaning of the statute. State v. Shoemaker, 101 N. C. 690. 8 S. E. 332.

To say of a woman, that "she was kept by a man" is actionable as a slander under our act of assembly. McBrayer v. Hill, 26 N. C. 136.

Same—Not Sufficient.—The words that a woman "looked like a woman who had miscarried," do not, per se imply a charge of incontinence. State v. Benton, 117 N. C. 788, 790, 23 S. E. 432.

Calling a woman a "damned bitch" held not a charge of incontinency. State v. Harwell, 129 N. C. 550, 553, 40 S. E. 48.

Stated in Harshaw v. Harshaw, 220 N. C. 145, 16 S. E. (2d) 666, 136 A. L. R. 1411.

Chapter 100. Monuments, Memorials and Parks.

Art. 1. Memorials Commission.

§ 100-1. Memorials commissions created; members; officers; quorum, etc.—A memorials commission in and for the state of North Carolina is hereby created, to consist of the following officials, ex-officio: The governor of North Carolina, the secretary of the North Carolina historical commission, the head of the art department of the University of North Carolina at Chapel Hill, the head of the history department of the University of North Carolina at Chapel Hill, and the head of the department of architecture of the North Carolina State College of Agriculture and Engineering. The memorials commission shall have the power to adopt its own rules and to elect such officers from its own members as may be deemed proper. Three commissioners shall constitute a quorum. The members shall serve without compensation. (1941, c. 341, s. 1.)

§ 100-2. Approval of memorials before acceptance by state; regulation of existing memorials, etc.; "work of art" defined; highway markers.—No memorial or work of art shall hereafter become the property of the state by purchase, gift or otherwise, unless such memorial or work of art or a design of the same, together with the proposed location of the same, shall first have been submitted to and approved by said memorials commission; nor shall any memorial or work of art, until so submitted and approved, be contracted for, placed in or upon or allowed to extend over any property belonging to the state. No existing memorial or work of art owned by the state shall be removed, relocated, or altered in any way without approval of the memorials commission. The term "work of art" as used in this section shall include any painting, portrait, mural decoration, stained glass, statue, bas-relief, sculpture, monument, tablet, fountain, or other article or structure of a permanent character intended for decoration or commemoration. This section, however, shall not apply to markers set up by the state highway and public works commission in coöperation with the department of conservation and development and the state historical commission as provided by chapter one hundred and ninety-seven of the Public Laws of one thousand nine hundred and thirty-five. (1941, c. 341, s. 2.)

§ 100-3. Approval of design, etc., of certain bridges and other structures.—No bridge, arch, gate, fence or other structure intended primarily for ornamental or memorial purposes and which is paid for either wholly or in part by appropriation from the state treasury, or which is to be placed on or allowed to extend over any property belonging to the state, shall be begun unless the design and proposed location thereof shall have been submitted to said memorials commission and approved by it. Furthermore, no existing structures of the kind named and described in the preceding part of this section owned by the state, shall be removed or remodeled without submission of the plans therefor to the commission and approval of said plans by the commission. This section shall not be construed as amending or repealing chapter one hundred and ninety-seven of the Public Laws of one thousand nine hundred and thirty-five. (1941, c. 341, s. 3.)

§ 100-4. Governor to accept works of art approved by commission.—The governor of North Carolina is hereby authorized to accept, in the name of the state of North Carolina, gifts to the state of works of art as defined in § 100-2. But no work of art shall be so accepted unless and until the same shall have been first submitted to said memorials commission and by it judged worthy of acceptance. (1941, c. 341, s. 4.)

§ 100-5. Duties as to buildings erected or remodeled by state.—Upon request of the governor and the board of public buildings and grounds, said memorials commission shall act in an advisory capacity relative to the artistic character of any building constructed, erected, or remodeled by the state. The term "building" as used in this section shall include structures intended for human occupation, and also bridges, arches, gates, walls, or other permanent structures of any character not intended primarily for purposes of decoration or commemoration. (1941, c. 341, s. 5.)

§ 100-6. Disqualification to vote on work of art, etc.; vacancy.—Any member of said memorials commission who shall be employed by the

state to execute a work of art or structure of any kind requiring submission to the commission, or who shall take part in a competition for such work of art or structure, shall be disqualified from voting thereon, and the temporary vacancy thereby created may be filled by appointment by the governor. (1941, c. 341, s. 6.)

§ 100-7. Construction.—The provisions of this article shall not be construed to include exhibits of an educational nature arranged by museums or art galleries administered by the state or any of its agencies or institutions, or to prevent the placing of portraits of officials, officers, or employees of the state in the offices or buildings of the departments, agencies, or institutions with which such officials, officers, or employees are or have been connected. But upon request of such museums or agencies, said memorials commission shall act in an advisory capacity as to the artistic qualities and appropriations of memorial exhibits or works of art submitted to it. (1941, c. 341, s. 7.)

§ 100-8. Memorials to persons within twenty-five years of death; acceptance of commemorative funds for useful work.—No monument, statue, tablet, painting, or other article or structure of a permanent nature intended primarily to commemorate any person or persons shall be purchased from state funds or shall be placed in or upon or allowed to extend over state property within twenty-five years after the death of the person or persons so commemorated: Provided, nevertheless, that nothing in this article shall be interpreted as prohibiting the acceptance of funds by state agencies or institutions from individuals or societies who wish to commemorate some person or persons by providing funds for educational, health, charitable, or other useful work. The agency or institution to which such funds are offered for memorial enterprises shall exercise its discretion as to the acceptance and expenditure of such funds. (1941, c. 341, s. 8.)

Art. 2. Memorials Financed by Counties and Cities.

§ 100-9. County commissioners may protect monuments.—When any monument has been or shall hereafter be erected to the memory of our Confederate dead or to perpetuate the memory and virtues of our distinguished dead, if such monument is erected by the voluntary subscription of the people and is placed on the courthouse square, the board of county commissioners of such county are permitted to expend from the public funds of the county an amount sufficient to erect a substantial iron fence around such monument in order that the same may be protected. (Rev., s. 3928; 1905, c. 457; C. S. 6934.)

Cross Reference.—As to criminal liability for defacing or removing monuments, see § 14-148.

§ 100-10. Counties, cities, and towns may contribute toward erection of memorials. — Any county, city or town by resolution first adopted by its governing body may become a member of any memorial association or organization for perpetuating the memory of the soldiers and sailors of North Carolina who served the United States in the great world war, or who fought in the war between the states, and may subscribe and pay toward the cost of the erection of any memorial to the memory of such soldiers and sailors such sums of money as its governing body may determine, and may be represented in such association or organization by such persons as its governing body may select. Any contribution so made shall be paid out of the general fund of such county, city, or town making same, on such terms as may be agreed upon by its governing body, and the officers having the control and management of the association or organization to which subscription and contributions are made. (1919, c. 21, ss. 1, 2, 3; 1924, c. 200; C. S. 6938.)

Editor's Note.—By amendment Public Laws 1923, ch. 200, there was added to this section the provision for perpetuating the memory of the soldiers and sailors of the Civil War.

Art. 3. Mount Mitchell Park.

§ 100-11. Duties.—The Board of Conservation and Development shall have complete control, care, protection and charge of that part of Mitchell's park acquired by the state. (1919, c. 316, s. 3; 1915, c. 76; 1921, c. 222, s. 1; 1925, c. 122, s. 23; C. S. 6940.)

Editor's Note.—Public Laws 1921, c. 222, made the North Carolina geological and economic survey and the geological board the successor of the Mount Mitchell Park Commission and the Mitchell Peak Park Commission. The survey and board were in turn replaced by the board of conservation and development by authority of Public Laws 1925, c. 122.

§ 100-12. Roads, trails, and fences authorized; protection of property.—The Board of Conservation and Development is authorized and empowered to enter upon the land hereinbefore referred to, and to build a fence or fences around the same, also roads, paths, and trails and protect the property against trespass and fire and injury of any and all kinds whatsoever; cut wood and timber upon the same, but only for the purpose of protecting the other timber thereon and improving the property generally. (1919, c. 316, s. 5; 1921, c. 222, s. 1; 1925, c. 122, s. 23; C. S. 6942.)

§ 100-13. Fees for use of improvements; fees for other privileges; leases; rules and regulations.—The Board of Conservation and Development is further authorized and empowered to charge and collect fees for the use of such improvements as have already been constructed, or may hereafter be constructed, on the park, and for other privileges connected with the full use of the park by the public; to lease sites for camps, houses, hotels, and places of amusement and business; and to make and enforce such necessary rules and regulations as may best tend to protect, preserve, and increase the value and attractiveness of the park. (1921, c. 222, s. 2; 1925, c. 122, s. 23; C. S. 6942(a).)

§ 100-14. Use of fees and other collections.—All fees and other money collected and received by the Board of Conservation and Development in connection with its proper administration of Mount Mitchell state park shall be used by said board for the administration, protection, improvement, and maintenance of said park. (1921, c. 222, s. 3; 1925, c. 122, s. 23; C. S. 6942(b).)

§ 100-15. Annual reports.—The Board of Conservation and Development shall make an annual report to the governor of all money received and

expended by it in the administration of Mount Mitchell state park, and of such other items as may be called for by him or by the general assembly. (1921, c. 222, s. 4; 1925, c. 122, s. 23; C. S. 6942(c).)

Art. 4. Toll Roads or Bridges in Public Parks.

§ 100-16. Private operation of toll roads or bridges in public parks prohibited.—No person, firm or corporation shall have the right or privilege to privately operate any toll road or toll bridge in this state upon lands belonging to the state, set apart or designated as a public park.

In the event any such toll road or bridge is on March 17, 1939 being privately operated under any real or assumed right, privilege, or lease, the state institution or department having such state-owned property in charge or under its supervision shall immediately give notice to such person, firm or corporation so operating such toll road or toll bridge to discontinue the operation of the same.

Any person, firm or corporation who sustains any legal damage by reason of the exercise of the authority hereinbefore granted shall be entitled to just compensation therefor, and, in the event satisfactory settlement cannot be made with the department or state agency exercising the authority herein contained, the amount of just compensation may be determined by a special proceeding instituted by the claimant against the department or agency having such property in custody under the provisions of the chapter on Eminent Domain, in so far as the same may be applicable hereto: Provided, such proceeding shall be instituted within six months from the time such notice is given. Any compensation awarded shall be a valid claim against the state of North Carolina, payable out of the funds of the department or state agency having such property in charge. (1939, c. 127.)

Chapter 101. Names of Persons.

§ 101-1. Legislature may regulate change by general but not private law.—The general assembly shall not have power to pass any private law to alter the name of any person, but shall have power to pass general laws regulating the same. (Rev., s. 2146; Const., Art. II, s. 11; C. S. 2970.)

Cross References.—As to changing name of minor child upon adoption, see § 48-7. As to resumption of maiden name by a woman after divorce, see § 50-12. As to duty to disclose real name when trading as "company" or "agent," see § 59-89. As to trademarks, etc., see chapter 80.

§ 101-2. Procedure for changing name; petition; notice.—A person who wishes, for good cause shown, to change his name must file his application before the clerk of the superior court of the county in which he lives, having first given ten days' notice of the application by publication at the courthouse door. (Rev., s. 2147; 1891, c. 145; C. S. 2971.)

§ 101-3. Contents of petition. — The applicant shall state in the application his true name, the name he desires to adopt, his reasons for desiring such change, and that his name has never been changed before by law. (Rev., s. 2147; 1891, c. 145; C. S. 2972.)

§ 101-4. Proof of good character to accompany petition.—The applicant shall also file with said petition proof of his good character, which proof must be made by at least two citizens of the county who know his standing. (Rev., s. 2148; 1891, c. 145; C. S. 2973.)

§ 101-5. Clerk to order change; certificate and record.—If the clerk thinks that good and sufficient reason exists for the change of name, it shall be his duty to issue an order changing the name of the applicant from his true name to the name sought to be adopted. He shall issue to the applicant a certificate under his hand and seal of office, stating the change made in the applicant's name, and shall also record said application and order on the docket of special proceedings in his court. (Rev., ss. 2149, 2150; 1891, c. 145; C. S. 2974.)

§ 101-6. Effect of change; only one change.—When the order is made and the applicant's name changed, he is entitled to all the privileges and protection under his new name as he would have been under the old name. No person shall be allowed to change his name under this chapter but once. (Rev., ss. 2147, 2149; 1891, c. 145; C. S. 2975.)

Chapter 102. Official Survey Base.

§ 102-1. Name and description. — The official survey base for the state of North Carolina shall be a system of plane coördinates to be known as the "North Carolina Coördinate System," said system being defined as a Lambert conformal projection of Clarke's spheroid of one thousand eight hundred sixty-six, having a central meridian of 79°—00′ west from Greenwich and standard parallels of latitude of 34°—20′ and 36°—10′ north of the equator, along which parallels the scale shall be exact. All coördinates of the system are expressed in feet, the x coördinate being measured easterly along the grid and the y coördinate being measured northerly along the grid. The origin of the coördinates is hereby established on the meridian 79°—00′ west from Greenwich at the intersection of the parallels 33°—45′ north latitude, such origin being given the coördinates x=2,000,000 feet, y=0 feet. The precise position of said system shall be as marked on the ground by triangulation or traverse stations or monuments established in conformity with the standards adopted by the United States coast and geodetic survey for first- and second-order work, whose geodetic positions have been rigidly adjusted on the North American datum of one thousand nine hundred twenty-seven, and whose plane coördinates have been computed on the system defined. (1939, c. 163, s. 1.)

§ 102-2. Physical control. — Any triangulation or traverse station or monument established as described in § 102-1 may be used in establishing a connection between any survey and the above-mentioned system of rectangular coördinates. (1939, c. 163, s. 2.)

§ 102-3. Use of name.—The use of the term "North Carolina Coördinate System" on any map, report, or survey, or other document, shall be limited to coördinates based on the North Carolina coördinate system as defined in this chapter. (1939, c. 163, s. 3.)

§ 102-4. Damaging, defacing, or destroying monuments.—If any person shall willfully damage, deface, destroy, or otherwise injure a station, monument or permanent mark of the North Carolina coördinate system, or shall oppose any obstacles to the proper, reasonable, and legal use of any such station or monument, such person shall be guilty of a misdemeanor, and shall be liable to fine or imprisonment at the discretion of the court. (1939, c. 163, s. 4.)

§ 102-5. Limitations of use.—No coördinates based on the North Carolina coördinate system purporting to define the position of a point on a land boundary shall be presented to be recorded in public land records or deed records unless such point in the survey is within one-half mile of a station or monument of the North Carolina coordinate system: Provided, that the administrative agency for said system may, by rules and regulations, increase or decrease such limiting distance for the whole state, or any area or areas thereof. (1939, c. 163, s. 5.)

§ 102-6. Legality of use in descriptions.—For the purpose of describing the location of any survey station or land boundary corner in the state of North Carolina, it shall be considered a complete, legal, and satisfactory description to define the location of such point or points by means of coördinates of the North Carolina coordinate system as described herein, and within the limitations of § 102-5. (1939, c. 163, s. 6.)

§ 102-7. Use not compulsory. — Nothing contained in this chapter shall be interpreted as requiring any purchaser or mortgagee to rely wholly on a description based upon the North Carolina coördinate system. (1939, c. 163, s. 7.)

§ 102-8. Administrative agency. — The administrative agency of the North Carolina coördinate system shall be the North Carolina department of conservation and development, through its appropriate division, hereinafter called the "Agency." (1939, c. 163, s. 8.)

§ 102-9. Duties and powers of the agency. — It shall be the duty of the agency to make or cause to be made from time to time such surveys and computations as are necessary to further or complete the North Carolina coördinate system. The agency shall endeavor to carry to completion as soon as practicable the field monumentation and office computations of the coördinate system. For the purpose of this work the agency shall have the power to accept grants for the specific purpose of carrying on the work; to coördinate, organize, and direct any federal or other assistance which may be offered to further the work; to coöperate with any individual, firm, company, public or private agency, state or federal agencies, in the prosecution of the work; to enter into contracts or coöperative agreements with other state or federal agencies in promoting the work of the coördinating system. The agency shall further have the power to adopt necessary rules, regulations, and specifications relating to the establishment and use of the coördinate system as defined in this chapter, consistent with the standards and practice of the United States coast and geodetic survey. (1939, c. 163, s. 9.)

§ 102-10. Prior work. — The system of stations, monuments, traverses, computations, and other work which has been done or is under way in North Carolina by the so-called North Carolina geodetic survey, under the supervision of the United States coast and geodetic survey, is, where consistent with the provisions of this chapter, hereby

made a part of the North Carolina coördinate system. The surveys, notes, computations, monuments, stations, and all other work relating to the coördinate system, which has been done by said North Carolina geodetic survey, under the supervision of and in coöperation with the United States coast and geodetic survey and federal relief agencies, hereby are placed under the direction of, and shall become the property of, the administrative agency, subject to the agreement of the federal Works Progress Administration. (1939, c. 163, s. 10).

§ 102-11. Vertical control.—Whereas the foregoing provisions of this chapter heretofore are related to horizontal control only, the administrative agency may adopt standards for vertical control or levying surveys consistent with those recommended by and used by the United States coast and geodetic survey, and make or cause to be made such surveys as are necessary to complete the vertical control of North Carolina, in accordance with the provisions for horizontal control surveys as defined in this chapter. (1939, c. 163, s. 11.)

Chapter 103. Sundays and Holidays.

§ 103-1. Work in ordinary calling on Sunday forbidden.—On the Lord's day, commonly called Sunday, no tradesman, artificer, planter, laborer, or other person shall, upon land or water, do or exercise any labor, business or work, of his ordinary calling, works of necessity and charity alone excepted, nor employ himself in hunting, fishing or fowling, nor use any game, sport or play, upon pain that every person so offending, being of the age of fourteen years and upwards, shall forfeit and pay one dollar. (Rev., s. 2836; Code, s. 3782; R. C. c. 115; 1741, c. 30, s. 2; C. S. 3955.)

Local Modification.—Forsyth: C. S. 3957; Johnston: 1925, c. 185; Robeson: Pub. Loc. 1925, c. 451.

Cross References.—As to Sunday fishing, see § 113-247. As to catching oysters on Sunday, see § 113-210. As to unloading oysters on Sunday, see § 113-211.

Editor's Note.—The theory is often advanced that Christianity is a part of the law of the land, and, hence, independent of any statute, contracts made on Sunday are illegal, and that the statute forbidding labor on Sunday was enacted solely for religious reasons. However, to show the fallacy in this argument, it need only be stated. Under our constitution, both State and Federal, no act can be required or forbidden by statute because such act may be in accordance with or opposed to the religious views of anyone. If, therefore, the cessation of labor or the prohibition or performance of any act were provided by statute for religious reasons, the statute could not be maintained.

Some economic or political ground must be found upon which to sustain the Sunday laws, because religious grounds will avail us nothing. Apparently the only ground upon which the "Sunday laws" can be sustained is that, in pursuance of the police power, the State can and ought to require a cessation of labor upon specified days, to protect the masses from being worn out by incessant and unremitting toil. If such days as the Legislature may care to designate happen to be those upon which the larger part of the people observe a cessation of toil for religious reasons, it is not an objection but a convenience. For a complete review of the Sunday laws, see Rodman v. Robinson, 134 N. C. 503, 47 S. E. 19.

Acts Which May Be Lawfully Done on Sunday.—It is said in State v. Ricketts, 74 N. C. 187, 192: "In this State every act may lawfully be done on Sunday which may lawfully be done on any other day, unless there is some statute forbidding it to be done on that day." Rodman v. Robinson, 134 N. C. 503, 507, 47 S. E. 19.

Keeping "Open Shop" on Sunday.—This section does not make keeping open shop and selling goods on Sunday an indictable offense, and an ordinance of a town, passed in pursuance of this section, for the better government of the town, prohibiting keeping open stores and other places of business on Sunday for the purpose of buying and selling, excepting ice, drugs and medicines, and permitting drug stores to sell soft drinks, etc., within certain hours, is not objectionable on the ground that the offense is covered by this section for the ordinance is passed under the police powers of the town, its violation is indictable, and in furtherance of local government, which the statute contemplates. State v. Medlin, 170 N. C. 682, 86 S. E. 597.

It is against the public policy of this State that one should pursue his ordinary business calling on Sunday, and such may not only be regulated by town ordinances, but altogether prohibited on that day; and an ordinance of this kind is not rendered invalid, as unduly discriminative, by reason of an exception in favor of drug stores or on account of this section. State v. Burbage, 172 N. C. 876, 89 S. E. 795.

Same—Powers of Towns.—Commissioners of a town may, by valid ordinance, prohibit the opening of places of business in the town on Sunday, excepting drug stores. State v. Medlin, 170 N. C. 682, 86 S. E. 597.

Power to Prohibit Labor—Public and Private.—The Legislature has power to prohibit labor of this kind on Sunday, on the ground of public decency. But when it goes further and prohibits labor which is done in private, the power is exceeded and the statute is void. Rodman v. Robinson, 134 N. C. 503, 507, 47 S. E. 19.

Sunday Contracts.—"In Melvin v. Easley, 52 N. C. 356, it was conceded by the whole court . . . that a contract made on Sunday was illegal, and could not support an action." Covington v. Threadgill, 88 N. C. 186, 189.

"In the language of Caldwell, J., in Swann v. Swann, 21 Fed., at p. 305, 'It would be downright hypocrisy for a court to affect to believe that the moral sense of the community would be shocked by compelling a man to pay a note given for an honest debt because it was executed on the Lord's Day.' And the same is true of the enforcement of any contract which is not forbidden by statute to be made on Sunday." Rodman v. Robinson, 134 N. C. 503, 513, 47 S. E. 19.

Same—Check.—Where a mechanic has repaired an automobile for its owner during the week, and delivered possession to him on Sunday on receipt of his check to cover his charges, the fact that the check was dated on Sunday does not render it invalid under this section, or permit the owner to stop its payment and retain the car in his possession, so as to release it from the lien thereon for the amount of the repairs. Maxton Auto Co. v. Rudd, 176 N. C. 497, 97 S. E. 477.

Same—Sale with Warranties.—The sale, privately, of a horse on Sunday by a horse-dealer to one knowing of the calling of the seller, was held not to be such a violation by the buyer of the section as to prevent him from recovering in an action for a deceit and false warranty against the seller. Melvin v. Easley, 52 N. C. 356.

Sufficiency of Indictment.—An indictment charging that the defendant was a common Sabbath-breaker and prophaner of the Lord's day, commonly called Sunday was held to be insufficient. State v. Brown, 7 N. C. 224.

Cited in Riddle v. Whisnant, 220 N. C. 131, 134, 16 S. E. (2d) 698.

§ 103-2. Hunting or going armed on Sunday.—If any person shall, except in defense of his own property, hunt on Sunday with a dog, or shall be found off his premises on Sunday, having with him a shotgun, rifle or pistol, he shall be guilty of a misdemeanor, and pay a fine not exceeding fifty dollars, or be imprisoned not exceeding thirty days. (Rev., s. 3842; Code, s. 3783; 1868-9, c. 18, ss. 1, 2; C. S. 3956.)

Local Modification.—Perquimans: 1935, c. 145.

Creates Two Offenses.—The section creates two offenses: 1st, Hunting on the Sabbath with a dog. 2d, Being found off one's premises having a shot-gun, rifle or pistol. State v. Howard, 67 N. C. 24.

Sufficiency of Indictment.—A conviction is sustainable under an indictment charging the defendant with being "found off his premises on the Sabbath day, having with him a shot-gun, contrary to the form of the statute," etc. State v. Howard, 67 N. C. 24.

Same—"Sabbath."—It is immaterial that the indictment used the expression "the Sabbath" instead of "Sunday." State v. Drake, 64 N. C. 589.

Same—Must State Act Committed on Sunday.—An indictment for an act which is criminal when committed upon Sunday, must state that the act in question was committed upon Sunday; but if it do so, no exception can be taken to it for reference to the same day by a wrong day of the month. State v. Drake, 64 N. C. 589.

§ 103-3. What process executed on Sunday.—It shall not be lawful for any sheriff, constable, or other officer to execute any summons, capias, or other process on Sunday, unless the same be issued for treason, felony or misdemeanor. (Rev., s. 2837; Code, s. 928; R. C., c. 31, s. 54; 1777, c. 118, s. 6; C. S. 3958.)

Cross Reference.—As to prohibition against arrest in civil cases on Sunday, see § 1-410.

Execution of Writ or Other Process.—It is unlawful for an officer to execute any writ or other process on Sunday. Devries & Co. v. Summit, 86 N. C. 126.

Summons in a civil action served on Sunday is invalid and does not bind defendant, and the status of the process is the same as if service had not been made. Mintz v. Frink, 217 N. C. 101, 6 S. E. (2d) 804.

A levy of an execution on Sunday is void. Bland v. Whitfield, 46 N. C. 122.

Distress for Penalty under Revenue Act.—The sheriff may proceed on Sunday by distress to enforce the penalty authorized by a revenue Act of the Legislature for peddling without license. Cowles v. Brittain, 9 N. C. 204.

Sunday is not a juridical day, hence an adjournment of the court from Saturday night to Monday morning during the progress of a trial for murder is not violative of the act requiring the adjournment to be "from day to day." State v. Howard, 82 N. C. 623.

When Court May Sit on Sunday.—There have been some instances in the judicial proceedings in this State where the courts have held their sessions on Sunday, but the cases are rare, and whenever it has been done, exception has generally been taken to the course of the court, upon the ground that it could not legally sit on that day. But the Supreme Court has held that in special cases ex necessitate the Court might sit on Sunday. State v. Ricketts, 74 N. C. 187; State v. McGimsey, 80 N. C. 377; State v. Howard, 82 N. C. 623, 626.

Term of Court Embraces Sunday.—When a term of court is set by statute to begin on a certain Monday, and to last for "one week," (or two or three weeks, as the case may be), it embraces the Sunday of each week (unless sooner adjourned), and the term expires by limitation at midnight of that day. Taylor v. Ervin, 119 N. C. 274, 25 S. E. 875.

Verdict of Jury.—The rendition by the jury of a verdict on Sunday is not invalid for that cause. Tuttle v. Tuttle, 146 N. C. 484, 59 S. E. 1008.

There being no inhibition of a verdict rendered on Sunday, either at common law or by statute, a judgment entered on that day (by virtue of the statute, that it shall be entered up at once on the verdict) is valid. Taylor v. Ervin, 119 N. C. 274, 25 S. E. 875.

A verdict entered on Sunday of a week set for the duration of a court, in the absence of an earlier adjournment, is legally entered. Taylor v. Ervin, 119 N. C. 274, 26 S. E. 875.

A notice to take a deposition on Sunday is not good, and a deposition taken on such notice must be rejected. Sloan v. Williford, 25 N. C. 307.

§ 103-4. Dates of public holidays.—The first day of January, the nineteenth day of January, the twenty-second day of February, Easter Monday, the twelfth day of April, the tenth day of May, the twentieth day of May, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, Tuesday after the first Monday in November when a general election is held, the day appointed by the governor as a Thanksgiving Day, and the twenty-fifth day of December of each and every year, are declared to be public holidays; and whenever any such holiday shall fall upon Sunday, the Monday following shall be a public holiday: Provided, that Easter Monday and the thirtieth day of May shall be holidays for all State and National Banks only. (Rev., s. 2838; Code, s. 3784; 1891, c. 58; 1899, c. 410; 1901, c. 25; 1881, c. 294; 1907, c. 996; 1909, c. 888; 1919, c. 287; 1935, c. 212; C. S. 3959.)

Editor's Note.—Public Laws 1935, chapter 212, inserted "Easter Monday" and the "thirtieth day of May" in this section.

Effect of Legal Holiday Generally.—The statute declaring certain days public holidays, does not prohibit the pursuit of the usual avocations of citizens, nor public officers, or the courts from exercising their respective functions on those days. While it might be the attendance of jurors, witnesses and suitors will not be enforced, and the courts will not sue out or enforce process on such days, yet the courts may lawfully proceed with the business before them. State v. Moore, 104 N. C. 743, 10 S. E. 183.

The section simply declares that certain days therein specified, in each year, shall be public holidays, and the following section prescribes when papers coming due on such days, or on Sunday, shall be payable. It does not purport, in terms or effect, to prohibit persons from pursuing their usual avocations on such days, nor is there any inhibition upon public officers to exercise their offices, respectively; nor, particularly for the present purpose, is there any inhibition upon the courts to sit on such days and exercise their functions and authority. There is no such statutory inhibition; nor, indeed, is there any, except such as may arise in the application of general principles of law. It has never been understood to be the law in this State that a public holiday is dies non juridicus, except perhaps to a limited extent; it is very certainly not wholly so. The courts, particularly the superior courts, very frequently sit on such days and hear and try causes and dispatch the business that ordinarily comes before them, especially when there is no objection. Id.

Deposition Opened on Holiday.—A legal holiday has not the same status in respect to legal proceedings as Sunday; and while depositions opened on the latter day are void, they are not so when they are opened on a legal holiday. Latta v. Catawba Elec. Co., 146 N. C. 285, 59 S. E. 1028.

§ 103-5. Acts to be done on Sunday or holidays.—Where the day or the last day for doing an act required or permitted by law to be done falls on Sunday or on a holiday the act may be done on the next succeeding secular or business day. (Rev., s. 2839; Code, ss. 3784, 3785, 3786; 1899, c. 733, s. 194; C. S. 3960.)

Cross References.—As to computing time when last day falls on Sunday, see § 1-593. As to time negotiable instrument becoming due on Sunday is payable, see § 25-91.

Chapter 104. United States Lands.

Art. 1. Authority for Acquisition.

§ 104-1. Acquisition of lands for specified purposes authorized; concurrent jurisdiction reserved.—The United States is authorized, by purchase or otherwise, to acquire title to any tract or parcel of land in the state of North Caroilna, not exceeding twenty-five acres, for the purpose of erecting thereon any customhouse, courthouse, postoffice, or other building, including lighthouses, lightkeepers' dwellings, life-saving stations, buoys and coal depots and buildings connected therewith, or for the establishment of a fishcultural station and the erection thereon of such buildings and improvements as may be necessary for the successful operations of such fishcultural station. The consent to acquisition by the United States is upon the express condition that the state of North Carolina shall so far retain a concurrent jurisdiction with the United States over such lands as that all civil and criminal process issued from the courts of the state of North Carolina may be executed thereon in like manner as if this authority had not been given, and that the state of North Carolina also retains authority to punish all violations of its criminal laws committed on any such tract of land. (Rev., s. 5426; Code, ss. 3080, 3083; 1887, c. 136; 1899, c. 10; 1870-1, c. 44, s. 5; C. S. 8053.)

§ 104-2. Unused lands to revert to state.—The consent given in § 104-1 is upon consideration of the United States building lighthouses, lighthouse-keepers' dwellings, life-saving stations, buoys, coal depots, fish stations, post-offices, customhouses, and other buildings connected therewith, on the tracts or parcels of land so purchased, or that may be purchased; and that the title to land so conveyed to the United States shall revert to the state unless the construction of the aforementioned buildings be completed thereon within ten years from the date of the conveyance from the grantor. (Rev., s. 5426; Code, ss. 3080, 3083; 1899, c. 10; 1887, c. 136; 1870-1, c. 44, s. 5; C. S. 8054.)

§ 104-3. Exemption of such lands from taxation.—The lots, parcels, or tracts of land acquired under this chapter, together with the tenements and appurtenances for the purpose mentioned in this chapter, shall be exempt from taxation. (Rev., s. 5428; Code, s. 3082; 1870-1, c. 44, s. 3; C. S. 8055.)

When Exemption Begins.—A contract to convey lands to the United States Government reservation, under the Federal statute, does not vest the title in the Government until survey made, acreage determined, purchase price paid, or conveyance made and title approved by the Attorney-General, and until then the land is subject to State taxes under the State statutes. Caldwell Land, etc., Co. v. Commissioners, 174 N. C. 634, 94 S. E. 406.

§ 104-4. Conveyances of such lands to be recorded.—All deeds, conveyances, or other title papers for the same shall be recorded, as in other cases, in the office of the register of deeds of the county in which the lands so conveyed may lie, in the same manner and under the same regulations as other deeds and conveyances are now recorded, and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or legal division of any public land belonging to the United States, which may be set apart by the general government for the purpose before mentioned, by an order, patent, or other official document or paper so describing such land. (Rev., s. 5429; Code, s. 3081; 1870-1, c. 44, s. 2; 1872-3, c. 201; C. S. 8056.)

§ 104-5. Forest reserve in North Carolina authorized; powers conferred.—The United States is authorized to acquire by purchase, or by condemnation with adequate compensation, except as hereinafter provided, such lands in North

Carolina as in the opinion of the federal government may be needed for the establishment of a national forest reserve in that region. This consent is given upon condition that the state of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the state of North Carolina against any person charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this consent had not been given. Power is hereby conferred upon the congress of the United States to pass such laws as it may deem necessary to the acquisition as hereinbefore provided, for incorporation in such national forest reserve such forest-covered lands lying in North Carolina as in the opinion of the federal government may be needed for this purpose, but as much as two hundred acres of any tract of land occupied as a home by bona fide residents in this state on the eighteenth day of January, one thousand nine hundred and one, shall be exempt from the provisions of this section. Power is hereby conferred upon congress to pass such laws and to make or provide for the making of such rules and regulations, of both civil and criminal nature, and to provide punishment therefor, as in its judgment may be necessary for the management, control, and protection of such lands as may be from time to time acquired by the United States under the provisions of this section. (Rev., s. 5430; 1901, c. 17; 1929, c. 67, s. 1; C. S. 8057.)

Editor's Note.—The Act of 1929 struck out the word "Western" whenever appearing in this section and inserted "North" in the title.

§ 104-6. Acquisition of lands for river and harbor improvement; reservation of right to serve process.—The consent of the legislature of the state is hereby given to the acquisition by the United States of any tracts, pieces, or parcels of land within the limits of the state, by purchase or condemnation, for use as sites for locks and dams, or for any other purpose in connection with the improvement of rivers and harbors within and on the borders of the state. The consent hereby given is in accordance with the seventeenth clause of the eighth section of the first article of the constitution of the United States, and with the acts of congress in such cases made and provided; and this state retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this section, so far as that all civil and criminal process issued under authority of any law of this state may be executed in any part of the premises so acquired, or the buildings or structures thereon erected. (1907, c. 681; C. S. 8058.)

§ 104-7. Acquisition of lands for public buildings; cession of jurisdiction; exemption from taxation.—The consent of the state is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in the state required for the sites for customhouses, courthouses, postoffices, arsenals, or other public buildings whatever, or for any other purposes of the government.

Exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands. The jurisdiction ceded shall not vest until the United States shall have acquired title to said lands by purchase, condemnation, or otherwise.

So long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all state, county, and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this state. (1907, c. 25; C. S. 8059.)

§ 104-8. Further authorization of acquisition of land.—The United States is hereby authorized to acquire lands by condemnation or otherwise in this State for the purpose of preserving the navigability of navigable streams and for holding and administering such lands for National Park purposes: Provided, that this section and § 104-9 shall in no wise affect the authority conferred upon the United States and reserved to the State in §§ 104-5 and 104-6. (1925, c. 152, s. 1.)

§ 104-9. Condition of consent granted in preceding section.—This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime, without or within said jurisdiction, may be executed thereon in like manner as if this consent had not been given. (1925, c. 152, s. 2.)

§ 104-10. Migratory bird sanctuaries or other wild life refuges. — The United States is authorized to acquire by purchase, or by condemnation with adequate compensation, such lands in North Carolina as in the opinion of the Federal Government may be needed for the establishment of one or more migratory bird sanctuaries or other wild life refuges. This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime without or within said jurisdiction, may be executed therein in like manner as if this consent had not been given. Power is hereby conferred upon the Congress of the United States to pass such laws as it may deem necessary to the acquisition as hereinbefore provided, for incorporation in such sanctuaries or refuges such lands lying in North Carolina as in the opinion of the Federal Government may be suitable and needed for this purpose. Power is hereby conferred upon Congress to pass

such laws and to make or provide for the making of such rules and regulations, of both civil and criminal nature, and to provide punishment therefor, as in its judgment may be necessary for the management, control and protection of such lands as may be from time to time acquired by the United States under the provisions of this section. (1929, c. 163, s. 1.)

§ 104-11. Utilities Commission to secure rights-of-way, etc., for waterway improvements by use of federal funds.—Hereafter whenever any waterway improvement in North Carolina by the use of federal funds is provided for upon condition that the state or locality shall furnish rights-of-way, permits for the dumping of dredged material, or furnish or do any other thing in connection with the proposed waterway improvement, the Utilities Commission is authorized and empowered to represent the State or locality in such matter of securing the rights-of-way, permits for the dumping of dredged material, or other things so required in connection with such waterway improvement; and in prosecuting such undertaking, the Utilities Commission may follow the same procedure provided in article two for the acquisition of rights-of-way for the intercoastal waterway from the Cape Fear river to the South Carolina line: Provided, however, that said Utilities Commission is not hereby authorized to enter into obligation or contract for the payment of any money or proceeds through condemnation or otherwise without the express approval of the governor and council of state. (1935, c. 240; 1937, c. 434.)

Art. 2. Inland Waterway.

§ 104-12. Acquisition of land for inland waterway from Cape Fear River; grant of state lands.—For the purpose of aiding in the construction of the proposed inland waterway by the United States from the Cape Fear River at Southport to the North Carolina-South Carolina State line, the Secretary of State is hereby authorized to issue to the United States of America a grant to the land located within said inland waterway, right-of-way, which is to be one thousand feet to seventeen hundred fifty feet wide in so far as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official, exercising control over the construction of the said waterway. Whenever in the construction of such inland waterway within this State, lands theretofore submerged shall be raised above the water by the deposit of excavated material, the land so formed shall become the property of the United States if within the limits of said inland waterway, right-of-way, herein set out one thousand feet to seventeen hundred fifty feet and the Secretary of State is hereby authorized to issue to the United States a grant to the land so formed within the limits above specified, the grant to issue upon a certificate furnished to the Secretary of State by some authorized official of the United States, as above provided. If said lands so required for the inland waterway right-of-way shall be marshlands, or sound lands, the title to which has heretofore been vested in the State Board of Education, the Governor of the State, as President thereof, and the Superintendent of Public Instruction as Secretary, are hereby authorized and required to execute proper conveyance to the United States of America for said marshlands or sound lands, free of cost, both to the State and to the United States Government, upon a certificate furnished to said Board of Education by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official exercising control over the construction of the said inland waterway. (1931, c. 2, s. 1.)

§ 104-13. Utilities Commission to secure right-of-way over private lands; condemnation by United States.—If the title to any part of the lands acquired by the United States Government for the construction of such inland waterway from the Cape Fear River at Southport to the North Carolina-South Carolina State line shall be in any private person, company or corporation, railroad company, street railway company, telephone or telegraph company, or other public service corporation or shall have been donated or condemned for any public use by any political sub-division of the State, or if it may be necessary, for the purpose of obtaining the proper title to any lands, the title to which has heretofore been vested in the State Board of Education, then the Utilities Commission, in the name of the State of North Carolina, is hereby authorized and empowered, acting for and in behalf of the State of North Carolina, to secure a right-of-way one thousand to seventeen hundred fifty feet wide for said inland waterway across and through such lands or any part thereof, by purchase, donation or otherwise, through agreement with the owner or owners where possible, and when any such property is thus acquired, the Governor and Secretary of State shall execute a deed for the same to the United States; and if for any reason the said commission shall be unable to secure such right-of-way across any such property by voluntary donation by and/or with the owner or owners, the said Commission acting for and in behalf of the State of North Carolina is hereby vested with the power to condemn the same, and in so doing, the ways, means, methods and procedure of the chapter of this Code, entitled "Eminent Domain," shall be used by it as near as the same is suitable for the purposes of this article, and in all instances, the general and special benefits to the owner thereof shall be assessed as offsets against the damages to such property or lands.

As such condemnation proceedings might result in delay in the acquiring of title to all parts of the right-of-way and in the construction of the said inland waterway by the United States, said Utilities Commission is authorized to enter any of said lands and property and take possession of the same at the time hereinafter provided as needed for this use in behalf of the State or the United States Government for the purposes herein set out, prior to the bringing of the proceeding for condemnation and prior to the payment of the money for such land or property under any judgment in condemnation. In the event the owner or owners shall appeal from the report of the commissioners appointed in any condemnation proceeding hereunder, it shall not be necessary for said commission, acting in behalf of

the State of North Carolina, or the United States Government, to deposit the money assessed by said commissioners with the clerk.

Whenever proceedings in condemnation are instituted in pursuance of the provisions of this section, the said commission upon the filing of the petition or petitions in such proceedings, shall have the right to take immediate possession, on behalf of the State, of such lands or property to the extent of the interest to be acquired and the order of the Clerk of the Superior Court of the county where the action is instituted, shall be sufficient to vest the title and possession in the State through the Utilities Commission. The Governor and Secretary of State shall, upon vesting of the title and possession, execute a deed to the United States and said lands or property may then be appropriated and used by the United States for the purposes aforesaid: Provided, that in every case the proceedings in condemnation shall be diligently prosecuted to final judgment in order that the just compensation, if any, to which the owners of the property are entitled may be ascertained and when so ascertained and determined, such compensation, if any, shall be promptly paid as hereinafter in this article provided.

If the United States Government shall so determine, it is hereby authorized to condemn and use all lands and property which may be needed for the purposes herein set out and which is specifically described and set out in the paragraph next preceding, under the authority of said United States Government, and according to the provisions existing in the Federal Statutes for condemning lands and property for the use of the United States Government. In case the United States Government shall so condemn said land and property, the said Utilities Commission is hereby authorized to pay all expenses of the condemnation proceedings and any award that may be made thereunder, out of the money which may be appropriated for said purposes.

All sums which may be agreed upon between the said Utilities Commission and the owner of any property needed by the United States Government for said inland waterway and all sums which may be assessed in favor of the owner of any property condemned hereunder, shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full, but the order of the clerk when entered in any condemnation proceeding shall divest the owner of the land condemned of all right, title, interest and possession in and to such land and property. (1931, c. 2, s. 2; 1937, c. 434.)

§ 104-14. Use declared paramount public purpose. — In such condemnation proceedings the uses for which such land or property is condemned are hereby declared to be for a purpose paramount to all other public uses, and the fact that any portion of it has heretofore been condemned by a railroad company, a street railway company, telephone or telegraph company, or other public service corporation, or by any political subdivision of the State of North Carolina, for public uses, or has been conveyed by any person or corporation for any such public uses, or vested in the State Board of Education, or by any other act dedicated to any public use, shall in no way affect the right of the State of North Carolina, or the United States Government, to proceed and condemn such land and property as hereinbefore provided. (1931, c. 2, s. 3.)

§ 104-15. Method of payment of expenses and awards.—Whenever said Commission has agreed with the owner of any such land or property as to the purchase price thereof, or the damage for the construction of the inland waterway has finally been determined in any condemnation proceeding necessary to secure such land or property, the said Commission is hereby authorized and directed to pay all of said sums and other expenses incident thereto by proper warrant upon the sum which may be appropriated for said purpose, and all such sums shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full. (1931, c. 2, s. 4.)

§ 104-16. State and United States may enter upon lands for survey, etc.—For the purpose of determining the lands necessary for the uses herein set out, the Utilities Commission or the United States Government, or the agents of either, shall have the right to enter upon any lands along the general line of the right-of-way in this article specified, and make such surveys, and do such other acts as in their judgment may be necessary for the purpose of definitely locating the specific lines of said right-of-way and the lands required for said purposes, and there shall be no claim against the State of North Carolina or the United States for such acts as may be done in making said surveys. (1931, c. 2, s. 5; 1937, c. 434.)

§ 104-17. Maintenance of bridges over waterway.—The State Highway and Public Works Commission or the road governing body of any political subdivision of the State of North Carolina is hereby authorized and directed to construct, maintain and operate in perpetuity, all bridges over the waterway without cost to the United States. (1931, c. 2, s. 7; 1933, c. 172, s. 17.)

§ 104-18. Concurrent jurisdiction over waterway.—The State of North Carolina retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this chapter, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired for such inland waterway, or for the buildings or constructions thereon erected for the purposes of such inland waterway. (1931, c. 2, s. 8.)

§ 104-19. Acquisition of land for inland waterway from Beaufort Inlet; grant of state lands.—For the purpose of aiding in the construction of the proposed inland waterway by the United States from Beaufort Inlet in the State of North Carolina to the Cape Fear River, the secretary of State is hereby authorized to issue to the United States of America a grant to the land located within said inland waterway, right-of-way, which is to be one thousand feet wide, in so far as such land is subject to grant by the State of North Carolina, the said grant to issue upon a certificate furnished to the Secretary of State by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official, exercising control over the

construction of the said waterway. Whenever in the construction of such inland waterway within this State, lands theretofore submerged shall be raised above the water by the deposit of excavated material, the land so formed shall become the property of the United States if within the limits of said inland waterway, right-of-way, herein set out one thousand feet, and the Secretary of State is hereby authorized to issue to the United States a grant to the land so formed within the limits above specified, the grant to issue upon a certificate furnished to the Secretary of State by some authorized official of the United States, as above provided. If said lands so required for the inland waterway right-of-way shall be marshlands, the title to which has heretofore been vested in the State Board of Education, the Governor of the State, as President thereof, and the Superintendent of Public Instruction as Secretary, are hereby authorized and required to execute a proper conveyance to the United States of America for said marshlands, free of cost, both to the State and to the United States Government, upon a certificate furnished to said Board of Education by the Secretary of War, or by any authorized officer of the corps of engineers of the United States Army, or by any other authorized official exercising control over the construction of the said inland waterway. (1927, c. 44, s. 1.)

§ 104-20. Utilities Commission to secure right-of-way; condemnation by United States.—If the title to any part of the lands required by the United States Government for the construction of such inland waterway from Beaufort Inlet to the Cape Fear River shall be in any private person, company or corporation, railroad company, street railway company, telephone or telegraph company, or other public service corporation, or shall have been donated or condemned for any public use by any political subdivision of the State or if it may be necessary, for the purpose of obtaining the proper title to any lands, the title to which has heretofore been vested in the State Board of Education, then the Utilities Commission in the name of the State of North Carolina, is hereby authorized and empowered, acting for and in behalf of the State of North Carolina, to secure a right-of-way one thousand feet wide for said inland waterway across and through such lands or any part thereof, if possible by purchase, donation or otherwise, through agreement with the owner or owners, and when any such property is thus acquired, the Govenor and Secretary of State shall execute a deed for the same to the United States; and if for any reason the said Commission shall be unable to secure such right-of-way across any such property by voluntary agreement with the owner or owners as aforesaid, the said Commission acting for and in behalf of the State of North Carolina, is hereby vested with the power to condemn the same, and in so doing, the ways, means, methods and procedure of chapter forty of the General Statutes of North Carolina, entitled "Eminent Domain," shall be used by it as near as the same is suitable for the purposes of this act, and in all instances, the general and the special benefits to the owner thereof shall be assessed as offsets against the damages to such property or lands.

As such condemnation proceedings might result in delay in the acquiring of title to all parts of the right-of-way and in the construction of the said inland waterway by the United States, said Utilities Commission is authorized to enter any of said lands and property and take possession of the same at the time hereinafter provided as needed for this use in behalf of the State or the United States Government for the purposes herein set out prior to the bringing of the proceeding for condemnation and prior to the payment of the money for such land or property under any judgment in condemnation. In the event the owner or owners shall appeal from the report of the Commissioners appointed in the condemnation proceeding it shall not be necessary for said Commission, acting in behalf of the State of North Carolina, the State of North Carolina, or the United States Government, to deposit the money assessed by said Commissioners with the clerk.

Whenever proceedings in condemnation are instituted in pursuance of the provisions of this section, the said Commission upon the filing of the petition or petitions in such proceedings, shall have the right to take immediate possession on behalf of the State of such lands or property to the extent of the interest to be acquired and the Governor and Secretary of State shall thereupon execute a deed to the United States and said lands or property may then be appropriated and used by the United States for the purposes aforesaid. Provided, that in every case the proceedings in condemnation shall be diligently prosecuted to final judgment in order that the just compensation to which the owners of the property are entitled may be ascertained and when so ascertained and determined such compensation shall be promptly paid as hereinafter in this act provided.

If the United States Government shall so determine, it is hereby authorized to condemn and use all lands and property which may be needed for the purposes herein set out and which is specifically described and set out in the preceding paragraphs, under the authority of said United States Government, and according to the provisions existing in the federal statutes for condemning lands and property for the use of the United States Government. In case the United States Government shall so condemn said land and property, the said Utilities Commission is hereby authorized to pay all expenses of the condemnation proceedings and any award that may be made thereunder, out of the money which may be appropriated for said purposes. (1927, c. 44, s. 2; 1929, cc. 4, 7, s. 1; 1937, c. 434.)

§ 104-21. Use declared paramount public purpose.—In such condemnation proceedings the uses for which such land or property is condemned are hereby declared to be for a purpose paramount to all other public uses, and the fact that any portion of it has heretofore been condemned by a railroad company, street railway company, telephone or telegraph company, or other public service corporation, or by any political subdivision of the State of North Carolina, for public uses, or has been conveyed by any person or corporation for any such public uses, or vested in the State Board of Education, shall in no way affect the right of the State of North Carolina, or the United States

Government, to proceed and condemn such land and property as hereinbefore provided. (1927, c. 44, s. 3.)

§ 104-22. Method of payment of expenses and awards.—Whenever said commission has agreed with the owner of any such land or property as to the purchase price thereof, or the damage for the construction of the inland waterway has finally been determined in any condemnation proceeding necessary to secure such land or property, the said commission is hereby authorized and directed to pay all of said sums and other expenses incident thereto by proper warrant upon the sum which may be appropriated for said purpose, and all such sums shall constitute and remain a fixed and valid claim against the State of North Carolina until paid and satisfied in full. (1927, c. 44, s. 4.)

§ 104-23. Maintenance of bridges over waterway.—The State Highway and Public Works Commission or the road governing body of any political subdivision of the State of North Carolina is hereby authorized and directed to take over and maintain and operate in perpetuity, by contract with the United States Government, if necessary, or otherwise, any bridge or bridges which may be subject to their respective control and which the United States Government may construct across said inland waterway. (1927, c. 44, s. 6; 1929, cc. 4, 7, s. 2.)

§ 104-24. Concurrent jurisdiction over waterway.—The State of North Carolina retains concurrent jurisdiction with the United States over any lands acquired and held in pursuance of the provisions of this chapter, so far as that all civil and criminal process issued under authority of any law of this State may be executed in any part of the premises so acquired for such inland waterway, or for the buildings or constructions thereon erected for the purposes of such inland waterway. (1927, c. 44, s. 7.)

§ 104-25. Lands conveyed to United States for inland waterway.—For the purpose of aiding in the construction of a proposed inland waterway by the United States from the city of Norfolk, in the state of Virginia, to Beaufort inlet, in the state of North Carolina, the secretary of state is hereby authorized to issue to the United States of America a grant to the land located within a distance of one thousand feet on either side of the center of the said inland waterway, in so far as such land is subject to grant by the state of North Carolina, the said grant to issue upon a certificate furnished to the secretary of state by the secretary of war, or by any authorized officer of the corps of engineers of the United States army, or by any other authorized official, exercising control of the construction of the said waterway.

Wherever, in the construction of the said inland waterway, lands theretofore submerged shall be raised above the water by deposit of excavated material, the lands so formed shall become the property of the United States for a distance of one thousand feet on either side of the center of such canal or channel, and the secretary of state is hereby authorized to issue to the United States a grant to the land so formed within the distance above mentioned, the grant to issue upon a certificate furnished to the secretary of state by some authorized official of the United States as above provided. (1913, c. 197; 1937, c. 445; C. S. 7583.)

Editor's Note.—The 1937 amendment struck out the words "or in the improvement of any other waterway within this state" formerly appearing after the word "waterway" in the second line of the second paragraph.

Division XV. Taxation.

Chapter 105. Taxation.

SUBCHAPTER I. LEVY OF TAXES.

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SUBCHAPTER I. LEVY OF TAXES.

§ 105-1. Title and purpose of subchapter.—The title of this subchapter shall be "The Revenue Act." The purpose of this subchapter shall be to raise and provide revenue for the necessary uses and purposes of the government and state of North Carolina during the next biennium and each biennium thereafter, and the provisions of this subchapter shall be and remain in full force and effect until changed by law. (1939, c. 158, ss. A, B; 1941, c. 50, s. 1.)

Editor's Note.—The 1941 amendment added the provision relating to remaining in force until changed by law.

Art. 1. Schedule A. Inheritance Tax.

§ 105-2. General provisions.—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, in the following cases:

First. When the transfer is by will or by the intestate laws of this state from any person dying, seized or possessed of the property while a resident of the state.

Second. When the transfer is by will or intestate laws of this or any other state of real property or of goods, wares, and merchandise within this state, or of any property, real, personal, or mixed, tangible or intangible, over which the state of North Carolina has a taxing jurisdiction, including state and municipal bonds, and the decedent was a resident of the state at the time of death; when the transfer is of real property or intangible personal property within the state, or intangible personal property that has acquired a situs in this state, and the decedent was a non-resident of the state at the time of death.

Third. When the transfer of property made by a resident, or non-resident, is of real property within this state, or of goods, wares and merchandise within this state, or of any other property, real, personal, or mixed, tangible or intangible, over which the state of North Carolina has taxing jurisdiction, including state and municipal bonds, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death, including a transfer under which the transferor has retained for his life or any period not ending before his death (a) the possession or enjoyment of, or the income from, the property or (b) the right to designate the persons who shall possess or enjoy the property or the income therefrom. Every transfer by deed, grant, bargain, sale, or gift, made within three years prior to the death of the grantor, vendor, or donor, exceeding three per cent (3%) of his or her estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall, in the absence of proof to the contrary, be deemed to have been made in contemplation of death within the meaning of this section.

Fourth. When any person or corporation comes into possession or enjoyment, by a transfer from a resident, or from a non-resident decedent when such non-resident decedent's property consists of real property within this state or tangible personal property within the state, or intangible personal property that has acquired a situs in this state, of an estate in expectancy of any kind or character which is contingent or defeasible, transferred by any instrument taking effect after March 24, 1939, or of any property transferred pursuant to a power of appointment contained in any instrument.

Fifth. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this article, such appointment when made shall be deemed a transfer taxable under the provisions of this article, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will, and the rate shall be determined by the relationship between the beneficiary under the power and the donor; and whenever any person or corporation having such power of appointment so derived shall, for any reason whatever, omit or fail to exercise the same, in whole or in part, or where for any reason the said power has not been exercised, a transfer taxable under the provisions of this article shall be deemed to take place, to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by will of the donee of the power failing to exercise the same, taking effect at the time of such omission or failure.

Sixth. Whenever any real or personal property, or both, of whatever kind or nature, tangible or intangible, is disposed of by will or by deed to any person or persons for life, or the life of the survivor, or for a term of years, or to any corporation for a term of years, with the power of appointment in such person or persons, or in such corporation, or reserving to the grantor or devisor the power of revocation, the tax, upon the death of the person making such will or deed, shall, on the whole amount of property so disposed of, be due and payable as in other cases, and the said tax shall be computed according to the relationship of the first donee or devisee to the devisor.

Seventh. Where real property is held by husband and wife as tenants by the entirety, the surviving tenant shall be taxable on one-half of the value of such property.

Eighth. Where the proceeds of life insurance policies are payable as provided in § 105-13.

However, nothing in this article shall be construed as imposing a tax upon any transfer of intangibles not having a commercial or business situs in this State, by a person, or by reason of the death of a person, who was not a resident of this State at the time of his death, and, if held or transferred in trust, such intangibles shall not be deemed to have a commercial or business situs in this State merely because the trustee is a resident or, if a corporation, is doing business in this State, unless the same be employed in or held or used in connection with some business carried on in whole or in part in this State. (1939, c. 158, s. 1; 1941, c. 50, s. 2; 1943, c. 400, s. 1.)

Editor's Note.—The 1941 amendment made changes in subsections first and second and directed that the last paragraph be added at the end of the section.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 526.

The 1943 amendment inserted the eighth paragraph.

The annotations under this and the following sections are constructions of the corresponding sections (sections 7772 et seq.) of the Consolidated Statutes and of subsequent revenue acts.

For history of the inheritance tax statute, see State v. Scales, 172 N. C. 915, 90 S. E. 439.

See note 12 N. C. Law Rev. 180, on "Fate of the Trust as Device to Escape Inheritance Taxes."

For article discussing this subchapter, see 15 N. C. Law Rev. 387.

Constitutionality.—The provisions of section 7772 of the prior law were held not in conflict with Art. I, § 17, of the State Constitution or of the Fourteenth Amendment to the Constitution of the United States in Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 121 S. E. 741, discussed in 3 N. C. Law Rev. 107. The judgment of this court, however, was reversed, on a writ of error, by the Supreme Court of the United States. Trust Co. v. Doughton, 270 U. S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A. L. R. 1374. It was there held that the statute under which the tax was assessed and collected was invalid, upon the principle that the subject to be taxed must be within the jurisdiction of the state assessing and collecting the tax, and that this principle applies as well in the case of a transfer tax as in that of a property tax. Rotan v. State, 195 N. C. 291, 141 S. E. 733.

Liberal Construction.—A liberal construction will be given to inheritance tax statutes to the end that all property fairly and reasonably coming within their provision may be taxed. State v. Scales, 172 N. C. 915, 90 S. E. 439. See, also, Norris v. Durfey, 168 N. C. 321, 84 S. E. 687; Reynolds v. Reynolds, 208 N. C. 578, 581, 182 S. E. 341.

Under this liberal construction in favor of the government, every transfer of property that could be reasonably brought within the purview of the law has been subjected to taxation. Norris v. Durfey, 168 N. C. 321, 84 S. E. 687.

Basis of Inheritance Tax.—"The theory on which taxation of this kind on the devolution of estates is based and its legality upheld is clearly established and is founded upon two principles: (1) A succession tax is a tax on the right of succession to property, and not on the property itself. (2) The right to take property by devise or descent is not one of the natural rights of man, but is the creature of the law." Brown, J., in In re Morris Estate, 138 N. C. 259, 262, 50 S. E. 682, cited and approved in Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 267, 131 S. E. 741. See Waddell v. Doughton, 194 N. C. 537, 140 S. E. 160.

Transfer Necessary.—The thing taxed is the privilege of transferring and it is essential that there shall be a transfer, within the meaning of this section, from decedent to the beneficiary by reason of death. There must be a transfer of something before there can be a tax upon its transfer and where the decedent had no interest in or control over the policy which could be transferred by his death its proceeds are not subject to this article. Wachovia Bank, etc., Co. v. Maxwell, 221 N. C. 528, 532, 20 S. E. (2d) 840.

Situs for Taxation.—"The personal property of a decedent, whatever its character and wherever located, is subject to an inheritance tax in the State in which its owner was a resident at the time of his death. Bullen v. Wisconsin, 240 U. S. 625, 36 S. Ct. 473. This position is upheld upon the principle that the situs of personal property, for the purpose of taxation, is said to be in the State where the owner resides and has his domicile. Mobila sequuntur personam." Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 268, 121 S. E. 741.

Thus if the testator or intestate has his domicile abroad and his personal estate were also, no tax would be demanded of the legatee or next of kin, though they might be resident in the state. State v. Brim, 57 N. C. 300, 301. After the legacy or distributive share has been received, it then becomes a part of the property of one of the citizens of the state, and then it may be taxed in common with any other property of the like kind. Id.

Transfers Subject to Tax.—The right to impose an inheritance tax does not depend upon the kind of property transferred. In re Morris Estate, 138 N. C. 259, 50 S. E. 682.

A widow's dower and year's allowance allotted to her upon her dissent from her husband's will, is property passing by will or by intestate laws within the meaning of this statute. State v. Dunn, 174 N. C. 679, 94 S. E. 481.

The corresponding section of the prior law includes and lays a tax upon an interest made subject by will to the appointment of a third person. In re Inheritance Tax, 172 N. C. 170, 90 S. E. 203.

Under the provisions of the will in suit, the entire beneficial interest in the estate vested in testator's three sons upon testator's death with the right of full enjoyment postponed until the termination of the trust. One of the sons died during minority, prior to the termination of the trust, leaving his two brothers as his sole heirs at law. Held: The surviving brothers took under the laws of descent and distribution, and the estate so inherited is subject to the appropriate state and federal inheritance taxes and is encumbered by the lien for such taxes. Coddington v. Stone, 217 N. C. 714, 9 S. E. (2d) 420.

Same—Shares of Corporate Stock.—Under the provisions of the prior law an inheritance or transfer tax is imposed upon the right of nonresident legatees or distributees to take by will or to receive, under the intestate laws of another State, from a nonresident testator or intestate, shares of stock in a corporation of another State domiciled here, under the laws of this State, as a condition precedent to the right to have said stock transferred on the books of the corporation having the statutory proportion of its property located within this State and conducting its business here. The constitutionality was upheld. Rhode Island Hospital Trust Co. v. Doughton, 187 N. C. 263, 121 S. E. 741. See dissenting opinion as to constitutionality. A discussion of this case may be found in a note contained in 3 N. C. Law Rev. 107.

Settlement of Taxes Claimed by Compromise. — The settlement of taxes claimed under this section by compromise, in a court of competent jurisdiction, in view of the bona fide controversies between the parties, and the facts and circumstances of the case, was affirmed on appeal, the matter being a legitimate subject of compromise and all parties affected being duly represented. Reynolds v. Reynolds, 208 N. C. 578, 580, 182 S. E. 341.

§ 105-3. Property exempt. — The following property shall be exempt from taxation under this article:

(a) Property passing to or for the use of the state of North Carolina, or to or for the use of municipal corporations within the state or other political subdivisions thereof, for exclusively public purposes.

(b) Property passing to religious, charitable, or educational corporations, or to churches, hospitals, orphan asylums, public libraries, religious, benevolent, or charitable organizations, or passing to any trustee or trustees for religious, benevolent, or charitable purposes, where such religious, charitable, or educational institutions, corporations, churches, trusts, etc., are located within the state and not conducted for profit.

(c) Property passing to religious, educational, or charitable corporations, foundations or trusts, not conducted for profit, incorporated or created or administered under the laws of any other state: If such other state levies no inheritance or estate taxes on property similarly passing from residents of such state to religious, educational or charitable corporations, foundations or trusts incorporated or created or administered under the laws of this state; or if such corporation, foundation or trust is one receiving and disbursing funds donated in this state for religious, educational or charitable purposes.

(d) The amount of twenty thousand dollars ($20,000.00), only, of the total proceeds of life insurance policies, when such policy or policies are payable to a beneficiary or beneficiaries named in such policy or policies, and such beneficiary or beneficiaries are any such person or persons as are designated in § 105-4, subsection (a): Provided, that no more than twenty thousand dollars ($20,000.00) of any such policy or policies shall be exempt from taxation, whether in favor of one beneficiary or more, and the exemption thus provided shall be prorated between the beneficia-

ries in proportion to the amounts received under the policies, unless otherwise provided by the decedent; and also proceeds of all life insurance policies payable to beneficiaries named in subsections (a), (b), and (c) of this section. And also proceeds of all policies of insurance and the proceeds of all adjusted service certificates that have been or may be paid by the United States Government, or that have been or may be paid on account of policies required to be carried by the United States government or any agency thereof, to the estate, beneficiary, or beneficiaries of any person who has served in the armed forces of the United States or in the merchant marine during the first or second World War; and proceeds, not exceeding the sum of ten thousand dollars ($10,000.00), of all policies of insurance paid to the estate, beneficiary or beneficiaries of any person whose death was caused by enemy action during the second World War. This provision will be operative only when satisfactory proof that the death was caused by enemy action is filed by the executor, administrator or beneficiary with the commissioner of revenue. (1939, c. 158, s. 2; 1943, c. 400, s. 1.)

Editor's Note.—The 1943 amendment added the last sentence and rewrote the next to the last sentence of subsection (d).

For comment on exemption of property passing to foreign eleemosynary organizations, see 17 N. C. L. Rev. 381.

Section 7773 was the corresponding provision of the Consolidated Statutes.

Exemptions of property from taxation are to be strictly construed. Benson v. Johnston County, 209 N. C. 751, 185 S. E. 6.

Property is liable for county taxes where it is not used by the city for a governmental purpose, and therefore does not come within the constitutional provision for the exemption of property from taxation (N. C. Const. Art. V, § 5), or within the scope of this section enacted pursuant thereto. Benson v. Johnston County, 209 N. C. 751, 185 S. E. 6.

Same—Property Held for Business Purposes.—Property was held subject to taxation by the county in which the property is situate although owned by a municipal corporation, where the property was held by the municipal corporation purely for business purposes and not for any governmental or necessary public purpose. Board of Financial Control v. Henderson County, 208 N. C. 569, 181 S. E. 636, 101 A. L. R. 783.

Cited in Weaverville v. Hobbs, 212 N. C. 684, 194 S. E. 860.

§ 105-4. Rate of tax—Class A.—(a) Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue, or lineal ancestor, or husband or wife of the person who died possessed of such property aforesaid, or stepchild of the person who died possessed of such property aforesaid, or child adopted by the decedent in conformity with the laws of this state or of any of the United States, or of any foreign kingdom or nation, at the following rates of tax (for each one hundred dollars ($100.00) or fraction thereof) of the value of such interest:

First $	10,000	above exemption	...	1 per cent
Over $	10,000	and to $ 25,000	..	2 per cent
Over $	25,000	and to $ 50,000	..	3 per cent
Over $	50,000	and to $ 100,000	..	4 per cent
Over $	100,000	and to $ 200,000	..	5 per cent
Over $	200,000	and to $ 500,000	..	6 per cent
Over $	500,000	and to $1,000,000	..	7 per cent
Over $1,000,000		and to $1,500,000	..	8 per cent
Over $1,500,000		and to $2,000,000	..	9 per cent
Over $2,000,000		and to $2,500,000	..	10 per cent
Over $2,500,000		and to $3,000,000	..	11 per cent
Over $3,000,000			...	12 per cent

(b) The persons mentioned in this class shall be entitled to the following exemptions: Widows, ten thousand dollars ($10,000.00); each child under twenty-one years of age, five thousand dollars ($5,000.00); all other beneficiaries mentioned in this section, two thousand dollars ($2,000.00) each: Provided, a grandchild or grandchildren shall be allowed the single exemption or pro rata part of the exemption of the parent, when the parent of any one grandchild or group of grandchildren is deceased or when the parent is living and does not share in the estate: Provided, that any part of the exemption not applied to the share of the parent may be applied to the share of a grandchild or group of grandchildren of such parent. The same rule shall apply to the taking under a will, and also in case of a specific legacy or devise: Provided, that when any person shall die leaving a widow and child or children under twenty-one years of age, and leaving all or substantially all of his property by will to his wife, the wife shall be allowed an additional exemption of five thousand dollars ($5,000.00) for each child under twenty-one years of age. (1939, c. 158, s. 3.)

Cross Reference.—As to kinds of property contemplated by this section, see § 105-2.

Real Property, as well as personal, is included in this section. Norris v. Durfey, 168 N. C. 321, 84 S. E. 687.

Who Entitled to Exemption.—The court in State v. Scales, 172 N. C. 915, 90 S. E. 439, in construing the words "all other beneficiaries in this section," contained in sub-division one of the corresponding section of the prior law holds that the word "section" was intended and meant for the subdivision in which it was placed and does not apply to the whole section to exempt strangers of the blood of the testator along with the beneficiaries of the first class. It is to be noted, however, that the word "section" is no longer included in this clause, the word "subchapter" having been substituted therefor.

Interest under Discretionary Control of Another Taxable.—The interest acquired by the child of testator is taxable and does not escape by reason of the fact that the testator placed it under the discretionary control and disposition of its mother. In re Inheritance Tax, 172 N. C. 170, 90 S. E. 203.

§ 105-5. Rate of tax—Class B.—Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or descendant of the brother or sister, or shall be the uncle or aunt by blood of the person who died possessed as aforesaid, at the following rates of tax (for each one hundred dollars ($100.00) or fraction thereof) of the value of such interest:

First $	5,000		...	4 per cent
Over $	5,000	and to $ 10,000	..	5 per cent
Over $	10,000	and to $ 25,000	..	6 per cent
Over $	25,000	and to $ 50,000	..	7 per cent
Over $	50,000	and to $ 100,000	..	8 per cent
Over $	100,000	and to $ 250,000	..	10 per cent
Over $	250,000	and to $ 500,000	..	11 per cent
Over $	500,000	and to $1,000,000	..	12 per cent
Over $1,000,000		and to $1,500,000	..	13 per cent
Over $1,500,000		and to $2,000,000	..	14 per cent
Over $2,000,000		and to $3,000,000	..	15 per cent
Over $3,000,000			...	16 per cent

(1939, c. 158, s. 4.)

§ 105-6. Rate of tax—Class C.—Where the

person or persons entitled to any beneficial interest in such property shall be in any other degree of relationship or collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the following rates of tax (for each one hundred dollars ($100.00) or fraction thereof) of the value of such interest:

First $ 10,000	8	per cent
Over $ 10,000 and to $ 25,000	9	per cent
Over $ 25,000 and to $ 50,000	10	per cent
Over $ 50,000 and to $ 100,000	11	per cent
Over $ 100,000 and to $ 250,000	12	per cent
Over $ 250,000 and to $ 500,000	13	per cent
Over $ 500,000 and to $1,000,000	14	per cent
Over $1,000,000 and to $1,500,000	15	per cent
Over $1,500,000 and to $2,500,000	16	per cent
Over $2,500,000	17	per cent

(1939, c. 158, s. 5.)

§ 105-7. Estate tax.—(a) A tax in addition to the inheritance tax imposed by this schedule is hereby imposed upon the transfer of the net estate of every decedent dying after March 24, 1939, whether a resident or nonresident of the state, where the inheritance tax imposed by this schedule is in the aggregate of a lesser amount than the maximum credit of eighty per cent (80%) of the federal estate tax allowed by the Federal Estate Tax Act as contained in the Federal Revenue Act of one thousand nine hundred and twenty-six, or subsequent acts and amendments, because of said tax herein imposed, then the inheritance tax provided for by this schedule shall be increased by an estate tax on the net estate so that the aggregate amount of tax due this state shall be the maximum amount of credit allowed under said Federal Estate Tax Act; said additional tax shall be paid out of the same funds as any other tax against the estate.

(b) Where no tax is imposed by this schedule because of the exemptions herein or otherwise, and a tax is due the United States under the Federal Estate Tax Act, then a tax shall be due this state equal to the maximum amount of the credit allowed under said Federal Estate Tax Act.

(c) The administrative provisions of this schedule, wherever applicable, shall apply to the collection of the tax imposed by this section. The amount of the tax as imposed by subsection (a) of this section shall be computed in full accordance with the Federal Estate Tax Act as contained in the Federal Revenue Act of one thousand nine hundred and twenty-six, or subsequent acts and amendments. (1939, c. 158, s. 6.)

Editor's Note.—In 1924 the Federal Government provided in its estate tax act that the estate of the decedent should be credited up to 25% of Federal tax therein imposed for any payment of estate, inheritance, legacy, or succession taxes actually made to any of the several states, in respect of any property included in the gross estate. See Federal Revenue Act of 1924, Title III, part I, section 301(b). Since such credit is made to the estate, the Federal Government does not collect the 25% or less for the state, but leaves it to the state to make such collections under its own laws.

As a result, the legislatures of the several states, including New York, Massachusetts, Georgia and Pennsylvania, have amended their inheritance tax statutes to take advantage of such provisions. And this section was enacted with that view.

See 13 N. C. Law Rev. 271, 281, for article on "The Federal Estate Credit Clause."

§ 105-8. Credit allowed for gift tax paid.—In case a tax has been imposed under Schedule G of the Revenue Act of one thousand nine hundred and thirty-seven, or under subsequent acts, upon any gift, and thereafter upon the death of the donor, the amount thereof is required by any provision of this article to be included in the gross estate of the decedent, then there shall be credited against and applied in reduction of the tax, which would otherwise be chargeable against the beneficiaries of the estate under the provisions of this article, an amount equal to the tax paid with respect to such gift. Any additional tax found to be due because of the inclusion of gifts in the gross estate of the decedent, as provided herein, shall be a tax against the estate and shall be paid out of the same funds as any other tax against the estate. (1939, c. 158, s. 6½.)

Editor's Note.—For comment on this section, see 17 N. C. Law Rev. 381.

§ 105-9. Deductions.—In determining the clear market value of property taxed under this article, or schedule, the following deductions, and no others, shall be allowed:

(a) Taxes accrued and unpaid at the death of the decedent and unpaid ad valorem taxes accruing during the calendar year of death.

(b) Drainage and street assessments (fiscal year in which death occurred).

(c) Reasonable funeral and burial expenses.

(d) Debts of decedent.

(e) Estate and inheritance taxes paid to other states, and death duties paid foreign countries, and the net amount of federal estate taxes as finally assessed under the Revenue Act of one thousand nine hundred and twenty-six. No deduction will be allowed for federal estate taxes levied by subsequent acts and amendments.

(f) Amount actually expended for monuments not exceeding the sum of five hundred dollars ($500.00).

(g) Commissions of executors and administrators actually allowed and paid.

(h) Costs of administration, including reasonable attorneys' fees. (1939, c. 158, s. 7; 1941, c. 50, s. 2.)

Editor's Note.—Prior to the 1941 amendment, subsection (a) read, "Taxes that have become due and payable and the pro rata part of taxes accrued for the fiscal year that have not become due and payable."

No Corresponding Deduction Where Amount of Federal Tax Increased.—It is proper for a state statute levying inheritance and transfer taxes to refer to a federal statute in allowing deductions for amounts paid the federal government in estate taxes and in excepting from deductible amounts additional taxes levied by the federal government under a federal act effective on a certain date, and a taxpayer relying on the state statute for the right to make deductions may not complain that additional federal taxes not deductible, were computed according to an amendment of the federal act changing the schedule of rates but depending upon the original act for the tax-levying provisions, although the amendment was enacted subsequent to the enactment of the state revenue act, since in such case the additional federal estate taxes are levied by the original federal act, although the amount thereof is computed under the amendment changing the schedule of rates. Harwood v. Maxwell, 213 N. C. 55, 195 S. E. 54.

§ 105-10. Where no personal representative appointed, clerk of superior court to certify same to commissioner of revenue.—Whenever an estate subject to the tax under this article shall be settled or divided among the heirs-at-law, legatees or devi-

sees, without the qualification and appointment of a personal representative, the clerk of the superior court of the county wherein the estate is situated shall certify the same to the commissioner of revenue, whereupon the commissioner of revenue shall proceed to appraise said estate and collect the inheritance tax thereon as prescribed by this article. (1939, c. 158, s. 8.)

§ 105-11. Tax to be paid on shares of stock before transferred, and penalty for violation.—(a) Property taxable within the meaning of this article shall include bonds or shares of stock in any incorporated company incorporated in this state, regardless of whether or not such incorporated company shall have any or all of its capital stock invested in property outside of this state and doing business outside of this state, and the tax on the transfer of any bonds and/or shares of stock in any such incorporated company owning property and doing business outside of the state shall be paid before waivers are issued for the transfer of such shares of stock. No corporation of this state shall transfer any bonds or stock of said corporation standing in the name of or belonging to a decedent or in the joint names of a decedent and one or more persons, or in trust for a decedent, unless notice of the time of such transfer is served upon the commissioner of revenue at least ten days prior to such transfer, nor until said commissioner of revenue shall consent thereto in writing. Any corporation making such a transfer without first obtaining consent of the commissioner of revenue as aforesaid shall be liable for the amount of any tax which may thereafter be assessed on account of the transfer of such bonds and/or stock, together with the interest thereon, and in addition thereto a penalty of one thousand dollars ($1,000.00), which liability for such tax, interest, and penalty, may be enforced by an action brought by the state in the name of the commissioner of revenue. The word "transfer" as used in this article shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by distribution, or by statute, descent, devise, bequest, grant, deed, bargain, sale, gift, or otherwise. A waiver signed by the commissioner of revenue of North Carolina shall be full protection for any such company in the transfer of any such stock.

(b) Any incorporated company not incorporated in this state and owning property in this state which shall transfer on its books the shares of stock of any resident decedent holder of bonds and/or shares of stock in such company exceeding in value two hundred dollars ($200.00) before the inheritance tax, if any, has been paid, shall become liable for the payment of said tax; and any property held by such company in this state shall be subject to execution to satisfy same. A receipt or waiver signed by the commissioner of revenue of North Carolina shall be full protection for any such company in the transfer of any such stock. (1939, c. 158, s. 9.)

§ 105-12. Commissioner of revenue to furnish blanks and require reports of value of shares of stock.—(a) The commissioner of revenue shall prepare and furnish, upon application, blank forms covering such information as may be necessary to determine the amount of inheritance tax due the state of North Carolina on the transfer of any such bonds and/or stock; he shall determine the value of such bonds and/or stock, and shall have full authority to do all things necessary to make full and final settlement of all such inheritance taxes due or to become due.

(b) The commissioner of revenue shall have authority, under penalties provided in this article, to require that any reports necessary to a proper enforcement of this article be made by any such incorporated company owning property in this state. (1939, c. 158, s. 10.)

§ 105-13. Life insurance proceeds. — The proceeds of life insurance policies, payable at or after the death of the decedent, shall, in the following instances, be taxable at the rates provided in this article, subject to the exemptions in § 105-3:

1. When such insurance proceeds are receiveable by the executor as insurance under policies upon the life of the decedent, regardless of whether the premiums thereon were paid by the decedent.

2. When such insurance proceeds are receivable by all other beneficiaries as insurance under policies upon the life of the decedent—

(a) Where such insurance was purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in the proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance. In all such cases, it is declared that life insurance and the transfer of the proceeds thereof is testamentary in nature, and therefore, the payment of the premiums or other consideration by the decedent shall be deemed to effect a transfer from him at his death of benefits equal to such insurance proceeds, or such rateable proportion thereof regardless of (1) whether the decedent had taken or retained any incidents of ownership in said policies or (2) whether the decedent applied for said insurance or (3) whether the decedent was under a legal duty to pay said premiums or (4) whether said policies had been assigned irrevocably or otherwise, except as hereinafter stated. For the purpose of determining the amount of premiums or other consideration paid by decedent, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer;

(b) Or where, with respect to such insurance, the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. The term "incident of ownership," as used herein, does not include a reversionary interest: Provided, if the premiums or other considerations have been paid in whole or in part upon such insurance by a beneficiary thereof, said beneficiary shall not be taxed on that proportion of the insurance proceeds that the amount of the premiums or other consideration paid by said beneficiary bears to the total premiums paid on said insurance.

The decedent shall not be demed to have paid premiums or other consideration, within the mean-

ing of this section, where the decedent has made a gift, either before or after the issuance of the policy, or money or property and the gift tax, if any, has been paid with respect to such gift, and the said money or property has been used by the donee to pay any premium or premiums.

This section shall not apply to the proceeds of insurance policies transferred, by assignment or otherwise, during the life of the decedent if the transfer did not constitute a gift, in whole or in part, under article 6, Schedule G, of this chapter, or in case the transfer was made at a time when said article was not in effect, or if the transfer would not have constituted a gift, in whole or in part, under said article had it been in effect at such time.

If a gift tax has been paid with respect to any gift of an insurance policy by the decedent, the amount of tax so paid shall be credited against the amount of inheritance tax due on the proceeds of such policy under this article, and if there was more than one beneficiary to such insurance, such credit shall be apportioned against the inheritance tax payable by each beneficiary in the ratio that the interest receivable by each beneficiary bears to the total amount of the insurance proceeds. (1939, c. 158, s. 11; 1943, c. 400, s. 1.)

Editor's Note.—The 1943 amendment rewrote this section.

Proceeds of Policy Procured by Beneficiary under Former Statute.—Section 11, ch. 127, Public Laws 1937, could not be construed to impose a separate and independent excise tax upon the receipt of the proceeds of life insurance policies when such policies were issued to the beneficiary who retained all rights and liabilities thereunder, in addition to imposing an inheritance tax on the proceeds of policies when they were issued to the insured or insured retained the right to change the beneficiary or some other incidents of ownership, since that section had to be construed as a part of the whole act, and when so construed, no such intent appeared from its language. Wachovia Bank, etc., Co. v. Maxwell, 221 N. C. 528, 20 S. E. (2d) 840.

Where the wife procured a policy of insurance upon the life of her husband, the policy being issued on her application and all rights and liabilities thereunder being retained by her, upon the husband's death the proceeds of the policy were not subject to a tax under the provisions of § 11, ch. 127, Public Laws 1937, as a gift inter vivos to take effect at or after death, even though the husband during his life voluntarily paid all premiums, since he did not procure the issuance of the policy and each payment of premium constituted a completed gift. Id.

§ 105-14. Recurring taxes. — Where property transferred has been taxed under the provisions of this article, such property shall not be assessed and/or taxed on account of any other transfer of like kind occurring within two years from the date of the death of the former decedent: Provided, that this section shall apply only to the transferees designated in §§ 105-4 and 105-5. (1939, c. 158, s. 12.)

Cross Reference.—As to definition of "transfer," see § 105-11.

§ 105-15. When all heirs, legatees, etc., are discharged from liability.—All heirs, legatees, devisees, administrators, executors, and trustees shall only be discharged from liability for the amount of such taxes, settlement of which they may be charged with, by paying the same for the use aforesaid as hereinafter provided. (1939, c. 158, s. 13.)

§ 105-16. Discount for payment in six months; interest after twelve months; penalty after two years.—All taxes imposed by this article shall be due and payable at the death of the testator, intestate, grantor, donor, or vendor, and if the same are paid within six months from the date of the death of the testator, intestate, grantor, donor, vendor, a discount of three per centum (3%) shall be allowed and deducted from such taxes; if not paid within twelve months from date of death of the testator, intestate, grantor, donor, or vendor, such tax shall bear interest at the rate of six per centum (6%) per annum, to be computed from the expiration of twelve months from the date of the death of such testator, intestate, grantor, donor, or vendor until paid: Provided, that if the taxes herein levied shall not be paid in full within two years from date of death of testator, intestate, grantor, donor, or vendor, then and in such case a penalty of five per centum (5%) upon the amount of taxes remaining due and unpaid shall be added: Provided further, that the penalty of five per centum (5%) herein imposed may be remitted by the commissioner of revenue in case of unavoidable delay in settlement of estate or of pending litigation, and the commissioner of revenue is further authorized, in case of protracted litigation or other delay in settlement not attributable to laches of the party liable for the tax, to remit all or any portion of the interest charges accruing under this schedule, with respect to so much of the estate as was involved in such litigation or other unavoidable cause of delay: Provided, that time for payment and collection of such tax may be extended by the commissioner of revenue for good reasons shown. (1939, c. 158, s. 14.)

§ 105-17. Collection to be made by sheriff if not paid in two years.—If taxes imposed by this article are not paid within two years after the death of the decedent, it shall be the duty of the commissioner of revenue to certify to the sheriff of the county in which the estate is located the amount of tax due upon such inheritance, and the sheriff shall collect the same as other taxes, with an addition of two and one-half per cent (2½%) as sheriff's fees for collecting same, which fees shall be in addition to any salary or other compensation allowed by law to the sheriffs for their services; and the sheriff is hereby given the same rights of levy and sale upon any property upon which the said tax is payable as said officer is given for the collection of any and all other taxes. The sheriff shall make return to the commissioner of revenue of all such taxes within thirty days after collection. (1939, c. 158, s. 15.)

§ 105-18. Executor, etc., shall deduct tax.—The executor or administrator or other trustee paying any legacy or share in the distribution of any estate subject to said tax shall deduct therefrom at the rate prescribed, or if the legacy or share in the estate be not money, he shall demand payment of a sum to be computed at the same rates upon the appraised value thereof for the use of the state; and no executor or administrator shall pay or deliver any specific legacy or article to be distributed, subject to tax, except on the payment into his hands of a sum computed on its value as aforesaid; and in case of neglect or refusal on the part of said legatee to pay the same, such specific legacy or article, or so much thereof as shall be necessary, shall be sold by such executor or administrator at public sale, after notice to such legatee, and the balance that may be left in the

hands of the executor or administrator shall be distributed as is or may be directed by law; and every sum of money retained by any executor or administrator or paid into his hands on account of any legacy or distributive share for the use of the state shall be paid by him to the proper officer without delay. (1939, c. 158, s. 16.)

§ 105-19. Legacy for life, etc., tax to be retained, etc., upon the whole amount.—If the legacy or devise subject to said tax be given to a beneficiary for life or for a term of years, or upon condition or contingency, with remainder to take effect upon the termination of the life estate or the happening of the condition or contingency, the tax on the whole amount shall be due and payable as in other cases, and said tax shall be apportioned between such life tenant and the remainderman, such apportionment to be made by computation based upon the mortuary and annuity tables set out as §§ 8-46 and 8-47, and upon the basis of six per centum (6%) of the gross value of the estate for the period of expectancy of the life tenant in determining the value of the respective interests. When property is transferred or limited in trust or otherwise, and the rights, interest, or estate of the transferees or beneficiaries are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate, within the discretion of the revenue commissioner, which on the happening of any of the said contingencies or conditions would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith out of the property transferred, and the commissioner of revenue shall assess the tax on such property. (1939, c. 158, s. 17.)

§ 105-20. Legacy charged upon real estate, heir or devisee to deduct and pay to executor, etc.—Whenever such legacy shall be charged upon or payable out of real estate, the heir or devisee of such real estate, before paying the same to such legatee, shall deduct the tax therefrom at the rates aforesaid, and pay the amount so deducted to the executor or administrator or the commissioner of revenue, and the same shall remain a charge upon such real estate until paid, and in default thereof the same shall be enforced by the decrees of the court in the same manner as the payment of such legacy may be enforced: Provided, that all taxes imposed by this article shall be a lien upon the real and personal property of the estate on which the tax is imposed or upon the proceeds arising from the sale of such property from the time said tax is due and payable, and shall continue a lien until said tax is paid and receipted for by the proper officer of the state: Provided further, that no lien for inheritance or estate taxes which accrued prior to May first, one thousand nine hundred and twenty-eight shall attach or affect the land. (1939, c. 158, s. 18.)

§ 105-21. Computation of tax on resident and non-resident decedents.—A tax shall be assessed on the transfer of property, including property specifically devised or bequeathed, made subject to tax as aforesaid in this state of a resident or non-resident decedent, if all or any part of the estate of such decedent, wherever situated, shall pass to persons or corporations taxable under this article, which tax shall bear the same ratio to the entire tax which the said estate would have been subject to under this article if such decedent had been a resident of this state, and all his property, real and personal, had been located within this state, as such taxable property within this state bears to the entire estate, wherever situated. It shall be the duty of the personal representative to furnish to the commissioner of revenue such information as may be necessary or required to enable the commissioner to ascertain a proper computation of his tax. Where the personal representative fails or refuses to furnish information from which this assessment can be made, the property in this state liable to tax under this article shall be taxed at the highest rate applicable to those who are strangers in blood. (1939, c. 158, s. 19.)

§ 105-22. Duties of the clerks of the superior court.—(a) It shall be the duty of the clerk of the superior court to obtain from any executor or administrator, at the time of the qualification of such executor or administrator, the address of the personal representative qualifying, the names and addresses of the heirs-at-law, legatees, distributees, devisees, etc., as far as practical; the approximate value and character of the property or estate, both real and personal; the relationship of the heirs-at-law, legatees, devisees, etc., to the decedents, and forward the same to the commissioner of revenue on or before the tenth day of each month; and the commissioner of revenue shall furnish the several clerks blanks upon which to make said report, but the failure to so furnish blanks shall not relieve the clerk from the duty herein imposed. The clerk shall make no report of a death where the estate of a decedent is less than two thousand dollars ($2,000.00) in value, when the beneficiary is husband or wife or child or grandchild of the decedent. Any clerk of the superior court who shall fail, neglect, or refuse to file such monthly reports as required by this section shall be liable to a penalty in the sum of one hundred dollars ($100.00) to be recovered by the commissioner of revenue in an action to be brought by the commissioner of revenue.

(b) It shall also be the duty of the clerk of the superior court of each of the several counties of the state to enter in a book, prepared and furnished by the commissioner of revenue, to be kept for that purpose, and which shall be a public record, a condensed copy of the settlement of inheritance taxes of each estate, together with a copy of the receipt showing payment, or a certificate showing no tax due, as shall be certified to him by the commissioner of revenue.

(c) For these services, where performed by the clerk, the clerk shall be paid by the commissioner of revenue, when certificates and receipts are sent in to be recorded, as follows: For recording the certificate of the commissioner of revenue showing no tax due, the sum of fifty cents (50c). For recording the certificate of the commissioner of revenue showing that the tax received by the state is one hundred dollars ($100.00) or less, he shall be paid the sum of one dollar ($1.00). For recording the certificate of the commissioner of revenue showing that the tax received by the state is more than one hundred dollars ($100.00) and not over

five hundred dollars ($500.00) he shall be paid the sum of two dollars ($2.00). For recording the certificate of the commissioner of revenue showing that the tax received by the state is more than five hundred dollars ($500.00) he shall be paid the sum of five dollars ($5.00), which sum shall be the maximum amount paid for recording the certificate of the commissioner of revenue for any one estate: Provided, that where the decedent owns real estate in one or more counties, other than the county in which the administration of the estate is had, then the fee of the clerks of the courts of such other counties for recording the certificates of the commissioner of revenue shall be fifty cents (50c) each, and the same fee shall be paid for like service by the clerks in case of the settlement of the estates of non-residents. The clerk of the superior court shall receive the sum of one dollar ($1.00) for making up and transmitting to the commissioner of revenue the report required in this section, containing a list of persons who died leaving property in his county during the preceding month, etc.: Provided further, that where the clerk of the superior court has failed or neglected to make the report required of him in this section, in that case he shall only receive for recording the certificate of the commissioner of revenue the sum of fifty cents (50c).

The clerks of the superior courts of the several counties shall be allowed the fees provided for in this section in addition to other fees or salaries received by them, and any and all provisions in local acts in conflict with this section are hereby repealed. (1939, c. 158, s. 20; 1943, c. 400, s. 1.)

Editor's Note.—The 1943 amendment increased the fee, in line thirty-one of subsection (c), from fifty cents to one dollar.

§ 105-23. Information by administrator and executor.—Every administrator shall prepare a statement in duplicate, showing as far as can be ascertained the names of all the heirs-at-law and their relationship to decedent, and every executor shall prepare a like statement, accompanied by a copy of the will, showing the relationship to the decedent of all legatees, distributees, and devisees named in the will, and the age at the time of the death of the decedent of all legatees, distributees, devisees to whom property is bequeathed or devised for life or for a term of years, and the names of those, if any, who have died before the decedent, together with the postoffice address of executor, administrator, or trustee. If any of the heirs-at-law, distributees, and devisees are minor children of the decedent, such statement shall also show the age of each of such minor children. The statement shall also contain a complete inventory of all the real property of the decedent located in and outside the state, and of all personal property, wherever situate, of the estate, of all insurance policies upon the life of the decedent, together with an appraisal under oath of the value of each class of property embraced in the inventory, and the value of the whole, together with any deductions permitted by this statute, so far as they may be ascertained at the time of filing such statement; and also the full statement of all gifts or advancements made by deed, grant, or sale to any person or corporation, in trust or otherwise, within three years prior to the death of the decedent. The statement herein provided for shall be filed with the commissioner of revenue at Raleigh, North Carolina, within six months after the qualification of the executor or administrator, upon blank forms to be prepared by the commissioner of revenue. If any administrator or executor fails or refuses to comply with any of the requirements of this section, he shall be liable to a penalty in the sum of five hundred dollars ($500.00), to be recovered by the commissioner of revenue in an action to be brought by the commissioner of revenue to collect such sum in the superior court of Wake county against such administrator or executor. The commissioner of revenue, for good cause shown, may remit all or any portion of the penalty imposed under the provisions of this section. Every executor or administrator may make a tentative settlement of the inheritance tax with the commissioner of revenue, based on the sworn inventory provided in this section: Provided, that this does not apply to estates of less than two thousand dollars ($2,000.00) in value when the beneficiaries are husband or wife or children or grandchildren, or parent or parents of the decedent. If any executor, administrator, collector, committee, trustee or any other fiduciary within or without this state holding or having control of any funds, property, trust or estate, the transfer of which becomes taxable under the provisions of this article, shall fail to file the statements herein required, within the times herein required, the commissioner of revenue is authorized and shall be required to secure the information herein required from the best sources available, and therefrom assess the taxes levied hereunder, together with the penalties herein and otherwise provided. (1939, c. 158, s. 21.)

§ 105-24. Access to safe deposits of a decedent; withdrawal of bank deposit, etc., payable to either husband or wife or the survivor.—No safe deposit company, trust company, corporation, bank, or other institution, person or persons having in possession or control or custody, in whole or in part, securities, deposits, assets, or property belonging to or standing in the name of a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, shall deliver or transfer the same to any person whatsoever, whether in a representative capacity or not, or to the survivor or to the survivors when held in the joint names of a decedent and one or more persons, without retaining a sufficient portion or amount thereof to pay taxes or interest which would thereafter be assessed thereon under this article; but the commissioner of revenue may consent in writing to such delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank or other institution, person or persons from the obligation herein imposed. Provided: The clerk of superior court of the resident county of a decedent may authorize in writing any bank, safe deposit company, trust company, or any other institution to transfer to the properly qualified representative of the estate any funds on deposit in the name of the decedent or the decedent and one or more persons when the total amount of such deposit or deposits is three hundred dollars ($300.00) or less, and when such deposit or deposits compose the total cash assets of the estate. Such authorization shall have the same force and

effect as when issued in writing by the commissioner of revenue. Every safe deposit company, trust company, corporation, bank or other institution, person, or persons engaged in the business of renting lock boxes for the safe keeping of valuable papers and personal effects, or having in their possession or supervision in such lock boxes such valuable papers or personal effects shall, upon the death of any person using such lock box, as a condition precedent to the opening of such lock box by the executor, administrator, personal representative, or co-tenant of such deceased person, require the presence of the clerk of the superior court of the county in which such lock box is located. It shall be the duty of the clerk of the superior court, or his representative, in the presence of an officer or representative of the safe deposit company, trust company, corporation, bank, or other institution, person or persons, to make an inventory of the contents of any such lock box and to furnish a copy of such inventory to the commissioner of revenue, to the executor, administrator, personal representative, or co-tenant of the decedent, and a copy to the safe deposit company, trust company, corporation, bank, or other institution, person, or persons having possession of such lock box. The clerk of the superior court shall be paid for his services rendered as hereinbefore described by the representative of said estate at the time of his qualification the sum of two ($2.00) dollars for the first hour or portion thereof actually required for said services, and the sum of one ($1.00) dollar for each additional hour or portion thereof actually required for said services, subject to a maximum fee of five ($5.00) dollars, and in addition thereto he shall receive the same mileage as is now allowed by law to witnesses for going from his office to any place located in his county to perform such services. The clerks of the superior court of the several counties shall be allowed the fees provided for in this section in addition to other fees or salaries received by them, and any and all provisions in local acts in conflict with this article are hereby repealed. Notwithstanding any of the provisions of this section any life insurance company may pay the proceeds of any policy upon the life of a decedent to the person entitled thereto as soon as it shall have mailed to the commissioner of revenue a notice, in such form as the commissioner of revenue may prescribe, setting forth the fact of such payment; but if such notice be not mailed, all of the provisions of this section shall apply.

Notwithstanding any of the provisions of this section, in any case where a bank deposit has been heretofore made or is hereafter made, or where building and loan stock has heretofore been issued or is hereafter issued, in the names of a husband and wife and payable to either or the survivor of them, such bank or building and loan association may, upon the death of either of such persons, upon mailing notice to the commissioner of revenue in such form as may be prescribed by the commissioner stating the facts with respect to such deposits or stock, allow the survivor to withdraw as much as eighty per cent of such deposit or stock, and the balance thereof shall be retained by the bank or building and loan association to cover any taxes that may thereafter be assessed against such deposit or stock under this article. When such taxes as may be due on such deposit or stock are paid, or when it is ascertained that there is no liability of such deposit or stock for taxes under this article, the commissioner of revenue shall furnish the bank or building and loan association his written consent for the payment of the retained percentage to the survivor; and the commissioner of revenue may furnish such written consent to the bank or building and loan association upon the qualification of a personal representative of the deceased. No bank or building and loan association shall be liable for any failure to withhold the specified percentage of such deposit or stock if the same was paid out prior to actual notice of the death of the deceased.

Failure to comply with the provisions of this section shall render such safe deposit company, trust company, corporation, bank or other institution, person or persons liable for the amount of the taxes and interest due under this article on the succession to such securities, deposits, assets, or property, but in any action brought under this provision it shall be a sufficient defense that the delivery or transfer of securities, deposits, assets, or property was made in good faith without knowledge of the death of the decedent and without knowledge of circumstances sufficient to place the defendant on inquiry. (1939, c. 158, s. 21½; 1943, c. 400, s. 1.)

Editor's Note.—The 1943 amendment changed the sentence of the first paragraph relating to clerk's fee, and inserted the second paragraph.

§ 105-25. Supervision by commissioner of revenue.—The commissioner of revenue shall have complete supervision of the enforcement of all provisions of the Inheritance Tax Act and the collections of all inheritance taxes found to be due thereunder, and shall make all necessary rules and regulations for the just and equitable administration thereof. He shall regularly employ such deputies, attorneys, examiners, or special agents as may be necessary for the reasonable carrying out of its full intent and purpose. Such deputies, attorneys, examiners, or special agents shall, as often as required to do so, visit the several counties of the state to inquire and ascertain if all inheritance taxes due from estates of decedents, or heirs-at-law, legatees, devisees, or distributees thereof have been paid; to see that all statements required by this article are filed by administrators and executors, or by the beneficiaries under wills where no executor is appointed; to examine into all statements filed by such administrators and executors; to require such administrators and executors to furnish any additional information that may be deemed necessary to determine the amount of tax that should be paid by such estate. If not satisfied, after investigation, with valuation returned by the administrator or executor, the deputy, attorney, examiner, or appraiser shall make an additional appraisal after proper examination and inquiry, or may, in special cases, recommend the appointment by the commissioner of revenue of a special appraiser who, in such case, shall be paid five dollars ($5.00) per day and expenses for his services. The administrator or executor, if not satisfied with such additional appraisal, may appeal within thirty days to the commissioner of revenue, which appeal

shall be heard and determined as other cases. From this decision the administrator or executor shall have the right to appeal to the superior court of the county in which said estate is situated for the purpose of having said issue tried; said appeal to be made in the same way and manner as is now provided by law for appeals from the decisions of the public utilities commission: Provided, that the tax shall first be paid, or satisfactory surety bond in double the amount of any alleged deficiency shall be filed with the commissioner pending an appeal; and if it shall be determined upon trial that said tax or any part thereof was illegal or excessive, judgment shall be rendered therefor with interest, and the amount of tax so adjudged overpaid or declared invalid shall be certified by the clerk of court to the commissioner of revenue, who is authorized and directed to draw his account on the state treasurer for the amount thereof. (1939, c. 158, s. 22.)

§ 105-26. Proportion of tax to be repaid upon certain conditions.—Whenever debts shall be proven against the estate of a decedent after the distribution of legacies from which the inheritance tax has been deducted in compliance with this article, and the legatee is required to refund any portion of the legacy, a proportion of the said tax shall be repaid to him by the executor or administrator if the said tax has not been paid into the state treasury, or shall be refunded by the state treasurer, if it has been so paid in, upon certificate of the commissioner of revenue. (1939, c. 158, s. 23.)

§ 105-27. Commissioner of revenue may order executor, etc., to file account, etc.—If the commissioner of revenue shall discover that reports and accounts have not been filed, and the tax, if any, has not been paid as provided in this article, he shall issue a citation to the executor, administrator, or trustee of the decedent whose estate is subject to tax, to appear at a time and place therein mentioned, not to exceed twenty days from the date thereof, and show cause why said report and account should not be filed and said tax paid; and when personal service cannot be had, notice shall be given as provided for service of summons by publication in the county in which said estate is located; and if said tax shall be found to be due, the said delinquent shall be adjudged to pay said tax, interest and cost; if said tax shall remain due and unpaid for a period of thirty days after notice thereof, the commissioner of revenue shall certify the same to the sheriff, who shall make collection of said tax, cost and commissions for collection, as provided in § 105-16. (1939, c. 158, s. 24.)

§ 105-28. Failure of administrator, executor, or trustee to pay tax.—Any administrator, executor, or trustee who shall fail to pay the lawful inheritance taxes due upon any estate in his hands or under his control within two years from the time of his qualification shall be liable for the amount of the said taxes, and the same may be recovered in an action against such administrator, executor, or trustee, and the sureties on his official bond. Any clerk of the court who shall allow any administrator, executor, or trustee to make a final settlement of his estate without having paid the inheritance tax due by law, and exhibiting his receipt from the commissioner of revenue therefor, shall be liable upon his official bond for the amount of such taxes. (1939, c. 158, s. 25.)

§ 105-29. Uniform valuation.—(a) If the value of any estate taxed under this schedule shall have been assessed and fixed by the federal government for the purpose of determining the federal taxes due thereon prior to the time the report from the executor or administrator is made to the commissioner of revenue under the provisions of this article, the amount or value of such estate so fixed, assessed, and determined by the federal government shall be stated in such report. If the assessment of the estate by the federal government shall be made after the filing of the report by the executor or administrator with the commissioner of revenue, as provided in this article, the said executor or administrator shall, within thirty days after receipt of notice of the final determination by the federal government of the value or amount of said estate as assessed and determined for the purpose of fixing federal taxes thereon, make report of the amount so fixed and assessed by the federal government, under oath or affirmation, to the commissioner of revenue. If the amount of said estate as assessed and fixed by the federal government shall be in excess of that theretofore fixed or assessed under this schedule for the purpose of determining the amount of taxes due the state from said estate, then the commissioner of revenue shall reassess said estate and fix the value thereof at the amount fixed, assessed, and determined by the federal government, unless the said executor or administrator shall, within thirty days after notice to him from the commissioner of revenue, show cause why the valuation and assessment of said estate as theretofore made should not be changed or increased. If the valuation placed upon said estate by the federal government shall be less than that theretofore fixed or assessed under this article, the executor or administrator may, within thirty days after filing his return of the amount so fixed or assessed by the federal government, file with the commissioner of revenue a petition to have the value of said estate reassessed and the same reduced to the amount as fixed or assessed by the federal government. In either event the commissioner of revenue shall proceed to determine, from such evidence as may be brought to his attention or which he shall otherwise acquire, the correct value of the said estate, and if the valuation is changed, he shall reassess the taxes due by said estate under this article and notify the executor or administrator of such fact. In the event the valuation on said estate shall be decreased, and if there shall have been an overpayment of the tax, the said commissioner shall, within sixty days after the final determination of the value of said estate and the assessment of the correct amount of tax against the same, refund the amount of such excess tax theretofore paid.

(b) If the executor or administrator shall fail to file with the commissioner of revenue the return under oath or affirmation, stating the amount or value at which the estate was assessed by the federal government as provided for in this section, the commissioner of revenue shall assess and

collect from the executor or administrator a penalty equal to twenty-five per cent (25%) of the amount of any additional tax which may be found to be due by such estate upon reassessment and reappraisal thereof, which penalty shall under no condition be less than twenty-five dollars ($25.00) or more than five hundred dollars ($500.00) and which cannot be remitted by the commissioner of revenue except for good cause shown. The commissioner of revenue is authorized and directed to confer quarterly with the department of internal revenue of the United States government to ascertain the value of estates in North Carolina which have been assessed for taxation by the federal government, and he shall cooperate with the said department of internal revenue, furnishing to said department such information concerning estates in North Carolina as said department may request. (1939, c. 158, s. 26.)

§ 105-30. Executor defined.—Wherever the word "executor" appears in this article it shall include executors, administrators, collectors, committees, trustees, and all fiduciaries. (1939, c. 158, s. 27.)

§ 105-31. Additional remedies for enforcement of tax. — In addition to all other remedies which may now exist under the law, or may hereafter be established, for the collection of the taxes imposed by the preceding sections of this article, the tax so imposed shall be a lien upon all of the property and upon all of the estate, with respect to which the taxes are levied, as well as collectible out of any other property, resort to which may be had for their payment; and the said taxes shall constitute a debt, which may be recovered in an action brought by the commissioner of revenue in any court of competent jurisdiction in this state, and/or in any court having jurisdiction of actions of debt in any state of the United States, and/or in any court of the United States against an administrator, executor, trustee, or personal representative, and/or any person, corporation, or concern having in hand any property, funds, or assets of any nature, with respect to which such tax has been imposed. No title or interest to such estate, funds, assets, or property shall pass, and no disposition thereof shall be made by any person claiming an interest therein until the said taxes have been fully paid. (1939, c. 158, s. 28.)

§ 105-32. Reciprocal relations in respect to death taxes.—(a) The terms "death tax" and "death taxes" as used in the five following subsections, shall include inheritance, succession, transfer and estate taxes and any taxes levied against the estate of a decedent upon the occasion of his death.

(b) At any time before the expiration of eighteen months after the qualification in any probate court in this commonwealth of any executor of the will or administrator of the estate of any nonresident decedent, such executor or administrator shall file with such court proof that all death taxes, together with interest or penalties thereon, which are due to the state of domicile of such decedent, or to any political subdivision thereof, have been paid or secured, or that no such taxes, interest or penalties are due, as the case may be, unless it appears that letters testamentary or of administration have been issued on the estate of such decedent in the state of his domicile in the four following subsections called the domiciliary state.

(c) The proof required by subsection (b) may be in the form of a certificate issued by the official or body charged with the administration of the death tax laws of the domiciliary state. If such proof has not been filed within the time limited in subsection (b), and if within such time it does not appear that letters testamentary or of administration have been issued in the domiciliary state, the register of probate shall forthwith upon the expiration of such time notify by mail the official or body of the domiciliary state charged with the administration of the death tax laws thereof with respect to such estate, and shall state in such notice so far as is known to him (a) the name, date of death and last domicile of such decedent, (b) the name and address of each executor or administrator, (c) a summary of the values of the real estate, tangible personalty, and intangible personalty, wherever situated, belonging to such decedent at the time of his death, and (d) the fact that such executor or administrator has not filed theretofore the proof required in subsection (b). Such register shall attach to such notice a plain copy of the will and codicils of such decedent, if he died testate, or, if he died intestate, a list of his heirs and next of kin, so far as they are known to such register. Within sixty days after the mailing of such notice the official or body charged with the administration of the death tax laws of the domiciliary state may file with such probate court in this commonwealth a petition for an accounting in such estate, and such official or body of the domiciliary state shall, for the purposes of this section, be a party interested for the purpose of petitioning such probate court for such accounting. If such petition be filed within said period of sixty days, such probate court shall decree such accounting, and upon such accounting being filed and approved shall decree either the payment of any such tax found to be due to the domiciliary state or subdivision thereof or the remission to a fiduciary appointed or to be appointed by the probate court, or other court charged with the administration of estates of decedents, of the domiciliary state, of the balance of the intangible personalty after the payment of creditors and expenses of administration in this commonwealth.

(d) No final account of an executor or administrator of a nonresident decedent shall be allowed unless either (1) proof has been filed as required by subsection (b), or (2) notice under subsection (c) has been given to the official or body charged with the administration of the death tax laws of the domiciliary state, and such official or body has not petitioned for an accounting under said subsection within sixty days after the mailing of such notice, or (3) an accounting has been had under said subsection (c), a decree has been made upon such accounting and it appears that the executor or administrator has paid such sums and remitted such securities, if any, as he was required to pay or remit by such decree, or (4) it appears that letters testamentary or of administration have been issued by the domiciliary state and that no notice has been given under said subsection (c).

(e) Subsections (a) to (d), inclusive, shall apply to the estate of a non-resident decedent, only in case the laws of the domiciliary state contain a provision, of any nature or however expressed, whereby this commonwealth is given reasonable assurance, as finally determined by the commissioner, of the collection of its death taxes, interest and penalties from the estates of decedents dying domiciled in this commonwealth, when such estates are administered in whole or in part by a probate court, or other court charged with the administration of estates of decedents, in such other state.

(f) The provisions of subsections (a) to (e), inclusive, shall be liberally construed in order to insure that the domiciliary state of any non-resident decedent whose estate is administered in this commonwealth shall receive any death taxes, together with interest and penalties thereon, due to it from the estate of such decedent. (1939, c. 158, s. 29.)

Art. 2. Schedule B. License Taxes.

§ 105-33. Taxes under this article.—Taxes in this article or schedule shall be imposed as state license taxes for the privilege of carrying on the business, exercising the privilege, or doing the act named, and nothing in this article shall be construed to relieve any person, firm, or corporation from the payment of the tax prescribed in this article or schedule: Provided, the obtaining of a license required by this article shall not of itself authorize the practice of a profession, business, or trade for which a state qualification license is required.

(a) If the business made taxable or the privilege to be exercised under this article or schedule is carried on at two or more separate places, a separate state license for each place or location of such business shall be required.

(b) Every state license issued under this article or schedule shall be for twelve months, shall expire on the thirty-first day of May of each year, and shall be for the full amount of tax prescribed: Provided, that where the tax is levied on an annual basis and the licensee begins such business or exercises such privilege after the first day of January and prior to the thirty-first day of May of each year, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed and levied upon a gross receipts and/or percentage basis for the conducting of such business or the exercising of such privilege to and including the thirty-first day of May, next following. Every county, city and town license issued under this article or schedule shall be for twelve months, and shall expire on the thirty-first day of May or thirtieth day of June of each year as the governing body of such county, city or town may determine: Provided, that where the licensee begins such business or exercises such privilege after the expiration of seven months of the current license year of such municipality, then such licensee shall be required to pay one-half of the tax prescribed other than the tax prescribed to be computed upon a gross receipts and/or percentage basis.

(c) The state license issued under §§ 105-41, 105-42, 105-43, 105-45, 105-48, 105-53, 105-54, 105-55, 105-56, 105-57, 105-58 and 105-59 shall be and constitute a personal privilege to conduct the profession or business named in the state license, shall not be transferable to any other person, firm or corporation and shall be construed to limit the person, firm or corporation named in the license to conducting the profession or business and exercising the privilege named in the state license to the county and/or city and location specified in the state license, unless otherwise provided in this article or schedule. Other license issued for a tax year for the conduct of a business at a specified location shall upon a sale or transfer of the business be deemed a sufficient license for the succeeding purchaser for the conduct of the business specified at such location for the balance of the tax year: Provided, that if the holder of a license under this schedule moves the business for which a license has been paid to another location, a new license may be issued to the licensee at a new location for the balance of the license year, upon surrender of the original license for cancellation and the payment of a fee of five dollars ($5.00) for each license certificate reissued.

(d) Whenever, in any section of this article or schedule, the tax is graduated with reference to the population of the city or town in which the business is to be conducted or the privilege exercised, the minimum tax provided in such section shall be applied to the same business or privilege when conducted or exercised outside of the municipality, unless such business is conducted or privilege exercised within one mile of the corporate limits of such municipality, in which event the same tax shall be imposed and collected as if the business conducted or the privilege exercised were inside of the corporate limits of such municipality: Provided, that with respect to taxes in this article, assessed on a population basis, the same rates shall apply to incorporated towns and unincorporated places or towns alike, with the best estimate of population available being used as a basis for determining the tax in unincorporated places or towns. The term "places or towns" means any unincorporated community, point or collection of people having a geographical name by which it may be generally known, and is so generally designated.

(e) All state taxes imposed by this article shall be paid to the commissioner of revenue, or to one of his deputies; shall be due and payable on or before the first day of June of each year, and after such date shall be deemed delinquent, and subject to all the remedies available and the penalties imposed for the payment of delinquent state license and privilege taxes: Provided, that if a person, firm, or corporation begins any business or the exercise of any privilege requiring a license under this article or schedule after the thirty-first day of May and prior to the thirty-first day of the following May of any year, then such person, firm, or corporation shall apply for and obtain a state license for conducting such business or exercising any such privilege in advance, and before the beginning of such business or the exercise of such privilege; and a failure to so apply and to obtain such state license shall be and constitute a delinquent payment of the state license tax due, and such person, firm, or corporation shall be subject to the remedies available and penalties imposed for the payment of such delinquent taxes.

(f) The taxes imposed and the rates specified in this article or schedule shall apply to the subjects taxed on and after the first day of June, one thousand nine hundred thirty-nine, and prior to said date the taxes imposed and the rates specified in the Revenue Act of one thousand nine hundred thirty-seven shall apply.

(g) It shall be the duty of a grantee, transferee, or purchaser of any business or property subject to the state license taxes imposed in this article to make diligent inquiry as to whether the state license tax has been paid, but when such business or property has been granted, sold, transferred, or conveyed to an innocent purchaser for value and without notice that the vendor owed or is liable for any of the state license taxes imposed under this article, such property, while in the possession of such innocent purchaser, shall not be subject to any lien for such state license taxes.

(h) All county or municipal taxes levied by the board of county commissioners of any county, or by the board of aldermen or other governing body of any municipality within this state, under the authority conferred in this article, shall be collected by the sheriff or tax collector of such county and by the tax collector of such city, and the county or municipal license shall be issued by such officer.

(i) Any person, firm, or corporation who shall willfully make any false statement in an application for a license under any section of this article or schedule shall be guilty of a misdemeanor, and upon conviction shall be fined and/or imprisoned in the discretion of the court, which fine shall not be less than the amount of tax specified under such section, and shall be in addition to the amount of such tax.

(j) Wherever the business taxed in §§ 105-61, 105-62, 105-79 and/or 105-84 is of a seasonal character at summer or winter resorts, license may be issued for such seasonal business at one-half of the annual license tax for the four months period from June first to October first in summer resorts and from December first to April first in winter resorts. (1939, c. 158, s. 100; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment added the proviso to the first paragraph. It substituted near the beginning of subsection (c) the references to the enumerated sections for the words "thus obtained." The amendment also inserted in said subsection the provision relating to sale or transfer of business.

Several Kinds of Business Conducted by Individual.—Where several occupations are conducted in a town by the same individual, a privilege tax on one does not prevent a similar tax on another. Guano Co. v. Tarboro, 126 N. C. 68, 35 S. E. 231.

Where Goods Manufactured in Another State.—The right of a state to tax traders, professions and avocations within the borders of the state is unquestionable, though the goods dealt in be manufactured in another state. State v. Gorham, 115 N. C. 721, 20 S. E. 179.

Cited in State v. Warren, 211 N. C. 75, 189 S. E. 108.

§ 105-34. Amusement parks. — Every person, firm, or corporation engaged in the business of operating a park, open to the public as a place of amusement, and in which there may be either a bowling alley, trained animal show, penny or nickel machine for exhibiting pictures, theatrical performance, or similar entertainment, shall apply for and obtain from the commissioner of revenue a state license for the privilege of conducting such amusement park, and shall pay for such license the following tax:

State license for two months	$200.00
State license for four months	400.00
State license for eight months	600.00
State license for twelve months	800.00

This section shall not apply to bathing beaches which are not operated for more than four months each year.

(a) The licensee shall have the privilege of doing any or all of the things set out in this section; but the operation of a carnival, circus, or a show of any kind that moves from place to place shall not be allowed under the state license provided for in this section.

(b) Counties shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 102.)

§ 105-35. Amusements—traveling theatrical companies, etc.—Every person, firm, or corporation engaged in the business of a traveling theatrical, traveling moving picture, and/or traveling vaudeville company, giving exhibitions or performances in any hall, tent, or other place not licensed under §§ 105-34 or 105-37, whether on account of municipal ownership or otherwise, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and pay for such license a tax of twenty-five dollars ($25.00) for each day or part of a day's exhibits or performances: Provided, that

(a) Artists exhibiting paintings or statuary work of their own hands shall only pay two dollars ($2.00) for such state license.

(b) Such places of amusement as do not charge more than a total of fifty cents (50c) for admission at the door, including a reserved seat, and shall perform or exhibit continuously in any given place as much as one week, shall be required to pay for such state license a tax of twenty-five dollars ($25.00) per week.

(c) The owner of the hall, tent, or other place where such amusements are exhibited or performances held shall be liable for the tax.

(d) In lieu of the state license tax, hereinbefore provided for in this section, such amusement companies, consisting of not more than ten performers, may apply for an annual statewide license, and the same may be issued by the commissioner of revenue for the sum of three hundred dollars ($300.00), paid in advance, prior to the first exhibition in the state, and shall be valid in any county of this state, and shall be in full payment of all state license taxes imposed in this section.

(e) Any traveling organization which exhibits animals or conducts side shows in connection with its exhibitions or performances shall not be taxed under this section, but shall be taxed as herein otherwise provided.

(f) The owner, manager, or proprietor of any such amusements described in this section shall apply in advance to the commissioner of revenue for a state license for each county in which a performance is to be given.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in Sched-

tile E, §§ 105-164 to 105-187, upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The commissioner of revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority of supervision as may be necessary to effectuate the purposes of this subchapter.

(g) Counties, cities and towns may levy a license tax not in excess of the license tax levied by the state.

(h) Where the taxpayer elects to pay an annual state-wide license in the sum of three hundred dollars ($300.00) in advance, as provided for in subsection (d) of this section, counties, cities and towns may each levy a license tax not in excess of ten dollars ($10.00) per week, provided such places of amusement do not charge more than a total of fifty cents (50c) for admission at the door, as provided for in subsection (b) of this section. (1939, c. 158, s. 103.)

§ 105-36. Amusements—manufacturing, selling, leasing, or distributing moving picture films or checking attendance at moving picture shows. —Every person, firm, or corporation engaged in the business of manufacturing, selling, or leasing, furnishing, and/or distributing films to be used in moving pictures within this state shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business in this state, and shall pay for such license a tax of six hundred and twenty-five dollars ($625.00): Provided, that persons, firms, or corporations engaged exclusively in the business of selling, leasing or furnishing and/or distributing films for use in schools, public or private, and other institutions of learning, in this state shall pay a tax of twenty-five dollars ($25.00).

Any person, firm, or corporation engaged under contract or for compensation in the business of checking the attendance of any moving picture or show for the purpose of ascertaining attendance or amount of admission receipts at any theatre or theatres shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business in this state, and shall pay for such license an annual tax of two hundred and fifty dollars ($250.00).

Counties, cities, and towns shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 104.)

§ 105-37. Amusements — moving pictures or vaudeville shows—admission.—Every person, firm, or corporation engaged in the business of operating a moving picture show or place where vaudeville exhibitions or performances are given or operating a theatre or opera house where public exhibitions or performances are given for compensation shall apply for and obtain in advance from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such state license for each room, hall, or tent used the following tax:

	Seating Capacity up to 600 Seats	Seating Capacity of 600 to 1200 Seats	Seating Capacity over 1200 Seats
In cities or towns of less than 1,500 population	$125.00	$ 150.00	$ 200.00
In cities or towns of 1,500 and less than 3,000 population	200.00	250.00	300.00
In cities or towns of 3,000 and less than 5,000 population	250.00	300.00	400.00
In cities or towns of 5,000 and less than 10,000 population	350.00	400.00	600.00
In cities or towns of 10,000 and less than 15,000 population	400.00	600.00	800.00
In cities or towns of 15,000 and less than 25,000 population	500.00	800.00	1,000.00
In cities or towns of 25,000 and less than 40,000 population	600.00	1,000.00	1,500.00
In cities or towns of 40,000 population and over	800.00	1,500.00	2,500.00

(a) For any moving picture show operated more than two miles from the business center of any city having a population of twenty-five thousand, or over (for the purpose of this provision, the term "business center" to be defined as the intersection of the two principal business streets of the city), the tax levied shall be one-third of the above, based upon the population of, the city in which such theatre is located or adjacent to.

(b) For any moving picture show operated within the city limits or within one mile of the corporate limits of any city having a population of twenty-five thousand, or over, and known as neighborhood or suburban theatres, or for any theatre operated exclusively for colored people in a city having a population of ten thousand, or over, the tax levied shall be one-third of the above tax, based upon the population of such city.

(c) For any moving picture show operated at bathing beaches or resort towns for less than six months each year, the tax levied shall be one-half the annual tax provided above, based upon the population of the city or town in which such seasonal moving picture show shall be operated.

(d) For any motion picture show operating three days or less each week, the tax levied shall be one-half the annual tax provided above, based upon the population of the city or town in which such theatre is located.

(e) Counties shall not levy any license tax on the business taxed under the foregoing portion of this section, but cities and towns may levy a license tax not in excess of the tax levied by such city or town as of and in effect January first, one thousand nine hundred and forty-three.

(f) Upon any and all other forms of entertainment and amusement not otherwise taxed or

specifically exempted in this article, for which an admission is charged, every person, firm, or corporation engaged in such business shall pay an annual license tax for each room, hall, or tent where such admission charges are made graduated according to population, as follows:

In cities or towns of less than 1,500 population	$10.00
In cities or towns of 1,500 and less than 3,000 population	15.00
In cities or towns of 3,000 and less than 5,000 population	20.00
In cities or towns of 5,000 and less than 10,000 population	25.00
In cities or towns of 10,000 and less than 15,000 population	30.00
In cities or towns of 15,000 and less than 25,000 population	40.00
In cities or towns of 25,000 population or over	50.00

In addition to the license tax levied in the above schedule of this subsection, such person, firm, or corporation shall pay an additional tax upon the gross receipts of such business at the rate of tax levied in Schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. Reports shall be made to the commissioner of revenue in such form as he may prescribe within the first ten days of each month, covering all such gross receipts for the previous month and the additional tax herein levied shall be paid monthly at the time such reports are made. The annual license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the annual license tax shall be applied as a credit upon or advance payment of the gross receipts tax.

Provided, that athletic contests of all kinds, high school and elementary school contests, for which an admission is charged in excess of fifty cents (50c), including football, baseball, basketball, dances, wrestling, and boxing contests, shall pay an annual license tax of five dollars ($5.00), for each location where such charges are made, and an additional charge upon the gross receipts at the rate of tax levied in Schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise, the additional tax upon gross receipts to be levied and collected as provided in this section for motion picture shows, or in accordance with such regulations of payments as may be made by the commissioner of revenue. The tax levied in this last portion of subsection (b), shall apply to all privately owned toll bridges, including all charges made for all vehicles, freight and passenger, and the minimum charge of fifty cents (50c), for admission shall not apply to bridge tolls.

(g) Counties shall not levy any license tax on the business taxed under subsection (f), this section, but cities and towns may levy a license tax not in excess of one-half the base tax levied in subsection (f). (1939, c. 158, s. 105; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment rewrote the part of this section ending with subsection (e). Prior to the amendment subsections (f) and (g) were designated (b) and (c), respectively. The amendment made changes in the paragraph immediately following the tax schedule in subsection (f). It also inserted the references to said subsection in subsection (g).

Educational Entertainment Hall Exempt.—A musical conservatory, owning a hall in which it gives musical entertainments for the special benefit of its pupils and teachers, charging for admission thereto, is not liable for the opera-house tax herein provided. Markham v. Southern Conservatory, 130 N. C. 276, 277, 41 S. E. 531.

The Federal Census in use at the time is the basis of determining the population for the purposes of this section. State v. Prevo, 178 N. C. 740, 101 S. E. 370.

§ 105-38. Amusements — circuses, menageries, wild west, dog and/or pony shows, etc.—Every person, firm, or corporation engaged in the business of exhibiting performances, such as a circus, menagerie, wild west show, dog and/or pony show, or any other show, exhibition or performance similar thereto, not taxed in other sections of this article, shall apply for and obtain a state license from the commissioner of revenue for the privilege of engaging in such business, and pay for such license the following tax for each day or part of a day:

(a) Such shows and/or exhibitions traveling on railroads and requiring transportation of:

Not more than two cars	$ 30.00
Three to five cars, inclusive	45.00
Six to ten cars, inclusive	90.00
Eleven to twenty cars, inclusive	125.00
Twenty-one to thirty cars, inclusive	175.00
Thirty-one to fifty cars, inclusive	250.00
Over fifty cars	300.00

(b) Such shows and/or exhibitions traveling by automobiles, trucks, or other vehicles, other than railroad cars, and requiring transportation by:

Not over two vehicles	$ 7.50
Three to five vehicles	10.00
Six to ten vehicles	15.00
Eleven to twenty vehicles	25.00
Twenty-one to thirty vehicles	45.00
Thirty-one to fifty vehicles	60.00
Fifty-one to seventy-five vehicles	75.00
Seventy-six to one hundred vehicles	100.00
Over one hundred vehicles, per vehicle in excess thereof	5.00

It is the intent of this subsection that every vehicle used in transporting circus property or personnel, whether owned by the circus or by others, shall be counted in computing the tax.

(c) Every person, firm, or corporation by whom any show or exhibition taxed under this section is owned or controlled shall file with the commissioner of revenue, not less than five days before entering this state for the purpose of such exhibitions or performances therein, a statement, under oath, setting out in detail such information as may be required by the commissioner of revenue covering the places in the state where exhibitions or performances are to be given, the character of the exhibitions, the mode of travel, the number of cars or other conveyances used in transferring such shows, and such other and further information as may be required. Upon receipt of such statement, the commissioner of revenue shall fix and determine the amount of state license tax with which such person, firm, or corporation is chargeable, shall endorse his findings upon such statement, and shall transmit a copy of such statement and findings to each such person, firm, or corporation to be charged, to the sheriff or tax collector of each county in which exhibitions or performances are to be given, and to the division deputy of the commissioner of

revenue, with full and particular instructions as to the state license tax to be paid. Before giving any of the exhibitions or performances provided for in such statement, the person, firm, or corporation making such statement shall pay the commissioner of revenue the tax so fixed and determined. If one or more of such exhibitions or performances included in such statement and for which the tax has been paid shall be canceled, the commissioner of revenue may, upon proper application made to him, refund the tax for such canceled exhibitions or performances. Every such person, firm, or corporation shall give to the commissioner of revenue a notice of not less than five days before giving any of such exhibitions or performances in each county.

(d) The sheriff of each county in which such exhibitions or performances are advertised to be exhibited shall promptly communicate such information to the commissioner of revenue; and if the statement required in this section has not been filed as provided herein, or not filed in time for certified copies thereof, with proper instructions, to be transmitted to the sheriffs of the several counties and the division deputy commissioner, the commissioner of revenue shall cause his division deputy to attend at one or more points in the state where such exhibitions or performances are advertised or expected to exhibit, for the purpose of securing such statement prescribed in this section, of fixing and determinining the amount of state license tax with which such person, firm, or corporation is taxable, and to collect such tax or give instructions for the collection of such tax.

(e) Every such person, firm, or corporation by whom or which any such exhibition or performance described in this section is given in any county, city or town, or within five miles thereof, wherein is held an annual agricultural fair, during the week of such annual agricultural fair, shall pay a state license of one thousand dollars ($1,000.00) for each exhibition or performance in addition to the license tax first levied in this section, to be assessed and collected by the commissioner of revenue or his duly authorized deputy.

(f) The provisions of this section, or any other section of this article, shall not be construed to allow without the payment of the tax imposed in this section, any exhibition or performance described in this section for charitable, benevolent, educational, or any other purpose whatsoever, by any person, firm, or corporation who is engaged in giving such exhibitions or performances, no matter what terms of contract may be entered into or under what auspices such exhibitions or performances are given. It being the intent and purpose of this section that every person, firm, or corporation who or which is engaged in the business of giving such exhibitions or performances, whether a part or all of the proceeds are for charitable, benevolent, educational, or other purposes or not, shall pay the state license tax imposed in this section.

(g) Every such person, firm, or corporation who shall give any such exhibitions or performances mentioned in this section within this state, before the statement provided for has been filed with the commissioner of revenue, or before the state license tax has been paid, or which shall, after the filing of such statement, give any such exhibitions or performances taxable at a higher rate than the exhibition or performance authorized by the commissioner of revenue upon the statement filed, shall pay a state license tax of fifty per cent (50%) greater than the tax hereinbefore prescribed, to be assessed and collected either by the commissioner of revenue or by his division deputy.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in Schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The commissioner of revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority of supervision as may be necessary to effectuate the purposes of this subchapter.

(h) In lieu of the tax levied in § 105-86, each circus, or other form of amusement taxed under this section, advertising by means of outdoor advertising displays, a bill posting or as otherwise defined in § 105-86, shall pay a tax of one hundred dollars ($100.00) for a statewide license for the privilege of advertising in this manner, said tax to be in addition to the other taxes levied in this section.

(i) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of one-half of the license tax levied by the state, but shall not levy a parade tax or a tax under subsection (h) of this section. (1939, c. 158, s. 106.)

§ 105-39. Amusement—carnival companies, etc. —Every person, firm, or corporation engaged in the business of a carnival company or a show of like kind, moving picture and vaudeville shows, museums and menageries, merry-go-rounds, ferris wheels, riding devices, and other like amusements, and enterprises, conducted for profit, under the same general management, or an aggregate of shows, amusements, eating places, riding devices, or any of them operating together on the same lot or contiguous lots or streets, traveling from place to place, whether owned and actually operated by separate persons, firms, or corporations or not, filling week-stand engagements, or giving week-stand exhibitions, under canvas or not, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business or amusement, and shall pay for such license for each week, or part of a week, a tax based according to the population of the city or town in which such carnival is showing as follows:

In cities or towns of less than 2,500 population	$100.00
In cities or towns of 2,500 population and less than 10,000	200.00
In cities or towns of more than 10,000 population	300.00

Provided that any carnival operating within a radius of five miles of any city shall pay the same

tax as if they were actually showing within the city limits of said town. Provided further that if such a carnival operates over five miles from any city or town such a carnival shall be liable for a tax of one hundred dollars ($100.00) per week or part of a week.

Provided, that when a person, firm, or corporation exhibits only riding devices which are not a part of, nor used in connection with any carnival company, the tax shall be ten dollars ($10.00) per week for each such riding device, provided that counties, cities and towns may levy and collect a license tax upon such riding devices not in excess of five dollars ($5.00) for each such device.

Provided, further, that it shall be unlawful under this section for the owners and/or operators of riding devices to operate, or cause to be operated, any show, game, stand or other attraction whatsoever.

(a) This section shall not repeal any local act prohibiting any of the shows, exhibitions, or performances mentioned in this section, or limit the authority of the board of county commissioners of any county, or the board of aldermen or other governing body of any city or town, in prohibiting such shows, exhibitions, or performances.

If the commissioner of revenue shall issue a state license for any such show, exhibition, or performance in any county or municipality having a local statute prohibiting the same, then the said state license shall not authorize such show, exhibition, or performance to be held in such county or municipality, but the commissioner of revenue shall refund, upon proper application, the tax paid for such state license.

(b) No person, firm, or corporation, nor any aggregation of same, giving such shows, exhibitions, or performances, shall be relieved from the payment of the tax levied in this section, regardless of whether or not the state derives a benefit from same. Nor shall any carnival operating or giving performances or exhibitions, in connection with any fair in North Carolina, be relieved from the payment of tax levied in this section. It is the intent and purpose of this section that every person, firm, or corporation, or aggregation of same which is engaged in the giving of such shows, exhibitions, performances, or amusements, whether the whole or a part of the proceeds are for charitable, benevolent, educational, or other purposes whatsoever, shall pay the state license taxes provided for in this section.

It is not the purpose of this article to discourage agricultural fairs in the state, and to further this cause, no carnival company will be allowed to play a "Still Date" in any county where there is a regularly advertised agricultural fair, fifteen days prior to the dates of said fair. An agricultural fair shall be construed as meaning one that has operated at least one year prior to March 24, 1939.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in Schedule E, §§ 105-164 to 105-187, upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon the gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The commissioner of revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority or supervision as may be necessary to effectuate the purposes of this subchapter.

Nothing herein contained shall prevent American Legion Posts in North Carolina from holding fairs or tobacco festivals on any dates which they may select, provided said fairs and festivals have heretofore been held as annual events.

(c) Counties, cities and towns may levy a license tax on the business taxed hereunder not in excess of one-half of that levied by the state. (1939, c. 158, c. 107; 1941, c. 50, s. 3.)

Editor's Note.—The 1941 amendment struck out the third paragraph of this section and inserted the above in place thereof.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 529.

§ 105-40. Amusements—certain exhibitions, performances, and entertainments exempt from license tax. — All exhibitions, performances, and entertainments, except as in this article expressly mentioned as not exempt, produced by local talent exclusively, and for the benefit of religious, charitable, benevolent, or educational purposes, and where no compensation is paid to such local talent shall be exempt from the state license tax. (1939, c. 158, s. 108.)

Educational Entertainment Hall Exempt.—A musical conservatory, owning a hall in which it gives entertainments for the special benefit of its pupils and teachers, charging admission thereto, is not liable for the opera house tax provided in § 105-37. Markham v. Southern Conservatory of Music, 130 N. C. 276, 277, 41 S. E. 531.

§ 105-41. Attorneys at law and other professionals.—Every practicing attorney at law, practicing physician, veterinary, surgeon, osteopath, chiropractor, chiropodist, dentist, oculist, optician, optometrist, any person practicing any professional art of healing for a fee or reward, civil engineer, electrical engineer, mining engineer, mechanical engineer, architect and landscape architect, photographer, canvasser for any photographer, agent of a photographer in transmitting pictures or photographs to be copied, enlarged or colored (including all persons enumerated in this section employed by the state, county, municipality, a corporation, firm or individual), and every person, whether acting as an individual, as a member of a partnership, or as an officer and/or agent of a corporation, who is engaged in the business of selling or offering for sale, buying or offering to buy, negotiating the purchase, sale, or exchange of real estate, or who is engaged in the business of leasing or offering to lease, renting or offering to rent, or of collecting any rents as agent for another for compensation, or who is engaged in the business of soliciting and/or negotiating loans on real estate as agent for another for a commission, brokerage and/or other compensation, shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business or profession, or the doing of the act named, and shall pay for such license twenty-five dollars ($25.00): Provided, that no professional man or woman shall be required to pay a privilege tax after he or she has arrived at the age of seventy-five years.

Every person engaged in the public practice of accounting as a principal, or as a manager of the business of public accountant, shall pay for such license twenty-five dollars ($25.00), and in addition shall pay a license of twelve and fifty one-hundredths dollars ($12.50) for each person employed who is engaged in the capacity of supervising or handling the work of auditing, devising or installing systems of accounts.

Every licensed mortician or embalmer shall in like manner apply for and obtain from the commissioner of revenue a state-wide license for practicing his profession, whether for himself or in the employ of another of ten dollars ($10.00).

Licenses issued under this section are issued as personal privilege licenses and shall not be issued in the name of a firm or corporation: Provided, that a licensed photographer having a located place of business in this state, shall be liable for a license tax on each agent or solicitor, employed by him for soliciting business. If any person engages in more than one of the activities for which a privilege tax is levied by this section, such person shall be liable for a privilege tax with respect to each activity engaged in.

(a) Only one-half of the tax levied in this section shall be collected from those persons whose gross receipts from the business or profession for the preceding year did not exceed one thousand dollars ($1,000.00).

(b) License revocable for failure to pay tax. Whenever it shall be made to appear to any judge of the superior court that any person practicing any profession for which the payment of a license tax is required by this section has failed, or fails, to pay the professional tax levied in this section, and execution has been issued for the same by the commissioner of revenue and returned by the proper officer "no property to be found," or returned for other cause without payment of the tax, it shall be the duty of the judge presiding in the superior court of the county in which such person resides, upon presentation therefor, to cause the clerk of said court to issue a rule requiring such person to show cause by the next term of court why such person should not be deprived of license to practice such profession for failure to pay such professional tax. Such rule shall be served by the sheriff upon said person twenty days before the next term of the court, and if at the return term of court such person fails to show sufficient cause, the said judge may enter a judgment suspending the professional license of such person until all such tax as may be due shall have been paid, and such order of suspension shall be binding upon all courts, boards and commissions having authority of law in this state with respect to the granting or continuing of license to practice any such profession.

(c) Counties, cities, or towns shall not levy any license tax on the business or professions taxed under this section; and the state-wide license herein provided for shall privilege the licensee to engage in such business or profession in every county, city, or town in this state. (1939, c. 158, s. 109; 1941, c. 50, s. 3; 1943, c. 400, s. 2.)

Editor's Note.—The 1941 amendment struck out a provision of subsection (c) excepting photographers, etc.

The 1943 amendment added the last sentence of the fourth paragraph. It also directed that former subsection (d), providing an exception as to certain temporary photography, be sericken out. This subsection had already been omitted upon codification.

Persons Making "Negatives" Are Photographers Subject to License Tax.—To solicit persons to have their photographs taken, arrange for the sitting, and actually have the camera present and take what is popularly called a picture, but in fact is a "negative," which is the outline of the subject on glass, is engaging within the state in the profession or business of photography within the meaning of this section. Lucas v. Charlotte, 14 F. Supp. 163, 167.

Although the "negatives" are sent to another state for development the assessment of the tax under this section on photographers does not constitute an interference with or burden upon interstate commerce. Id.

This section gives to each county and city the privilege of levying a similar tax upon photographers. Lucas v. Charlotte, 14 F. Supp. 163, 165.

Discriminatory Statute Applying Only to Certain Real Estate Brokers Is Unconstitutional.—Ch. 241, Public-Local Laws of 1927, requiring real estate brokers and salesmen in certain designated counties to be licensed by a real estate commission on the basis of moral character and proficiency in the public interest, and requiring the payment of a license fee in addition to the license required by this section, was held unconstitutional as discriminatory. State v. Warren, 211 N. C. 75, 189 S. E. 108.

Quoted in State v. Dixon, 215 N. C. 161, 1 S. E. (2d) 521.

§ 105-41.1. Bondsmen.—Every person, firm, or corporation, excepting agents of insurance or bonding companies which are licensed by the commissioner of insurance to issue bonds, engaged in the business of writing or executing, for a consideration, appearance, compliance, or bail bonds, or any type of bond or undertaking required in connection with criminal proceedings in any of the courts of this state, shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business and shall pay for such license the following tax:

In cities or towns of less than 2,000 population	$10.00
In cities or towns of 2,000 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or town of 10,000 population or over	40.00

Counties, cities and towns may levy a license tax on the business taxed under this section in an amount not in excess of the tax levied by the state. (1943, c. 400, s. 2.)

Editor's Note.—As to taxation and regulation of professional bondsmen in Cumberland County, see Session Laws, 1913, c. 316; in Wayne County, see Session Laws 1943, c. 210.

§ 105-42. Detectives. — Every person, whether acting as an individual, as a member of a partnership, or as an officer and/or agent of a corporation, who is engaged in business as a detective or what is ordinarily known as "secret service work," or who is engaged in the business of soliciting such business, shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business, and shall pay for such license a tax of twenty-five dollars ($25.00): Provided, any such person regularly employed by the United States government, any state or political subdivision of any state shall not be required to pay the license herein provided for. (1939, c. 158, s. 110.)

§ 105-43. Real estate auction sales.—(a) Every person, firm, or corporation engaged in the business of conducting auction sales of real estate for

profit or compensation shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business in this state, and shall pay for such license a tax of two hundred and fifty dollars ($250.00.).

Provided, that any person, firm, or corporation engaged in the business of conducting auction sales in one county only in this state, shall be liable for a license tax in the amount of seventy-five dollars ($75.00).

(b) This section shall not apply to sales for foreclosure of liens or sales made by order of court.

(c) Counties, cities, and towns may levy a tax on the business taxed under this section not in excess of twelve and fifty one-hundredths dollars ($12.50) for each sale conducted in the county, city, or town: Provided, that the total tax levied by any county, city, or town on said business during any year shall not exceed twenty-five dollars ($25.00). (1939, c. 158, s. 111.)

§ 105-44. Coal and coke dealers.—(a) Every person, firm, or corporation, either as agent or principal, engaged in and conducting the business of selling and/or delivering coal or coke in carload lots, or in greater quantities, shall be deemed a wholesale dealer, and shall apply for and procure from the revenue commissioner a state license and pay for such license the sum of seventy-five dollars ($75.00): Provided, that if such wholesale dealer shall also sell and/or deliver coal or coke in less than carload lots, he shall not be subject to the retailer's license tax provided in this section.

(b) Every person, firm, or corporation engaged in and conducting the business of selling and/or delivering coal or coke at retail shall apply for and procure from the commissioner of revenue a state license, and shall pay for such license for each city or town in which such coal or coke is sold or delivered, as follows:

In cities or towns of less than 2,500 population	$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	25.00
In cities or towns of 10,000 and less than 25,000 population	50.00
In cities or towns of 25,000 and over	75.00

Dealers or peddlers in coal who sell in quantities of not more than one hundred (100) pounds shall pay a state license tax of five dollars ($5.00); provided that this section shall not apply to persons, firms or corporations who deliver coal or coke to state institutions or public schools only.

(c) No county shall levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the state.

(d) From the taxes levied under authority of this section, any person, firm or corporation owning or operating a coal mine in this state shall be allowed to deduct the amount of ad valorem taxes for the current year levied by any county in this state on the mine, mineral rights or land itself, from which said coal is mined: Provided, further, that any person, firm or corporation soliciting orders for pool cars of coal to be distributed without profit shall be subject to the license tax. (1939, c. 158, s. 112; 1941, c. 50, s. 3.)

Editor's Note.—The 1941 amendment added the proviso at the end of subsection (b) and changed subsection (d).

Census Applicable for 1940.—In ascertaining the state license tax on businesses in accordance with the graduated scale based upon the population of the municipalities in which the business is operated, for the tax year beginning 1 July, 1940, the commissioner of revenue properly used the 1930 United States Census figures, since the 1940 figures were not available at the beginning of that tax year. Clark v. Greenville, 221 N. C. 255, 20 S. E. (2d) 56.

Cited in Atlantic Ice, etc., Co. v. Maxwell, 210 N. C. 723, 188 S. E. 381.

§ 105-45. Collecting agencies. — Every person, firm, or corporation engaged in the business of collecting, for a profit, claims, accounts, bills, notes, or other money obligations for others, and of rendering an account for same, shall be deemed a collection agency, and shall apply for and receive from the commissioner of revenue a state license for the privilege of engaging in such business, and pay for such license a tax of fifty dollars ($50.00).

(a) This section shall not apply to a regularly licensed practicing attorney at law.

(b) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the state. (1939, c. 158, s. 113.)

§ 105-46. Undertakers and retail dealers in coffins.—Every person, firm, or corporation engaged in the business of burying the dead, or in the retail sale of coffins, shall apply for and procure from the revenue commissioner a state license for transacting such business within this state, and shall pay for such license the following tax:

In cities or towns of less than 500 population	$ 10.00
In cities or towns of 500 and less than 5,000 population	25.00
In cities or towns of 5,000 and less than 10,000 population	40.00
In cities or towns of 10,000 and less than 15,000 population	50.00
In cities or towns of 15,000 and less than 25,000 population	75.00
In cities or towns of 25,000 population or over	100.00

This section shall not apply to a cabinet-maker (who is not an undertaker) who makes coffins to order.

No county shall levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the state. (1939, c. 158, s. 114.)

§ 105-47. Dealers in horses and/or mules.—Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall apply for and procure from the commissioner of revenue a state license for the privilege of engaging in such business in this state and shall pay for such license an annual tax for each location where such business is carried on as follows:

Where not more than one carload of horses and/or mules is purchased for the purpose of resale	$ 25.00
Where more than one carload and not	

more than two carloads of horses and/or mules are purchased for the purpose of resale 50.00

Where more than two carloads of horses and/or mules are purchased for the purpose of resale 100.00

For the purpose of calculating the amount of tax due under the above schedule, a carload of horses and/or mules shall be twenty-five (25) and purchases for the preceding license tax year shall be used as a medium for arriving at the amount of tax due for the ensuing year: Provided, however, that if during the current license year horses and/or mules are purchased for the purpose of resale in such quantities that would establish liability for a greater tax than that previously paid, it shall be immediately remitted to the commissioner of revenue with the license which has already been issued in order that it may be canceled and a corrected license issued.

In addition to the above license, every person, firm, or corporation engaged in the business of purchasing for the purpose of resale and/or selling horses and/or mules at public auction, either on his or its own behalf or for any other person, whether a commission or fee is or is not charged, shall apply for and procure from the commissioner of revenue a state license for each place of auction and shall pay for such license an annual tax of one hundred dollars ($100.00).

In addition to the above license, every transient vendor of horses and/or mules who has no permanent or established place of business in this state shall apply for and procure from the commissioner of revenue a state license for each county in which horses and/or mules are sold and shall pay for such license an annual tax of three hundred dollars ($300.00).

(a) In addition to the annual licenses levied in this section, every person, firm, or corporation, engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall pay a tax of three dollars ($3.00) per head on all such horses and/or mules purchased for the purpose of resale. "Purchase" shall be taken to mean and shall include all horses and/or mules acquired or received as a result of outright purchase or on consignment, account or otherwise for resale, either at wholesale or retail: Provided, however, that "purchases" shall not include the acquisition of horses and/or mules which are acquired or received as a result of an allowance for credit for horses and/or mules taken in part payment on horses and/or mules subject to the tax imposed in this section nor shall it include horses and/or mules which have been repossessed as a result of nonpayment of the original sales or purchase price. "Purchases" shall include all horses and/or mules acquired for the purpose of resale, either at wholesale or retail, whether such horses and/or mules are shipped into this state by railroad or brought in otherwise.

The original or first dealer or consignee, purchasing or receiving horses and/or mules in this state, shall be primarily liable for payment of the additional per-head tax levied in this section. Horse and/or mule auctioneers, engaged in the business of purchasing, acquiring or receiving on consignment, account or otherwise, either as principal or agent, horses and/or mules from out-of-state dealers or other persons and selling same at either private or public auction, shall be primarily liable for payment of the additional per-head tax levied in this section unless sold to a licensed dealer for the purpose of resale. In order to avoid double taxation, dealers purchasing or acquiring horses and/or mules from another established dealer located within this state may be relieved of reporting the additional per-head tax on such horses and/or mules acquired from another dealer located within this state, provided an official receipt or statement from the commissioner of revenue or his duly authorized agents is produced, showing that the additional per-head tax levied in this section has been paid.

(b) The additional per-head tax levied in this section on purchases of horses and/or mules purchased for the purpose of resale, either at wholesale or retail, shall be due and payable immediately upon receipt of such horses and/or mules within this state. The commissioner of revenue may, however, in his discretion, where he thinks circumstances justify it, permit licensed and established dealers to file monthly reports, which reports shall be due to be filed on or before the fifteenth (15th) of each month for all purchases during the preceding month, and such report when filed shall be accompanied by a remittance for the amount of tax shown to be due. Reports shall be filed in such form and in such manner as may be prescribed by the commissioner of revenue, and failure to file the report herein prescribed and pay the tax as shown to be due thereon shall subject such dealer to a penalty of five per cent (5%) of the amount of tax due for each month or fraction thereof that such report may be delinquent.

(c) Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall keep a full, true and accurate record of all purchases and sales, including purchase invoices and freight bills covering such purchases and sales of all horses and/or mules until such purchases and sales, including purchase invoices and freight bills, have been checked by a duly authorized agent of the commissioner of revenue. Failure to comply with the provisions of this section in this respect shall be prima facie evidence of attempting to evade the additional taxes levied in this section and shall subject such dealer, in addition to all other penalties imposed by this article, to the additional per-head tax on all purchases and/or sales from whatever source such horses and/or mules are acquired or received, and it shall be the duty of the commissioner of revenue or his duly authorized agents to assess the additional tax upon an estimation of purchases and/or sales from the best information obtainable.

(d) As a condition to the issuance or the continuance of the annual license levied in this section, and in order to secure the payment of the additional per-head tax levied on purchases and/or sales in this section, the commissioner of revenue may in his discretion, when it appears reasonably necessary therefor, require any dealer in horses and/or mules, applying for a license under this section, to post a surety bond or other adequate security sufficient to guarantee and secure the payment of any tax due under this section.

(e) Any person, firm, or corporation, required

to procure from the commissioner of revenue a license under this section, who shall purchase and sell or offer for sale by principal or agent any horses and/or mules without first having obtained such license, or shall fail, neglect or refuse to file any report and pay the additional taxes levied in this section when due and payable, shall in addition to the other penalties imposed by this article, be deemed guilty of a misdemeanor and upon conviction shall be fined not to exceed one hundred dollars ($100.00) and/or imprisoned not less than thirty (30) days within the discretion of the court.

(f) Counties, cities and towns may levy an annual license tax on the business taxed under this section not in excess of twelve dollars and fifty cents ($12.50). (1939, c. 158, s. 115; 1941, c. 50, s. 3.)

Editor's Note.—The 1941 amendment added at the end of the second sentence of the second paragraph of subsection (a) the following: "unless sold to a licensed dealer for the purpose of resale."

§ 105-48. Phrenologists.—Any person engaged in the practice of phrenology for compensation shall procure from the commissioner of revenue a state license for engaging in such practice, and shall pay for same a tax of two hundred dollars ($200.00) for each county in which such person does business.

Counties, cities, and towns may levy any license tax on the business taxed in this section. (1939, c. 158, s. 116.)

§ 105-49. Bicycle dealers.—Any person, firm, or corporation engaged in the business of buying and/or selling bicycles, supplies and accessories shall apply for and procure a state license from the commissioner of revenue for the privilege of transacting such business, and shall pay tax for such license as follows:

In cities and towns of less than 10,000 population	$10.00
In cities and towns of 10,000 and less than 20,000 population	20.00
In cities or towns of 20,000 population or more	25.00

Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the state. (1939, c. 158, s. 117.)

Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.1.

§ 105-50. Pawnbrokers. — Every person, firm, or corporation engaged in and conducting the business of lending or advancing money or other things of value for a profit, and taking as a pledge for such loan specific articles of personal property, to be forfeited if payment is not made within a definite time, shall be deemed a pawnbroker, and shall pay for the privilege of transacting such business an annual license as follows:

In cities or towns of less than 10,000 population	$200.00
In cities or towns of 10,000 and less than 15,000 population	250.00
In cities or towns of 15,000 and less than 20,000 population	300.00
In cities or towns of 20,000 and less than 25,000 population	350.00
In cities or towns of 25,000 population or more	400.00

(a) Before such pawnbroker shall receive any article or thing of value from any person or persons, on which a loan or advance is made, he shall issue a duplicate ticket, one to be delivered to the owner of said personal property and the other to be attached to the article, and said ticket shall have an identifying number on the one side, together with the date at the expiration of which the pledger forfeits his right to redeem, and on the other a full and complete copy of this subsection; but such pawnbroker may, after the pledger has forfeited his right to redeem the specific property pledged, sell the same at public auction, deducting from the proceeds of sale the money or fair value of the thing advanced, the interest accrued, and the cost of making sale, and shall pay the surplus remaining to the pledger.

(b) Any person, firm, or corporation transacting the business of pawnbroker without a license as provided in this section, or violating any of the provisions of this section, shall be guilty of a misdemeanor and fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00).

(c) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of that levied by the state. (1939, c. 158, s. 118.)

Broker and Pawnbroker Distinguished.—There is a great difference between the terms "broker" and "pawnbroker." A broker is an agent, middleman or negotiator, who works for a commission. A pawnbroker is not an agent at all. He is one who lends money upon personalty pledged as security. Brokers and pawnbrokers constitute distinct classes, and entirely different license taxes may be assessed upon them. Schaul & Co. v. Charlotte, 118 N. C. 733, 24 S. E. 526.

§ 105-51. Cash registers, adding machines, typewriters, refrigerating machines, washing machines, etc.—Every person, firm, or corporation engaged in the business of selling and/or delivering and/or renting cash registers, typewriters, adding or bookkeeping machines, billing machines, check protectors or protectographs, kelvinators, frigidaires, or other refrigerating machines, lighting systems, washing machines, mechanically or electrically operated burglar alarms, addressograph machines, multigraph and other duplicating machines, vacuum cleaners, mechanically or electrically operated oil burners and coal stokers, card punching, assorting and tabulating machinery, shall apply for and procure from the commissioner of revenue a state license for each place where such business is transacted in this state, and shall pay for such license a tax of ten dollars ($10.00).

Counties, cities, and towns shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 119.)

Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.1.

§ 105-52. Sewing machines.—(a) Every person, firm, or corporation engaged in the business of selling sewing machines within this state shall apply for and obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business and shall pay for such license a tax of one hundred dollars ($100.00) per annum for each such make of machines sold or offered for sale.

(b) In addition to the annual license tax imposed in subsection (a) of this section, such per-

son, firm, or corporation engaged in the business taxed under this section shall pay a tax at the rate of tax levied in Schedule E, §§ 105-164 to 105-187, on retail sales of merchandise on the total receipts during the preceding year from the sale, lease, or exchange of sewing machines and/or accessories within the state, which said tax shall be paid to the commissioner of revenue at the time of securing the annual license provided for in subsection (a) of this section: Provided, that the tax on sales in the preceding year, levied in this subsection, shall apply only for the fiscal year ending May thirty-first, one thousand nine hundred thirty-five: Provided further, that on and after June first, one thousand nine hundred thirty-five, the additional tax on sales levied in this subsection shall be assessed and collected under the provisions of Schedule E, §§ 105-164 to 105-187, the same as the tax on sales of other merchandise.

(c) Any person, firm, or corporation obtaining a license under the foregoing sections may employ agents and secure a duplicate copy of such license for each such agent by paying a tax of ten dollars ($10.00) to the commissioner of revenue. Each such duplicate license so issued shall contain the name of the agent to whom it is issued, shall not be transferable, and shall license the licensee to sell or offer for sale only the sewing machines sold by the holder of the original license.

(d) Any merchant or dealer who shall purchase sewing machines from a manufacturer or a dealer who has paid the license tax provided for in this section may sell such sewing machines without paying the annual state-wide license tax provided for in subsection (a), but shall procure the duplicate license provided for in subsection (c) of this section: Provided, that the tax imposed by this subsection shall be the only tax required to be paid by dealers in secondhand sewing machines exclusively.

(e) Any person, firm, or corporation who or which violates any of the provisions of this section shall, in addition to all other penalties imposed in this article, pay an additional tax of double the state-wide annual license, and the duplicate tax imposed in this section.

(f) No county shall levy a license tax on the business taxed under this section, except that the county may levy a license tax not in excess of five dollars ($5.00) on each agent in a county who holds a duplicate license provided for in this section.

Cities and towns shall not levy a license tax on the business taxed under this section. (1939, c. 158, s. 120.)

§ 105-53. Peddlers.—(a) Any person, firm, or corporation who or which shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sells or barters the same, shall be deemed a peddler, except such person, firm, or corporation who or which is a wholesale dealer, with an established warehouse in this state and selling only to merchants for resale, and shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business, and shall pay for such license the following tax:

Peddler, on foot, for each county	$10.00
Peddler, with horse or other animal, and with or without vehicle, each county, for each vehicle	15.00
Peddler, with vehicle propelled by motor or other mechanical power, for each county, for each vehicle	25.00

(b) Any person, firm, or corporation employing the service of another as peddler, whether on a salary or commission basis, or furnishing merchandise to be sold by a peddler under any kind of contractual agreement, shall be liable for the payment of the taxes levied above in this section, instead of the peddler.

Provided, however, any person peddling fruits, vegetables, or products of the farm shall pay a license tax of twenty-five dollars ($25.00) per year, which license shall be state-wide. Counties, cities and towns may levy a tax under this subsection not in excess of one-half of the state tax. Provided, however, no county, city or town shall issue any license, or permit any person, firm, or corporation to do any business under the provisions of this subsection, until and unless such person shall produce and exhibit to the tax collector of such county, city or town, his or its state license for the privilege of engaging in such business.

(c) Any person, firm, or corporation who or which sells or offers to sell from a cart, truck, automobile, or other vehicle operated over and upon the streets and/or highways within this state any fresh fruits and/or vegetables shall be deemed a peddler within the meaning of this section and shall pay the annual license tax levied in subsection (a) of this section with reference to the character of the vehicle employed. Any person, firm, or corporation who or which sells or offers for sale from any railway car fresh fruits and/or vegetables shall be deemed a peddler within the meaning of this section, and shall pay an annual tax of twenty-five dollars ($25.00). Nothing in this section shall apply to the sale of farm products raised on the premises owned or occupied by the person, firm, or corporation, his or its bona fide agent or employee selling same.

(d) Every itinerant salesman or merchant who shall expose for sale, either on the street or in a building occupied, in whole or in part, for that purpose, any goods, wares or merchandise, not being a regular merchant in such county, shall apply for in advance and procure a state license from the commissioner of revenue for the privilege of transacting such business, and shall pay for such license a tax of one hundred dollars ($100.00) in each county in which he shall conduct or carry on such business.

Any salesman or merchant, offering for sale goods, wares or merchandise, other than fruits and farm products, shall be deemed an itinerant, within the meaning of this subsection, who conducts said business within the county for less than six consecutive months, except in case of discontinuance for one of the reasons hereinafter mentioned. When any salesman or merchant, beginning said business, does not pay the tax herein levied in advance, on the ground of stated intention to become a regular merchant,

the commissioner of revenue may, in his discretion, require said salesman or merchant to post satisfactory bond, or make a cash deposit, in the sum of one hundred dollars ($100.00), which bond or deposit shall be forfeited in payment of the tax herein levied in case such salesman or merchant discontinues said business in the county within less than six months for any reason other than death or disablement of said salesman or merchant, or insolvency of said business, or destruction of the stock by fire or other catastrophe. In like manner the tax collector of any county or city levying a tax, as permitted by subsection (g), on the business taxed in this subsection, may, in his discretion, require posting of satisfactory bond or cash deposit in an amount equivalent to the tax so levied by said county or city; and said bond or deposit shall in like manner be subject to forfeiture in payment of said tax. Any salesman or merchant failing to post such bond or make such deposit within three days after being notified to do so by the commissioner or collector, shall immediately become liable for the taxes levied or authorized to be levied on the business taxed in this subsection. When any salesman or merchant, having been required to post such bond or deposit, has conducted said business for six consecutive months, or has discontinued said business within six months for one of the reasons specifically mentioned herein, he shall be entitled to have said bond canceled or said deposit returned.

(e) The provisions of this section shall not apply to any person, firm, or corporation who sells or offers for sale books, periodicals, printed music, ice, wood or fuel, fish, beef, mutton, pork, bread, cakes, pies, products of the dairy, poultry, eggs, livestock, or articles produced by the individual vendor offering them for sale, but shall apply to medicines, drugs, or articles assembled.

(f) The board of county commissioners of any county in this state, upon proper application, may exempt from the annual license tax levied in this section Confederate soldiers, disabled veterans of the Spanish-American War, disabled soldiers of the World War, who have been bona fide residents of this state for twelve or more months continuously, and the blind who have been bona fide residents of this state for twelve or more months continuously, widows with dependent children; and when so exempted, the board of county commissioners shall furnish such person or persons with a certificate of exemption, and such certificate shall entitle the holder thereof to peddle within the limits of such county without payment of any license tax to the state.

(g) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of the annual license levied by the state. But the board of county commissioners of any county may levy a license tax on the business taxed in this section not in excess of that levied by the state for each unincorporated town or village in the county with a population of one thousand or more within a radius of one mile in which such business is engaged in; and any county or city may levy on peddlers of goods, wares, or merchandise with vehicle propelled by motor or other mechanical power, taxed by the state under subsection (a) of this section, a tax not exceeding two hundred dollars ($200.00) for each vehicle, which said tax may, in the discretion of the governing body, be graduated in accordance with the size or weight of said vehicles, the amount of merchandising space in and on said vehicles, the average value of goods carried, the types of products offered for sale, or any other reasonable principle, except that the tax levied hereunder on account of a vehicle of one-half ton capacity or less shall not exceed twenty-five dollars ($25.00).

No county, city, or town shall levy any license tax under this section upon the persons so exempted in this section, nor upon drummers selling by wholesale. (1939, c. 158, s. 121; 1941, c. 50, s. 3; 1943. c. 400, s. 2.)

Cross Reference.—The tax imposed by this section does not apply to the sale of gasoline to dealers for resale. See § 105-89, subsection (1), subdivision (d).

Editor's Note.—The 1941 amendment struck out former subsection (e), relating to display of samples, etc., in hotel rooms, etc., and relettered the remaining subsections.

The 1943 amendment inserted in the first paragraph of subsection (b) the provision as to furnishing merchandise to be sold under agreement.

Peddler Defined.—A peddler is one who sells and delivers the identical goods he carries about with him. State v. Lee, 113 N. C. 681, 18 S. E. 713.

A peddler is primarily one who travels around on foot, selling or bartering the identical goods he carries. State v. Frank, 130 N. C. 724, 41 S. E. 785.

Former Subdivision Requiring License for Display of Goods by One Not Regular Retailer Was Unconstitutional.—Former subdivision (e) requiring one not a regular retail merchant in North Carolina to obtain a $250 license to entitle him to display goods for purpose of securing orders for retail sale, violated "commerce" clause of federal constitution as applied to a New York merchandise establishment which rented display room in a North Carolina hotel for several days and took orders for goods corresponding to samples, which orders were filled by shipping direct to customers from New York City, where regular retail merchants in North Carolina were subject to only an annual $1 license tax for privilege of doing business. Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 334, 85 L. Ed. 275. For note on this case, see 18 N. C. Law Rev. 48.

Nature of Peddling.—To peddle is not a matter of right under our laws, which any person can demand upon the payment of the tax. It is a privilege. It is discretionary with the county commissioners whether or not they will grant a license to a peddler. The privilege is personal to the applicant, and is not assignable. State v. Rhyne, 119 N. C. 905, 907, 26 S. E. 126.

Power of Legislature.—Under the N. C. Const. Art. V., sec. 3, the General Assembly may tax trades, etc. The term "trade" includes the business of peddling. Smith v. Wilkins, 164 N. C. 135, 80 S. E. 168.

Nature of Tax.—Peddlers and transient dealers are commonly taxed a specific sum because they are likely to escape any other. A peddler's tax is on the occupation, not on the goods, and one who engages in the business, whether as agent or owner, must pay it. State v. Rhyne, 119 N. C. 905, 907, 26 S. E. 126.

Presumption as to Having License.—The case of State v. Crump, 104 N. C. 763, 10 S. E. 468, contains a dictum to the effect that if a peddler is required by proper authorities to exhibit his license and he fails to do so the presumption is that he has none.

Discretion of County Commissioners.—The discretion vested in the county commissioners to exempt from the peddler's tax the "poor and infirm" is necessary to the administration of statutes like this, and will not be interfered with unless arbitrarily exercised. Smith v. Wilkins, 164 N. C. 135, 80 S. E. 168.

Not Applicable to Citizens of Other States.—The provision of a statute similar to this was held unconstitutional on the grounds that it was made to apply to citizens of other states, thus regulating interstate commerce. In re Spain, 47 Fed. 208. See also, In re Flinn, 57 Fed. 496.

Sales by Samples.—This section does not apply to sales by sample of goods not at the time of sale within the state, and ready for immediate delivery, but applies only where goods are actually exposed and offered for sale, and ready

for delivery at once to the purchaser. In re Flinn, 57 Fed. 496.

Applications.—A picture dealer, who contracts to sell pictures, has them sent out to him, delivers to the purchaser, and receives the price agreed upon beforehand, is no peddler. Greensboro v. Williams, 124 N. C. 167, 32 S. E. 492.

A person who travels from house to house on foot selling goods by sample, and afterwards delivers them on foot, is not a peddler. State v. Frank, 130 N. C. 724, 41 S. E. 785.

The words "any articles of the farm" are used to embrace all the products of the farm and a farmer who butchers cattle raised on his farm and sells the beef is not a peddler. State v. Smith, 173 N. C. 772, 92 S. E. 325. See 14 N. C. Enc. Dig. 287.

This section does not apply to a person selling watermelons in wholesale lots in the city of Salisbury, to be shipped from a nearby town, and only delivered to those from whom he had taken orders. State v. Ninestein, 132 N. C. 1039, 43 S. E. 936.

One who sells goods by sample, which goods are shipped to purchaser in care of one who sold them and delivered by him, is a peddler. State v. Franks, 127 N. C. 510, 37 S. E. 70.

Paragraphs (e) and (g) relate exclusively to privilege taxes upon peddlers. State v. Bridgers, 211 N. C. 235, 238, 189 S. E. 869.

Subsection (g) Does Not Prohibit Levying of City Tax.—A tax levied under the general authority given a city in its charter, authorizing the levying of a tax upon trades and businesses carried on within its corporate limits is not such a tax as is prohibited by subsection (g) of this section. The prohibition relates to license taxes levied "under this section." The tax complained of was not levied "under this section." State v. Bridgers, 211 N. C. 235, 239, 189 S. E. 869.

Cited in Kohn v. Elizabeth City, 199 N. C. 529, 531, 155 S. E. 152.

§ 105-54. Contractors and construction companies.—(a) Every person, firm, or corporation who, for a fixed price, commission, fee, or wage, offers or bids to construct within the state of North Carolina any building, highway, street, sidewalk, bridge, culvert, sewer or water system, drainage or dredging system, electric or steam railway, reservoir or dam, hydraulic or power plant, transmission line, tower, dock, wharf, excavation, grading or other improvement or structure, or any part thereof, the cost of which exceeds the sum of ten thousand dollars ($10,000.00), shall apply for and obtain from the commissioner of revenue an annual state-wide license, and shall pay for such license a tax of one hundred dollars ($100.00) at the time of or prior to offering or submitting any bid on any of the above enumerated projects.

(b) In addition to the tax levied in subsection (a) of this section, every person, firm, or corporation who, for a fixed price, commission, fee, or wage, undertakes or executes a contract for the construction, or who superintends the construction of any of the above enumerated projects, shall, before or at the time of entering into such projects and/or such contract, apply for and procure from the commissioner of revenue a state-wide license, and shall pay for such license the following tax:

When the total contract price or estimated cost of such project is over:

$ 5,000	and not more than $ 10,000	...$ 25.00
10,000	and not more than $ 50,000	... 50.00
50,000	and not more than $ 100,000	... 125.00
100,000	and not more than $ 250,000	... 175.00
250,000	and not more than $ 500,000	... 300.00
500,000	and not more than $ 750,000	... 400.00
750,000	and not more than $1,000,000	... 500.00
1,000,000	.....	625.00

(c) The application for license under subsection (b) of this section shall be made to the commissioner of revenue and shall be accompanied by the affidavit of the applicant, stating the contract price, if known, and if the contract price is not known, his estimate of the entire cost of the said improvement or structure, and if the applicant proposes to construct only a part of said improvement or structures, the contract price, if known, or his estimated cost of the part of the project he proposes to superintend or construct.

In the event the construction of any of the above mentioned improvements or structures shall be divided and let under two or more contracts to the same person, firm, or corporation, the several contracts shall be considered as one contract for the purpose of this article, and the commissioner of revenue shall collect from such person, firm, or corporation the license tax herein imposed as if only one contract had been entered into for the entire improvement or structure.

(d) In the event any person, firm, or corporation has procured a license in one of the lower classes provided for in subsection (b) of this section, and constructs or undertakes to construct or to superintend any of the above mentioned improvements or structures or parts thereof, the completed cost of which is greater than that covered by the license already secured, application shall be made to the commissioner of revenue, accompanied by the license certificate held by the applicant, which shall be surrendered to the commissioner of revenue, and upon paying the difference between the cost of the license surrendered and the price of the license applied for, the commissioner of revenue shall issue to the applicant the annual state-wide license applied for, showing thereon that it was issued on the surrender of the former license and payment of the additional tax.

(e) No employee or sub-contractor of any person, firm, or corporation who or which has paid the tax herein provided for, shall be required to pay the license tax provided for in this section while so employed by such person, firm, or corporation.

(f) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy an annual contractor's license tax not in excess of ten dollars ($10.00) when the license provided for under this section has been paid: Provided, that this subsection shall not be construed to prevent the collection of building, electrical, and plumbing inspection charges by municipalities to cover the actual cost of said inspection.

(g) The tax under this section shall not apply to the business taxed in § 105-91. (1939, c. 158, s. 122.)

§ 105-55. Installing elevators and automatic sprinkler systems.—Every person, firm, or corporation engaged in the business of selling or installing elevators or automatic sprinkler systems shall apply for and procure from the commissioner of revenue an annual state-wide license for the transaction of such business in this state, and shall pay for such license a tax of one hundred dollars ($100.00).

(a) Counties, cities, and towns in which there

is located a principal office or a branch office may levy a tax on the business taxed under this section not in excess of that levied by the state.

Provided, however, no county, city, or town may collect tax under this section from any person, firm, or corporation who or which does not maintain an established place of business in said county, city or town.

(b) The businesses taxed and licensed hereunder shall not be liable for any tax or license levied under § 105-91. (1939, c. 158, s. 122½.)

§ 105-56. Repairing and servicing elevators and automatic sprinkler systems. — Every person, firm, or corporation engaged in the business of repairing or servicing elevators or automatic sprinkler systems, shall apply for and procure from the commissioner of revenue, an annual state-wide license for the transaction of such business in this state and shall pay for such license the following tax based on population:

Municipalities of less than two thousand population	$ 5.00
Municipalities of more than two thousand and less than five thousand population	7.50
Municipalities of more than five thousand and less than ten thousand population	10.00
Municipalities of more than ten thousand and less than twenty thousand population	12.50
Municipalities of more than twenty thousand and less than thirty thousand population	15.00
Municipalities of more than thirty thousand and less than forty thousand population	17.50
Municipalities of more than forty thousand and less than fifty thousand population	20.00
Municipalities of more than fifty thousand population	25.00

(a) Counties, cities and towns in which there is located a principal office or a branch office may levy a tax on the business taxed under this section not in excess of that levied by the state.

Provided, however, no county, city or town may collect tax under this section from any person, firm, or corporation who, or which, does not maintain an established place of business in said county, city or town.

(b) The tax under this section shall not apply to the business taxed in §§ 105-55 and 105-91. (1939, c. 158, s. 122¾.)

§ 105-57. Mercantile agencies.—(a) Every person, firm or corporation engaged in the business of reporting the financial standing of persons, firms or corporations for compensation shall be deemed a mercantile agency, and shall apply for and procure from the commissioner of revenue a statewide license for the privilege of transacting such business within this state, and shall pay for such license a tax of five hundred dollars ($500.00), the said tax to be paid by the principal office in the state, and if no such principal office in this state, then by the agent of such mercantile agency operating in this state: Provided, however, that mercantile agencies not publishing a statewide credit or financial rating book shall pay only an annual tax of one hundred dollars ($100.00).

(b) Any person representing any mercantile agency which has failed to pay the license tax provided for in this section shall be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court.

(c) Counties, cities, or towns shall not levy any license tax on mercantile agencies, as herein defined. (1939, c. 158, s. 123; 1941, c. 50, s. 3.)

Editor's Note.—The 1941 amendment substituted the above for the former section.

§ 105-58. Gypsies and fortune tellers. — (a) Every company of gypsies or strolling bands of persons, living in wagons, tents, or otherwise, who or any of whom trade horses, mules, or other things of value, or receive reward for telling or pretending to tell fortunes, shall apply for in advance and procure from the commissioner of revenue a state license for the privilege of transacting such things, and shall pay for such license a tax of five hundred dollars ($500.00) in each county in which they offer to trade horses, mules, or other things of value, or to practice the telling of fortunes or any of their crafts. The amount of such license tax shall be recoverable out of any property belonging to any member of such company.

(b) Any person or persons, other than those mentioned in subsection (a) of this section, receiving rewards for pretending to tell and/or telling fortunes, practicing the art of palmistry, clairvoyance and other crafts of a similar kind, shall apply for in advance and procure from the commissioner of revenue a state license for the privilege of practicing such arts or crafts, and shall pay for such license a tax of two hundred dollars ($200.00) for each county in which they offer to practice their profession or crafts: Provided, that the tax levied under this section shall not apply to fortune tellers or other artists practicing the art of palmistry, clairvoyance, and other crafts of a similar kind, when appearing under contract in regularly licensed theatres taxed under § 105-37.

(c) Any county, city, or town may levy a license tax on the business taxed under this section not in excess of that levied by the state. (1939, c. 158, s. 124.)

§ 105-59. Lightning rod agents.—(a) No manufacturer or dealer, whether person, firm, or corporation, shall sell, or offer for sale, in this state any brand of lightning rod, and no agent of such manufacturer or dealer shall sell, or offer for sale, or erect any brand of lightning rod until such brand has been submitted to and approved by the insurance commissioner and a license granted for its sale in this state. The fee for such license, including seal, shall be fifty dollars ($50.00).

(b) Upon written notice from any manufacturer or dealer licensed under the preceding subsection of the appointment of a suitable person to act as his agent in this state, and upon filing an application for license upon the prescribed form, the insurance commissioner may, if he is satisfied as to the reputation and moral character of such applicant, issue him a license as general agent of such manufacturer or dealer. Said license shall set forth the brand of lightning rod licensed to be sold, and the fee for such license, including seal, shall be fifty dollars ($50.00).

(c) Such general agent may appoint local agents to represent him in any county in the state

by paying to the insurance commissioner a fee of ten dollars ($10.00) for each such county. Upon filing application for license of such local agent on a prescribed form and paying him a fee of three dollars ($3.00) for each county in which said applicant is to operate, the insurance commissioner may, if he is satisfied that such applicant is of good repute and moral character, and is a suitable person to act in such capacity, issue him a license to sell and erect any brand of lightning rod approved for sale by the general agent in such county applied for.

(d) Each general agent shall submit to the insurance commissioner semi-annually, on January thirty-first and July thirty-first, on prescribed forms, a sworn statement of gross receipts from the sale of lightning rods in this state during the preceding six months, and pay a tax thereon of eighty cents (80c) on each one hundred dollars ($100.00), such returns to be accompanied by an itemized list showing each sale, the county in which sold, and the agent making the sale.

(e) No county, city, or town shall levy a license or privilege tax exceeding twenty dollars ($20.00) on any dealer having a general office or selling from a receiving point.

(f) Licenses issued under this section are not transferable, are valid for only one person, and revocable by the insurance commissioner for good cause after hearing.

(g) Every agent licensed under this section shall, upon demand, exhibit his license to any officer of the law or citizen, and any person, firm, or corporation acting without a license or selling or offering for sale any brand of lighning rod not approved by the insurance commissioner, or otherwise violating any of the provisions of this article, shall be punished by a fine of not more than two hundred dollars ($200.00) and/or six months imprisonment for each offense. (1939, c. 158, s. 125.)

§ 105-60. Hotels.—Every person, firm, or corporation engaged in the operation of any hotel in this state shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business, and shall pay for such license the following tax:

(a) For hotels operating on the American plan for rooms in which rates per person per day are:

Less than two dollars	$ .60
Two dollars and less than three dollars	.90
Three dollars and less than four dollars and fifty cents	1.80
Four dollars and fifty cents and less than six dollars	4.20
Six dollars and less than seven dollars and fifty cents	5.40
Seven dollars and fifty cents and less than fifteen dollars	6.00
Fifteen dollars and over	7.20

(b) For hotels operating on the European plan for rooms in which the rates per person per day are:

Less than two dollars	$1.25
Two dollars and less than three dollars	3.00
Three dollars and less than four dollars and fifty cents	4.50
Four dollars and fifty cents and less than six dollars	5.50
Six dollars and less than seven dollars and fifty cents	6.50
Seven dollars and fifty cents and less than ten dollars	7.50
Ten dollars and over	8.50

(c) The office, dining room, one parlor, kitchen, and two other rooms shall not be counted when calculating the number of rooms in the hotel.

(d) Only one-half of the annual license tax levied in this section shall be levied or collected from resort hotels and boarding houses which are open for only six months or less in the year: Provided, that the minimum tax under any schedule in the section shall be five dollars ($5.00).

(e) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the state. (1939, c. 158, s. 126; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment directed that the words "over fifteen dollars" in the last line of subsection (a) be struck out and the words "fifteen dollars and over" be inserted in lieu thereof. It also directed a similar change as to the last line of subsection (b). These changes had already been made upon the codification of this section.

Tax May Be Exacted of Lessee.—Where a corporation chartered for the purpose of owning and conducting a hotel has paid the franchise tax, the lessee of such corporation is not relieved thereby from paying the tax imposed upon the business of conducting a hotel. Cobb v. Commissioners, 122 N. C. 307, 30 S. E. 338.

§ 105-61. Tourist homes and tourist camps.—(a) Every person, firm, or corporation engaged in the business of operating a tourist home, tourist camp, or similar place advertising in any manner for transient patronage, or soliciting such business, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business, and shall pay the following tax:

Homes or camps having five rooms or less, ten dollars ($10.00); houses or camps having more than five rooms, two dollars ($2.00) per room. For the purpose of this section, the sitting-room, dining room, kitchen, and rooms occupied by the owner or lessee of the premises, or members of his family, for his or their personal or private use, shall not be counted in determining the number of rooms for the basis of the tax. The tax herein levied shall be in addition to any tax levied in § 105-62 for the sale of prepared food.

(b) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the state. (1939, c. 158, s. 126½.)

Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.1.

§ 105-62. Restaurants.—Every person, firm, or corporation engaged in the business of operating a restaurant, cafe, cafeteria, hotel, with dining service on the European plan, drug store, or other place where prepared food is sold, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business. The tax for such license shall be based on the number of persons provided

with chairs, stools, or benches, and shall be one dollar ($1.00) per person, with a minimum tax of five dollars ($5.00): Provided, that the tax levied in this paragraph shall not apply to industrial plants maintaining a non-profit restaurant, cafe or cafeteria solely for the convenience of its employees.

(a) All other stands or places where prepared food is sold as a business, and drug stores, service stations, and all other stands or places where prepared sandwiches only are served, shall pay a tax of five dollars ($5.00).

(b) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the state. (1939, c. 158, s. 127.)

§ 105-63. Cotton compresses. — Every person, firm, or corporation engaged in the business of compressing cotton shall pay an annual license tax of three hundred dollars ($300.00) on each and every compress.

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the state. (1939, c. 158, s. 128.)

§ 105-64. Billiard and pool tables.—Every person, firm or corporation who shall rent, maintain, own a building wherein there is a table or tables at which billiards or pool is played, whether operated by slot or otherwise, shall apply for and procure from the commissioner of revenue a state license for the privilege of operating such billiard or pool tables, and shall pay for such license a tax for each table as follows:

Tables measuring not more than 2 feet wide and 4 feet long	$ 5.00
Tables measuring not more than 2½ feet wide and 5 feet long	10.00
Tables measuring not more than 3 feet wide and 6 feet long	15.00
Tables measuring not more than 3½ feet wide and 8 feet long	20.00
Tables measuring more than 3½ feet wide and 8 feet long	25.00

Provided, each such billiard or pool table so licensed shall receive a number and receipt from the commissioner of revenue when the license is issued, and it shall be the duty of each operator to attach said numbered license to said table or machine and display the same at all times. Failure to have such license and receipt on display attached to said machine or table shall be prima facie evidence that the tax has not been paid hereunder.

(a) This section shall not apply to fraternal organizations having a national charter, American Legion Posts, Young Men's Christian Associations, and Young Women's Christian Associations.

(b) If the commissioner of revenue shall have issued any such state license to any person, firm, or corporation to operate any billiard or pool tables in any city or town, the board of aldermen or other governing body of such city or town shall have the right at any time, and notwithstanding the issuance of such state license, to prohibit any billiard or pool tables within its limits, unless otherwise provided in its charter; and in the event any city or town shall exercise the right to prohibit the keeping and operation of such billiard or pool tables, the commissioner of revenue shall refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid. And, where the commissioner of revenue has issued any such license and the said billiard or pool tables is or are to be, or are operated outside of the corporate limits of any incorporated city or town, the board of county commissioners may by resolution request that such license be revoked, and upon receipt of such resolution the commissioner of revenue shall forthwith revoke said license and refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid.

(c) Counties may levy a license tax on the business taxed under this section upon such billiard or pool tables as are located outside of incorporated cities or towns, and cities and towns may levy a license tax upon such as are within the city limits, but in neither case shall the license tax so levied be in excess of the tax levied by the state. (1939, c. 158, s. 129; 1943, c. 400, s. 2.)

Editor's Note.—Prior to the 1943 amendment this section also applied to bowling alleys.

Constitutionality.—A license tax imposed upon a business is not void as contravening the State Constitution upon the theory that the statute gives an invalid arbitrary power to the county commissioners with reference to the issuance of the license among applicants therefor, as to locality or otherwise; and the tax so imposed will nevertheless remain, these different portions of the law not being so interdependent that one must fall with the other. Brunswick-Balke-Collender Co. v. Mecklenburg, 181 N. C. 386, 107 S. E. 317.

Same—License without City Limits.—Billiard and pool tables kept open for indiscriminate use by the public are liable to become a source of disorder and demoralization, coming within the police powers, and requiring, in the nature of the business, that power be lodged in some governmental board to withhold or revoke a license imposed by statute for the conduct of the business, and such power lodged in the board of county commissioners, differentiating as to licenses to be issued within and without the city limits, the latter not subject to the same degree of police protection, and requiring a greater license fee, and certain publicity before the license may be issued, etc., is not an unconstitutional discrimination, or the exercise of an invalid arbitrary power, the decision of the commissioners being reviewable in the courts upon the question of whether this power has been arbitrarily and unjustly exercised. Brunswick-Balke-Collender Co. v. Mecklenburg, 181 N. C. 386, 107 S. E. 317.

§ 105-64.1. Bowling alleys.—Every person, firm, or corporation who shall rent, maintain, or own a building wherein there is a bowling alley or alleys of like kind shall apply for and procure from the commissioner of revenue a state license for the privilege of operating such bowling alley or alleys, and shall pay for such license a tax of ten dollars ($10.00) for each alley kept or operated.

(a) This section shall not apply to fraternal organizations having a national charter, American Legion Posts, Young Men's Christian Associations, and Young Women's Christian Associations.

(b) If the commissioner of revenue shall have issued any such state license to any person, firm, or corporation to operate any bowling alley or alleys, in any city or town, the board of aldermen or other governing body of such city or town shall have the right at any time, and notwithstanding the issuance of such state license, to prohibit any

bowling alley or alleys of like kind within its limits, unless otherwise provided in its charter; and in the event any city or town shall exercise the right to prohibit the keeping and operation of such bowling alley or alleys of like kind, the commissioner of revenue shall refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid. And, where the commissioner of revenue has issued any such license and the said bowling alley or alleys is or are to be, or are operated outside of the corporate limits of any incorporated city or town, the board of county commissioners may by resolution request that such license be revoked, and upon receipt of such resolution the commissioner of revenue shall forthwith revoke said license and refund the proportion of the tax thereof during the time which the right is not allowed to be exercised bears to the time for which the tax is paid.

(c) Counties may levy a license tax on such bowling alley or alleys of like kind as are located outside of incorporated cities or towns, and cities and towns may levy a license tax upon such as are within the city limits, but in neither case shall the license tax so levied be in excess of the tax levied by the state. (1943, c. 400, s. 2.)

§ 105-65. Merchandising, music, and weighing machines.—(1) Every person, firm, or corporation engaged in the business of operating, maintaining, or placing on location anywhere within the state of North Carolina, any machine or machines, in which is kept any article or merchandise to be purchased, any machine which plays records, or produces music, or any weighing machine, shall apply for and procure from the commissioner of revenue a statewide license to be known as an annual operator's license, and shall pay for such license the following tax:

Operators of Music Machines	$100.00
Operators of Cigarette Vendors	100.00
Operators of Slot Drink Vendors	100.00
Operators of Food Vending or Merchandising Machines	25.00
Operators of Weighing Machines	25.00

(2) In addition to the above annual operator's license, every person, firm, or corporation operating any of the above machines, shall apply for and obtain from the commissioner of revenue, what shall be termed a statewide license for each machine operated and shall pay therefor the following annual tax:

Music Machines	$10.00
Cigarette Vendors	5.00
Slot Drink Vendors	15.00
Weighing Machines	2.50
1c Food Vending or Merchandising Machines	.50
5c Food Vending or Merchandising Machines	1.00

Provided, that the above tax on food vending or merchandising machines shall not apply to machines that vend solely peanuts, neither shall the tax apply to machines that vend candy containing fifty per cent (50%) or more peanuts, nor to penny self-service machines contributing twenty per cent (20%) of their gross revenue to work for the visually handicapped.

(3) The applicant for license under this section shall, in making application for license, specify the serial number of the machine or machines proposed to be operated, together with a description of the merchandise or service offered for sale thereby, and the amount of deposit required by or in connection with the operation of such machine or machines. The license shall carry the serial number to correspond with that on the application, and no such license shall under any condition be transferable to any other machines. It shall be the duty of the person in whose place of business the machine is operated or located to see that the proper state license is attached in a conspicuous place on the machine before its operation shall commence: Provided, that when application is made under this section for license to operate a machine vending bottled drinks or cigarettes, the applicant for such license shall specify the serial number of the license issued under § 105-79 or § 105-84, as the case may be, and this serial number shall be placed upon the license issued for such machine.

(4) If any person, firm, or corporation shall fail, neglect or refuse to comply with the terms and provisions of this section or shall fail to attach the proper state license to any machine as herein provided, the commissioner of revenue, or his agents, or deputies, shall forthwith seize and remove such machine, and shall hold the same until the provisions of this section have been complied with. In addition to the above provision the applicant shall be further liable for the additional tax imposed under § 105-112.

(5) Sales of merchandise herein referred to shall be subject to the provisions of Schedule "E", §§ 105-164 to 105-187, and the tax therein levied shall be paid by the operator of such machines.

(6) Counties, cities and towns may levy and collect a license tax not in excess of fifty per cent (50%) of the total amount collected by the state from music machines, weighing machines, and 1c and 5c food vending machines: Provided, that counties, cities and towns shall not levy and collect an annual operator's occupational license levied for the operation of the above named machines, neither shall any county, city or town levy and collect any tax whatsoever from operators of soft drink vendors: Provided, further, that counties, cities and towns shall not levy and collect any per machine license tax from operators of cigarette vendors. Counties, cities and towns may levy and collect an annual operator's occupational license on cigarette vendors not in excess of ten dollars ($10.00).

Counties, cities and towns levying a tax under the provisions of this section shall have power through their tax collecting officers, upon nonpayment of the tax levied by them, or of any interest or penalty thereon, or upon failure to attach the evidence of license issued by them to any such machines, to seize, remove and hold such machines until all such defaults have been remedied. (1939, c. 158, s. 130; 1941, c. 50, s. 3; 1943, c. 105; 1943, c. 400, s. 2.)

Editor's Note.—The 1941 amendment substituted the above for the former section.

The cases below were decided under the statute as it read prior to the 1941 amendment.

The first 1943 amendment added at the end of subsection (2) the provision as to penny self-service machines. The second 1943 amendment added the proviso at the end of subsection (3).

All of the subsections of this section must be construed in pari materia, and upon such construction the section discloses the legislative intent to impose a license tax of $30.00 on slot machines vending soft drinks as an exception to the general classification of mechanical vending machines. Snyder v. Maxwell, 217 N. C. 617, 9 S. E. (2d) 19.

Tax on Vendors of Soft Drinks Is Based on Reasonable Classification.—The provision of this section, imposing a license tax of $30.00 on the privilege of operating a vending machine selling soft drinks at the retail price of five cents while imposing a smaller tax on vending machines selling other kinds of merchandise at the same price, prescribes classifications based upon real and reasonable distinctions, since it is a matter of common knowledge that the sale of soft drinks has obtained a unique commercial place, affording unusual opportunities for gainful returns, thus justifying the imposition of a higher license tax upon the privilege of selling this kind of merchandise by vending machine. Snyder v. Maxwell, 217 N. C. 617, 9 S. E. (2d) 19.

Criminal Provisions Not Repealed.—The provisions of the Flanagan Act, chapter 196 Public Laws of 1937, § 14-304 et seq., proscribing the possession and distribution of a coin slot machine in the operation of which the user may secure additional chances or rights to use the machine, is not repealed by this section, since subsection 5 expressly negatives the intention to license or legalize any gaming slot machine or device, and since subsection 1 excludes from its licensing provisions slot machines which "automatically vend" any prize, coupon or reward which may be used in the further operation of such machine, the word "vend" being equivalent to the word "give" and the intent being to exclude from the licensing provisions a machine which provides a player with additional plays or games as a premium, prize, or reward irrespective of whether physical tokens of such premium, prize or reward are, or are not, delivered to the player. State v. Abbott, 218 N. C. 470, 11 S. E. (2d) 539, followed in 218 N. C. 480, 481, 482, 11 S. E. (2d) 545, 546, 547.

Injunction.—Plaintiff, the owner of certain slot machines which had been seized by officers of the law, instituted action to restrain the officers from interfering with the operation of the said machines, alleging that plaintiff had paid state and county licenses thereon and that the machines were lawful under the provisions of this section and that if defendants were not restrained plaintiff would be forced out of his lawful business. The court dissolved the temporary restraining order theretofore issued on the ground that it was without jurisdiction to interfere with the enforcement of the criminal laws of the state in any event, and refused to hear evidence or to find facts as to whether the machines in question were lawful. It was error for the court to dissolve the temporary order without finding whether the machines were lawful, since in the absence of such finding the supreme court is unable to determine whether the case falls within the general rule that courts of equity will not interfere with the administration of the criminal laws of the state or whether it comes within the exception to that rule that the enforcement of a criminal law may be enjoined when necessary to protect constitutional rights and prevent irremedial injury. McCormick v. Proctor, 217 N. C. 23, 6 S. E. (2d) 870.

Cited in State v. Finch, 218 N. C. 511, 11 S. E. (2d) 547.

§ 105-66. Bagatelle tables, merry-go-rounds, etc.—Every person, firm, or corporation that is engaged in the operation of a bagatelle table, merry-go-round or other riding device, hobby horse, switchback railway, shooting gallery, swimming pool, skating rink, other amusements of a like kind, or a place for other games or play with or without name (unless used solely and exclusively for private amusement or exercise), at a permanent location, shall apply for and procure from the commissioner of revenue a state license for the privilege of operating such objects of amusement, and shall pay for each subject enumerated the following tax:

In cities or towns of less than 10,000 population	$10.00
In cities or towns of 10,000 population and over	25.00

(a) The tax under this section shall not apply to machines and other devices licensed under §§ 105-64 and 105-65.

(b) Counties, cities or towns may levy a license tax on the business taxed under this section not in excess of that levied by the state. (1939, c. 158, s. 131.)

§ 105-67. Security dealers.—(a) Every person, firm, or corporation who or which is engaged in the business of dealing in securities as defined in §§ 78-1 to 78-24, or who or which maintains a place for or engaged in the business of buying and/or selling shares of stock in any corporation, bonds, or any other securities on commission or brokerage, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business, and shall pay for such license the following tax:

In cities or towns of less than 5,000 population	$ 25.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 15,000 population	100.00
In cities or towns of 15,000 and less than 25,000 population	200.00
In cities or towns of 25,000 population and above	300.00

(b) Every dealer, as defined herein, who shall maintain in the state of North Carolina more than one office for dealing in securities, as hereinbefore defined, shall apply for and procure from the commissioner of revenue a license for the privilege of transacting such business at each such office, and shall pay for such license the same tax as hereinbefore fixed.

(c) Every foreign dealer, as dealer is hereinbefore defined, who shall maintain an office in this state, or have a salesman in this state, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business, and shall pay for such license the tax hereinbefore imposed.

(d) If such person, firm, or corporation described in sub-section (a) of this section maintains and/or operates a leased or private wire and/or ticker service in connection with such business the annual license tax shall be as follows:

In cities and towns of less than 10,000 population	$ 150.00
In cities and towns of 10,000 and less than 15,000 population	250.00
In cities and towns of 15,000 and less than 20,000 population	350.00
In cities and towns of 20,000 to 25,000 population	450.00
In cities and towns of 25,000 or more..	600.00

Provided, that the tax levied in subsection (d) shall not apply to private wire service not connected with or handling quotations of a stock exchange, grain or cotton exchange.

(e) Counties shall not levy any license tax on the business taxed under this section, but cities

and towns may levy a license tax not in excess of fifty dollars ($50.00). (1939, c. 158, s. 132.)

Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.1.

§ 105-68. Cotton buyers and sellers on commission.—(1) Every person, firm, or corporation who or which engages in the business of buying and/or selling on commission any cotton, grain, provisions, or other commodities, either for actual, spot, or instant delivery, shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business in this state, and shall pay for such license a tax of fifty dollars ($50.00).

(2) Every person, firm, or corporation who or which engages in the business of buying or selling any cotton, grain, provisions, or other commodities, either for actual, spot, instant or future delivery, and also maintains and/or operates a private or leased wire and/or ticker service in connection with such business shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting such business in this state and shall pay for such license the following tax:

In cities and towns of less than 10,000 population	$ 100.00
In cities and towns of 10,000 and less than 15,000 population	200.00
In cities and towns of 15,000 and less than 25,000 population	400.00
In cities and towns of 25,000 population or more	600.00

Persons, firms, and corporations who pay the tax imposed in subsection (d) of § 105-67 shall not be required to pay the tax imposed in this subsection.

(3) Every person, firm, or corporation, domestic or foreign, who or which is engaged in the business of selling any cotton either for actual, spot, instant, or future delivery, in excess of five thousand bales per annum, shall be deemed to be a cotton merchant, shall apply for and obtain from the commissioner of revenue a state-wide license for each office or agency maintained in this state for the sale of cotton and shall pay for each such license the following tax:

In cities and towns of less than 10,000 population	$ 50.00
In cities and towns of 10,000 and less than 15,000 population	100.00
In cities and towns of 15,000 and less than 25,000 population	200.00
In cities and towns of 25,000 population and over	300.00

(4) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of fifty dollars ($50.00). (1939, c. 158, s. 133.)

§ 105-69. Manufacturers, producers, bottlers and distributors of soft drinks.—(a) Every person, firm, or corporation or association manufacturing, producing, bottling and/or distributing in bottles, or other closed containers, soda water, coca-cola, pepsi-cola, chero-cola, ginger ale, grape and other fruit juices or imitations thereof, carbonated or malted beverages and like preparations, or preparations of any nature whatever commonly known as soft drinks, shall apply for and obtain from the commissioner of revenue a state license for the privilege of doing business in this state, and shall pay for such license the following base tax for each place of business:

Low-Pressure Equipment

Where the machine or the equipment unit used in the manufacture of the above beverage is a:

51 spouts or greater capacity, low pressure filler	$1,800.00
41 spouts and less than 51 spouts, low pressure filler	1,500.00
36 spouts and less than 41 spouts, low pressure filler	1,200.00
32 spouts and less than 36 spouts, low pressure filler	1,000.00
24 spouts and less than 32 spouts, low pressure filler	700.00
18 spouts and less than 24 spouts, low pressure filler	500.00
12 spouts and less than 18 spouts, low pressure filler	175.00

High-Pressure Equipment

Where the machine or the equipment unit used in the manufacture of the above mentioned beverages is a Royal (8-head), Shields (6-head), Adriance (6-head), or other high-pressure equipment having manufacturer's rating capacity of over sixty bottles per minute, one thousand two hundred dollars ($1,200.00).

Royal (4-head), Adriance (2-head), Shields (2-head), full equipment having manufacturer's rating capacity of over fifty and less than sixty bottles per minute, one thousand dollars ($1,000.00).

Royal (4-head), Adriance (2-head), Shields (2-head) (full automatic), or other high-pressure equipment having manufacturer's rating capacity of more than forty and less than fifty bottles per minute, seven hundred dollars ($700.00).

Dixie (automatic), Shields (2-head hand feed), Adriance (1-head), Calleson (1-head), Senior (high-pressure), Junior (high-pressure), or Burns or other high-pressure equipment having manufacturer's rating capacity of more than twenty-four bottles and less than forty bottles per minute, one hundred five dollars ($105.00).

Single-head Shields, Modern Bond (power), Baltimore (semi-automatic), and all other machines or equipment having manufacturer's rating capacity of less than twenty-four bottles per minute and all foot-power bottling machines, seventy dollars ($70.00).

Provided, that any bottling machine or equipment unit not herein specifically mentioned shall bear the same tax as a bottling machine or equipment unit of the nearest rated capacity as herein enumerated: Provided further, that where any person, firm, corporation, or association has within his or its bottling plant or place of manufacture more than one bottling machine or equipment unit, then such person, firm, corporation, or association shall pay the tax as herein specified upon every such bottling machine or equipment unit if in actual operation: Provided further, that where no standard high or low-pressure bottling machine is used to fill the containers, a tax of fifty dollars ($50.00) shall apply. The tax levied in this section shall not apply to any

product containing more than fifty per cent (50%) of milk, put up in containers for sale as food rather than soft drink preparations.

(b) Every person, corporation, or association distributing, selling at wholesale, or jobbing bottled beverages as enumerated in subsection (a) of this section shall pay an annual license tax for the privilege of doing business in this state, as follows:

In cities or towns of 30,000 inhabitants or more	$100.00
In cities or towns of 20,000 inhabitants and less than 30,000 inhabitants	90.00
In cities or towns of 10,000 inhabitants and less than 20,000 inhabitants	80.00
In cities or towns of 5,000 inhabitants and less than 10,000 inhabitants	70.00
In cities and towns of 2,500 inhabitants and less than 5,000 inhabitants	60.00
In rural districts and towns of less than 2,500 inhabitants	50.00

The tax levied in this subsection shall not include the right to sell products authorized to be sold under Schedule F, §§ 18-63 to 18-92.

(c) Every distributing warehouse selling or supplying to retail stores cereal or carbonated beverages manufactured or bottled within the state, but outside of the county in which such cereal or carbonated beverages are manufactured or bottled, shall pay one-half of the annual license tax for the privilege of doing business in this state provided for in subsection (b) of this section.

(d) Every distributing warehouse selling or supplying to retail stores cereal or carbonated beverages on which the tax has not been paid under the provisions of subsection (a) of this section shall pay the annual license tax for the privilege of doing business in the state provided in sub-section (b) of this section.

(e) Each truck, automobile, or other vehicle coming into this state from another state, and selling and/or delivering carbonated beverages on which the tax has not been paid under the provisions of subsection (a) of this section, shall pay an annual license tax for the privilege of doing business in this state, in the sum of two hundred dollars ($200.00) per truck, automobile, or vehicle. The license secured from the state under this section shall be posted in the cab of the truck, automobile, or vehicle.

(f) No county shall levy a tax on any business taxed under the provisions of this section, nor shall any city or town in which any person, firm, corporation, or association taxed hereunder has its principal place of business levy and collect more than one-eighth of the state tax levied under this section; nor shall any tax be levied or collected by any county, city, or town on account of the delivery of the products, beverages, or articles enumerated in subsection (a) or (b) or (c) or (d) of this section when a tax has been paid under any of those subsections. (1939, c. 158, s. 134; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment made changes in the schedules of taxes appearing in subsection (a). It also struck out in line twelve of the last paragraph of said subsection the words "whether in actual operation or not," and inserted in lieu thereof the words "if in actual operation."

When Each Distributing Point Liable for Tax.—Under the prior law, it was held that where the bottling of the beverage was done at a company's home office in this State and, at its expense of delivery and storage, sent to warehouses owned by it for distribution in other cities and towns herein, each of these distributing points was liable for the payment of the license tax, and did not come within the intent and meaning of the exempting provision. Bottling Co. v. Doughton, 196 N. C. 791, 147 S. E. 289.

§ 105-70. Packing houses.—Every person, firm, or corporation engaged in or operating a meat packing house in this state, and every wholesale dealer in meat packing-house products who owns, leases, or rents and operates a cold-storage room or warehouse in connection with such wholesale business, shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such business in this state, and shall pay for such license the sum of one hundred dollars ($100.00) for each county in which is located such a packing house or a cold storage room or warehouse. Every person, firm, or corporation maintaining a cold-storage room or warehouse and distributing such products to other stores owned in whole or in part by the distributor for sale at retail shall be deemed a wholesale dealer or distributor in the meaning of this section. Counties shall not levy any tax on business taxed under this section. (1939, c. 158, s. 135.)

Cross Reference.—See N. C. Const., Art. V, § 3, and notes thereto.

§ 105-71. Newspaper contests.—Every person, firm, or corporation that conducts contests and offers a prize, prizes, or other compensation to obtain subscriptions to newspapers, magazines, or other periodicals in this state shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such contests, and shall pay for such license the following tax for each such contest:

Monthly, weekly, semi-weekly newspaper, magazine or other periodical	$ 50.00
Daily newspaper or other daily periodical	200.00

Counties, cities and towns may levy a tax not to exceed one-half of that levied by the state under the provisions of this section. (1939, c. 158, s. 136.)

§ 105-72. Persons, firms, or corporations selling certain oils. — (a) Every person, firm, or corporation engaged in the business of selling illuminating or lubricating oil or greases, or benzine, naphtha, gasoline, or other products of like kind shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such business, and shall pay for the same a tax of two dollars and fifty cents ($2.50).

(b) In addition to the tax herein levied under subsection (a) of this section, such person, firm, or corporation shall pay to the commissioner of revenue, on or before the first day of July of each year, an annual additional license tax equal to five per cent (5%) of the total gross sales for the preceding year or part of the year that the business is so conducted or the privilege so exercised, when the total gross sales of such commodities exceed five thousand dollars ($5,000.00), or pro rata for a part of the year.

(c) The amount of such total gross sales shall be returned to the commissioner of revenue on or before the date specified in subsection (b) of this

section by such person, firm, or corporation, verified by the oath of the person making the return, upon such forms and in such detail as may be required by the commissioner of revenue.

(d) Counties shall not levy any license tax on the business taxed under this section; but cities or towns in which there is located an agency, station, or warehouse for the distribution or sale of such commodities enumerated in this section may levy the following license tax:

In incorporated towns and cities of less than 10,000 population	$ 25.00
In cities and towns of 10,000 population and over	50.00

(e) Any person, firm, or corporation subject to this license tax, and doing business in this state without having paid such license tax, shall be fined one thousand dollars ($1,000.00), and in addition thereto double the tax imposed by this section.

(f) No license or privilege tax, other than the license tax permitted in this section to cities or towns, shall be levied or collected for the privilege of engaging in or doing the business named in this section from any person, firm, or corporation paying the inspection fees and charges provided for under the chapter, agriculture, except license taxes levied in §§ 105-89 and 105-99. (1939, c. 158, s. 137.)

§ 105-73. Building and loan associations. — Every building and loan association, domestic or foreign, operating under a charter granted by authority of the laws of this state or any other state, or the United States, for the purpose of making loans to its members only and of enabling its members to acquire real estate, make improvements thereon, and remove encumbrances therefrom by the payment of money in periodical installments or principal sums, and for the accumulation of a fund to be returned to members who do not obtain advances for such purposes, shall pay to the insurance commissioner, on or before the first day of April of each year, the following annual license tax for the privilege of doing business in the state:

(a) A tax of thirteen cents (13c) on each one hundred dollars ($100.00) of liability on actual book value of shares of stock outstanding on the thirty-first day of December of the preceding year, as shown by reports of such association to be made to the insurance commissioner. The tax levied herein shall be in addition to the license fee required under § 54-25, and expenses and cost of examination required under § 54-29.

(b) Counties, cities, and towns shall not levy any license tax on the business taxed in this section. (1939, c. 158, s. 138.)

§ 105-74. Pressing clubs, dry cleaning plants, and hat blockers.—Every person engaging in any of the businesses as herein defined shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such a business, and pay for each such place of business the following tax in each city or town in which he operates any such place of business, except branch offices when located in the same city or town as the parent establishment shall pay one-half the tax levied on the parent establishment:

In cities or towns of less than 1,000 population	$ 15.00
In cities or towns of 1,000 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	60.00
In cities or towns of 10,000 and less than 20,000 population	90.00
In cities or towns of 20,000 and less than 50,000 population	120.00
In cities or towns of 50,000 population and over	150.00

Provided that pressing clubs, cleaning plants, and/or hat blocking establishments, as same are defined in this section in cities or towns of 5,000 population or over, employing four or less operators or employees, including the owner if he works in said plant, shall be liable for only one-half the amount of license tax specified above.

Every person, firm, or corporation soliciting cleaning work and/or pressing in any city or town where the actual cleaning and/or pressing is done in a cleaning plant or press shop located outside the city or town wherein said cleaning work and/or pressing is solicited shall procure from the commissioner of revenue a state license for the privilege of soliciting in said city or town, and pay for the same an amount equal to the tax which would be paid by said cleaning plant or press shop as if the said cleaning plant or press shop was actually located and being operated in the city or town in which the soliciting is done. This shall not apply to soliciting in cities or towns where there is no cleaning plant, press shop or established agency with fixed place of business, provided that the solicitor shall have paid a state and municipal license tax in this state.

Cities and towns of under 10,000 population may levy a license tax not in excess of $25.00; cities and towns of 10,000 population and over may levy a license tax not in excess of $50.00. Counties shall not levy a license tax on the business taxed under this section.

Definitions: For the purpose of this section, the following definitions shall apply:

"Dry cleaning, and/or hat blocking, and/or pressing establishments" shall mean any place of business, establishment or vehicle wherein the services of dry cleaning, wet cleaning as a process incidental to dry cleaning, spotting and/or pressing, finishing and/or reblocking hats, garments, or wearing apparel of any kind is performed.

"Retail outlet" shall mean any place of business or vehicle where garments are accepted to be dry cleaned and/or pressed, but where the actual dry cleaning and/or pressing is not performed on the premises or vehicles, and where the dry cleaning and/or pressing is performed by a dry cleaning plant or press shop operating under a trade name other than that of the retail outlet.

"Branch office" shall mean an additional establishment where garments are accepted to be dry cleaned and/or pressed, when same is owned and operated by a dry cleaning plant, press shop, or retail outlet and under the same trade name, but where the actual dry cleaning and/or pressing is not performed on the premises.

"Soliciting" as used herein shall mean the acceptance of any article or garment to be dry cleaned and/or pressed.

"Person" as used herein shall mean any person, firm, corporation, partnership, or association.

The term "employee" as used herein shall mean any person working either partially or full time for a cleaning plant, press shop, hat blocking establishment, retail outlet or branch office and shall include all drivers, solicitors and route salesmen irrespective of the method of payment they receive for their services, and shall also include independent contractors soliciting under the same style and firm name as the processing plant. It shall also include any member of the firm, association, corporation or partnership who actually performs any work of any nature in the business.

This section shall not apply to any bona fide student of any college or university in this state operating such pressing or dry cleaning business at such college or university during the school term of such college or university. (1939, c. 158, s. 139; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment changed the schedule of license taxes and inserted the proviso immediately following. It also changed the first sentence of the fifth paragraph and struck out the former last two paragraphs of the section.

§ 105-75. Barber shops.—Every person, firm, or corporation engaged in the business of conducting a barber shop, beauty shop or parlor, or other shop of like kind shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such business, and shall pay for such license the following tax:

For each barber chair maintained in a barber shop $2.50

For each barber, manicurist, cosmetologist, beautician, or operator in beauty parlor, or other shop of like kind in any office, hotel, or other place 2.50

Counties shall not levy a license tax under this section, but cities and towns may levy a license tax not in excess of that levied by the state. (1939, c. 158, s. 140; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment lowered the tax for each barber, manicurist, etc., from $5.00 to $2.50.

§ 105-76. Shoeshine parlors. — Every person, firm, or corporation who or which maintains or operates a place of business wherein is operated a shoeshine parlor, stand, or chair or other device shall apply for and procure from the commissioner of revenue a state license for the privilege of conducting such business and shall pay for such license a tax of one dollar ($1.00) per chair or stool.

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of that levied by the state. (1939, c. 158, s. 141.)

§ 105-77. Tobacco warehouses. — Every person, firm, or corporation engaged in the business of operating a warehouse for the sale of leaf tobacco upon commission shall, on or before the first day of June of each year, apply for and obtain from the commissioner of revenue a state license for the privilege of operating such warehouse for the next ensuing year, and shall pay for such license the following tax:

For a warehouse in which was sold during the preceding year ending the first day of June:

Less than 1,000,000 pounds	$ 50.00
1,000,000 pounds and less than 2,000,000	75.00
2,000,000 pounds and less than 3,000,000	175.00
3,000,000 pounds and less than 4,000,000	250.00
4,000,000 pounds and less than 5,000,000	400.00
5,000,000 pounds and less than 6,000,000	500.00

For all in excess of 6,000,000 pounds, $500.00 and six cents per thousand pounds.

(a) If a new warehouse not in operation the previous year, the person, firm, or corporation operating such warehouse may procure a license by payment of the minimum tax provided in the foregoing schedule, and at the close of the season for sales of tobacco in such warehouse shall furnish the commissioner of revenue a statement of the number of pounds of tobacco sold in such warehouse for the current year, and shall pay an additional license tax for the current year based on such total volume of sales in accordance with the schedule in this section.

If an old warehouse with new or changed ownership or management, the tax shall be paid according to the schedule in this section, based on the sale during the preceding year, just as if the old ownership or management had continued its operation.

(b) The commissioner of agriculture shall certify to the commissioner of revenue, on or before the first day of June of each year, the name of each person, firm, or corporation operating a tobacco warehouse in each county in the state, together with the number of pounds of leaf tobacco sold by such person, firm, or corporation in each warehouse for the preceding year, ending on the first day of June of the current year.

(c) The commissioner of agriculture shall report to the solicitor of any judicial district in which a tobacco warehouse is located which the owner or operator thereof shall have failed to make a report of the leaf tobacco sold in such warehouse during the preceding year, ending the first day of June of the current year, and such solicitor shall prosecute any such person, firm or corporation under the provisions of this section.

(d) The tax levied in this section shall be based on official reports of each tobacco warehouse to the state department of agriculture showing amount of sales for each warehouse for the previous year.

(e) The commissioner of revenue or his deputies shall have the right, and are hereby authorized, to examine the books and records of any person, firm, or corporation operating such warehouse, for the purpose of verifying the reports made and of ascertaining the number of pounds of leaf tobacco sold during the preceding year, or other years, in such warehouse.

(f) Any person, firm, or corporation who or which violates any of the provisions of this section shall, in addition to all other penalties provided for in this article, be guilty of a misdemeanor, and upon conviction shall be fined not less than five hundred dollars ($500.00) and/or imprisoned, in the discretion of the court.

(g) No county shall levy any license tax on the business taxed under this section. Cities and towns may levy a tax not in excess of fifty dollars ($50.00) for each warehouse. (1939, c. 158, s. 142.)

Cited in State v. Morrison, 210 N. C. 117, 185 S. E. 674.

§ 105-78. News dealers on trains.—Every person, firm, or corporation engaged in the business of selling books, magazines, papers, fruits, confections, or other articles of merchandise on railroad trains or other common carriers in this state shall apply for and obtain a state license from the commissioner of revenue for the privilege of conducting such business, and shall pay for such license the following tax:

Where such person, firm, or corporation operates on railroads or other common carriers on:

Less than 300 miles	$ 250.00
Three hundred and less than 500 miles	500.00
Five hundred miles or more	$1,000.00

This section shall not apply to any railroad company engaged in selling such articles to passengers on its train and paying the tax upon the retail sales of merchandise levied in Schedule E, §§ 105-164 to 105-187.

Counties, cities, and towns shall not levy any license tax on the business taxed under this section. (1939, c. 158, s. 143.)

§ 105-79. Soda fountains, soft drink stands.—Every person, firm, or corporation engaged in the business of operating a soda fountain or soft drink stand shall apply for and obtain from the commissioner of revenue a state license for the privilege of conducting such business, and shall pay for such license the following tax:

On soda fountains.

On each carbonated draft arm of each soda fountain, a tax of ten dollars ($10.00).

On each stand at which soft drinks are sold, the same not being strictly a soda fountain, and on each place of business where bottled carbonated drinks are sold at retail, the license tax shall be five dollars ($5.00).

In addition to the license tax levied in this section, the tax shall be paid upon the gross sales at the rate of tax levied in Schedule E, §§ 105-164 to 105-187, upon the retail sales of merchandise, such tax to be paid at the time and in the manner required for the sales of other merchandise.

Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half of the base tax levied by the state. (1939, c. 158, s. 144.)

Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.1.

§ 105-80. Dealers in pistols, etc.—Every person, firm, or corporation who is engaged in the business of keeping in stock, selling, and/or offering for sale any of the articles or commodities enumerated in this section, shall apply for and obtain a state license from the commissioner of revenue for the privilege of conducting such business, and shall pay for such license the following tax:

For pistols	$ 50.00
For bowie knives, dirks, daggers, slingshots, leaded canes, iron or metallic knuckles, or articles of like kind	200.00
For blank cartridge pistols	200.00

(a) If such person, firm, or corporation deals only in metallic cartridges, the tax shall be five dollars ($5.00).

(b) Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of that levied by the state. (1939, c. 158, s. 145; 1941, c. 50, s. 3.)

Editor's Note.—The 1941 amendment reduced the tax in subsection (a) from ten to five dollars.

§ 105-81. Dealers in cap pistols, fireworks, etc.—Every person, firm, or corporation engaged in the business of selling or offering for sale fire crackers, fireworks, or other articles of like kind, cap pistols, or pistols so constructed that they can by treatment to release the hammer be used to fire caps, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for the same a tax of one hundred dollars ($100.00).

Counties, cities, or towns may levy a license tax on the business taxed under this section not in excess of twice that levied by the state. (1939, c. 158, s. 146.)

§ 105-82. Pianos, organs, victrolas, records, radios, accessories.—Every person, firm, or corporation engaged in the business of selling, offering or ordering for sale any of the articles hereinafter enumerated in this section shall apply for and obtain from the commissioner of revenue a state license for the privilege of conducting such business, and shall pay for each license the following tax:

For pianos and/or organs, graphophones, victrolas, or other instruments using discs or cylinder records, and/or the sale of records for either or all of these instruments, radios or radio accessories, an annual license tax of ten dollars ($10.00).

(a) Any person, firm, or corporation applying for and obtaining a license under this section may employ traveling representatives or agents, but such traveling agents or representatives shall obtain from the commissioner of revenue a duplicate license of such person, firm, or corporation who or which he represents, and pay for the same a tax of ten dollars ($10.00).

Each duplicate copy so issued is to contain the name of the agent to whom it is issued, the instrument to be sold, and the same shall not be transferable.

Representatives or agents holding such duplicate copy of such license are licensed thereby to sell or offer for sale only the instrument and/or articles authorized to be sold by the person, firm, or corporation holding the original license, and such license shall be good and valid in any county in the state.

(b) Every person, firm, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor and shall pay a penalty of two hundred and fifty dollars ($250.00), and in addition thereto double the state license tax levied in this section for the then current year.

(c) Counties shall not levy any license tax on the business taxed under this section, except that the county in which the agent or representative holding a duplicate copy of the license aforesaid does business may impose a license tax not in excess of five dollars ($5.00). Cities or towns may levy a license tax on the business taxed under this section not in excess of one-half of that levied by the state. (1939, c. 158, s. 147; 1943, c. 400, s. 2.)

Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.1.

Editor's Note.—The 1943 amendment directed that the

words "does business" be inserted in line five of subsection (c). This insertion had already been made upon the codification of this section.

Sales by Sample.—An act requiring every one, before engaging in selling pianos or organs in the state by sample, list or otherwise, to pay a certain sum for a license, is, in the case of one selling by sample and list, as agent for a manufacturer and dealer located in another state, void, as a regulation of interstate commerce. Ex parte Hough, 69 Fed. 330.

Employment of Several Agents.—If the licensee employs more than one salesman he must take out and furnish each salesman with an additional license. This because the license authorizes only the person having it in possession to sell under it. State v. Morrison, 126 N. C. 1123, 36 S. E. 329.

§ 105-83. Installment paper dealers.—(a) Every person, firm, or corporation, foreign or domestic, engaged in the business of dealing in, buying, and/or discounting installment paper, notes, bonds, contracts, evidences of debt and/or other securities, where a lien is reserved or taken upon personal property located in this state to secure the payment of such obligations, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business or for the purchasing of such obligations in this state, and shall pay for such license an annual tax of one hundred dollars ($100.00).

(b) In addition to the tax levied in subsection (a) of this section, such person, firm, or corporation shall submit to the revenue commissioner quarterly on the first day of January, April, July, and October of each year, upon forms prescribed by the said commissioner, a full, accurate, and complete statement, verified by the officer, agent, or person making such statement, of the total face value of the installment paper, notes, bonds, contracts, evidences of debt, and/or other securities described in this section dealt in, bought and/or discounted within the preceding three months and, at the same time, shall pay a tax of one-third of one per cent of the face value of such obligations dealt in, bought and/or discounted for such period.

(c) If any person, firm, or corporation, foreign or domestic, shall deal in, buy and/or discount any such paper, notes, bonds, contracts, evidences of debt and/or other securities described in this section without applying for and obtaining a license for the privilege of engaging in such business or dealing in such obligations, or shall fail, refuse, or neglect to pay the taxes levied in this section, such obligation shall not be recoverable or the collection thereof enforceable at law or by suit in equity in any of the courts of this state until and when the license taxes prescribed in this section have been paid, together with any and all penalties prescribed in this article for the non-payment of taxes.

(d) This section shall not apply to corporations organized under the state or national banking laws.

(e) Counties, cities and towns shall not levy any license tax on the business taxed under this section. (1939, c. 158, s. 148.)

§ 105-84. Tobacco and cigarette retailers and jobbers.—Every person, firm, or corporation engaged in the business of retailing and/or jobbing cigarettes, cigars, chewing tobacco, snuff, or any other tobacco products shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such license the following tax:

Outside of incorporated cities or towns and cities or towns of less than 1,000 population	$ 5.00
Cities or towns of 1,000 population and over	10.00

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of that levied by the state. (1939, c. 158, s. 149.)

§ 105-85. Laundries.—Every person, firm, or corporation engaged in the business of operating a laundry, including wet or damp wash laundries, where steam, electricity, or other power is used, or who engages in the business of supplying or renting clean linen or towels, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such license the following tax:

In cities or towns of less than 5,000 population	$ 12.50
In cities or towns of 5,000 and less than 10,000 population	25.00
In cities or towns of 10,000 and less than 15,000 population	37.50
In cities or towns of 15,000 and less than 20,000 population	50.00
In cities or towns of 20,000 and less than 25,000 population	60.00
In cities or towns of 25,000 and less than 30,000 population	72.50
In cities or towns of 30,000 and less than 35,000 population	85.00
In cities or towns of 35,000 and less than 40,000 population	100.00
In cities or towns of 40,000 and less than 45,000 population	112.50
In cities or towns of 45,000 population and above	125.00

Provided, however, that any laundry or other concern herein referred to where the work is performed exclusively by hand or home-size machines only, and where not more than four persons are employed, including the owners, the license tax shall be one-third of the amount stipulated in the foregoing schedule.

Every person, firm, or corporation soliciting laundry work or supplying or renting clean linen or towels in any city or town, outside of the city or town wherein said laundry or linen supply or towel supply business is established, shall procure from the commissioner of revenue a state license as provided in the above schedule, and shall pay for such license a tax based according to the population of the city or town, for the privilege of soliciting therein. The additional tax levied in this paragraph shall apply to the soliciting of laundry work or linen supply or towel supply work in any city or town in which there is a laundry, linen supply or towel supply establishment located in the said city or town. The soliciting of business for or by any person, firm, or corporation engaged in the business of laundry work and/or supplying or renting clean linen or towels shall and the same is hereby construed to be engaging in the said business. Any person, firm, or corporation soliciting in said city or town shall procure from the commissioner of revenue a state license for the privilege of soliciting in said city or town, said tax to be in the sum equal to the

amount which would be paid if the solicitor had an establishment and actually engaged in such business in the said city or town; provided the solicitor has paid a state, county and municipal license in this state.

Counties, cities and towns, respectively, may levy a license tax not in excess of twelve dollars and fifty cents ($12.50) on any person, firm, or corporation engaged in the business of laundry work and/or supplying or renting clean linens or towels in instances when said work is performed outside the said county or town, or when the linen or towels are supplied by business outside said county or town.

In addition to the annual tax levied in this section, there is hereby levied a tax of one per cent (1%) on the gross receipts of such laundries, as the same are defined in this section, or of such persons, firms or corporations supplying or renting clean linen or towels. The word "laundry" or "laundries" as hereafter used in this section, shall include laundries as defined in this section and persons, firms, or corporations renting clean linen or towels. Laundries shall add to the amount charged each customer, except those exempted herein one per cent (1%) of said amount and this added amount shall be paid by each customer as a tax. Provided, the failure of any laundry to add, and collect from its customers one per cent (1%) of the amount charged its customers shall not relieve said laundry from liability for the tax herein imposed. Reports shall be made to the commissioner of revenue in such form as he may prescribe within the first ten days of each month, covering all such gross receipts for the previous month, and the tax herein levied shall be paid monthly at the time such reports are made. There shall be excluded from the gross receipts taxed under this section, all sales to the United States government, the state of North Carolina or any agency or subdivision thereof, and sales to charitable or religious organizations or institutions, and hospitals not operated for profit.

Failure to file reports herein prescribed and pay the tax shown to be due thereon, within the time prescribed, shall subject such laundries to a penalty of five per centum per month of the amount of tax due from the date the tax is due. If the taxpayer shall refuse to make the reports required under this section, then such reports shall be made by the commissioner or his duly authorized agents from the best information available, and such reports shall be prima facie correct for the purpose of this article, and the amount of tax due thereby shall be a lien against all the property of the taxpayer until discharged by payments, and if payment not be made within thirty days after demand therefor by the commissioner or his duly authorized agents, there shall be added not more than one hundred per centum as damages, together with interest at the rate of one per centum per month from the time such tax was due. If such tax be paid within thirty days after notice by the commissioner, then there shall be added not more than ten per centum as damages per month from the time such tax was due until paid.

The commissioner for good cause may extend the time for making any report required under the provisions of this section, and may grant such additional time within which to make such report as he may deem proper, but the time for filing any such report shall not be extended beyond the fifteenth day of the month next succeeding the regular due date of such report. If the time for filing a report be extended, interest at the rate of one-half of one per centum per month from the time the report was required to be filed to the time of payment shall be added and paid. (1939, c. 158, s. 150; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment added the last paragraph and rewrote the two paragraphs immediately preceding it.

§ 105-86. Outdoor advertising.—(a) Every person, firm, or corporation who or which is engaged in the business of outdoor advertising by placing, erecting or maintaining one or more outdoor advertising signs or structures of any nature by means of sign boards, poster boards, or printed bulletins, or other painted matter, or any other outdoor advertising devices, erected upon the grounds, walls or roofs of buildings, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay annually for said license as follows:

For posting or erecting 20 or more signs or panels	$25.00
For posting or erecting less than 20 signs or panels, for each sign or panel	1.00

And in addition thereto the following license tax for each city, town or other place in which such sign boards, poster boards, painted bulletins and other painted or printed matter or other outdoor advertising devices are maintained, in cities and towns of:

Less than 1,000 population	$ 5.00
1,000 to 1,999 population	10.00
2,000 to 2,999 population	15.00
3,000 to 3,999 population	20.00
4,000 to 4,999 population	25.00
5,000 to 7,499 population	30.00
7,500 to 14,999 population	50.00
15,000 to 24,999 population	100.00
25,000 to 49,999 population	150.00
50,000 population and over	200.00
In each county outside of cities and towns	25.00

Provided, that the tax levied in this section shall not apply to regularly licensed motion picture theatres taxed under § 105-37 upon any advertising signs, structures, boards, bulletins, or other devices erected by or placed by the theatre upon property which the theatre has secured by permission of the owner.

Every person, firm, or corporation who or which places, erects or maintains one or more outdoor advertising signs, structures, boards, bulletins or devices as specified in this section shall be deemed to be engaged in the business of outdoor advertising, but when the applicant intends to advertise his own business exclusively by the erection or placement of such outdoor advertising signs, structures, boards, bulletins or devices as specified in this section, he may be licensed to do so upon the payment annually of one dollar ($1.00) for each sign up to one thousand (1,000) in number, and for one thousand (1,000) or more, the sum of one thousand dollars ($1,000.00) for the privilege in lieu of all other taxation as provided in this section, except such further taxation as

may be imposed upon him by cities or towns, acting under the power to levy not in excess of one-half of that specified in paragraph two of subsection (a) of this section.

(b) Every person, firm, or corporation shall show in its application for the state license herein provided for the name of each incorporated city or town within which, and the county within which, it is maintaining or proposes to maintain said sign boards, poster boards, painted bulletins or other painted or printed signs or other outdoor advertising devices within the state of North Carolina. No person, firm, or corporation, licensed under the provisions of this section, shall erect or maintain any outdoor advertising structure, device or display until a permit for the erection of such structure, device or display shall have been obtained from the commissioner of revenue. Application for such permit shall be in writing, signed by the applicant or his duly authorized agent, upon blanks furnished by the commissioner of revenue, in such form and requiring such information as said commissioner of revenue may prescribe. Each application shall have attached thereto the written consent of the owners or duly authorized agent of the property on which structures, device or display is to be erected or maintained, and shall state thereon the beginning and ending dates of such written permission: Provided, the subsection shall not apply to persons, firms, or corporations who or which advertise their or its own business exclusively, and who or which have been licensed therefor pursuant to subsection (a) of this section.

(c) It shall be unlawful for any person engaged in the business of outdoor advertising to in any manner paint, print, place, post, tack or affix, or cause to be painted, printed, placed, posted, tacked or affixed any sign or other printed or painted advertisement on or to any stone, tree, fence, stump, pole, building or other object which is upon the property of another without first obtaining the written consent of such owner thereof, and any person, firm, or corporation who in any manner paints, prints, places, posts, tacks or affixes, or causes to be painted, printed, posted, tacked or affixed any such advertisement on the property of another except as herein provided shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding fifty dollars ($50.00), or imprisonment of thirty days: Provided, that the provisions of this section shall not apply to legal notices.

(d) It shall be unlawful for any person, firm, or corporation to paint, print, place, post, tack or affix any advertising matter within the limits of the right of way of public highways of the state without the permission of the state highway and public works commission, or upon the streets of the incorporated towns of the state without permission of the governing authorities, and if and when signs of any nature are placed without permission within the highways of the state, or within the streets of incorporated towns, it shall be the duty of the highway and public works commission or any other administrative body or other governing authorities of the cities and towns of said state to remove said advertising matters therefrom.

(e) Every person, firm, or corporation owning or maintaining sign boards, poster boards, printed bulletins, or other outdoor advertisements of any nature within this state shall have imprinted on the same the name of such person, firm, or corporation in sufficient size to be plainly visible and permanently affixed thereto.

(f) A license shall not be granted any person, firm, or corporation having his or its principal place of business outside the state for the display of any advertising of any nature whatsoever, designed or intended for the display of advertising matter, until such person, firm, or corporation shall have furnished and filed with the commissioner of revenue a surety bond to the state, approved by him, in such sum as he may fix, not exceeding five thousand dollars ($5,000.00), conditioned that such licensee shall fulfill all requirements of law, and lawful regulations and orders of said commissioner of revenue, relative to the display of advertisements. Such surety bond shall remain in full force and effect as long as any obligations of such licensee to the state shall remain unsatisfied.

(g) No advertising, or other signs specified in this section, shall be erected in the highway right of way so as to obstruct the vision or otherwise to increase the hazards, and all signs upon the highways shall be placed in a manner to be approved by the said highway and public works commission.

(h) Any person, firm, or corporation who or which shall refuse to or neglect to comply with the terms and provisions of this section, and who shall fail to pay the tax herein provided for within thirty days after the same shall become due, or who shall paint, print, place, post, tack, affix or display any advertising sign or other matter contrary to the provisions of this section, the highway and public works commission of the state of North Carolina or other governing body having jurisdiction over the roads and highways of the state, and the governing authorities of cities and towns and its agents and employees, and the board of county commissioners of the various counties of said state and its employees are directed to forthwith seize and remove or cause to be removed all advertisements, signs or other matter displayed contrary to the provisions of this section.

For the purpose of more effectually carrying into effect the provisions of this section, the commissioner of revenue is authorized and directed to prepare and furnish to the highway and public works commission or other governing body having jurisdiction over the roads and highways of the state a sufficient number of permits to be executed by the owner, lessee or tenant occupying the lands adjacent to the highways of the state, upon which advertisements, signs or other matter displayed contrary to the provisions of this section, in words as follows:

"I, (we), (owner), (lessee), (tenant), authorize and direct the Highway and Public Works Commission of the State of North Carolina to remove from my lands the following signs and advertising matter placed upon my lands unlawfully or without my permission: .....

"This..... day of....., 19..

....."

And the said highway and public works commission or other governing body having jurisdiction over the roads and highways of the state shall

forthwith proceed, through its agents, servants and employees, wherever and whenever in its opinion it is necessary to secure the consent to the removal of said signs or other advertising matter from the lands of the owner, lessee or tenant, to secure said consent and to immediately remove said signs or other advertising matter from the lands adjacent to the highways of the state of North Carolina as herein directed.

(i) Every person, firm, or corporation who violates any of the provisions of this section shall be guilty of a misdemeanor, and in addition to the license tax and penalties provided for herein shall be fined not more than one hundred dollars ($100.00) for each sign so displayed, or imprisoned, in the discretion of the court.

(j) Counties shall not levy any license tax under this section, but cities and towns may levy a license tax not in excess of one-half of that levied by the state under paragraph two of subsection (a).

(k) The following signs and announcements are exempted from the provisions of this section: Signs upon property advertising the business conducted thereon; notice or advertisements erected by public authority or required by law in any legal proceedings; any signs containing sixty (60) square feet or less bearing an announcement of any town or city advertising itself: Provided, the same is maintained at public expense.

No tax shall be levied under this section against any person, firm, or corporation erecting, painting, posting or otherwise displaying signs or panels advertising his or its own business containing twelve (12) square feet or less of advertising surface: Provided, that this exemption shall not apply if the signs or panels are displayed in more than five counties. (1939, c. 158, s. 151; 1943, c. 400, s 2.)

Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.1.

Editor's Note.—The 1943 amendment struck out former subsections (k) and (l) and the last proviso to former subsection (m), and changed the designation of former subsection (m) to (k).

§ 105-87. Motor advertisers.—(a) Every person, firm, or corporation operating over the streets or highways of this state any motor vehicle or other mechanical conveyance equipped with radio, phonograph, or other similar mechanism to produce music, or having any loudspeaker attachment or other sound magnifying device to produce sound effects for advertising purposes, whether advertising his or its own products or those of others, shall be deemed a motor advertiser, shall procure from the commissioner of revenue a state-wide license for the privilege of engaging in such business in this state, and shall pay for such license a tax of one hundred dollars ($100.00) for each vehicle or conveyance so used: Provided, that any such advertiser owning a located place of business in this state and advertising in not more than five counties shall pay one-fourth the tax provided in this section.

(b) Counties may levy a license tax on the business taxed under this section not in excess of one-fourth of that levied by the state, and cities and towns may levy a tax not in excess of ten dollars ($10.00). (1939, c. 158, s. 151½.)

§ 105-88. Loan agencies or brokers. — Every person, firm, or corporation engaged in the regular business of making loans or lending money, accepting liens on, or contracts of assignments of, salaries or wages, or any part thereof, or other security or evidences of debt for repayment of such loans in installment payments or otherwise, and maintaining in connection with same any office or other located or established place for the conduct, negotiation, or transaction of such business and/or advertising or soliciting such business in any manner whatsoever, shall be deemed a loan agency, and shall apply for and procure from the commissioner of revenue a state license for the privilege of transacting or negotiating such business at each office or place so maintained, and shall pay for such license a tax of seven hundred fifty dollars ($750.00).

(a) Nothing in this section shall be construed to apply to banks, industrial banks, trust companies, building and loan associations, cooperative credit unions, nor installment paper dealers defined and taxed under other sections of this article, nor shall it apply to the business of negotiating loans on real estate as described in § 105-41, nor to pawnbrokers lending or advancing money on specific articles of personal property. It shall apply to those persons or concerns operating what are commonly known as loan companies or finance companies and whose business is as hereinbefore described, and those persons, firms, or corporations pursuing the business of lending money and taking as security for the payment of such loan and interest an assignment of wages or an assignment of wages with power of attorney to collect same, or other order or chattel mortgage or bill of sale upon household or kitchen furniture.

(b) At the time of making any such loan, the person, or officer of the firm or corporation making the same, shall give to the borrower in writing in convenient form a statement showing the amount received by the borrower, the amount to be paid back by the borrower, and the time in which said amount is to be paid, and the rate of interest and discount agreed upon.

(c) Any such person, firm, or corporation failing, refusing, or neglecting to pay the tax herein levied shall be guilty of a misdemeanor, and in addition to double the tax due shall be fined not less than two hundred and fifty dollars ($250.00) and/or imprisoned, in the discretion of the court. No such loan shall be collectible at law in the courts of this state in any case where the person making such loan has failed to pay the tax levied herein, and/or otherwise complied with the provisions of this section.

(d) Counties, cities, and towns may levy a license tax on the business taxed under this section not in excess of one hundred dollars ($100.00). (1939, c. 158, s. 152.)

§ 105-89. Automobiles and motorcycle dealers and service stations.—(1) Automotive Service Stations.—Every person, firm, or corporation engaged in the business of servicing, storing, painting, repairing, welding, or upholstering motor vehicles, trailers, semi-trailers, or engaged in the business of retail selling and/or delivering of any tires, tools, batteries, electrical equipment, automotive accessories, including radios designed for exclusive use in automobiles, or supplies, motor

fuels and/or lubricants, or any of such commodities, in this state, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In cities or towns of less than 2,500 population	$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or towns of 10,000 and less than 20,000 population	30.00
In cities or towns of 20,000 and less than 30,000 population	40.00
In cities or towns of 30,000 or more	50.00

(a) In rural sections where a service station is operated the tax shall be five dollars ($5.00), unless more than one pump is operated, in which event the tax shall be five dollars ($5.00) per pump.

(b) The tax levied in this section shall in no case be less than five dollars ($5.00) per pump.

(c) No additional license tax under this subsection shall be levied upon or collected from any employee, agent, or salesman whose employer or principal has paid the tax for each location levied in this subsection.

(d) The tax imposed in § 105-53 shall not apply to the sale of gasoline to dealers for resale.

(e) Counties, cities, and towns may levy a license tax on each place of business located therein under this subsection not in excess of one-fourth of that levied by the state.

(2) Motorcycle Dealers.—Every person, firm, or corporation, foreign or domestic, engaged in the business of buying, selling, distributing, and/or exchanging motorcycles or motorcycle supplies or any of such commodities in this state shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and cities or towns of less than 2,500 population	$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or towns of 10,000 and less than 20,000 population	25.00
In cities or towns of 20,000 and less than 30,000 population	30.00
In cities or towns of 30,000 population or more	40.00

(a) A motorcycle dealer paying the license tax under this subsection may buy, sell, and/or deal in bicycle and bicycle supplies without the payment of an additional license tax.

(b) No additional license tax shall be levied upon or collected from any employee or salesman whose employer has paid the tax levied in this subsection.

(c) No motorcycle dealer shall be issued dealer's tags until the license tax levied under this subsection has been paid.

(d) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one-fourth of that levied by the state, with the exception that the minimum tax may be as much as ten dollars ($10.00).

(3) Automotive Equipment and Supply Dealers at Wholesale.—Every person, firm, or corporation engaged in the business of buying, selling, distributing, exchanging, and/or delivering automotive accessories, including radios designed for exclusive use in automobiles, parts, tires, tools, batteries, and/or other automotive equipment or supplies or any of such commodities at wholesale shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license an annual tax for each location where such business is carried on as follows:

In unincorporated communities and in cities or towns of less than 2,500 population	$ 25.00
In cities or towns of 2,500 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 20,000 population	75.00
In cities or towns of 20,000 and less than 30,000 population	100.00
In cities or towns of 30,000 population or more	125.00

Provided, any person, firm, or corporation engaged in the business enumerated in this section and having no located place of business, but selling to retail dealers by use of some form of vehicle, shall obtain from the commissioner of revenue a state-wide license for the privilege of engaging in such business in this state, and shall pay for such license an annual tax for each vehicle used in carrying on such business fifty dollars ($50.00).

(a) For the purpose of this section, the word "wholesale" shall apply to manufacturers, jobbers, and such others who sell to retail dealers, except manufacturers of batteries.

(b) No additional license tax under this subsection shall be levied upon or collected from any employee, agent, or salesman whose employer or principal has paid the tax for each location levied in this subsection.

(c) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one-half of that levied by the state, with the exception that the minimum tax may be as much as ten dollars ($10.00).

(d) No person, firm, or corporation paying the wholesalers' tax as levied in subsection three hereof shall be required to pay any additional tax under subsection one of this section for engaging in any of the types of business levied upon in said subsection one.

(4) Motor Vehicle Dealers.—Every person, firm, or corporation engaged in the business of buying, selling, distributing, servicing, storing and/or exchanging motor vehicles, trailers, semi-trailers, tires, tools, batteries, electrical equipment, lubricants, and/or automotive equipment, including radios designed for exclusive use in automobiles,

and supplies in this state shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and in cities or towns of less than 1,000 population	$ 25.00
In cities or towns of 1,000 and less than 2,500 population	50.00
In cities or towns of 2,500 and less than 5,000 population	75.00
In cities or towns of 5,000 and less than 10,000 population	110.00
In cities or towns of 10,000 and less than 20,000 population	140.00
In cities or towns of 20,000 and less than 30,000 population	175.00
In cities or towns of 30,000 or more	200.00

Provided, that persons, firms, or corporations dealing in secondhand or used motor vehicles exclusively shall be liable for the tax as set out in the foregoing schedule unless such business is of a seasonal, temporary, transient, or itinerant nature, in which event the tax shall be three hundred dollars ($300.00) for each location where such business is carried on.

(a) Any person, firm, or corporation who or which deals exclusively in motor fuels and lubricants, and has paid the license tax levied under subsection one of this section, shall not be subject to any license tax under subsections two, three, and four of this section.

(b) No additional license tax under this subsection shall be levied upon or collected from any employee or salesman whose employer has paid the tax levied in this subsection; nor shall the tax apply to dealers in semi-trailers weighing not more than five hundred pounds and carrying not more than one-thousand-pound load, and to be towed by passenger cars.

(c) No dealer shall be issued dealer's tags until the license tax levied under this subsection has been paid.

(d) Premises on which used cars are stored or sold when owned or operated by a licensed new car dealer under the same name shall not be deemed as a separate place of business when conducted within the corporate limits of any city or town in which such new car business is conducted.

(e) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one-fourth of that levied by the state, with the exception that the minimum tax may be as much as twenty dollars ($20.00): Provided, if such business is of a seasonal, temporary, transient, or itinerant nature, counties, cities, and towns may levy a tax of three hundred dollars ($300.00) for each location where such business is carried on. (1939, c. 158, s. 153.)

Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.1.

Constitutionality.—A provision in a former statute as to the reduction of the license tax if three-fourths of the assets are invested in this state was held constitutional in Bethlehem Motors Corp. v. Flynt, 178 N. C. 399, 100 S. E. 693.

The decision in this case was appealed from, and the question was presented to the United States Supreme Court. The court construed the statute as discriminating against nonresident manufacturers doing business in the state by reducing the tax from $500 to $100 if the manufacturer of automobiles has three-fourths of his entire assets invested in bonds of the state or any of its counties, cities or towns, or in other property situated therein and returned for taxation, and as discriminating in favor of the product of resident manufacturers by attempting to regulate interstate commerce. See Bethlehem Motors Corp. v. Flynt, 256 U. S. 421, 41 S. Ct. 571, 65 L. Ed. 1029. But this decision has not been understood as to invalidate the entire statute since the proviso in question was separable from the remainder of the statute. American Exch. Nat. Bank v. Lacy, 188 N. C. 25, 28, 123 S. E. 475.—Ed. Note.

Auto trucks come within the designation of automobiles used in this section in taxing manufacturers of automobiles. Bethlehem Motors Corp. v. Flynt, 178 N. C. 399, 100 S. E. 693.

Bank as "Dealer."—Where a dealer in automobiles has sold to the bank, to which he was indebted, his automobiles on hand, for the purpose of securing the debt, under further provisions that he was to sell and collect and hold the proceeds in trust for the purpose stated, and has thereafter left the State, and the bank has assumed to continue the sales and make collection therefor, the bank may not avoid payment of the tax upon the ground that it was not a dealer, etc., in contemplation of the statute, and thus evade the practical efficiency of the statute and reduce it to a nullity. American Exch. Nat. Bank v. Lacy, 188 N. C. 25, 123 S. E. 475.

Tax on Operators of Gasoline Pumps.—The provision of this section, prescribing that no county, city or town shall levy a license tax on the business of selling gasoline at retail in excess of one-fourth of the State license tax does not preclude a city from levying a tax on operators of gasoline pumps located on sidewalks along certain streets between the curb and the property line when such city tax is levied in the nature of a permit in the exercise of regulatory police power. State v. Evans, 205 N. C. 434, 171 S. E. 640.

§ 105-90. Emigrant and employment agents.—(a) Every person, firm, or corporation, either as agent or principal, engaged in soliciting, hiring, and/or contracting with laborers, male or female, in this state for employment out of the state shall apply for and obtain from the commissioner of revenue a state license for each county for the privilege of engaging in such business, and shall pay for such license a tax of five hundred dollars ($500.00) for each county in which such business is carried on.

(b) Every person, firm, or corporation who or which engages in the business of securing employment for a person or persons and charging therefor a fee, commission, or other compensation shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license the following annual tax for each location in which such business is carried on:

In unincorporated communities and in cities and towns of less than 2,500 population	$100.00
In cities or towns of 2,500 and less than 5,000 population	200 00
In cities or towns of 5,000 and less than 10,000 population	300.00
In cities or towns of 10,000 or more population	500.00

Provided, that this section shall not apply to any employment agency operated by the federal government, the state, any county or municipality, or whose sole business is procuring employees for work in the production and harvesting of farm crops within the state: And provided further, that under this section the tax on any employment agency whose sole business is the placement of teachers and/or other school employees and which

has been approved by the state superintendent of public instruction shall be twenty-five dollars ($25.00): Provided further, that the tax on employment agencies where the sole business is the placement of domestic servants or unregistered nurses for employment within the state shall be twenty-five dollars ($25.00).

(c) Any person, firm, or corporation violating the provisions of this section shall be guilty of a misdemeanor and fined, in addition to other penalties, not less than one thousand dollars ($1,000.00) and/or imprisoned, in the discretion of the court.

(d) Counties, cities and towns may levy a license tax on the business taxed under this section not in excess of that levied by the state. (1939, c. 158, s. 154.)

Generally.—This statute is a severe measure imposing a tax upon the business of hiring hands, and its validity can be sustained only upon this view. Lane v. Commissioners, 139 N. C. 443, 445, 52 S. E. 140. See also State v. Hunt, 129 N. C. 686, 40 S. E. 216.

The occupation of an "emigrant agent," as defined in chapter 75, Acts of 1891, similar to this section, does not belong to that class of trades or occupations which are so inherently harmful or dangerous to the public that they may, either directly or indirectly, be restricted or prohibited. State v. Moore, 113 N. C. 697, 698, 18 S. E. 342.

Scope of Section.—In Theus v. State, 114 Ga. 53, 39 S. E. 913, Lewis, J., construing a section worded exactly as this, says, "The legislative enactment imposing a tax upon emigrant agents, and providing a penalty for the failure to register and pay such tax, was clearly intended to apply to persons who, as agents of others, make it their business to hire laborers in this state to be sent beyond the limits of the state and then employed by others. To extend its application to a resident of another state, who, being in this state, incidentally employs laborers on his own behalf to work for him beyond the limits of this state, would be entirely unwarranted." Cited and approved in Carr v. Commissioners, 136 N. C. 125, 127, 48 S. E. 597.

Employment of Laborers for Work in Another State.—This section does not apply to a person who comes into this state and employs laborers to work for him in another state. Carr v. Commissioners, 136 N. C. 125, 48 S. E. 597.

An officer of a foreign corporation coming into this state and hiring hands for employment by himself as the officer of the corporation, is not "engaged in the business of hiring hands," etc., and is not liable for the tax on emigrant agents, under this section. Lane v. Commissioners, 139 N. C. 443, 52 S. E. 140.

Amount of Tax Not Reviewable.—A tax on the business of procuring laborers for employment outside the state being an exercise of the power of the state to levy taxes, the amount is not reviewable by the courts. State v. Roberson, 136 N. C. 587, 48 S. E. 595. The court said: "When the constitution confers upon the legislature the power to levy taxes, the amount of the tax to be levied is committed to that department of the government and not open to review by the judicial department. We may inquire into the question of power, but not as to the manner of its exercise."

§ 105-91. Plumbers, heating contractors, and electricians.—Every person, firm, or corporation engaged in the business of a plumber, installing plumbing fixtures, piping or equipment, steam or gas fitter, or installing hot-air heating systems, or installing electrical equipment, or offering to perform such services, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such license the following tax based on population:

Municipalities of less than two thousand population	$ 5.00
Municipalities of two thousand and less than five thousand population	7.50
Municipalities of five thousand and less than ten thousand population	10.00
Municipalities of ten thousand and less than twenty thousand population	12.50
Municipalities of twenty thousand and less than thirty thousand population	15.00
Municipalities of thirty thousand and less than forty thousand population	17.50
Municipalities of forty thousand and less than fifty thousand population	20.00
Municipalities of fifty thousand population or more	25.00

Provided, that when a licensed plumber employs only one additional person the tax shall be one-half: Provided further, that any person, firm, or corporation engaged exclusively in the businesses enumerated in and licensed under this section shall not be liable for the tax provided in §§ 105-54 to 105-56. All plumbing inspectors in cities or towns shall make a monthly report to the commissioner of revenue of all installation or repair permits issued for plumbing or heating.

Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of the base license tax levied by the state. (1939, c. 158, s. 155.)

§ 105-92. Trading stamps.—Every person, firm, or corporation engaged in the business of issuing, selling, and/or delivering trading stamps, checks, receipts, certificates, tokens, or other similar devices to persons, firms, or corporations engaged in trade or business, with the understanding or agreement, expressed or implied, that the same shall be presented or given by the latter to their patrons as a discount, bonus, premium, or as an inducement to secure trade or patronage, and that the person, firm, or corporation selling and/or delivering the same will give to the person presenting or promising the same, money or other thing of value, or any commission or preference in any way on account of the possession or presentation thereof, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such license a tax of two hundred dollars ($200.00).

(a) This section shall not be construed to apply to a manufacturer or to a merchant who sells the goods, wares, or merchandise of such manufacturer, offering to present to the purchaser or customer a gift of certain value as an inducement to purchase such goods, wares or merchandise.

(b) Counties, cities, or towns may levy a license tax on the business taxed under this section and not in excess of that levied by the state. (1939, c. 158, s. 156.)

Trading Stamp Dealers.—Dealers in trading stamps do not come within the provision of an ordinance taxing "gift enterprises." Winston v. Beeson, 135 N. C. 271, 47 S. E. 457.

§ 105-93. Process tax.—(a) In every indictment or criminal proceeding finally disposed of in the superior court, the party convicted or adjudged to pay the cost shall pay a tax of two dollars ($2.00): Provided, that this tax shall not be levied in cases where the county is required to pay the cost.

(b) At the time of suing out the summons in a civil action in the superior court or other court of record, or the docketing of an appeal from the lower court in the superior court, the plaintiff or the appellant shall pay a tax of two dollars ($2.00):

Provided, that this tax shall not be demanded of any plaintiff or appellant who has been duly authorized to sue or appeal in forma pauperis; but when in cases brought or in appeals in forma pauperis the costs are taxed against the defendants the tax shall be included in the bill of costs: Provided, that this tax shall not be levied in cases where the county is required to pay the cost and in tax foreclosure suits.

(c) No county, city, or town, or other municipal corporation shall be required to pay said tax upon the institution of any action brought by it, but whenever such plaintiff shall recover in such action, the said tax shall be included in the bill of costs and collected from the defendant.

(d) In any case where the party has paid the aforesaid cost in a civil action and shall recover in the final decision of the case, then such cost so paid by him shall be retaxed against the losing party adjudged to pay the cost, plus five per cent (5%) which the clerk of the superior court may retain for his services, and this shall be received by him, whether he is serving on a salary or fee basis, and if on a salary basis, shall be in addition to such salary.

(e) This section shall not apply to cases in the jurisdiction of magistrates' courts, whether civil or criminal, except upon appeals to the superior court from the judgment of such magistrate, and shall not apply for the docketing in the superior court of a transcript of a judgment rendered in any other court, whether of record or not.

(f) The tax provided for in this section shall be levied and assessed by the clerk of the superior court or other court in all cases described herein; and on the first Monday in January, April, July, and October of each and every year he shall make to the commissioner of revenue a sworn statement and report in detail, showing the number of the case on the docket, the name of the plaintiff or appellant in civil action, or the defendant in criminal action, and accompany such report and statement with the amount of such taxes collected, or which should have been collected, by him in the preceding three months. Any clerk of the superior court failing to make the report and pay the amount of tax due under this section within the first fifteen days of the month in which such report is required to be made, shall be liable for a penalty of ten per cent (10%) on the amount of tax that may be due at the time such report should be made. (1939, c. 158, s. 157.)

Where Appeal Is from Clerk to Judge.—Where an appeal is taken from an order of the clerk of the Superior Court to the judge thereof, the judge has jurisdiction by mandate of § 1-276, and no "docketing" is involved within the meaning of this section, nor is the clerk a "lower court," so the two dollar tax as here provided is inapplicable to the Superior Court with respect to appeals, and the judge acquires jurisdiction without the payment of the tax. Windsor v. McVay, 206 N. C. 730, 175 S. E. 83.

§ 105-94. Morris Plan or industrial banks.— Every person, firm, or corporation engaged in the business of operating a Morris Plan or industrial bank in the state shall apply for and obtain a state license from the commissioner of revenue for the privilege of engaging in such business, and shall pay for such license the following tax:

When the total resources as of December thirty-first of the previous calendar year are—

Less than $250,000	$ 75.00
$250,000 and less than $500,000	150.00
$500,000 and less than $1,000,000	225.00
$1,000,000 and less than $2,000,000	300.00
$2,000,000 and less than $5,000,000	450.00
$5,000,000 and over	600.00

(a) Any such bank that shall begin business during the current tax year applicable to this article, the tax shall be calculated on the total resources at the beginning of business.

(b) Every person, firm, or corporation engaged in the business of soliciting loans or deposits for a Morris Plan or other industrial bank not licensed as such by the state for the county in which such person, firm, or corporation solicits business shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, and shall pay for such license a tax of fifty dollars ($50.00) per annum, in each county in which business is solicited.

(c) Counties shall not levy any license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-half (½) of that levied by the state. (1939, c. 158, s. 158.)

§ 105-95. Marriage license. — There shall be levied on all marriage licenses a state license tax of three dollars on each such license, which shall be assessed and collected by the register of deeds of the county in which the license is issued.

The register of deeds of each county shall submit to the commissioner of revenue, on the first Monday in January, April, July, and October of each year a sworn statement or report in detail, showing the names of the persons to whom such license has been issued during the preceding three months, and accompany such sworn report or statement with the amount of such state taxes collected by him or that should have been collected by him in the preceding three months.

The counties may levy one dollar ($1.00) upon such marriage license, to be assessed and collected by the register of deeds and accounted for to the county treasurer at the same time and in the same manner as he accounts to the commissioner of revenue for the state tax. (1939, c. 158, s. 159.)

§ 105-96. Marble yards.—Every person, firm, or corporation engaged in the business of manufacturing, erecting, jobbing, selling, or offering for sale monuments, marble tablets, gravestones or articles of like kind, or, if a non-resident, selling and erecting monuments, marble tablets, or gravestones at retail shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state, and shall pay for such license the following tax:

In unincorporated communities and cities or towns of less than 2,000 population	$15.00
In cities or towns of 2,000 and less than 5,000 population	25.00
In cities or towns of 5,000 and less than 10,000 population	30.00
In cities or towns of 10,000 and less than 15,000 population	40.00
In cities or towns of 15,000 and less than 20,000 population	50.00

In cities or towns of 20,000 and less than 25,000 population	60.00
In cities or towns of 25,000 population or over	70.00

In addition to the license tax levied in this section, an additional tax shall be paid by the person, firm, or corporation engaged in the business taxed under this section of ten dollars ($10.00) for each person soliciting or selling.

Counties shall not levy any license tax on the business taxed under this section, but cities and towns in which the principal office or plant of any such business is located may levy a license tax not in excess of that levied by the state. (1939, c. 158, s. 160.)

§ 105-97. Manufacturers of ice cream.—(a) Every person, firm, or corporation engaged in the business of manufacturing or distributing ice cream at wholesale shall apply for and obtain from the commissioner of revenue a state license for each factory or place where manufactured and/or stored for distribution, and shall pay an annual state license tax of ten dollars ($10.00) in cities and towns of less than two thousand five hundred (2,500) population; twenty-five dollars ($25.00) in cities and towns having population between two thousand five hundred (2,500) and ten thousand (10,000), and in cities and towns having a population of more than ten thousand (10,000), fifty dollars ($50.00), and an additional tax of one-half cent for each gallon manufactured, sold, and/or distributed. Reports shall be made to the commissioner of revenue in such form as he may prescribe within the first ten days of each month covering all such gross sales for the previous month, and the additional tax herein levied shall be paid monthly at the time such reports are made.

(b) For the purpose of this section the words "ice cream" shall apply to ice cream, frozen custards, sherbets, water ices, and/or similar frozen products.

(c) Every retail dealer selling at retail ice cream purchased from a manufacturer other than a manufacturer who has paid the tax imposed in subsection (a) of this section shall pay an annual license tax for the privilege of doing business in this state of ten dollars ($10.00).

(d) Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of one-fourth of the above. (1939, c. 158, s. 161.)

Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.1.

§ 105-98. Branch or chain stores.—Every person, firm, or corporation engaged in the business of operating or maintaining in this state, under the same general management, supervision, or ownership, two or more stores, or mercantile establishments where goods, wares, and/or merchandise is sold or offered for sale, or from which such goods, wares, and/or merchandise are sold and/or distributed at wholesale or retail, or who or which controls by lease, either as lessor or lessee, or by contract, the manner in which any such store or stores are operated, or the kinds, character, or brands of merchandise which are sold therein, shall be deemed a branch or chain store operator, and shall apply for and obtain from the commissioner of revenue a state license for the purpose of engaging in such business of a branch or chain store operator, and shall pay for such license a tax according to the following schedule:

On each and every such store operated in this state in excess of one—

For not more than four additional stores, for each such additional store	$ 65.00
For five additional stores and not more than eight, for each such additional store	85.00
For nine additional stores and not more than twelve, for each such additional store	95.00
For thirteen additional stores and not more than sixteen, for each such additional store	105.00
For seventeen additional stores and not more than twenty, for each such additional store	115.00
For twenty-one additional stores and not more than thirty, for each such additional store	140.00
For thirty-one additional stores and not more than fifty, for each such additional store	175.00
For fifty-one additional stores and not more than one hundred, for each such additional store	200.00
For one hundred and one additional stores and not more than two hundred, for each such additional store	225.00
For two hundred and one additional stores and over, for each such additional store	250.00

The term "chain store" as used in this section shall include stores operated under separate charters of incorporation, if there is common ownership of a majority of stock in such separately incorporated companies, and/or if there is similarity of name of such separately incorporated companies, and/or if such separately incorporated companies have the benefit in whole or in part of group purchase of merchandise, or of common management. And in like manner the term "chain store" shall apply to any group of stores where a majority interest is owned by an individual or partnership.

Counties shall not levy a license tax on the business taxed under this section, but cities and towns may levy a license tax not in excess of fifty dollars ($50.00) for each chain store located in such city or town. For the purpose of ascertaining the particular unit in each chain of stores not subject to taxation by the state under this section, and therefore not liable for city license tax, the particular store in which the principal office of the chain in this state is located shall be designated as the unit in the chain not subject to this tax.

In enforcing the provisions of this section, the commissioner of revenue may prorate the total amount of tax for a chain to the several units and the amount so prorated may be recovered from each unit in the chain in the same way as other taxes levied in this article.

This section shall not apply to retail or wholesale dealers in motor vehicles and automotive equipment and supply dealers at wholesale who are not liable for tax hereunder on account of the sale of other merchandise. (1939, c. 158, s. 162.)

Constitutionality and Nature of Tax.—The classification

in this section is a reasonable one based upon a substantial difference. The statute applies equally to all within the class, and it is constitutional and valid. Great A. & P. Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838.

This section, imposes a license tax for the purpose of raising revenue, and not an ad valorem tax. Nor does the statute seek to regulate chain stores under the police power, and the tax is in accord with the fiscal policy of the State of raising revenue for State purposes by the imposition of taxes on trades, professions, franchises and incomes, and leaving to the counties and municipalities for their support ad valorem taxes on real and personal property. Great A. & P. Tea Co. v. Maxwell, 199 N. C. 433, 154 S. E. 838.

Prior Law Invalid.—The prior law, which imposed a license tax of fifty dollars each on stores operated in this State when there were six or more such stores under the same management, but which imposed no such tax on other mercantile establishments doing the same business when there were less than six stores under one management, was held an arbitrary classification, and unconstitutional. Great Atlantic & Pacific Tea Co. v. Doughton, 196 N. C. 145, 144 S. E. 701.

Corporation Operating Coal and Ice Yards Liable for Tax.—A corporation operating coal and ice yards at established places of business in several cities of the state, one or more yards being operated in each of the cities, and maintaining scales, bins, etc., and a staff composed of a yard foreman and other employees at each establishment, was held liable for the tax imposed by this section. Atlantic Ice, etc., Co. v. Maxwell, 210 N. C. 723, 188 S. E. 381.

Whether or Not Such Yards Constitute "Stores."—It was held not necessary to decide whether such establishments constitute "stores" in the common acceptation or the legal meaning of the word, since the application of the statute is not limited to stores. Atlantic Ice, etc., Co. v. Maxwell, 210, N. C. 723, 188 S. E. 381.

§ 105-99. Wholesale distributors of motor fuels.—Every person, firm, or corporation engaged in the business of distributing or selling at wholesale any motor fuels in this state shall apply to the commissioner for an additional annual license to engage in such business, and shall pay for such privilege an additional annual license tax determined and measured by the number of pumps owned or leased by the distributor or wholesaler through which such motor fuels are sold, at retail, according to the following schedule:

For the first 100 pumps	$ 4.00 per pump
For 101 additional pumps and not more than 200 pumps	5.00 per pump
For 201 additional pumps and not more than 300 pumps	6.00 per pump
For 301 additional pumps and not more than 400 pumps	7.00 per pump
For 401 additional pumps and not more than 500 pumps	8.00 per pump
For 501 additional pumps and not more than 600 pumps	9.00 per pump
For all over 600 pumps	10.00 per pump

Any contract or agreement, oral or written, express or implied by the terms or the effects of which the tax herein imposed shall be passed on directly or indirectly to any person, firm, or corporation not engaged in the business hereby taxed is hereby declared to be against the public policy of this state and null and void, and any person, firm, or corporation negotiating such an agreement, or receiving the benefits thereof, shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court.

The tax herein imposed shall be in addition to all other taxes imposed by this chapter or under any other laws.

Counties, cities and towns shall not levy any tax by reason of the additional tax imposed by this section, but this section shall in no way affect the right given to counties, cities, and towns to levy taxes under § 105-89.

The business taxed under this section shall not be taxed under § 105-98. (1939, c. 158, s. 162½.)

Cross Reference.—For temporary reduction of the taxes levied under this section, see § 105-113.1.

§ 105-100. Patent rights and formulas.—Every person, firm, or corporation engaged in the business of selling or offering for sale any patent right or formula shall apply in advance and obtain from the commissioner of revenue a separate state license for each and every county in this state where such patent right or formula is to be sold or offered for sale, and shall pay for each such separate license a tax of ten dollars ($10.00).

Counties, cities, or towns may levy a license on the business taxed under this section not in excess of the taxes levied by the state. (1939, c. 158, s. 163.)

In General.—It is within the legislative power of taxation, in respect to corporations, to levy any two or more of the following taxes simultaneously (1) on the franchise (including corporate dividends); (2) on the capital stock; (3) on the tangible property of the corporation, and (4) on the shares of the capital stock in the hands of the stockholders. The tax on the two subjects last named is imperative. Board v. Blackwell Durham Tobacco Co., 116 N. C. 441, 21 S. E. 423.

License Tax by State Exclusive.—The general assembly may require a corporation to pay a license tax for the privilege of carrying on its business, and forbid counties or other municipalities to exact any other license tax or fee. Loan Ass'n v. Commissioners, 115 N. C. 410, 414, 20 S. E. 526.

§ 105-101. Tax on seals affixed by officers.—Whenever the seal of the state, of the state treasurer, the secretary of state, or of any other public officer required by law to keep a seal (not including clerks of courts, notaries public, and other county officers) shall be affixed to any paper, the tax to be paid by the party applying for same shall be as follows:

For the Great Seal of the state, on any commission	$2.50
For the Great Seal of the state on warrants of extradition for fugitives from justice from other states, the same fee and seal tax shall be collected from the state making the requisition which is charged in this state for like service. For the seal of the state department, to be collected by the secretary of state	1.00
For the seal of the state treasurer, to be collected by him	1.00
For a scroll, when used in the absence of a seal, the tax shall be on the scroll, and the same as for the seal.	

(a) All officers shall keep a true, full, and accurate account of the number of times any of such seals or scrolls are used, and shall deliver to the governor of the state a sworn statement thereof.

(b) All seals affixed for the use of any county of the state, used on the commissions of officers of the national guard, and any other public officer not having a salary, under the pension law, or under any process of court, or to any commission issued by the governor to any person in the employ of the state, or to be employed by the state shall be exempt from taxation. (1939, c. 158, s. 166.)

§ 105-102. Junk dealers.—Every person, firm, or corporation engaged in the business of buying and/or selling or dealing in what is commonly

known as junk, including scrap metals, glass, waste paper, waste burlap, waste cloth and cordage of every nature, kind and description, shall apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business in this state and shall pay for such license an annual tax for each location where such business is carried on, according to the following schedule:

In unincorporated communities and in cities or towns of less than 2,500 population	$ 25.00
In cities or towns of 2,500 and less than 5,000 population	30.00
In cities or towns of 5,000 and less than 10,000 population	50.00
In cities or towns of 10,000 and less than 20,000 population	75.00
In cities or towns of 20,000 and less than 30,000 population	100.00
In cities or towns of 30,000 population or more	125.00

Provided, that if any person, firm, or corporation shall engage in the business enumerated in this section within a radius of two miles of the corporate limits of any city or town in this state, he or it shall pay a tax based on the population of such city or town according to the schedule above set out. Counties, cities and towns may levy a license tax not in excess of one-half of that levied by the state; provided, however, that any person, firm, or corporation dealing solely in waste paper shall not be liable for said tax; and provided further, the licenses levied herein shall not apply to persons engaged in the collection of scrap, who maintain no regular place of business, but sell only to licensed dealers or manufacturers using scrap engaged in shipment in interstate commerce; and further that salvage committees operating, under state or federal sponsorship, community scrap yards where personal profit does not accrue, shall not be required to pay license under this section. (1939, c. 158, s. 168; 1943, c. 400, s. 2.)

Editor's Note.—The 1943 amendment added the last proviso.

Municipal Tax.—Facts agreed were conflicting and cause was remanded in Weinstein v. Raleigh, 218 N. C. 549, 11 S. E. (2d) 560.

The findings of fact made by the trial court under the agreement of the parties were held to support the court's conclusion of law that plaintiff, although his place of business was located one-half mile outside the limits of defendant municipality, was engaged in the business of buying and selling junk within the municipality, and the judgment holding plaintiff liable for license tax levied by the municipality under authority of this section was affirmed. Weinstein v. Raleigh, 219 N. C. 643, 14 S. E. (2d) 661.

Administrative Provisions of Schedule B.

§ 105-103. Unlawful to operate without license. —When a license tax is required by law, and whenever the general assembly shall levy a license tax on any business, trade, employment, or profession, or for doing any act, it shall be unlawful for any person, firm, or corporation without a license to engage in such business, trade, employment, profession, or do the act; and when such tax is imposed it shall be lawful to grant a license for the business, trade, employment, or for doing the act; and no person, firm, or corporation shall be allowed the privilege of exercising any business, trade, employment, profession, or the doing of any act taxed in this schedule throughout the state under one license, except under a state-wide license. (1939, c. 158, s. 181.)

§ 105-104. Manner of obtaining license from the commissioner of revenue. — (a) Every person, firm, or corporation desiring to obtain a state license for the privilege of engaging in any business, trade, employment, profession, or of the doing of any act for which a state license is required, shall, unless otherwise provided by law, make application therefor in writing to the commissioner of revenue, in which shall be stated the county, city, or town and the definite place therein where the business, trade, employment, or profession is to be exercised; the name and resident address of the applicant, whether the applicant is an individual, firm, or corporation; the nature of the business, trade, employment, or profession; number of years applicant has prosecuted such business, trade, employment, or profession in this state, and such other information as may be required by the commissioner of revenue. The application shall be accompanied by the license tax prescribed in this article.

(b) Upon receipt of the application for a state license with the tax prescribed by this article, the commissioner of revenue, if satisfied of its correctness, shall issue a state license to the applicant to engage in the business, trade, employment, or profession in the name of and at the place set out in the application. No license issued by the commissioner of revenue shall be valid or have any legal effect unless and until the tax prescribed by law has been paid, and the fact of such shall appear on the face of the license. (1939, c. 158, s. 182.)

§ 105-105. Persons, firms, and corporations engaged in more than one business to pay tax on each. — Where any person, firm, or corporation is engaged in more than one business, trade, employment, or profession which is made under the provisions of this article subject to state license taxes, such persons, firms, or corporations shall pay the license tax prescribed in this article for each separate business, trade, employment, or profession. (1939, c. 158, s. 183.)

§ 105-106. Effect of change in name of firm.— No change in the name of a firm, partnership, or corporation, nor the taking in of a new partner, nor the withdrawal of one or more of the firm, shall be considered as commencing business; but if any one or more of the partners remain in the firm, or if there is change in ownership of less than a majority of the stock, if a corporation, the business shall be regarded as continuing. (1939, c. 158, s. 184.)

§ 105-107. License may be changed when place of business is changed. — When a person, firm, or corporation has obtained a state license to engage in any business, trade, employment, or profession at any definite location in a county, and desires to remove to another location in the same county, the commissioner of revenue may, upon proper application, grant such person, firm, or corporation permission to make such move, and may endorse upon the state license his approval of change in location. (1939, c. 158, s. 185.)

§ 105-108. Property used in a licensed business

not exempt from taxation.—A state license, issued under any of the provisions of this article shall not be construed to exempt from other forms of taxation the property employed in such licensed business, trade, employment, or profession. (1939, c. 158, s. 186.)

§ 105-109. Engaging in business without a license.—(a) All state license taxes under this article or schedule, unless otherwise provided for, shall be due and payable annually on or before the first day of June of each year, or at the date of engaging in such business, trade, employment and/or profession, or doing the act.

(b) If any person, firm, or corporation shall continue the business, trade, employment, or profession, or to do the act, after the expiration of a license previously issued, without obtaining a new license, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined and/or imprisoned in the discretion of the court, but the fine shall not be less than twenty per cent (20%) of the tax in addition to the tax and the costs; and if such failure to apply for and obtain a new license be continued, such person, firm, or corporation shall pay additional tax of five per centum (5%) of the amount of the state license tax which was due and payable on the first day of June of the current year, in addition to the state license tax imposed by this article, for each and every thirty days that such state license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the commissioner of revenue and paid with the state license tax, and shall become a part of the state license tax. The penalties for delayed payment hereinbefore provided shall not impair the obligation to procure a license in advance or modify any of the pains and penalties for failure to do so.

The provisions of this section shall apply to taxes levied by the counties of the state under authority of this article in the same manner and to the same extent as they apply to taxes levied by the state.

(c) If any person, firm, or corporation shall commence to exercise any privilege or to promote any business, trade, employment, or profession, or to do any act requiring a state license under this article without such state license, he or it shall be guilty of a misdemeanor, and shall be fined and/or imprisoned in the discretion of the court; and if such failure, neglect, or refusal to apply for and obtain such state license be continued, such person, firm, or corporation shall pay an additional tax of five per centum (5%) of the amount of such state license tax which was due and payable at the commencement of the business, trade, employment or profession, or doing the act, in addition to the state license tax imposed by this article, for each and every thirty (30) days that such state license tax remains unpaid from the date that same was due and payable, and such additional tax shall be assessed by the commissioner of revenue and paid with the state license tax and shall become a part of the state license tax.

(d) If any person, firm, or corporation shall fail, refuse, or neglect to make immediate payment of any taxes due and payable under this article, additional taxes, and/or any penalties imposed pursuant thereto, upon demand, the commissioner of revenue shall certify the same to the sheriff of the county in which such delinquent lives or has his place of business, and such sheriff shall have the power and shall levy upon any personal or real property owned by such delinquent person, firm, or corporation, and sell the same for the payment of the said tax or taxes, penalty and costs, in the same manner as provided by law for the levy and sale of property for the collection of other taxes; and if sufficient property is not found, the said sheriff or deputy commissioner shall swear out a warrant before some justice of the peace or recorder in the county for the violation of the provisions of this article and as provided in this article. (1939, c. 158, s. 187.)

§ 105-110. Each day's continuance in business without a state license a separate offense.—Each and every day that any person, firm, or corporation shall continue to exercise or engage in any business, trade, employment, or profession, or do any act in violation of the provisions of this article, shall be and constitute a distinct and a separate offense. (1939, c. 158, s. 188.)

§ 105-111. Duties of commissioner of revenue.—(a) Except where otherwise provided, the commissioner of revenue shall be the duly authorized agent of this state for the issuing of all state licenses and the collection of all license taxes under this article, and it shall be his duty and the duty of his deputies to make diligent inquiry to ascertain whether all persons, firms, or corporations in the various counties of the state who are taxable under the provisions of this article have applied for the state license and paid the tax thereon levied.

(b) The commissioner of revenue shall continually keep in his possession a sufficient supply of blank state license certificates, with corresponding sheets and duplicates consecutively numbered; shall stamp across each state license certificate that is to be good and valid in each and every county of the state the words "state-wide license," and shall stamp or imprint on each and every license certificate the words "issued by the commissioner of revenue."

(c) Neither the commissioner of revenue nor any of his deputies shall issue any duplicate license unless expressly authorized to do so by a provision of this article or schedule, and unless the original license is lost or has become so mutilated as to be illegible, and in such cases the commissioner of revenue is authorized to issue a duplicate certificate for which the tax is paid, and shall stamp upon its face "duplicate." (1939, c. 158, s. 189.)

§ 105-112. License to be procured before beginning business.—(a) Every person, firm, or corporation engaging in any business, trade, and/or profession, or doing any act for which a state license is required and a tax is to be paid under the provisions of this article or schedule, shall, annually in advance, on or before the first day of June of each year, or before engaging in such business, trade, and/or profession, or doing the act, apply for and obtain from the commissioner of revenue a state license for the privilege of engaging in such business, trade, and/or profession, or doing such act, and shall pay the tax levied therefor.

(b) Licenses shall be kept posted where business is carried on. No person, firm, or corporation shall

engage in any business, trade, and/or profession, or do the act for which a state license is required in this article or schedule, without having such state license posted conspicuously at the place where such business, trade, and/or profession is carried on; and if the business, trade, and/or profession is such that license cannot be so posted, then the itinerant licensee shall have such license required by this article or schedule in his actual possession at the time of carrying on such business, trade, and/or profession, or doing the act named in this article or schedule, or a duplicate thereof.

(c) Any person, firm, or corporation failing, neglecting, or refusing to have the state license required under this article or schedule posted conspicuously at the place of business for which the license was obtained, or to have the same or a duplicate thereof in actual possession if an itinerant, shall pay an additional tax of twenty-five dollars ($25.00) for each and every separate offense, and each day's failure, neglect, or refusal shall constitute a separate offense. (1939, c. 158, s. 190.)

§ 105-113. Sheriff and city clerk to report.—The sheriff of each county and the clerk of the board of aldermen of each city or town in the state shall, on or before the fifteenth day of June of each year, make a report to the commissioner of revenue, containing the names and the business, trade, and/or the profession of every person, firm, or corporation in his county or city who or which is required to apply for and obtain a state license under the provisions of this article or schedule, and upon such forms as shall be provided and in such detail as may be required by the commissioner of revenue. (1939, c. 158, s. 191.)

§ 105-113.1. Privilege taxes payable in advance; reduction.—The license taxes levied under this article upon the business of selling particular kinds of merchandise or commodities are levied for the privilege of engaging in the business of selling such articles, merchandise or commodities in the normal course of business.

The taxes are required to be paid in advance at the beginning of the tax year with no provision for refund for any cause with possible exception of the indirect method prescribed by the one thousand nine hundred and forty-three amendment to the Revenue Act providing for the transfer of such licenses under certain conditions.

War conditions have affected business licenses levied under Schedule B more than any other taxes levied by the state.

Under war conditions priorities, rationing, and restrictions upon the sale of particular articles of merchandise have so restricted business opportunities in many lines as to make the application of the license taxes now levied wholly unreasonable, and relief must be granted to those businesses which have suffered severely, and provisions must be made to provide relief for those businesses which will suffer severely before the convening of the next general assembly; therefore, Schedule B license privilege taxes levied by the state under this article are reduced as follows:

(a) The taxes levied by the state under § 105-49 are reduced 50%.

(b) The taxes levied by the state under § 105-51 are reduced 50%.

(c) The taxes levied by the state under § 105-61 are reduced 50%.

(d) The taxes levied by the state under § 105-67 are reduced 50%.

(e) The taxes levied by the state under § 105-79 are reduced 50%.

(f) The taxes levied by the state under § 105-82 are reduced 50%.

(g) The taxes levied by the state under § 105-89 are reduced 75%.

(h) The taxes levied by the state under § 105-97 are reduced 30%.

(i) The taxes levied by the state under § 105-99 are reduced 75%.

(j) The taxes levied by the state under § 105-86 are reduced 50%.

The reductions in taxes herein authorized shall not be applicable to counties, cities and towns. It is the intent of this section that counties, cities and towns may continue to levy privilege taxes within the same limits authorized by the Revenue Act of one thousand nine hundred and thirty-nine, as amended, prior to the enactment of this section.

This section shall be in full force and effect from and after its ratification, but the reductions in license taxes authorized herein shall be effective only from and after June first, one thousand nine hundred and forty-three.

This section shall be in effect until June first, one thousand nine hundred and forty-five. (1943, c. 400, s. 2.)

Art. 3. Schedule C. Franchise Tax.

§ 105-114. Defining taxes in this article.—The taxes levied and assessed in this article or schedule shall be paid as specifically herein provided, and shall be for the privilege of engaging in or carrying on the business or doing the act named; and, if taxpayer be a corporation, shall be a tax also for the continuance of its corporate rights and privileges granted under its charter, if incorporated in this state, or by reason of any act of domestication if incorporated in another state, and such taxes and taxpayers shall be subject to other pertinent regulations mentioned in this chapter. The taxes levied in this article or schedule shall be for the fiscal year of the state in which said taxes become due. (1939, c. 158, s. 201; 1943, c. 400, s. 3.)

Editor's Note.—The 1943 amendment struck out former provisions of the last sentence relating to lien of taxes.

See 11 N. C. Law Rev. 258, for general amount of increase made in these taxes by the 1933 act.

Franchise Tax on Corporation.—The franchise tax imposed upon every corporation doing business in the State is a tax upon the privilege of being a corporation, and its payment does not relieve it, or its lessee, from the payment of a tax imposed upon the privilege of carrying on the particular kind of business for which the corporation was chartered. Cobb v. Commissioners, 122 N. C. 307, 30 S. E. 338.

Whenever a tax is imposed upon a corporation directly by the legislature and is not assessed by assessors, and the amount depends on the amount of business transacted by the corporation, and the extent to which it has exercised the privileges granted in its charter, without reference to the value of its property or the nature of the investments made of it, it is a franchise tax. Burroughs on Tax., 169; Worth v. Petersburg R. Co., 89 N. C. 301, 302, 306.

Tax on Gross Receipts.—A tax on the gross receipts of an insurance company is a privilege tax. Insurance Co. v. Stedman, 130 N. C. 221, 41 S. E. 279.

§ 105-115. Franchise or privilege tax on railroads.—Every person, firm, or corporation, domestic or foreign, owning and/or operating a railroad in this state shall, in addition to all other taxes levied and assessed in the state, pay annually to the commissioner of revenue a franchise, license, or privilege tax for the privilege of engaging in such railroad business within the state of North Carolina, as follows:

(a) Such person, firm or corporation shall during the month of June each year furnish to the commissioner of revenue a copy of the report and statement required to be made to the state board of assessment by the Machinery Act in effect at the time such report is due, and such other and further information as the commissioner of revenue may require.

(b) The value upon which the tax herein levied shall be assessed by the commissioner of revenue and the measure of the extent to which every such railroad company is carrying on intrastate commerce within the state of North Carolina shall be the value of the total property, tangible and intangible, in this state, for each such railroad company, as assessed for ad valorem taxation during the calendar year in which such report is due.

(c) The franchise or privilege tax which every such railroad company shall pay for the privilege of carrying on or engaging in intrastate commerce within this state shall be seventy-five one-hundredths of one per cent (75/100%) of the value ascertained as above by the commissioner of revenue, and tax shall be due and payable within thirty days after date of notice of such tax.

(d) If any such person, firm, or corporation shall fail, neglect, or refuse to make and deliver the report or statements provided for in this section, the commissioner of revenue shall estimate, from the reports and records on file with the state board of assessment, the value upon which the amount of tax due by such company under this section shall be computed, and shall assess the franchise or privilege tax upon such estimate, and shall collect the same, together with such penalties herein imposed for failure to make the report and statement.

(e) It is the intention of this section to levy upon railroad companies a license, franchise, or privilege tax for the privilege of engaging in intrastate commerce carried on wholly within this state, and not a part of interstate commerce; that the tax provided for in this section is not intended to be a tax for the privilege of engaging in interstate commerce, nor is it intended to be a tax on the business of interstate commerce, nor is it intended to be a tax having any relation to the interstate or foreign business or commerce in which any such railroad company may be engaged in addition to its business in this state.

(f) No county, city or town shall levy a license, franchise, or privilege tax on the business taxed under this section. (1939, c. 158, s. 202.)

Cross References.—As to requirement of uniformity, see N. C. Const., Art. V, § 3, and note to Worth v. Petersburg R. Co., 89 N. C. 301, under § 105-241.

§ 105-116. Franchise or privilege tax on electric light, power, street railway, gas, water, sewerage, and other similar public-service companies not otherwise taxed.—(1) Every person, firm, or corporation, domestic or foreign, other than municipal corporations, engaged in the business of furnishing electricity, electric lights, current, power or gas, or owning and/or operating a water or public sewerage system, or owning and/or operating a street railway, street bus or similar street transportation system for the transportation of freight or passengers for hire, shall, within thirty days after the first day of January, April, July and October of each year, make and deliver to the commissioner of revenue, upon such forms and blanks as required by him, a report verified by the oath of the officer or authorized agent making such report and statement, containing the following information:

(a) The total gross receipts for the three months ending the last day of the month immediately preceding such return from such business within and without this state.

(b) The total gross receipts for the same period from such business within this state.

(c) The total gross receipts from the commodities or services described in this section sold to any other person, firm, or corporation engaged in selling such commodities or services to the public, and actually sold by such vendee to the public for consumption and tax paid to this state by the vendee, together with the name of such vendee, with the amount sold and the price received therefor.

(d) The total amount and price paid for such commodities or services purchased from others engaged in the above named business in this state, and the name or names of the vendor.

(2) From the total gross receipts within this state there shall be deducted the gross receipts reported in subsection (1) (c) of this section: Provided, that this deduction shall not be allowed where the sale of such commodities was made to any person, firm, or corporation or municipality which is exempted by law from the payment of the tax herein imposed upon such commodities when sold or used by it.

(3) On every such person, firm or corporation there is levied an annual franchise or privilege tax of six per cent (6%), payable quarterly, of the total gross receipts derived from such business within this state, after the deductions allowed as herein provided for, which said tax shall be for the privilege of carrying on or engaging in the business named in this state, and shall be paid to the commissioner of revenue at the time of filing the report herein provided for: Provided, the tax upon privately owned water companies shall be four per cent (4%) of the total gross receipts derived from such business within this state: Provided further, the tax on gas companies shall be at the rate of four per cent (4%) upon the first twenty-five thousand dollars ($25,000.00) of the total gross receipts, and the tax on all gross receipts in excess of twenty-five thousand dollars ($25,000.00) shall be at the rate of six per cent (6%).

(4) Any person, firm, or corporation failing to file report and pay tax found to be due in accordance with the provisions of this section at the time herein provided for shall, in addition to all other penalties prescribed by this article, pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall in no case

be less than two dollars ($2.00), and shall be added to the tax, together with interest accrued, and shall become an integral part of the tax.

(5) The report herein required of gross receipts within and without the state, shall include the total gross receipts for the period stated of all properties owned and operated by the reporting person, firm, or corporation on the first day of each calendar quarter year, whether operated by it for the previous annual period, or whether intermediately acquired by purchase or lease, it being the intent and purpose of this section to measure the amount of privilege or franchise tax in each calendar quarter year with reference to the gross receipts of the property operated for the previous calendar quarter year and to fix liability for the payment of the tax on the owner, operator, or lessor on the first day of January, April, July and October of each year.

(6) Companies taxed under this section shall not be required to pay the franchise tax imposed by §§ 105-122 or 105-123 unless the tax levied by §§ 105-122 and 105-123 exceed the tax levied in this section, and no county shall impose a franchise or privilege tax upon the business taxed under this section, and no city or town shall impose a greater privilege or license tax upon such companies than the aggregate privilege or license tax which is now imposed by any such city or town. (1939, c. 158, s. 203.)

Section Held Inapplicable. — This section, imposing a franchise tax of six per cent of the total gross earnings on businesses therein enumerated, does not apply to the operation of buses for hire within a city, even though operated on definite routes, unless used in connection with or in substitution for a street railway. Safe Bus v. Maxwell, 214 N. C. 12, 197 S. E. 567.

§ 105-117. Franchise or privilege tax on Pullman, sleeping, chair, and dining cars.—(1) Every person, firm, or corporation, domestic or foreign, engaged in the business of operating in this state any Pullman, sleeping, chair, dining or other similar cars, where an extra charge is made for the use or occupancy of same, shall annually, on or before the first day of August, make and deliver to the commissioner of revenue, upon such forms, blanks, and in such manner as may be required by him, a full, accurate, and true report and statement, verified by oath of the officer or authorized agent making such report, of the total gross receipts of such person, firm, or corporation from such business wholly within this state during the year ending the thirtieth day of June of the current year.

(2) Such person, firm, or corporation shall pay an annual privilege, license, or franchise tax of ten per cent (10%) of the total gross receipts derived from such business wholly within this state; which said tax shall be paid for the privilege of carrying on or engaging in the business named in this state, and shall be paid to the commissioner of revenue at the time of filing the report and statements herein provided for.

(3) No county, city or town shall impose any franchise or privilege tax on the business taxed under this section. (1939, c. 158, s. 204.)

§ 105-118. Franchise or privilege tax on express companies.—(1) Every person, firm, or corporation, domestic or foreign, engaged in this state in the business of an express company as defined in this chapter, shall, in addition to a copy of the report required by the Machinery Act then in effect, annually, on or before the first day of August, make and deliver to the commissioner of revenue a report and statement, verified by the oath of the officer or authorized agent making such report or statement, containing the following information as of the thirtieth day of June of the current year:

(a) The average amount of invested capital employed within and without the state in such business during the year ending the thirtieth day of June of the current year.

(b) The total net income earned on such invested capital from such business during the year ending the thirtieth day of June of the current year.

(c) The total number of miles of railroad lines or other common carriers over which such express companies operate in this state during the year ending the thirtieth day of June of the current year.

(2) Every such person, firm, or corporation, domestic or foreign, engaged in such express business within this state shall pay to the commissioner of revenue, at the time of filing the report required in this section, the following annual franchise or privilege tax for the privilege of engaging in such express business within this state:

Where the net income of the average capital invested during the year ending the thirtieth day of June of the current year is six per cent (6%) or less, fifteen dollars ($15.00) per mile of railroad lines over which operated.

More than six per cent (6%) and less than eight per cent (8%), twenty-one dollars ($21.00) per mile of railroad lines over which operated.

Eight per cent (8%) and over, twenty-five dollars ($25.00) per mile of railroad lines over which operated.

(3) Every such person, firm, or corporation, domestic or foreign, who or which engages in such business without having had previous receipts upon which to levy the franchise or privilege tax, shall report to the commissioner at the time of beginning business in this state and pay for such privilege of engaging in business in this state a tax of seven dollars and fifty cents ($7.50) per mile of the railroad lines over which operated or proposed to operate.

(4) Counties shall not levy a franchise, privilege or license tax on the business taxed under this section; and municipalities may levy an annual franchise, privilege, or license tax on such express companies for the privilege of doing business within the municipal limits as follows:

Municipalities of less than 500 population	$ 5.00
Municipalities of 500 and less than 1,000 population	10.00
Municipalities of 1,000 and less than 5,000 population	20.00
Municipalities of 5,000 and less than 10,000 population	30.00
Municipalities of 10,000 and less than 20,000 population	50.00
Municipalities of 20,000 and over	75.00

(1939, c. 158, s. 205.)

Cross References.—As to requirement of uniformity, see N. C. Const., Art. V, § 3, and note to Worth v. Petersburg R. Co., 89 N. C. 301, under § 105-241.

Constitutionality.—A tax upon express companies of $15.00

per mile of track over which they operate in this State, when the net income is six per cent or less, levied under the provisions of the former statute, was held valid under the provisions of our State Constitution, Art. V, sec. 3. Railway Express Agency v. Maxwell, 199 N. C. 637, 155 S. E. 553.

Where a tax levied on an express company under the provisions of the statute is $15.00 per mile of track over which it operates in this State, amounting to slightly in excess of 12 per cent of its gross revenue exclusively derived from intrastate business, not taking into account large gross receipts from interstate business, it will not be held as a matter of law that the tax is unconstitutional as being confiscatory. Railway Express Agency v. Maxwell, 199 N. C. 637, 638, 155 S. E. 553.

Question of Earnings within and without State Immaterial.—Where a statute imposes a tax upon express companies based upon the mileage of track in this State over which they operate, levying a tax of $15.00 per mile when the net income of the company is six per cent or less, $18.00 when the net income does not exceed eight per cent, and $21.00 per mile when the net income exceeds eight per cent, and the State levies the minimum tax on an express company, which sues to recover the amount so paid, the question of the ratio of the company's net earnings in this and other States, and the amount of the net income are immaterial to the conclusion as to whether the tax is valid, the tax levied being constant regardless of income or the ratio between interstate and intrastate business, and the validity of the higher rate of taxes levied by the statute is not directly presented for decision. Railway Express Agency v. Maxwell, 199 N. C. 637, 638, 155 S. E. 553.

§ 105-119. Franchise or privilege tax on telegraph companies.—(1) Every person, firm or corporation, domestic or foreign, engaged in operating the apparatus necessary for communication by telegraph between points within this state, shall annually, on or before the first day of August, make and deliver to the commissioner of revenue, upon such forms and in such manner as required by him, a report verified by the oath of the officer or authorized agent making such report and statement, containing the following information:

(a) The total gross receipts from business within and without this state for the entire calendar year next preceding due date on such return.

(b) The total gross receipts for the same period from business within this state.

(2) On every such person, firm or corporation there is hereby levied an annual franchise or privilege tax of six per cent (6%) of the total gross receipts derived from business within this state. Such gross receipts shall include all charges for services, all rentals, fees, and all other similar charges from business which both originates and terminates in the state of North Carolina, whether such business in the course of transmission goes outside this state or not. The tax herein levied shall be for the privilege of carrying on or engaging in the business named in this state, and shall be paid to the commissioner of revenue at the time of filing the report herein provided for: Provided, that the tax on the first one thousand dollars ($1,000.00) of gross receipts of any such telegraph company shall be at the rate of four per cent (4%), and all gross receipts in excess of said first one thousand dollars ($1,000.00) shall be taxed at the rate of six per cent (6%).

(3) The report herein required shall include the total gross receipts for the period stated of all properties owned, leased, controlled and/or over which operated by such person, firm or corporation in this state.

(4) Any person, firm or corporation failing to file report and pay tax found to be due in accordance with the provisions of this section at the time herein provided for shall, in addition to all other penalties prescribed in this article, pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall in no case be less than two dollars ($2.00), and shall be added to the tax, together with interest accrued, and shall become an integral part of the tax.

(5) (a) Nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce.

(b) Counties shall not levy a franchise, privilege, or license tax on the business taxable under this section, and municipalities may levy the following license tax:

Less than 5,000 population	$10.00
5,000 and less than 10,000 population	15.00
10,000 and less than 20,000 population	20.00
20,000 population and over	50.00

(1939, c. 158, s. 206.)

§ 105-120. Franchise or privilege tax on telephone companies.—(1) Every person, firm or corporation, domestic or foreign, owning and/or operating a telephone business for the transmission of messages and/or conversations to, from, through, in or across this state, shall, within thirty days after the first day of January, April, July and October of each year, make and deliver to the commissioner of revenue a quarterly return, verified by the oath of the officer or authorized agent making such return, showing the total amount of gross receipts of such telephone company for the three months ending the last day of the month immediately preceding such return, and pay, at the time of making such return, the franchise, license or privilege tax herein imposed.

(2) An annual franchise or privilege tax of six per cent (6%), payable quarterly, on the gross receipts of such telephone company, is herein imposed for the privilege of engaging in such business within this state. Such gross receipts shall include all rentals, other similar charges, and all tolls received from business which both originates and terminates in the state of North Carolina, whether such business in the course of transmission goes outside of this state or not: Provided, where any city or town in the state has heretofore sold at public auction to the highest bidder the right, license and/or privilege of engaging in such business in such city or town, based upon a percentage of gross revenue of such telephone company, and is now collecting and receiving therefor a revenue tax not exceeding one per cent of such revenues, the amount so paid by such operating company, upon being certified by the treasurer of such municipality to the commissioner of revenue, shall be from time to time credited by the commissioner of revenue to such telephone company upon the tax imposed by the state under this section of this chapter.

(3) Any such person, firm or corporation, domestic or foreign, who or which fails, neglects, or refuses to make the return, and/or pay the tax at the time provided for in this section, shall pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall not be less than two dollars ($2.00) in any case, and shall be added to the tax, together with the interest ac-

crued, and shall become an integral part of the tax.

(4) Nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce.

(5) Counties, cities and towns shall not levy any franchise, license, or privilege tax on the business taxed under this section. (1939, c. 158, s. 207.)

§ 105-121. Franchise or privilege tax on insurance companies.—Every person, firm, or corporation, domestic or foreign, which contracts on his, their, or its account to issue any policies for or agreements for life, fire, marine, surety, guaranty, fidelity, employers' liability, liability, credit, health, accident, livestock, plate glass, tornado, automobile, automatic sprinkler, burglary, steam boiler, and all other forms of insurance shall apply for and obtain from the insurance commissioner a state license for the privilege of engaging in such business within this state and shall pay for such state license the following tax:

(1) The annual license or privilege tax, due and payable on or before the first day of April of each year, shall be for each such license issued to:

An insurance rate-making company or association	$200.00
A life insurance company or association	250.00
A fire insurance company or association of companies operating a separate or distinct plant of agencies	200.00
An accident or health insurance company or association	200.00
A marine insurance company or association	200.00
A fidelity or surety company or association	200.00
A plate-glass insurance company or association	200.00
A boiler insurance company or association	200.00
A foreign mutual insurance company or association	200.00
A domestic farmers' mutual insurance company or association	10.00
A fraternal order	25.00
A bond, investment, dividend, guaranty, registry, title guaranty, credit, fidelity, liability, or debenture company or association	200.00
All other insurance companies or associations except domestic mutual burial associations	200.00

When the paid-in capital stock and/or surplus of an insurance company does not exceed one hundred thousand dollars ($100,000.00), the license tax levied in subsection one shall be one-half the amount named.

All such license fees shall be subject to the provisions of § 58-64 as to additional classes of business.

(2) Every such person, firm, or corporation, domestic or foreign, engaged in the business hereinbefore described in this section, shall by its general agent, president, or secretary, within the first fifteen days of February and August of each year, file with the insurance commissioner of this state a full, accurate, and correct report and statement, verified by the oath of such general agent or president, secretary, or some officer at the home or head office of the company or association in this country, of the total gross premium receipts including premiums or deposits on annuity contracts derived from such insurance business from the residents of this state, or on property located therein, during the preceding six months of the previous calendar year, and at the time of making such report and statement shall, except as hereinafter provided, pay to the insurance commissioner, in addition to other license taxes imposed in this section, a license or privilege tax for the privilege of engaging in such business in this state, a license tax of two and one-half per cent (2½%) upon the amount of such gross premium receipts, with no deduction for dividends, whether returned in cash or allowed in payment or reduction of premiums or for additional insurance, and without any deduction except for return premiums or return assessments. The rate of tax on premiums for liability under the Workmen's Compensation Act for all insurance companies collecting such premiums shall be four per cent (4%) on all premiums collected in this state on such liability insurance, and a corresponding rate of tax shall be collected from self-insurers: Provided, if any general agent shall file with the insurance commissioner a sworn statement showing that fifteen per centum of the entire assets of his company are invested and are maintained in any of the following securities or property, to-wit: bonds of this state or any county, city, town, or school district of this state; or in loans to citizens or corporations or organizations in this state; or stock in corporations of this state; or property situated within this state, then such tax shall be three-fourths per centum of such gross premium receipts: Provided, that the provisions herein as to tax and premium receipts shall not apply to domestic farmers' mutual fire insurance companies, nor to fraternal orders or societies that do not operate for a profit and do not issue policies on any person except its members.

(3) Every special or district agent, manager, or organizer, general agent, local canvassing agent, resident or non-resident adjuster, or non-resident broker, representing any company referred to in this section, shall on or before the first day of April of each year apply for and obtain from the insurance commissioner a license for the privilege of engaging in such business in this state, and shall pay for such license for each company represented the following annual tax:

Special or district agent, manager, or organizer (including seal)	$ 5.00
General agent	6.00
Local or canvassing agent (including seal)	2.50
Resident fire insurance adjuster	2.00
Non-resident fire insurance adjuster	5.00
Non-resident broker	10.00

But any such company having assets invested and maintained in this state as provided in subsection three of this section shall pay the following license fees: for

Special agent (including seal)	$2.50
Local canvassing agent (including seal)	1.00

Any person not licensed as an insurance agent on April first, one thousand nine hundred and thirty-three, and applying for license thereafter, shall pay an examination fee of ten dollars

($10.00), to be paid to the insurance commissioner as other license fees and taxes: Provided, agents for farm mutual fire insurance companies shall not be required to take an examination and pay the examination fee.

In the event a license issued under this subsection is lost or destroyed, the insurance commissioner, for a fee of fifty cents ($0.50) may certify to its issuance, giving number, date, and form, which may be used by the original party named thereon in lieu of the said original license. There shall be no charge for the seal affixed to such certificate of said license.

(4) Any person, firm, or corporation, domestic or foreign, exchanging reciprocal or inter-insurance contracts as provided herein, shall pay through their attorneys an annual license fee, due and payable on the first day of April of each year, of two hundred dollars ($200.00) and two and one-half per cent (2½%) of the gross premium deposits, and also all other regular fees prescribed by law, to be reported, assessed, and paid as other gross premium taxes provided for in this section: Provided, the tax on workmen's compensation insurance premiums shall be the same as that fixed in subsection two of this section.

(5) Companies paying the tax levied in this section shall not be liable for franchise tax on their capital stock, and no county, city, or town shall be allowed to impose any additional tax, license, or fee, other than ad valorem taxes, upon any insurance company, association or agent paying the tax levied in this section. The license fees and taxes imposed in this section shall be paid to the insurance commissioner. (1939, c. 158, s. 208; 1941, c. 50, s. 4; 1943, c. 60, s. 1; 1943, c. 400, s. 3.)

Editor's Note.—The 1941 amendment reduced the license tax on insurance rate-making companies or associations from $350 to $200. For comment on this amendment, see 19 N. C. Law Rev. 529.

The first 1943 amendment struck out a former provision of subsection (1) relating to mutual burial associations. The second 1943 amendment omitted the word "life" formerly appearing before the word "insurance" in line two of the next to the last paragraph of subsection (1). It also substituted in the first proviso of subsection (2) the words "fifteen per centum" for the word "one-fifth."

Constitutionality.—Foreign corporations do business here by comity of the state, and the latter may impose a license tax as a condition upon which such corporations may do business here under the protection of our laws, where such is not an interference with interstate commerce, or the tax is not otherwise invalid. Pittsburgh Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568; and it is no valid objection that such tax is higher than that imposed on similar domestic corporations. Id.

The license tax imposed upon the gross receipts of insurance companies on business written within the borders of our State, is not in contravention of the fourteenth amendment to the Constitution of the United States, as to due process and equal protection of the law, nor a burden upon interstate commerce, being restricted to intrastate commerce, and not extending beyond the boundaries of the State. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568.

The determination of the question as to just how far a state legislature could go in prohibiting foreign corporations from doing business within the state or just what restrictions and conditions could be validly imposed has given rise to many conflicting decisions. The cases, over a long period of time, were far from being harmonious and the various courts could not agree as to where the line of demarcation should be drawn. Finally the question was presented to the United States Supreme Court and the substance of the present rules in regard to this subject appears to be this: (1) a state may validly close her doors to a foreign corporation and prohibit it from coming within her borders to do business. (2) A state, upon granting admittance to a foreign corporation, may validly impose any and all restrictions and conditions it sees fit, and such corporation cannot object that a compliance with the same conditions is not exacted of a domestic corporation.

This seems to be the limit of the state's power, and the line is drawn when (3) it is held that a state, upon permitting a foreign corporation to do business within her borders, cannot require that if a suit or action is brought against such corporation, then the corporation cannot carry the case to a federal court.—Ed. Note.

Tax on Gross Earnings.—The tax on gross receipts means all receipts from business done in the state, whether the money is paid here or forwarded to the main office. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568.

Same—A License Tax.—The tax imposed upon the gross earnings of foreign life insurance companies doing business within this state, derived within this state, is a license or occupation tax. Pittsburg Life, etc., Co. v. Young, 172 N. C. 470, 90 S. E. 568.

§ 105-121.1. Mutual burial associations.—An annual franchise or privilege tax on all domestic mutual burial associations shall be due and payable to the commissioner of revenue on or before the first day of April of each year. The amount of this franchise or privilege tax shall be based on the membership of such associations according to the following schedule:

Membership less than 3,000	$15.00
Membership of 3,000 to 5,000	20.00
Membership of 5,000 to 10,000	25.00
Membership of 10,000 to 15,000	30.00
Membership of 15,000 to 20,000	35.00
Membership of 20,000 to 25,000	40.00
Membership of 25,000 to 30,000	45.00
Membership of 30,000 or more	50.00

(1943, c. 60, s. 2.)

§ 105-122. Franchise or privilege tax on domestic and foreign corporations.—(1) Every corporation, domestic and foreign, incorporated or, by any act, domesticated under the laws of this state, except as otherwise provided in this article or schedule, shall, on or before the thirty-first day of July of each year, make and deliver to the commissioner of revenue in such form as he may prescribe a full, accurate and complete report and statement verified by the oath of its duly authorized officers, containing such facts and information as may be required by the commissioner of revenue as shown by the books and records of the corporation as at the close of its last calendar or fiscal year next preceding July thirty-first of the year in which report is due.

(2) Every such corporation taxed under this section shall determine the total amount of its issued and outstanding capital stock, surplus and undivided profits; no reservation or allocation from surplus or undivided profits shall be allowed other than for definite and accrued legal liabilities, except as herein provided; taxes accrued, dividends declared and reserves for depreciation of tangible assets as permitted for income tax purposes shall be treated as deductable liabilities. Treasury stock shall not be considered in computing the capital stock, surplus and undivided profits as the basis for franchise tax, but shall be excluded proportionately from said capital stock, surplus and undivided profits as the case may be upon the basis and to the extent of the cost thereof. The capital stock for the purposes of this section shall be deemed to be inadequate to the extent that additional loans, credits, goods, supplies or other capital of whatsoever nature is furnished by the parent or affiliated corporation.

Every corporation doing business in this state

which is a subsidiary of another corporation shall add to its capital stock, surplus and undivided profits all indebtedness owed to or endorsed or guaranteed by the parent corporation as a part of the capital used in its business in this state, and as a part of the base for franchise tax under this article. The term "indebtedness" used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by the parent corporation, or by any subsidiary of the parent corporation. The term "subsidiary corporation" as used in this paragraph shall mean any corporation, a majority of stock in which is owned by a parent corporation. The term "parent corporation" shall include any subsidiary of the parent corporation. If any part of the capital used by the parent corporation is borrowed capital, the subsidiary may deduct from its indebtedness to the parent corporation such proportion of its indebtedness as the indebtedness of the parent corporation is to the total assets of such corporation.

(3) After ascertaining and determining the amount of its capital stock, surplus and undivided profits, as herein provided, every such corporation permitted to do business in this state shall allocate to such business in this state a proportion of the total amount of its capital stock, surplus and undivided profits as herein defined, according to the following rules:

(A) If the principal business of a company in this state is manufacturing, or if it is in any form of collecting, buying, assembling, or processing goods and materials within this state the total amount of capital stock, surplus and undivided profits of such corporation shall be apportioned to North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios:

(a) The ratio of the book value of its real estate and tangible personal property in this state on the date of the close of the calendar or fiscal year of such corporation in the income year is to the book value of its entire real estate and tangible personal property then owned by it, with no deductions on account of encumbrances thereon.

(b) The ratio of the total cost of manufacturing, collecting, buying, assembling, or processing within this state during the income year to the total cost of manufacturing, collecting, assembling, or processing within and without the state. The term "cost of manufacturing, collecting, buying, assembling, or processing within and without this state" as used herein shall be interpreted in a manner to conform as nearly as may be to the best accounting practice in the trade or business. Unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis, this term shall be generally interpreted to include as elements of cost within and without this state the following:

(c) The total cost of all goods, materials, and supplies used in manufacturing, assembling, or processing, regardless of where purchased.

(d) The total wages and salaries paid or accrued during the income year in such manufacturing, assembling, or processing activities.

(e) The total overhead or manufacturing burden properly assignable according to good accounting practice to such manufacturing, assembling, or processing activities, not including, however, property, privilege, stamp or other taxes.

(f) The term "book value" as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis.

(g) The words "tangible personal property" shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.

(h) The word "manufacturing" shall be defined as mining and all processes of fabricating or of curing raw material.

(B) If the principal business of a company in this state is selling, distributing, or dealing in tangible personal property within this state, the total amount of capital stock, surplus and undivided profits of such company shall be apportioned to North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios:

(a) The ratio of the book value of its real estate and tangible personal property in this state on the date of the close of the calendar or fiscal year of such company in the income year is to the book value of its entire real estate and tangible personal property then owned by it, with no deduction on account of encumbrances thereon.

(b) The ratio of the total sales made through or by offices, agencies, or branches located in North Carolina during the income year to the total sales made everywhere during said income year.

(c) The word "sales" as used in this section shall be defined as sale or rental of real estate and sale or rental of tangible properties.

(d) The term "book value" as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis.

(e) The words "tangible personal property" shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.

(C) If the principal business in this state of a corporation is other than that described in subsection (A) or subsection (B) of this section, then the total amount of capital stock, surplus and undivided profits of such corporation shall be apportioned to North Carolina on the basis of the ratio of its gross receipts in this state during the income year to its gross receipts for such year within and without the state.

(a) The words "gross receipts" as used in this subsection shall be taken to mean and include the entire receipts for business done by such corporation.

(D) If any corporation believes that the method of allocation or apportionment hereinbefore described as administered by the commissioner of revenue has operated or will so operate as to subject it to taxation on a greater portion of its capital stock, surplus, and undivided profits than is reasonably attributable to business within the state, it shall be entitled to file with the commissioner a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the commissioner may prescribe. If, after a consideration of the matters involved, it shall be found by the commissioner upon evidence offered which is clear, cogent and convincing that the application of the allocation formula subjects the corporation to taxation on a greater portion of its capital stock, surplus and undivided profits than is reasonably attributable to business within this state, the commissioner shall be authorized to add to the factors of the applicable allocation formula, or substitute for one of the factors of the applicable allocation formula, depending upon whether such addition or such substitution in the opinion of the commissioner more accurately reflects the capital stock, surplus, and undivided profits attributable to this state, the following factor:

The ratio of the expenditure of the wages, salaries, commissions, or other compensation of whatsoever kind to its officers or employees, assignable to this state as hereinafter provided, to the total expenditure of the corporation for wages, salaries, commissions, or other compensation of whatsoever kind to all its officers or employees. The amount assignable to this state of the expenditure of the corporation for wages, salaries, commissions or other compensation to its officers or employees shall be such expenditure for the taxable year as represents the compensation of officers or employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the state.

The relief herein authorized shall be granted by the commissioner only in cases of clear, cogent, and convincing proof that the petitioning taxpayer is entitled thereto. There shall be a presumption that the allocation formulae prescribed in subsection (3) of this section reasonably attribute to North Carolina the proportion of the corporation's capital stock, surplus and undivided profits used in connection with its business in this state, and the burden shall rest upon the corporation to show the contrary. No corporation shall use this alternative factor in making a franchise tax report or return to this state except upon order in writing of the commissioner, and any return in which the alternative factor is used without the permission of the commissioner shall not be a lawful return.

(E) The proportion of the total capital stock, surplus and undivided profits of each such corporation so allocated shall be deemed to be the proportion of the total capital stock, surplus and undivided profits of each such corporation used in connection with its business in this state and liable for annual franchise tax under the provisions of this section.

(4) After determining the proportion of its total capital stock, surplus and undivided profits as set out in subsection three of this section, which amount so determined shall in no case be less than the total assessed value (including total gross valuation returned for taxation of intangible personal property) of all the real and personal property in this state of each such corporation for the year in which report is due nor less than its total actual investment in tangible property in this state, every corporation taxed under this section shall annually pay to the commissioner of revenue, at the time the report and statement are due, a franchise or privilege tax, which is hereby levied, at the rate of one dollar and seventy-five cents ($1.75) per one thousand dollars ($1,000.00) of the total amount of capital stock, surplus and undivided profits as herein provided. The tax imposed in this section shall in no case be less than ten dollars ($10.00) and shall be for the privilege of carrying on, doing business, and/or the continuance of articles of incorporation or domestication of each such corporation in this state: Provided, that the basis for the franchise tax on all corporations, eighty per cent (80%) of whose outstanding capital stock is owned by persons or corporations to whom or to which such stock was issued prior to January first, one thousand nine hundred thirty-five, in part payment or settlement of their respective deposits in any closed bank of the state of North Carolina, shall be the total assessed value of the real and tangible personal property of such corporation in this state for the year in which report and statement is due under the provisions of this section. The term "total actual investment in tangible property" as used in this section shall be construed to mean the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this state plus additions and improvements thereto less reserve for depreciation as permitted for income tax purposes, and also less any indebtedness incurred and existing by virtue of the purchase of any real estate and any permanent improvements made thereon.

(5) The report, statement and tax required by this section shall be in addition to all other reports required or taxes levied and assessed in this state.

Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section. (1939, c. 158, s. 210; 1941, c. 50, s. 4; 1943, c. 400, s. 3.)

Editor's Note.—The 1941 amendment inserted the last sentence of the first paragraph of subdivision (2). It also made changes in subsection (C) of subdivision (3) and designated a following paragraph under said subdivision as (D).

The 1943 amendment rewrote portions of subsection (2). It also inserted subdivision (D) of subsection (3) and changed former subdivision "(D)" to "(E)."

Tax Is on Privilege of Existence.—By the express terms of P. L. 1931, ch. 427, § 210, which was superseded by this section, the corporation was liable for the annual franchise tax for each year during which it enjoyed the privilege of the continuance of its charter. It was immaterial whether or not the corporation exercised its privilege of doing or carrying on the business authorized by its charter or certificate of incorporation; it was liable so long as it enjoyed the privilege granted by the state of "being" a corporation. Stagg v. Nessen Co., 208 N. C. 285, 180 S. E. 658.

§ 105-123. New corporations.—(1) No corporation, domestic or foreign, shall be permitted to do business in this state without paying the franchise tax levied in this article or schedule. When such domestic corporation is incorporated under laws of this state or such foreign corporation is domesticated in this state, and has not heretofore done business in the state, upon which a report might be filed under § 105-122 notice in writing thereof shall be given to the commissioner of revenue by such corporation, and it shall be competent for the commissioner of revenue and he is hereby authorized to obtain such information concerning the basis for the levy of the tax from such other information he can obtain and to that end may require of such corporation to furnish him such a report as may clearly reflect and disclose the amount of its issued and outstanding capital stock, surplus and undivided profits as set out in § 105-122, and information as to such other factors as may be necessary to determine the basis of the tax. When this has been determined, in accordance with the provisions of § 105-122 as far as the same may be applicable, and upon the information which he has secured, the commissioner of revenue shall thereupon determine the amount of franchise tax to be paid by such new corporation, and said tax shall be due and payable within thirty days from date of notice thereof from the commissioner of revenue, which tax, in no event, shall be less than a ratable proportion of the tax for the franchise privilege extended for one year on the determined basis, nor less than the minimum tax of ten dollars ($10.00); the tax levied in this section shall be for the period from date of incorporation or domestication to June thirtieth next following.

(2) Any corporation failing to notify the commissioner of revenue as provided for in subsection (1) of this section within sixty days after date of the incorporation or domestication of such corporation in this state shall be subject to all penalties and remedies imposed for failure to file any report required under this article or schedule.

(3) The provisions of this section shall apply only to corporations newly incorporated or newly domesticated in this state. (1939, c. 158, s. 211.)

§ 105-124. Review of returns—additional taxes.—Upon receipt of any report, statement and tax as provided by this article or schedule, the commissioner of revenue shall cause same to be reviewed and examined for the purpose of ascertaining if same constitute a true and correct return as required by this article or schedule. If the commissioner of revenue discovers from the examination of any return, or otherwise, that the franchise or privilege tax of any taxpayer has not been correctly determined, computed and/or paid, he may at any time within three years after the time when the return was due, give notice in writing, to the taxpayer of such deficiency plus interest at the rate of six per cent (6%) per annum from date when return was due, and any over-payment of the tax shall be returned to the taxpayer within thirty days after it is ascertained. In the case of any taxpayer who has failed to file any return or statement required under this article or schedule, the limitation of three years shall not apply and the commissioner of revenue shall, from facts within his knowledge, prepare tentative returns for such delinquent taxpayer, and shall assess the taxes, penalties and interest upon these findings; this provision shall not be construed to relieve said taxpayer from liability for a return or from any penalties and remedies imposed for failure to file proper return. Any taxpayer feeling aggrieved by such proposed assessment shall be entitled to a hearing before the commissioner of revenue, if within thirty days after date of notice of such proposed assessment, the taxpayer shall apply in writing for such hearing, explaining in detail his objections to same. If no request for such hearing is made, such proposed assessment shall be final and conclusive. If the request for hearing is made, the taxpayer shall be heard by the commissioner of revenue, and after such hearing the commissioner of revenue shall render his decision. The taxpayer shall be advised of his decision by mail, and such amount shall be due and payable within ten days after date of notice thereof. (1939, c. 158, s. 212.)

§ 105-125. Corporations not mentioned.—None of the taxes levied in §§ 105-122 and 105-123 shall apply to religious, fraternal, benevolent, or educational corporations not operating for a profit; nor to banking and insurance companies; nor to business leagues, boards of trade, clubs organized and operated exclusively for pleasure, recreation and other non-profitable purposes, civic leagues operated exclusively for the promotion of social welfare, or chambers of commerce and merchants associations not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder, individual, or other corporations:

Provided, that each such corporation must, upon request by the commissioner of revenue, establish in writing its claim for exemption from said provisions. The provisions of §§ 105-122 and 105-123 shall apply to electric light, power, street railway, gas, water, Pullman, sleeping and dining car, express, telegraph, telephone, motor bus, and truck corporations to the extent and only to the extent that the franchise tax levied in §§ 105-122 and 105-123 exceed the franchise taxes levied in other sections of this article or schedule. The exemptions in this section shall apply only to those corporations specifically mentioned, and no other. (1939, c. 158, s. 213.)

§ 105-126. Penalties for non-payment or failure to file report.—(1) Any person, firm, or corporation, domestic or foreign, failing to pay the license, privilege, or franchise tax levied and assessed under this article or schedule when due and payable shall, in addition to all other penalties prescribed in this article, pay an additional tax of ten per cent (10%) and interest at the rate of six per cent (6%) per annum on the total amount of tax due and additional tax incurred, which said additional tax shall not be less than two dollars ($2.00) in any case, and shall be added to the tax, together with the interest accrued, and shall become an integral part of the tax.

(2) Any person, firm, or corporation failing to file the report required in this article or schedule on or before the date specified shall pay a penalty of ten per cent (10%) of the tax found to be due, which penalty shall in no case be less than five dollars ($5.00). (1939, c. 158, s. 214.)

§ 105-127. When franchise or privilege taxes payable. — (1) Every corporation, domestic or foreign, from which a report is required by law to be made to the commissioner of revenue shall, unless otherwise provided, pay to said commissioner annually the franchise tax as required by §§ 105-122 and 105-123.

(2) It shall be the duty of the commissioner of revenue to mail to the registered address, last listed with the commissioner of revenue, of every such corporation, report forms to be used in complying with the provisions of this article or schedule, which forms shall contain a copy of so much of this and other sections of this article as relates to penalties for failure to pay said taxes.

(3) It shall be the duty of the treasurer or other officer having charge of any such corporation, domestic or foreign, upon which a tax is herein imposed, to transmit the amount of the tax due to the commissioner of revenue within the time provided by law for payment of same.

(4) Individual stockholders in any corporation, joint stock association, limited partnership, or company paying a tax on its entire capital stock shall not be required to list or pay ad valorem taxes on the shares of stock owned by them.

(5) Corporations in the state legally holding shares of stock in other corporations, upon which the tax has been paid to the state by the corporation issuing the same, shall not be required to list or pay an ad valorem tax on said shares of stock. (1939, c. 158, s. 215.)

§ 105-128. Power of attorney.—The commissioner of revenue shall have the authority to require a proper power of attorney of each and every agent for any taxpayer under this article. (1939, c. 158, s. 217.)

§ 105-129. Extension of time for filing returns; fraudulent return made misdemeanor. — (1) The return required by this article or schedule shall be due on or before the dates specified unless written application for extension of time in which to file, containing reasons therefor, is made to the commissioner of revenue on or before due date of such return. The commissioner of revenue for good cause may extend the time for filing any return under this article or schedule, provided interest at the rate of six per cent (6%) per annum from date return is due is paid upon the total amount of tax due.

(2) The provisions of this article with respect to revision and appeal shall apply to the tax so assessed. The limitation of three years to the assessment of such tax or additional tax shall not apply to the assessment of additional taxes upon fraudulent return. Any officer or agent of a corporation who shall knowingly make a fraudulent return under this article or schedule shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) and/or imprisoned at the discretion of the court. (1939, c. 158, s. 216.)

Art. 4. Schedule D. Income Tax.

§ 105-130. Short title.—This article shall be known and may be cited as the income tax article of the revenue act. (1939, c. 158, s. 300.)

§ 105-131. Purpose.—The general purpose of this article is to impose a tax for the use of the state government upon the net income in excess of the exemption herein allowed, for the calendar year one thousand nine hundred and thirty-nine and each year thereafter collectible in the year one thousand nine hundred and forty and annually thereafter:

(a) Of every resident of the state.

(b) Of every domestic corporation.

(c) Of every foreign corporation and of every non-resident individual having a business or agency in this state or income from property owned, and from every business, trade, profession or occupation carried on in this state.

(d) The tax imposed upon the net income of corporations in this article is in addition to all other taxes imposed under this act. (1939, c. 158, s. 301.)

§ 105-132. Definitions. — For the purpose of this article, and unless otherwise required by the context:

1. The word "taxpayer" includes any individual, corporation, or fiduciary subject to the tax imposed by this article.

2. The word "individual" means a natural person.

3. A "head of a household" is an individual who actually maintains and supports in one household in this state one or more individuals who are closely related by blood relationship, relationship by marriage, or by adoption, and whose right to exercise family control and provide for these dependent individuals is based on some moral or legal obligation.

4. The word "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person, whether individual or corporation, acting in any fiduciary capacity for any person, estate or trust.

5. The word "person" includes individuals, fiduciaries, partnerships.

6. The word "corporation" includes joint stock companies or associations and insurance companies.

7. The words "domestic corporation" mean any corporation organized under the laws of this state.

8. The words "foreign corporation" mean any corporation other than a domestic corporation.

9. The words "tax year" mean the calendar year in which the tax is payable.

10. The words "income year" mean the calendar year or the fiscal year upon the basis of which the net income is computed under this article; if no fiscal year has been established, they mean the calendar year.

11. The words "fiscal year" mean an income year, ending on the last day of any month other than December.

12. The word "paid", for the purposes of the deductions under this article, means "paid or accrued" and the words "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this article. The word "received", for the purpose of the computation of the net income under this article, means "received or accrued", and the words "received or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this article.

13. The word "resident" applies only to individuals and includes, for the purpose of determining liability for the tax imposed with reference to the income of any income year, all individuals who, at any time during such income year, are domiciled in this state, or who, whether regarding their domicile as in this state or not, reside within this state for other than a temporary or transitory purpose. In the absence of convincing proof to the contrary, any individual who is present within the state for more than six months during such income year shall be deemed to be a resident of the state; but absence from the state for more than six months shall raise no presumption that the individual is not a resident of the state.

In cases in which it is demonstrated to the satisfaction of the commissioner of revenue that an individual was a resident of this state for only part of the income year, having moved into or removed from the state during such year, such individual shall, as to income received by him during the period of his residence, report for taxation all income required to be so reported by residents and shall, as to income received by him during the remainder of such year, report for taxation all income required to be so reported by nonresidents: Provided, that in the case of an individual removing from the state during such year, he shall not be regarded as having become a nonresident until he shall have both established a definite residence elsewhere and abandoned any domicile he may have acquired in this state.

The fact that an individual is a nonresident of the state at the time the tax becomes due and payable shall not affect his liability for the tax.

14. The words "foreign country" mean any jurisdiction other than the one embraced within the United States. The words "United States", when used in a geographical sense, include the states, and territories of Alaska and Hawaii, the District of Columbia, and the possessions of the United States. (1939, c. 158, s. 302; 1941, c. 50, s. 5.)

Editor's Note.—The 1941 amendment substituted subsection (13) for the former subsection 13. For comment on this amendment, see 19 N. C. Law Rev. 530. See 17 N. C. Law Rev. 382, for comment on definition of "head of household."

Salary of Federal Officer Not Taxable.—A state cannot tax the salary of a federal officer, nor of a state officer whose office is created by the constitution. Purnell v. Page, 133 N. C. 125, 45 S. E. 534.

Imposition of Income Tax.

§ 105-133. Individuals.—A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually, with respect to the net income of the taxpayer as herein defined, and upon income earned within the state of every non-resident having a business or agency in this state or income from property owned and from every business, trade, profession or occupation carried on in this state, computed at the following rates, after deducting the exemptions provided in this article.

On the excess over the amount legally exempted, up to two thousand dollars, three per cent (3%).

On the excess above two thousand dollars, and up to four thousand dollars, four per cent (4%).

On the excess above four thousand dollars, and up to six thousand dollars, five per cent (5%).

On the excess over six thousand dollars, and up to ten thousand dollars, six per cent (6%).

On the excess over ten thousand dollars, seven per cent (7%). (1939, c. 158, s. 310.)

§ 105-134. Corporations.

I. Domestic Corporations. — Every corporation organized under the laws of this state shall pay annually an income tax equivalent to six per cent on the entire net income, as herein defined, received by such corporation during the income year.

II. Foreign Corporations. — Every foreign corporation doing business in this state shall pay annually an income tax equivalent to six per cent of a proportion of its entire net income, to be determined according to the following rules:

1. If the principal business of a company in this state is manufacturing, or if it is any form of collecting, buying, assembling, or processing goods and materials within this state, the entire net income of such corporation shall be apportioned by North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios:

(a) The ratio of the book value of its real estate and tangible personal property in this state on the date of the close of the calendar or the fiscal year of such corporation in the income year is to the book value of its entire real estate and tangible personal property then owned by it, with no deductions on account of encumbrances thereon.

(b) The ratio of the total cost of manufacturing, collecting, buying, assembling, or processing within this state during the income year to the total cost of manufacturing, collecting, buying, assembling, or processing within and without the state. The term "cost of manufacturing, collecting, buying, assembling, or processing within and without this state", as used herein, shall be interpreted in a manner to conform as nearly as may be to the best accounting practice in the trade or business. Unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis, this term shall be generally interpreted to include as elements of cost within and without this state the following:

(c) The total cost of all goods, materials, and supplies used in manufacturing, assembling, or processing, regardless of where purchased.

(d) The total wages and salaries paid or accrued during the income year in such manufacturing, assembling or processing activities.

(e) The total overhead or manufacturing burden properly assignable according to good accounting practice to such manufacturing, assembling or processing activities, not including, however, property, privilege, stamp, or other taxes.

(f) The term "book value" as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis.

(g) The words "tangible personal property" shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock,

bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.

(h) The word "manufacturing" shall be defined as mining and all processes of fabricating or of curing raw materials.

2. If the principal business of a company in this state is selling, distributing or dealing in tangible personal property within this state, the entire net income of such company shall be apportioned to North Carolina on the basis of the ratio obtained by taking the arithmetical average of the following two ratios.

(a) The ratio of the book value of its real estate and tangible personal property in this state on the date of the close of the calendar or fiscal year of such company in the income year is to the book value of its entire real estate and tangible property then owned by it, with no deduction on account of encumbrances thereon.

(b) The ratio of the total sales made through or by offices, agencies, or branches located in North Carolina during the income year to the total sales made everywhere during said income year.

(c) The word "sales" as used in this section shall be defined as sale or rental of real estate and sale or rental of tangible properties.

(d) The term "book value" as used herein shall be defined to mean original cost plus additions and improvements less reserve for depreciation on the date of the close of the calendar or fiscal year of such company, unless in the opinion of the commissioner of revenue the peculiar circumstances in any case justify a different basis.

(e) The words "tangible personal property" shall be taken to mean corporeal personal property such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean cash on hand or in bank, shares of stock, bonds, notes, accounts receivable, credits, special privileges, franchises, good will, or evidence of an interest in property and evidences of debt.

(f) Foreign insurance companies doing business in this state and returning premium receipts to the insurance commissioner, and paying the tax upon such premium receipts as provided in § 105-121 shall be exempt from this tax on income in so far as the income is derived from their insurance business. However, in case of a foreign insurance company owning real estate in this state from which rents are received it is required to file an income tax return reporting income received from such real estate in this state and take credit for actual expenses incurred in connection therewith.

3. If the principal business in this state of a corporation is other than that described in subsection 1 or subsection 2 of subdivision II of this section, then the total income of such corporation shall be apportioned to North Carolina on the basis of the ratio of its gross receipts in this state during the income year to its gross receipts for such year within and without the state.

(a) The words "gross receipts" as used in this subsection shall be taken to mean and include the entire receipts for business done by such company.

4. If any corporation believes that the method of allocation or apportionment hereinbefore described as administered by the commssioner of revenue has operated or will so operate as to subject it to taxation on a greater portion of its net income than is reasonably attributable to business or earnings within the state, it shall be entitled to file with the commissioner a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the commissioner may prescribe. If, after a consideration of the matters involved, it shall be found by the commissioner upon evidence offered which is clear, cogent and convincing that the application of the allocation formula subjects the corporation to taxation on a greater portion of its income or earnings than is reasonably attributable to business or earnings within this state, the commissioner shall be authorized to add to the factors of the applicable allocation formula, or substitute for one of the factors of the applicable allocation formula, depending upon whether such addition or such substitution in the opinion of the commissioner more accurately reflects the income attributable to this state, the following factor:

The ratio of the expenditure of the wages, salaries, commissions or other compensation of whatsoever kind to its officers or employees, assignable to this state as hereinafter provided, to the total expenditure of the corporation for wages, salaries, commissions, or other compensation of whatsoever kind to all its officers or employees. The amount assignable to this state of the expenditure of the corporation for wages, salaries, commissions or other compensation to its officers or employees shall be such expenditure for the taxable year as represents the compensation of officers or employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the state.

The relief herein authorized shall be granted by the commissioner only in cases of clear, cogent, and convincing proof that the petitioning taxpayer is entitled thereto. There shall be a presumption that the allocation formulae prescribed in subdivisions one (1), two (2), and three (3) of Part II of this section reasonably attribute to North Carolina the proportion of the corporation's income earned in this state, and the burden shall rest upon the corporation to show the contrary. No corporation shall use this alternative factor in making a report or return of its income to this state except upon order in writing of the commissioner, and any return in which the alternative factor is used without the permission of the commissioner shall not be a lawful return. (1939, c. 158, s. 311; 1941, c. 50, s. 5; 1943, c. 400, s. 4.)

Editor's Note.—The 1941 amendment changed subsection 3 of subdivision II.

The 1943 amendment added subsection 4.

For an excellent note on constitutionality of income allocation formulae as applied to corporations, see 9 N. C. Law Rev. 470.

For case construing the early income tax laws, see Hans Rees' Sons v. North Carolina, 283 U. S. 123, 51 S. Ct. 385, 75 L. Ed. 879.

Corporation Must Show Allocation Unconstitutional.—Where the commissioner of revenue has assessed an income tax against a foreign corporation operating a manufacturing plant in this State in accordance with the provisions of this section, without regard to its intangible property, the commissioner's assessment will be up-

held by the courts upon appeal where the corporation has failed to show that such method of allocation is unconstitutional in its application to the corporation. State v. Kent-Coffey Mfg. Co., 204 N. C. 365, 168 S. E. 397.

§ 105-135. Income from stock in foreign corporations.—Income from stock in foreign corporations, in cash dividends, received by individuals, fiduciaries, partnerships (to be reported by partners on their individual returns) or corporations, resident in this state, or by non-resident fiduciary if held for a resident of this state, shall be reported and taxed as other income taxable under this article. Every individual, fiduciary, partnership, or corporation owning such shares of stock, and receiving dividends from same, shall report such income to the commissioner of revenue, at the time required by this article for reporting other income, and shall pay the tax herein imposed at the same time and in the same way as tax upon other income is payable. With respect to corporations paying a tax in this state on a proportionate part of their total income, the holder of shares of stock in such corporation shall pay on the total dividends received an amount equaling the percentage of the corporation's income on which it has not paid an income tax to the state of North Carolina for the year in which said dividends are received by the taxpayer. (1939, c. 158, s. 311½.)

Stock Received as Dividend Taxable.—Where plaintiff, owning stock in a foreign investment corporation, received as a dividend on such stock, stock of another foreign corporation, the stock received as a dividend was taken from the surplus of the investment corporation and was equivalent to a cash dividend, and was taxable as income from stock in a foreign corporation. Maxwell v. Tull, 216 N. C. 500, 5 S. E. (2d) 546.

§ 105-136. Railroads and public-service corporations.—The basis of ascertaining the net income of every corporation engaged in the business of operating a steam, electric railroad, express service, telephone or telegraph business, or other form of public service, when such company is required by the interstate commerce commission to keep records according to its standard classification of accounting, shall be the "net revenue from operations" of such corporation as shown by their records, kept in accordance with that standard classification of accounts when their business is wholly within this state, and when their business is in part within and in part without the state, their net income within this state shall be ascertained by taking their gross "operating revenues" within this state, including in their gross "operating revenues" within this state the equal mileage proportion within this state of their interstate business, and deducting from their gross "operating revenues" the proportionate average of "operating expense" or "operating ratio" for their whole business, as shown by the interstate commerce commission standard classification of accounts:

Provided, that if the standard classification of operating expenses prescribed by the interstate commerce commission for railroads differs from the standard classification of operating expenses prescribed by the interstate commerce commission for other public-service corporations, such other public-service corporations shall be entitled to the same operating expenses as prescribed for railroads. From the net operating income thus ascertained shall be deducted "uncollectible revenue" and taxes paid in this state for the income year other than income taxes, and the balance shall be deemed to be their net income taxable under this article. That in determining the taxable income of a corporation engaged in the business of operating a railroad under this section, in the case of a railroad located entirely within this state, the net operating income shall be increased or decreased to the extent of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire; and when any railroad is located partly within and partly without this state, the said net operating income shall be increased or decreased to the extent of an equal mileage proportion within this state of any credit or debit balance received or paid, as the case may be, on account of car or locomotive hire.

For the purposes of this section the words "interstate business" shall mean, as to transportation companies, operating revenue earned within the state by reason of the interstate transportation of persons or property into, out of, or through this state, and as to transmission companies the interstate transmission of messages into, out of, or through the state.

The words "equal mileage proportion within the state" shall mean the proportion of revenue received by the company operating in this state from interstate business as defined in the preceding paragraph, which the distance of movement over lines in this state bears to the total distance of movement over lines of the company receiving such revenue. If the commissioner of revenue shall find, with respect to any particular company, that its accounting records are not kept so as to reflect with exact accuracy such division of revenue by state lines as to each transaction involving interstate revenue, the commissioner of revenue may adopt such regulations, based upon averages, as will approximate with reasonable accuracy the proportion of interstate revenue actually earned upon lines in this state.

The words "proportionate average of 'operating expenses' or 'operating ratio'" shall mean the proportion of gross revenue of a company, on its whole business absorbed in operating expenses, as defined in the interstate commerce commission classification of accounts.

In determining the taxable income of a railroad company operating two or more lines of railroad not physically connected, and when one of such railroad lines is located wholly within this state, the actual earnings and expenses of such line in this state, in so far as they may be severable, shall be used in determining net income taxable in this state.

With respect to leased lines operated in this state where the operating company pays a tax on the income earned on such leased lines, without deduction for lease rental, and on a sum properly allocable to such leased lines equal to the amount of lease rental paid, such lease rental shall not be taxable income against the lessor; provided that the stockholders of any such lessor corporation who receive dividends on their stock in such corporation shall be entitled to such income tax exemption with respect to such dividends as they would have had if the lessor corporation had paid an income tax on such exempted lease rental.

All other public service corporations shall file

under § 105-134. (1939, c. 158, s. 312; 1941, c. 50, s. 5.)

Editor's Note.—The 1941 amendment added the proviso to the next to the last paragraph of this section.

Commissioner of Revenue Must Follow Formula Provided by Section.—In assessing income taxes against a corporation the Commissioner of Revenue must follow this section, leaving the question of whether the result is arbitrary or unwarranted to the determination of the courts upon appeal of the corporation. Maxwell v. Norfolk, etc., Ry. Co., 208 N. C. 397, 181 S. E. 248.

For ascertaining the net income of an interstate railway taxable within this state the formula provided by this section is not void upon its face, but may be unworkable or unfair when applied to a particular railway in particular conditions. Norfolk, etc., Ry. Co. v. North Carolina, 297 U. S. 682, 56 S. Ct. 625, 80 L. Ed. 977.

And Burden of Proving Use of Formula Wrong Is on Claimant.—The burden of proving that the use of the formula provided by this section arbitrarily attributes net income to the part of its line within this state derived from its business outside of the state is upon the railway claimant. Norfolk, etc., Ry. Co. v. North Carolina, 297 U. S. 682, 56 S. Ct. 625, 80 L. Ed. 977. See also, Maxwell v. Norfolk, etc., Ry. Co., 208 N. C. 397, 181 S. E. 248.

§ 105-137. Taxable year. — The tax imposed by this article for the year one thousand nine hundred and thirty-nine shall be assessed, collected, and paid in the year one thousand nine hundred and forty and for the year one thousand nine hundred and forty and years thereafter shall be assessed, collected, and paid in the year following the year for which the assessment is made. (1939, c. 158, s. 313.)

§ 105-138. Conditional and other exemptions. —The following organizations shall be exempt from taxation under this article:

1. Fraternal beneficiary societies, orders or associations.

(a) Operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and

(b) Providing for the payment of life, sick, accident, or other benefits to the members of such society, order or association, or their dependents.

2. Building and loan associations and cooperative banks without capital stock, organized and operated for mutual purposes and without profit.

3. Cemetery corporations and corporations organized for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual.

4. Business leagues, chambers of commerce, merchants' associations, or boards of trade not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder or individual.

5. Civic leagues or organizations not organized for profit, but operated exclusively for the promotion of social welfare.

6. Clubs organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member.

7. Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations of a purely local character the income of which consists solely of assessments, dues and fees collected from members for the sole purpose of meeting expenses.

8. Farmers', fruit growers', or like organizations organized and operated as sales agents for the purpose of marketing the products of members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of product furnished by them.

9. Mutual associations formed under §§ 54-111 to 54-128, formed to conduct agricultural business on the mutual plan; or to marketing associations organized under §§ 54-129 to 54-158. (1939, c. 158, s. 314.)

§ 105-139. Fiduciaries.—The tax imposed by this article shall be imposed upon resident fiduciries having in charge funds or property for the benefit of a resident of this state, and/or income earned in this state for the benefit of a non-resident, and upon a non-resident fiduciary having in charge funds or property for the benefit of a resident of this state, which tax shall be levied, collected and paid annually with respect to:

(a) That part of the net income of estates or trusts which has not become distributable during the income year.

(b) The net income received during the income year by deceased individuals who, at the time of death, were residents and who have died during the tax year or the income year without having made a return.

(c) The entire net income of resident, insolvent, or incompetent individuals, whether or not any portion thereof is held for the future use of the beneficiaries, where the fiduciary has complete charge of such net income.

(d) The tax imposed upon a fiduciary by this article shall be a charge against the estate or trust. (1939, c. 158, s. 315.)

§ 105-140. Net income defined. — The words "net income" mean the gross income of a taxpayer, less the deductions allowed by this article. (1939, c. 158, s. 316.)

§ 105-141. Gross income defined.—1. The words "gross income" mean the income of a taxpayer derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce or sales, or dealings in property, whether real or personal, located in this or any other state or any other place, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever and in whatever form paid. The amount of all such items shall be included in the gross income of the income year in which received by the taxpayer, unless, under the methods of accounting permitted under this article, any such amounts are to be properly accounted for as of a different period. The term "gross income" as used in this article shall include the salaries of all constitutional state officials taking office after the date of the enactment of this article by election, reelection or appointment, and all acts fixing the compensation of such constitutional state officials are hereby amended accordingly. The term "gross income" and the words "business, trade, profession, or occupation," and the words "salaries, wages, or compensation for personal services," as used in

this article, shall include compensation received for personal service as an officer or employee of the United States, any territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, including compensation as an officer or employee of the executive, legislative, or judicial branches of the government of the United States and of the military, naval, coast guard or other services thereof.

The term "gross income" as used in this article shall include income from annuities based on three per cent (3%) of the consideration or cost of the annuity or contract as income yearly: Provided, that during the continuance of the second World War persons serving in the armed forces of the United States, military, naval, marine or coast guard, shall not be required to include in gross income their salary compensation for such service from the government of the United States. This exemption shall not extend to any other income of person serving in the armed forces.

2. The words "gross income" do not include the following items, which shall be exempt from taxation under this article, but shall be reported in such form and manner as may be prescribed by the commissioner of revenue:

(a) The proceeds of life insurance policies and contracts paid upon the death of the insured to beneficiaries or to the estate of the insured.

(b) The amount received by the insured as a return of premium or premiums paid by him under life insurance endowment contracts, either during the term or at the maturity of the term mentioned in the contracts or upon surrender of the contract.

(c) The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income).

(d) Interest upon the obligations of the United States or its possessions, or of the state of North Carolina, or of a political subdivision thereof: Provided, interest upon the obligations of the United States, shall not be excluded from gross income unless interest upon obligations of the state of North Carolina or any of its political subdivisions is excluded from income taxes imposed by the United States. Except that interest upon the obligations of the United States or its possessions, or of the state of North Carolina, or of a political subdivision thereof, shall in no case be included in the "gross income" of any banking corporation organized under the banking laws of North Carolina.

(e) Any amounts received through accident or health insurance or under the Workmen's Compensation Act, as compensation for personal injuries or sickness, plus the amount of any damages received, whether by suit or agreement, on account of such injuries or sickness.

(f) In the case of domestic insurance companies or associations paying a tax on their gross premiums the following shall be excluded from gross income in addition to the above: (a) the net addition required by law to be made within the taxable year to reserve funds, including the actual deposit of sums with the commissioner of insurance or the treasurer of the state, pursuant to the law, as additions to guarantee or reserve funds for the benefit of policyholders; (b) the net addition to special contingency reserve funds established to cover possible losses arising from the increased mortality rates due to war, such an amount not to exceed ten per centum of the amount of reserves on life, annuity and endowment contracts allowed under subdivision (a) of this paragraph; and (c) an amount equal to the sums paid within the taxable year to policyholders on policy and annuity contracts. No exclusion shall be allowed under subdivision (b) of this paragraph except for amounts transferred to such special contingency reserves as shall have been established with the approval of the commissioner of insurance separate from the general surplus of any of said domestic insurance companies or associations, and which shall continue to be subject to the supervisory control of the commissioner of insurance as to the ultimate use or disposal of said special contingency reserves. If such special contingency reserves are released by the commissioner of insurance to the general surplus as reserves, they shall be considered taxable income to the company. (1939, c. 158, s. 317; 1941, c. 50, s. 5, c. 283; 1943, c. 400, s. 4.)

Editor's Note.—The first 1941 amendment changed the last sentence of the first paragraph of subdivision 1. The second 1941 amendment merely made a change in the first amendment.

The 1943 amendment added the proviso to the second paragraph of subsection 1 to apply as of Jan. 1, 1942, and rewrote paragraph (f) of subsection 2 to take effect as of Jan. 1, 1943.

For comment on definition of rents from foreign real estate, see 17 N. C. L. Rev. 382.

Exemption Applies to Individuals Only.—The provision of this section exempting from income tax that part of gross income received from salaries, wages, or other compensation from the Federal Government applies to individuals only and not to corporations, foreign or domestic. Atlantic Coast Line R. Co. v. Maxwell, 207 N. C. 746, 178 S. E. 592.

§ 105-142. Basis of return of net income.—1. The net income of a taxpayer shall be computed in accordance with the method of accounting regularly employed in keeping the books of such taxpayer, but such method of accounting must be consistent with respect to both income and deductions, but if in any case such method does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the commissioner does clearly reflect the income, but shall follow as nearly as practicable the federal practice, unless contrary to the context and intent of this article.

2. A taxpayer may, with the approval of the commissioner of revenue, and under such regulations as he may prescribe, change the income year from fiscal year to calendar year or otherwise, in which case his net income shall be computed upon the basis of such new income year: Provided, that such approval must be obtained from the commissioner at least thirty days prior to the end of such income year.

3. An individual carrying on business in partnership shall be liable for income tax only in his individual capacity, and shall include in his gross income, whether distributed or not, his distributive share of the net income of the partnership and dividends from foreign corporations for each income year. If an established business in this state is owned by a nonresident individual or by a partnership having one or more nonresident members, the manager of the business in this state shall re-

port the earnings of such business in this state, and the distributive share of the income of each nonresident owner or partner and pay the tax as levied on individuals in this article for each such nonresident owner or partner. The exemption and other deductions allowed individuals in this article may be deducted on a pro rata basis if the nonresident owner or partner furnishes to the manager of such business in this state complete information as to the total net income and total deductions allowable under this article to residents of this state, so that the same may be prorated in proportion to the income and deductions in this state and in the state of residence. The individual or partnership business carried on in this state may deduct the payment required to be made for such nonresident individual or partner or partners from their distributive share of the profits of such business in this state.

4. Every individual taxable under this article who is a beneficiary of an estate or trust shall include in his gross income the distributive share of the net income of the estate or trust received by him or distributable to him during the income year. Unless otherwise provided in the law, the will, the deed, or other instrument creating the estate, trust, or fiduciary relation, the net income shall be deemed to be distributed or distributable to the beneficiaries (including the fiduciary as a beneficiary, in the case of income accumulated for future distribution), ratable in proportion to their respective interest. (1939, c. 158, s. 318; 1943, c. 400, s. 4.)

Editor's Note.—The 1943 amendment added that part of subsection 3 beginning with the second sentence.

§ 105-143. Subsidiary corporations. — The net income of a corporation doing business in this state which is a subsidiary or affiliate of another corporation shall be determined by eliminating all payments to or charges by the parent corporation or other subsidiaries or affiliates of the parent corporation in excess of fair compensation for all services performed for or commodities or property sold, transferred, leased, or licensed to the parent or to its other subsidiary or affiliated corporations by the corporation doing business in this state. If the commissioner of revenue shall find as a fact that a report by such subsidiary or affiliated corporation does not disclose the true earnings of such corporation on its business carried on in this state, the commissioner may require that such subsidiary or affiliated corporation file a consolidated return of the entire operations of such parent corporation and of its subsidiaries and affiliates, including its own operations and income, and may determine the true amount of net income earned by such subsidiary or affiliated corporation in this state by taking the factor of investment in real estate and tangible personal property in this state and volume of business in this state and by relating these factors to the total investment of the parent corporation and its subsidiaries and affiliated corporations in real estate and tangible personal property in and out of this state and their total volume of business in and out of this state. The authority hereby given to require consolidated returns as aforesaid and to ascertain the true amount of income earned in this state on the basis herein prescribed may also be used by the commissioner as the basis of ascertaining the true net income earned in this state during the calendar year one thousand nine hundred and forty and for the three calendar years prior thereto. For the purposes of this section, a corporation shall be deemed a subsidiary of another corporation when, directly or indirectly, it is subject to control by such other corporation by stock ownership, interlocking directors, or by any other means whatsoever exercised by the same or associated financial interests, whether such control is direct or through one or more subsidiary, affiliated, or controlled corporations, and a corporation shall be deemed an affiliate of another corporation when both are directly or indirectly controlled by the same parent corporation or by the same or associated financial interests by stock ownership, interlocking directors, or by any other means whatsoever, whether such control be direct or through one or more subsidiary, affiliated or controlled corporations. Upon such finding by the commissioner, the consolidated returns authorized by this section may be required whether the parent or controlling corporation or interest or its subsidiaries or affiliates are or are not doing business in this state. The provisions of this section do not apply to corporations subject to regulation by a regulatory body of this state which are required to maintain accounts in such manner as to reflect separately the business done in this state and file a report thereof with such regulatory body. This section shall not apply unless the commissioner further finds that the business in this state is handled or effected in such manner as to distort or not reflect the true income earned in this state and finds in addition either or both of the following facts: (a) that the several corporations are owned or controlled by the same financial interests or (b) that they are members of a group of corporations associated together in carrying on a unitary business or are branches or parts of a unitary business or are engaged in different phases of the same general business or industry. If such consolidated return is required and is not filed within sixty days after demand, said subsidiary or affiliated corporation shall be subject to the penalty provided in this act for failure to file returns and in addition shall be subject to the penalty provided in § 105-230, and in such event the provisions of subsection 5 of § 105-161 shall apply.

Every subsidiary of a parent corporation doing business in this state shall not be allowed to deduct interest on indebtedness owed to or endorsed or guaranteed by the parent corporation and used by the subsidiary in carrying on its business in this state. The term "indebtedness" used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by the parent corporation, or by any subsidiary of the parent corporation. The term "subsidiary corporation" as used in this paragraph shall mean any corporation, a majority of stock in which is owned by a parent corporation. The term "parent corporation" shall include any subsidiary of the parent corporation. If any part of the capital used by the parent corporation is borrowed capital, the subsidiary may deduct from its gross income interest paid to the parent corporation in such proportion as the borrowed capital of the parent corporation is to the total assets of such parent corporation. The term "borrowed

capital" used in this paragraph shall include all loans and credits obtained by the parent corporation and also all goods, supplies or other capital of whatever nature borrowed by the parent corporation.

Such subsidiary or affiliated corporation shall incorporate in its returns required under this section and article such information as the commissioner may reasonably require for the determination of the net income taxable under this article, and shall furnish such additional information as the commissioner may reasonably require. If the return does not contain the information therein required or such additional information is not furnished within thirty days after demand, the corporation shall be subject to a penalty of one hundred dollars a day for each day's omission, in addition to the penalty provided in § 105-230.

If the commissioner finds that the determination of the income of a subsidiary or affiliated corporation under a consolidated return as herein provided will produce a greater or lesser figure than the amount of income earned in this state, he may readjust the determination by reasonable methods of computation to make it conform to the amount of income earned in this state; and if the corporation contends the figure produced is greater than the earnings in this state, it shall, within thirty days after notice of such determination, file with the commissioner a statement of its objections and of an alternative method of determination with such detail and proof as the commissioner may require, and the commissioner shall consider the same in determining the income earned in this state. In making such determination the findings and conclusions of the commissioner shall be presumed to be correct and shall not be set aside unless shown to be plainly wrong. (1939, c. 158, s. 318½; 1941, c. 50, s. 5; 1943, c. 400, s. 4.)

Editor's Note.—The 1941 amendment substituted the above in lieu of the former section.

The 1943 amendment rewrote the second paragraph.

§ 105-144. Determination of gain or loss.—For the purpose of ascertaining the gain or loss from the sale or other disposition of property, real, personal, or mixed, the basis shall be, in the case of property acquired before January first, one thousand nine hundred and twenty-one, the fair market price or the value of such property as of that date and in all other cases the cost thereof. The cost of such property acquired prior to January first, one thousand nine hundred and twenty-one, would be used in all cases if such cost is known or determinable: Provided, that in the case of property which was included in the last preceding annual inventory used in determining net income in a return under this article, such inventory value shall be taken in lieu of costs or market value. The final distribution to the taxpayer of the assets of a corporation shall be treated as a sale of the stock or securities of the corporation owned by him, and the gain or loss shall be computed accordingly: provided, no gain or loss shall be recognized upon the receipt of a corporation of property distributed in complete liquidation of another corporation, if the corporation receiving such property was on the date of the adoption of the plan of liquidation and has continued to be at all times until the receipt of the property the owner of stock (in such other corporation), possessing at least eighty per centum (80%) of the total combined voting power of all classes of stock entitled to vote, and the owner of at least eighty per centum (80%) of the total number of shares of all other classes of stock (except non-voting stock which is limited and preferred as to dividends). (1939, c. 158, s. 319; 1941, c. 50, s. 5.)

Editor's Note.—The 1941 amendment substituted the word "or" for the word "of" in the third line of the last sentence.

§ 105-145. Exchanges of property.—1. When property is exchanged for other property of like kind, the property received in exchange shall be considered as a conversion of assets from one form to another, from which no gain or loss shall be deemed to arise.

2. In the case of the organization of a corporation, the stock or securities received shall be considered to take the place of property transferred therefor, and no gain or loss shall be deemed to arise therefrom.

3. (a) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(b) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(c) As used in this section, the term "reorganization" includes a statutory merger or consolidation, a transfer by a corporation of all or a part of its assets to another corporation, if immediately after the transfer the transferor or its shareholders, or both, are in control of the corporation to which the assets are transferred, or a recapitalization, or a mere change in identity, form, or place of organization, however effected.

(d) As used in this section, the term "a party to a reorganization" includes the corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another, and the term "control" means the ownership of stock possessing at least eighty (80) per cent of the total combined voting power of all classes of stock entitled to vote and at least eighty (80) per cent of the total number of shares of all other classes of stock of the corporation.

4. The basis of property received by a corporation upon a distribution in complete liquidation of another corporation within the meaning of § 105-144 shall be the same as it would be in the hands of the transferor. (1939, c. 158, s. 320; 1943, c. 400, s. 4.)

Editor's Note.—The 1943 amendment rewrote subsection 3.

§ 105-146. Inventory.—Whenever, in the opinion of the commissioner of revenue, it is necessary, in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the commissioner of revenue may prescribe, conforming as nearly as may be to the best accounting practice in the trade

or business and most clearly reflecting the income. (1939, c. 158, s. 321.)

§ 105-147. Deductions.—In computing net income there shall be allowed as deductions the following items:

1. All the ordinary and necessary expenses paid during the income year in carrying on any trade or business, including:

(a) As to individuals, reasonable wages of employees for services rendered in producing such income.

(b) As to partnerships, reasonable wages of employees and a reasonable allowance for co-partners or members of a firm, for services actually rendered in producing such income, the amount of such salary allowance to be included in the personal return of the co-partner receiving same.

(c) As to corporations, wages of employees and salaries of officers, if reasonable in amount, for services actually rendered in producing such income.

2. Rentals or other payments required to be made as a condition of the continued use or possession for the purpose of the trade of property to which the taxpayer has not taken or is not taking title, or in which he has no equity.

3. Unearned discount and all interest paid during the income year on indebtedness except interest paid or accrued in connection with the ownership of real or personal property the current income from which is not taxable under this article, and except interest paid by a subsidiary to a parent corporation as defined in § 105-143. Interest on indebtedness incurred for the purchase of stock of corporations paying a tax on their entire net income under this article shall be deductible, and a ratable proportion of such interest with respect to corporations paying a tax on a proportion of their net income.

4. Taxes paid or accrued during the income year, except income taxes, gift taxes, taxes levied under § 105-135, inheritance and estate taxes, and taxes assessed for local benefit of a kind tending to increase the value of the property assessed. No deduction shall be allowed under this section for gasoline tax, sales tax, automobile license or registration fee by individuals not engaged in trade or business, nor shall deduction be allowed for taxes paid or accrued in connection with the ownership of property, the current income from which is not taxable under this article. All payments made by an employer into a federal fund as provided by the provisions of Title VIII and Title IX of the Federal Social Security Act, and all payments made by an employer as provided by a state unemployment compensation law: Provided, that none of the foregoing provisions shall apply to that part of such payments required to be deducted by an employer from the earnings of an employee. "Income taxes" which are not allowed to be deducted under this section shall be construed to include taxes that are in fact based upon net income, although such taxes may be levied in another state as franchise or excise taxes. The exclusion or deduction of income taxes in another state shall in each case depend upon whether the tax was in fact a tax upon net income by whatever name called.

5. Dividends from stock in any corporation, the income of which shall have been assessed, and the tax on such income paid by the corporation under the provisions of this article: Provided, that when only part of the income of any corporation shall have been assessed under this article, whether paid directly to the taxpayer or paid to the taxpayer by a trustee of a distributable trust, only a corresponding part of the dividends received therefrom shall be deducted.

5½. Interest received by a parent corporation on indebtedness owed to it by a subsidiary corporation doing business in North Carolina, which, in the determination of the taxable net income of such subsidiary corporation was not allowed as a deduction from gross income under the provisions of § 105-143.

6. Losses actually sustained during the income year of property used in trade or business or of property not connected with trade or business, if arising from fire, storm, shipwreck, or other casualties or theft and if not compensated for by insurance or otherwise. No deduction shall be allowed under this subsection for losses arising from personal loans or endorsements or other transactions of a personal nature not entered into for profit. A taxpayer shall be allowed to deduct losses in connection with the sale of securities only to the extent of the security gains during the income year, unless such losses resulted from the sale of stocks or bonds held by the taxpayer for a period of two years or more prior to the sale of such stocks or bonds. Losses may be carried forward by the taxpayer for two succeeding tax years as a credit against income received in either of the two succeeding years subject to the following limitations: First, no carry-over loss shall accrue from any tax year except to the extent that the loss of such year shall exceed any income not taxable under this article received in the same year; Second, the carry-over loss from any prior year or years may be deducted from the taxable income of any tax year only to the extent that such carry-over loss shall exceed any nontaxable income received in such tax year; and Third, any loss carry-over from the sale of securities may be deducted only from gains from the sale of securities in the two succeeding years. The deduction authorized herein shall be permitted in determining any income tax which shall become due and payable on or after January first, one thousand nine hundred and forty-four.

7. Debts ascertained to be worthless and actually charged off within the income year, if connected with business and, if the amount has previously been included in gross income in a return under this article.

8. A reasonable allowance for depreciation and obsolescence of property used in the trade or business shall be measured by the estimated life of such property; and in case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion. The cost of property acquired since January first, one thousand nine hundred and twenty-one, plus additions and improvements, shall be the basis for determining the amount of depreciation, and if acquired prior to that date the book value as of

that date of the property shall be the cost basis for determining depreciation.

In cases of mines, oil and gas wells, and other natural deposits, the cost of development not otherwise deducted will be allowed as depletion, and in the cases of leases, the deduction allowed may be equitably apportioned between the lessor and lessee.

In case the federal government determines depreciation or depletion of property for income tax purposes upon the basis of book value instead of original cost, the depreciation allowed under this article shall be upon the same basis.

9. Contributions or gifts made by individuals, firms, partnerships and corporations within the income year to corporations, trusts, community chests, funds, foundations or associations organized and operated exclusively for religious, charitable, literary, scientific, or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual: Provided, that in the case of such contributions or gifts by corporations and partnerships, the amount allowed as a deduction hereunder shall be limited to an amount not in excess of five (5%) per centum of the corporation's or partnership's net income, as computed without the benefit of this subdivision; and provided that in the case of such contributions or gifts by individuals, the amount allowed as a deduction shall be limited to an amount not in excess of ten (10%) per centum of the individual's net income, as computed without the benefit of this section.

10. Resident individuals and domestic corporations having an established business in another state, or investment in property in another state, may deduct the net income from such business or investment if such business or investment is in a state that levies a tax upon such net income. The deduction herein authorized shall not include income received by residents of this state and domestic corporations from personal services (except as provided in § 105-151), stocks, bonds, notes, mortgages, securities, or bank or other deposits or credits, nor in any case shall it operate to reduce the taxable income actually earned in this state or properly allocable as income earned in this state: Provided, however, that resident individuals or domestic corporations who or which have an established business or investment in another state which does not levy an income tax shall treat any gain or loss from such business or investment as though it occured from a business or investment in North Carolina.

The provision in this subsection for deductions of income that is earned and taxed in another state as net income shall be construed to include income that is earned and taxed in another state, although such tax may be levied in another state as franchise or excise taxes. The deduction of income earned and taxed in another state shall depend upon whether the tax was in fact a tax upon net income by whatever name called.

11. In the case of a non-resident individual, the deductions allowed in this section shall be allowed only if and to the extent that they are connected with income arising from sources within the state; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the state shall be determined under rules and regulations prescribed by the commissioner of revenue.

12. In computing net income no deduction shall be allowed under this section relating to salaries, wages, or other expenses, rentals or other similar payments, interest or taxes, if (1) the same are not actually paid within the taxable year or within two and one-half (2½) months after the close thereof; and (2) if, by reason of the method of accounting of the person or corporation to whom the payment is to be made, the amount thereof is not, unless actually paid, includible in the gross income of such person or corporation for the taxable year in which or with which the taxable year of the taxpayer ends. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1943, c. 668.)

Editor's Note.—The 1941 amendment substituted the second sentence of subsection 10 for the former two last sentences.

The first 1943 amendment added the second exception in the first sentence of subsection 3, and the last two sentences of subsections 4 and 6. It inserted subsection 5½, rewrote subsection 9 and added the proviso and the second paragraph of subsection 10. The second 1943 amendment also rewrote subsection 9 effective as of Jan. 1, 1943.

For comment on subdivision 12, see 17 N. C. Law Rev. 383.

§ 105-148. Items not deductible.—In computing net income no deduction shall in any case be allowed in respect of:

(a) Personal, living, or family expenses.

(b) Any amount paid out for new buildings or for permanent improvements or betterments, made to increase the value of any property or estate.

(c) Premiums paid on any life insurance policy.

(d) Income, excess profits and gift taxes, including federal tax on undistributed earnings.

(e) Social Security and unemployment tax paid by employee.

(f) Contributions to individuals.

(g) Commutation expenses.

(1939, c. 158, s. 323; 1941, c. 50, s. 5; 1943, c. 400, s. 4.)

Editor's Note.—The 1941 amendment added former subsection (i) at the end of this section.

The 1943 amendment omitted provisions relating to contributions or gifts by corporations and partnerships, and provided that it should be effective as of Jan. 1, 1943.

§ 105-149. Exemptions. — 1. There shall be deducted from the net income the following exemptions:

(a) In the case of a single individual, a personal exemption of one thousand dollars ($1,000.00).

(b) In the case of a married man with a wife living with him, two thousand dollars ($2,000.00), or in the case of a person who is the head of a household and maintains the same and therein supports one or more dependent relatives, under eighteen years of age, or, if over eighteen years of age, incapable of self-support because mentally or physically defective, two thousand dollars ($2,000.00).

(c) A married woman having a separate and independent income, one thousand dollars ($1,000.00).

(d) In the case of a widow or widower having minor child or children, natural or adopted, two thousand dollars ($2,000.00).

(e) Two hundred dollars ($200.00) for each individual (other than husband and wife) dependent

upon and receiving his chief support from the taxpayer, if such dependent individual is under eighteen years of age or is incapable of self-support because mentally or physically defective. Exemptions for the children of taxpayers shall be allowed under this subsection only to the person entitled to the $2,000.00 exemption provided in subsection (b) of this subdivision.

(f) In the case of a fiduciary filing a return for that part of the net income of estates or trusts which has not become distributable during the income year one thousand dollars ($1,000.00).

In the case of a fiduciary filing a return for the net income received during the income year of a deceased resident or nonresident individual who has died during the tax year or income year without having made a return, two thousand dollars ($2,000.00) if the individual was a married man, and one thousand dollars ($1,000.00) if the individual was single or a married woman not qualifying as "head of a household."

In the case of a fiduciary filing a return for an insolvent or incompetent individual resident or non-resident where the fiduciary has complete charge of such net income the same exemption to which the beneficiary would be entitled.

2. The exemptions allowed by this section shall not apply to a resident of this state having income from a business or agency in another state, or with respect to non-resident having a taxable income in this state unless the entire income of such resident or non-resident individual is shown in the return of such resident or non-resident; and if the entire income is so shown, the exemption shall be prorated in the proportion of the income of this state to the total income.

3. The status on the last day of the income year shall determine the right to the exemptions provided in this section: Provided, that a taxpayer shall be entitled to such exemption for husband or wife or dependents who have died during the income year. (1939, c. 158, s. 324; 1941, c. 50, s. 5; 1943, c. 400, s. 4.)

Editor's Note.—The 1941 amendment made changes in subdivision (b) of subsection 1 and added the second sentence of subdivision (e) of said subsection 1.

The 1943 amendment made changes in the second paragraph of subdivision (f) of subsection 1.

§ 105-150. Exemption as to insurance or other compensation received by veterans.—Any American residing in the State of North Carolina who joined any of the allied armies during the World War and who, on account of injuries received while in service, receives insurance or compensation from any of the allied countries is hereby exempt from liability for income tax on such insurance or compensation in the State of North Carolina. (1929, c. 184.)

§ 105-151. Exemption of compensation for personal services of residents taxed elsewhere; credit allowed nonresident taxpayer. — 1. The salaries, wages, or other compensation received during the income year by a resident of this state for personal services rendered outside of this state shall not be taxable in this state if he is required to pay an income tax thereon to another state or taxing jurisdiction other than the United States; but the same shall be included in his return to this state for the purpose of prorating the exemptions allowed by § 105-149, as therein provided.

2. Whenever a taxpayer other than a resident of the state has become liable to income tax to the state or country where he resides upon his net income for the taxable year, derived from sources within this state and subject to taxation under this article, the commissioner of revenue shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed: Provided, that such credit shall be allowed only if the laws of said state or country (1) grant a substantially similar credit to residents of this state subject to income tax under such laws, or (2) impose a tax upon the personal incomes of its residents derived from sources in this state and exempt from taxation the personal incomes of residents of this state. No credit shall be allowed against the amount of the tax on any income taxable under this article which is exempt from taxation under the laws of such other state or country. The exemption of credits allowed in this subsection shall not apply to the income of established unincorporated businesses in this state subject to tax under subsection three (3) of § 105-142. (1939, c. 158, s. 325; 1941, c. 50, s. 5, c. 204, s. 1; 1943, c. 400, s. 4.)

Editor's Note.—The 1941 amendments substituted paragraph one in lieu of the former section.

The 1943 amendment added paragraph 2.

§ 105-152. Returns.—1. The following persons shall file with the commissioner of revenue an income tax return under affirmation, showing therein specifically the items of gross income and the deductions allowed by this article, and such other facts as the commissioner may require for the purpose of making any computation required by this article:

(a) Every resident and nonresident who is a single person and who has a net income during the income year of over one thousand dollars ($1000.00) which is taxable in this state.

(b) Every resident or nonresident who is married but is not living with his or her wife or husband, and who has a net income during the income year of over one thousand dollars ($1000.00) which is taxable in this state.

(c) Any resident or nonresident married woman, whether or not she is living with her husband, who has a net income during the income year of over one thousand dollars ($1000.00) which is taxable in this state.

(d) Every resident or nonresident man who is married and is living with his wife, and who has a net income during the income year of over two thousand dollars ($2000.00), which is taxable in this state.

(e) Every resident or nonresident who is "head of a household" as defined in § 105-149 (1) (b) and who has a net income during the income year of over two thousand dollars ($2000.00) which is taxable in this state.

(f) Every resident of this state having a gross income from a business, agency or profession in excess of five thousand dollars ($5000.00).

(g) Every nonresident having a gross income from a business, agency or profession within this state in excess of five thousand dollars ($5000.00).

(h) Every resident or nonresident who is a widow or widower, having minor child or children, natural or adopted, and who has a net income during the income year of over two thousand dollars ($2000.00) which is taxable in this state.

(i) Every resident or nonresident who has an income during the income year from sources both within and without this state in excess of the prorated exemption provided for by § 105-149 (2).

(j) Every partnership having a place of business in the state as provided in § 105-154.

(k) Every corporation doing business in this state.

(l) Any person or corporation whom the commissioner believes to be liable for a tax under this article, when so notified by the commissioner and requested to file a return.

2. If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by a guardian or other person charged with the care of the person or property of such taxpayer.

3. The return by a corporation shall be sworn to by the president, vice-president, or other principal officer, and by the treasurer or assistant treasurer.

4. The return of an individual, who, while living, received income in excess of the exemption during the income year, and who has died before making the return, shall be made in his name and behalf by the administrator, or executor of the estate, and the tax shall be levied upon and collected from his estate.

5. When the commissioner of revenue has reason to believe that any taxpayer so conducts the trade or business as either directly or indirectly to distort his true net income and the net income property attributable to the state, whether by the arbitrary shifting of income, through price fixing, charges for service, or otherwise, whereby the net income is arbitrarily assigned to one or another unit in a group of taxpayers carrying on business under a substantially common control, he may require such facts as he deems necessary for the proper computation of the entire net income and the net income properly attributable to the state, and in determining same the commissioner of revenue shall have regard to the fair profit which would normally arise from the conduct of the trade or business.

6. When any corporation liable to taxation under this article conducts its business in such a manner as either directly or indirectly to benefit the members or stockholders thereof or any person interested in such business by selling its products or goods or commodities in which it deals at less than the fair price which might be obtained therefor, or where a corporation, a substantial portion of whose capital stock is owned either directly or indirectly by another corporation, acquires and disposes of the products of the corporation so owning a substantial portion of its stock in such a manner as to create a loss or improper net income for either of said corporations, or where a corporation, owning directly or indirectly a substantial portion of the stock of another corporation, acquires and disposes of the products of the corporation of which it so owns a substantial portion of the stock in such manner as to create a loss or improper net income for either of said corporations, the commissioner of revenue may determine the amount of taxable income of either or any such corporations for the calendar or fiscal year, having due regard to the reasonable profits which, but for such arrangement or understanding, might or could have been obtained by the corporation or corporations liable to taxation under this article from dealing in such products, goods or commodities. (1939, c. 158, s. 326; 1941, c. 50, s. 5; 1943, c. 400, s. 4.)

Editor's Note.—The 1941 amendment struck out former subsection 5, relating to required return and settlement of tax by corporation before dissolution, and renumbered former subsections 6 and 7 to appear as 5 and 6 respectively. The 1943 amendment rewrote subsection 1.

§ 105-153. Fiduciary returns.—1. Every fiduciary subject to taxation under the provisions of this article, as provided in § 105-139, shall make a return under oath for the individual, estate or trust for whom or for which he acts, if the net income thereof exceeds the personal exemptions.

2. The return made by a fiduciary shall state specifically the items of gross income and the deductions and exemptions allowed by this article, and such other facts as the commissioner of revenue may prescribe.

3. Fiduciaries required to make returns under this article shall be subject to all the provisions of this article which apply to individuals. (1939, c. 158, s. 327.)

§ 105-154. Information at the source.—1. Every individual, partnership, corporation, joint-stock company or association, or insurance company, being a resident or having a place of business in this state, in whatever capacity acting, including lessors or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the state or of any political subdivision of the state, having the control, receipt, custody, disposal, or payment of interest (other than interest coupons payable to bearer), rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits, and incomes above exemptions allowed in this article, paid or payable during any year to any taxpayer, shall make complete return thereof to the commissioner of revenue under such regulations and in such form and manner and to such extent as may be prescribed by him.

2. Every partnership having a place of business in the state shall make a return, stating specifically the items of its gross income and the deductions allowed by this article, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributable, and the amount of the distributive share of each individual, together with the distributive shares of corporation dividends. The return shall be sworn to by one of the partners.

3. Every corporation doing business or having a place of business in this state shall file with the commissioner of revenue, on such form and in such manner as he may prescribe, the names and addresses of all taxpayers, residents of North Carolina, to whom dividends have been paid and

the amount of such dividends during the income year. (1939, c. 158, s. 328.)

§ 105-155. Time and place of filing returns.—Returns shall be in such form as the commissioner of revenue may from time to time prescribe, and shall be filed with the commissioner at his main office, or at any branch office which he may establish, on or before the fifteenth day of March in each year, and for all taxpayers using a fiscal year, within seventy-five days after expiration of the fiscal year. In case of sickness, absence, or other disability or whenever in his judgment good cause exists, the commissioner may allow further time for filing returns.

There shall be annexed to the return the affirmation of the taxpayer making the return in the following form; "I hereby affirm that this return, including the accompanying schedules and statements (if any) has been examined by me, and, to the best of my knowledge and belief, is true and complete and is made in good faith covering the taxable period stated, pursuant to the Revenue Act of one thousand nine hundred and thirty-nine, as amended and the regulations issued under authority thereof, and that this affirmation is made under the penalties of perjury. The return shall also be signed by a competent witness of the signature." Any individual who wilfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury. The commissioner shall cause to be prepared blank forms for the said returns, and shall cause them to be distributed throughout the state, and to be furnished upon application; but failure to receive or secure the form shall not relieve any taxpayer from the obligation of making any return herein required. (1939, c. 158, s. 329; 1943, c. 400, s. 4.)

Editor's Note.—The 1943 amendment rewrote all of the second paragraph except the last sentence.

Applied in Winston-Salem v. Powell Paving Co., 7 F. Supp. 424.

§ 105-156. Failure to file returns; supplementary returns.—If the commissioner of revenue shall be of the opinion that any taxpayer has failed to file a return or to include in a return filed, either intentionally or through error, items of taxable income, he may require from such taxpayer a return or supplementary return, under oath, in such form as he shall prescribe, of all the items of income which the taxpayer received during the year for which the return is made, whether or not taxable under the provisions of this article. If from a supplementary return or otherwise the commissioner finds any items of income, taxable under this article, have been omitted from the original return, or any items returned as taxable that are not taxable, or any item of taxable income over-stated, he may require the items so omitted to be disclosed to him under oath of the taxpayer, and to be added to or deducted from the original return. Such supplementary return and the correction of the original return shall not relieve the taxpayer from any of the penalties to which he may be liable under any provision of this article. The commissioner may proceed under the provisions of § 105-159, whether or not he requires a return or a supplementary return under this section. (1939, c. 158, s. 331.)

Collection and Enforcement of Income Tax.

§ 105-157. Time and place of payment of tax.—(1) The full amount of the tax payable, as shown on the face of the return, shall be paid to the commissioner of revenue at the office where the return is filed at the time fixed by law for filing the return. The amount of said tax may be paid in four equal installments, one-fourth at the time of filing the report, one-fourth on or before June fifteenth, one-fourth on or before September fifteenth, and one-fourth on or before December fifteenth. Such deferred payments may be made with interest at four per cent (4%), but if any deferred payment is not made when due, the whole amount of deferred payments shall become due and interest at the rate of four per cent (4%) per annum shall be added to such deferred payment from March fifteenth until paid. This provision for deferred payments shall become effective as of January first, one thousand nine hundred and forty-four.

(2) If the time for filing the return be extended, interest at the rate of four per cent (4%) per annum from the time when the return was originally required to be filed to the time of payment shall be added and paid.

(3) The tax may be paid with uncertified check during such time and under such regulations as the commissioner of revenue shall prescribe; but if a check so received is not paid by the bank on which it is drawn, the taxpayer by whom such check is tendered shall remain liable for the payment of the tax and for all legal penalties the same as if such check had not been tendered. (1939, c. 158, s. 332; 1943, c. 400, s. 4.)

Editor's Note.—Prior to the 1943 amendment, if the amount of the tax exceeded fifty dollars it was payable in two installments. The amendment changed the interest rate from six to four per cent.

Applied in Winston-Salem v. Powell Paving Co., 7 F. Supp. 424.

§ 105-158. Examination of returns.—1. As soon as practicable after the return is filed the commissioner of revenue shall examine and compute the tax, and the amount so computed by the commissioner shall be the tax. If the tax found due shall be greater than the amount theretofore paid, the excess shall be paid to the commissioner within thirty days after notice of the amount shall be mailed by the commissioner, and any over-payment of tax shall be returned within thirty days after it is ascertained.

2. If the return is made in good faith and the under-statement of the tax is not due to any fault of the taxpayer, there shall be no penalty or additional tax added because of such under-statement, but interest shall be added to the amount of the deficiency at the rate of one-half (½) of one per cent (1%) per month or fraction thereof from the time said return was required by law to be filed until paid.

3. If the under-statement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added to the amount of the deficiency five per cent (5%) thereof, and, in addition, interest at the rate of one-half (½)

of one per cent (1%) per month or fraction thereof from time said return was required by law to be filed until paid.

4. If the under-statement is found by the commissioner of revenue to be false or fraudulent, with intent to evade the tax, the tax on the additional income discovered to be taxable shall be doubled and interest at the rate of one-half (½) of one per cent (1%) per month or fraction thereof from time said return was required by law to be filed until paid. The provisions of this article with respect to revision and appeal shall apply to a tax thus assessed. (1939, c. 158, s. 333.)

§ 105-159. Corrections and changes.—If the amount of the net income for any year of any taxpayer under this article, as returned to the United States treasury department, is changed and corrected by the commissioner of internal revenue or other officer of the United States of competent authority, such taxpayer, within thirty days after receipt of internal revenue agent's report or supplemental report reflecting the corrected net income, shall make return under oath or affirmation to the commissioner of revenue of such corrected net income. If the taxpayer fails to notify the commissioner of revenue of assessment of additional tax by the commissioner of internal revenue the statute of limitations shall not apply. The commissioner of revenue shall thereupon proceed to determine, from such evidence as he may have brought to his attention or shall otherwise acquire, the correct net income of such taxpayer for the fiscal or calendar year, and if there shall be any additional tax due from such taxpayer the same shall be assessed and collected; and if there shall have been an over-payment of the tax the said commissioner shall, within thirty days after the final determination of the net income of such taxpayer, refund the amount of such excess: Provided, that any taxpayer who fails to comply with this section as to making report of such change as made by the federal government within the time specified shall be subject to all penalties as provided in § 105-161, in case of additional tax due, and shall forfeit his rights to any refund due by reason of such change. (1939, c. 158, s. 334.)

Prescribed Procedure Exclusive.—The procedure prescribed by this section, that such new return be made within thirty days of redetermination by the Federal Government is exclusive and must be followed to entitle the taxpayer to the relief therein provided. State v. Hinsdale, 207 N. C. 37, 175 S. E. 847.

§ 105-160. Additional taxes.—If the commissioner of revenue discovers from the examination of the return or otherwise that the income of any taxpayer, or any portion thereof, has not been assessed, he may, at any time within three years (except where the taxpayer has failed to notify the commissioner of additional assessment by the federal department—see § 105-159) after the time when the return was due, give notice in writing to the taxpayer of such deficiency. Any taxpayer feeling aggrieved by such proposed assessment shall be entitled to a hearing before the commissioner of revenue, if within thirty days after giving notice of such proposed assessment he shall apply for such hearing in writing, explaining in detail his objections to same. If no request for such hearing is so made, such proposed assessment shall be final and conclusive. If the request for hearing is made, the taxpayer shall be heard by the commissioner of revenue, and after such hearing the commissioner of revenue shall render his decision. The taxpayer shall be advised of his decision and such amount shall be due within ten days after notice is given. The provisions of this article with respect to revision and appeal shall apply to the tax so assessed. The limitation of three years to the assessment of such tax or an additional tax shall not apply to the assessment of additional taxes upon fraudulent returns. Upon failure to file returns and in the absence of fraud the limitation shall be five years. (1939, c. 158, s. 335.)

Editor's Note.—See 12 N. C. Law Rev. 21, 35.

§ 105-161. Penalties.—1. If any taxpayer, without intent to evade any tax imposed by this article, shall fail to file a return of income and pay the tax, if one is due, at the time required by or under the provisions of this article, but shall voluntarily file a correct return of income and pay the tax due within sixty days thereafter, there shall be added to the tax an additional amount equal to five per cent thereof, but such additional amount shall in no case be less than one dollar and interest at the rate of one-half of one per cent (½%) per month or fraction thereof from the time said return was required by law to be filed until paid.

2. If any taxpayer fails voluntarily to file a return of income or pay the tax, if one is due, within sixty days of the time required by or under the provisions of this article, there shall be added to the tax an additional amount equal to twenty-five per cent (25%) thereof and interest at the rate of one-half of one per cent (½%) per month or fraction thereof, from the time such return was required to be filed until paid, but the penalty shall not be less than five dollars ($5.00).

3. If any taxpayer fails to file a return within sixty days of the time prescribed by this article, any judge of the superior court, upon petition of the commissioner of revenue or of any ten taxable residents of the state, shall issue a writ of mandamus requiring such person to file a return. The order of notice upon the petition shall be returnable not later than ten days after the filing of the petition. The petition shall be heard and determined on the return day or such day thereafter as the court shall fix, having regard to the speediest possible determination of the case consistent with the rights of the parties. The judgment shall include costs in favor of the prevailing party. All writs and processes may be issued from the clerk's offices in any county, and, except as aforesaid, shall be returnable as the court shall order.

4. The failure to do any act required by or under the provisions of this article shall be deemed an act committed in part at the office of the commissioner of revenue in Raleigh. The certificate of the commissioner of revenue to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied, as required by or under the provisions of this article, shall be prima facie evidence that such tax has not been paid, that such return has not been filed, or that such information has not been supplied.

5. If any taxpayer who has failed to file a re-

turn or has filed an incorrect or insufficient return, and has been notified by the commissioner of revenue of his delinquency, refuses or neglects within twenty days after such notice to file a proper return, or files a fraudulent return, the commissioner shall determine the income of such taxpayer, according to his best information and belief, and assess the same at not more than double the amount so determined. The commissioner may, in his discretion, allow further time for the filing of a return in such case.

6. Any person required under this article to pay any tax or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information for the purposes of computation, assessment or collection of any tax imposed by this article, who wilfully fails to pay this tax, make such return, keep such records or supply such information at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor, and upon conviction thereof, shall be fined not more than five hundred dollars ($500.00) or imprisoned not exceeding six months, or punished by both such fine and imprisonment at the discretion of the court, within the limitations aforesaid. (1939, c. 158, s. 336.)

Revision and Appeal.

§ 105-162. Revision by commissioner of revenue.—A taxpayer may apply to the commissioner of revenue for revision of the tax assessed against him at any time within three years from the time of the filing of the return or from the date of the notice of assessment of any additional tax. The commissioner shall grant a hearing thereon, and if upon such hearing he shall determine that the tax is excessive or incorrect, he shall resettle the same according to the law and the facts, and adjust the computation of tax accordingly. The commissioner shall notify the taxpayer of his determination, and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due. (1939, c. 158, s. 340.)

Revision Barred by Lapse of Time.—Where a taxpayer fails to apply to the Commissioner of Revenue for a revision within three years from the filing of its return, its claim is barred, under this section, and the fact that the application for a revision is made within three years of redetermination of income tax by the Federal Government, will not avail the taxpayer where he does not make a new return within thirty days after such redetermination by the Federal Government, as provided by § 105-159, since the limitation prescribed by the instant section is explicit and unequivocal. State v. Hinsdale, 207 N. C. 37, 175 S. E. 847.

§ 105-163. Appeal. — Any taxpayer may file formal exceptions to a finding by the commissioner of revenue, under the provisions of this article with respect to his taxable income, either to a matter of fact or law, as far as possible stating such exceptions separately. After they are filed, the commissioner shall pass upon the same formally, and notify the taxpayer immediately of his findings upon these exceptions. The taxpayer may, within ten days after notification of the commissioner's ruling upon these exceptions, appeal to the superior court of Wake county, upon paying the tax assessed by the commissioner and giving a bond for costs in the sum of two hundred dollars ($200.00): Provided, the taxpayer may within the above prescribed time first appeal to the state board of assessment on the exceptions to the findings of the commissioner; and provided further, that the commissioner may in his discretion require a surety bond or a deposit of state or government bonds in double the amount of the alleged deficiency. Appeal may then be taken by either the taxpayer or the commissioner to the superior court of Wake county as provided herein. Upon receipts of such notice and the taxes paid, and the filing of the cost bond in the sum of two hundred dollars ($200.00), the commissioner shall certify the record to the superior court of Wake county. In the superior court the proceedings shall be as follows:

The cause shall be entitled, "State of North Carolina on Relation of the Commissioner of Revenue vs. Appellant" (giving name). If there are exceptions to facts found by the commissioner, it shall be placed on the civil issue docket of such court and shall have precedence over other civil actions, and shall be tried under the same rules and regulations as are prescribed for the trial of such civil actions, except that the findings of the commissioner shall be prima facie correct. If only issues of law, or if issues of fact are raised, and the appellant shall waive jury trial at the time of taking the appeal, the appeal may be had to the superior court of the county in which the appellant resides, and the cause shall be heard by the judge holding court in the judicial district in which the appeal is docketed, at chambers, upon ten days notice to the parties of the time and place of hearing, and the said judge shall pass upon and determine all issues, both of law and fact, the state hereby waiving in such cases a trial by jury. Either party may appeal to the supreme court from the judgment of the superior court under the rules and regulations prescribed by law for appeals, except that the state, if it should appeal, shall not be required to give any undertaking or make any deposit to secure the cost of such appeal, and the supreme court may advance the cause on its docket so as to give the same a speedy hearing. Any taxes, interest, or penalties paid, found by the court to be in excess of those which can be legally assessed, shall be ordered refunded to the taxpayer, with interest from the time of payment. (1939, c. 158, s. 341.)

Art. 5. Schedule E. Sales Tax.

§ 105-164. Short title.—This article shall be known and and may be cited as the sales tax article of the revenue act. (1939, c. 158, s. 400.)

§ 105-165. Purpose.—The taxes levied in this article are to provide revenue for the support of the public schools of the state in substitution for the taxes formerly levied on property for this purpose. They are levied for the biennium of fiscal years beginning July first, one thousand nine hundred thirty-nine, and ending June thirtieth, one thousand nine hundred forty-one, and thereafter until otherwise provided by law.

The tax upon the sale of tangible personal property in this state is levied as a license or privilege tax for engaging or continuing in the business of a "wholesale" or "retail" merchant as defined in this article. Retail merchants may add to the price of merchandise the amount of the tax

on the sale thereof, and when so added shall constitute a part of such price, shall be a debt from purchaser to merchant until paid, and shall be recoverable at law in the same manner as other debts. It is the purpose and intent of this article that the tax levied herein on retail sales shall be added to the sales price of merchandise and thereby be passed on to the consumer instead of being absorbed by the merchant.

Any retail merchant who shall, by any character of public advertisement, offer to absorb the tax levied in this article upon the retail sale of merchandise, or in any manner, directly or indirectly, advertise that the tax herein imposed is not considered as an element in the price to the consumer, shall be guilty of a misdemeanor. Any violations of the provisions of this section reported to the commissioner of revenue shall be reported by the commissioner of revenue to the attorney general of the state, to the end that such violations may be brought to the attention of the solicitor of the court of the county or district whose duty it is to prosecute misdemeanors in the jurisdiction. It shall be the duty of such solicitor to investigate such alleged violations and if he finds that this section has been violated to prosecute such violations. The provisions of this section are deemed necessary to prevent fraud and unfair practices, but it is the intent of the general assembly that if one or both of such provisions be held unconstitutional and void, that such invalid provision or provisions be considered separable and that the balance of this article be given effect. (1939, c. 158, s. 401.)

§ 105-166. Contingency.—If the Congress of the United States shall, at any time hereafter, enact any form of sales or production tax distributable in whole or in part to the several states, the governor and council of state shall estimate the proportion of such tax distributable to this state, and shall, by proclamation of the governor, abate a uniform percentage of all the taxes levied in this article equal in estimated revenue yield to the estimated proportion of yield of such federal tax, and from and after the effective date of such proclamation the commissioner of revenue shall enforce and collect only the remaining percentage of taxes levied in this article. (1939, c. 158, s. 402.)

§ 105-167. Definitions.—For the purposes of this article.

1. The word "person" shall mean any person, firm, partnership, association, corporation, estate or trust.

2. The word "commissioner" shall mean the commissioner of revenue of the state of North Carolina.

3. The word "merchant" shall include any individual, firm, corporation, domestic or foreign, estate or trust, subject to the tax imposed by this article.

4. The words "wholesale merchant" shall mean every person who engages in the business of buying any article of commerce and selling same to merchants for resale. For the purposes of this article any person, firm, corporation, estate or trust engaged in the business of manufacturing, producing, processing or blending any articles of commerce and maintaining a store or stores, warehouse or warehouses, or any other place or places, separate and apart from the place of manufacture or production, for the sale or distribution of its products to other manufacturers or producers, wholesale or retail merchants, for the purpose of resale shall be deemed a "wholesale merchant."

5. The words "wholesale sale" or "sale at wholesale" shall mean a sale of tangible personal property by a wholesale merchant to a manufacturer, jobber or dealer, wholesale or retail merchant, for the purpose of resale, but does not include a sale to users or consumers not for resale. The term "wholesale sale" shall include a sale of tangible personal property to a manufacturer which enters into or becomes an ingredient or component part of the tangible personal property which is manufactured.

6. The words "retail merchant" shall mean every person who engages in the business of buying or acquiring, by consignment or otherwise, any articles of commerce and selling same at retail.

7. The word "retail" shall mean the sale of any articles of commerce in any quantity or quantities for any use or purpose on the part of the purchaser other than for resale.

8. The word "sale" or "selling" shall mean any transfer of title or possession, or both, exchange, or barter of tangible personal property, conditional or otherwise, however effected and by whatever name called, for a consideration paid or to be paid, in installments or otherwise, and shall include any of said transactions whereby title or ownership is ultimately to pass notwithstanding the retention of title or possession, or both, for security or other purposes, and shall further mean and include any bailment, loan, lease, rental or license to use or consume tangible personal property for a consideration paid or to be paid, in installments or otherwise: Provided, the provisions of this subsection shall not apply to the lease or rental of motion picture films used for exhibition purposes and for which a tax of three per cent is paid on the total admissions for such exhibitions.

9. The words "gross sales" shall mean the gross sales price at which such sales were made, whether for cash or on time, and if on time, the price charged on the books for such sales, without allowance for cash discount, and shall be reported as sales with reference to the time of delivery to the purchaser, except as this provision is modified by § 105-171. (1939, c. 158, s. 404; 1941, c. 50, s. 6.)

Editor's Note.—The 1941 amendment changed subsection 8. For comment on this amendment, see 19 N. C. Law Rev. 536. For an analysis of provisions of former law, see 11 N. C. Law Rev. 420. For decisions under former laws, see McCanless Motor Co. v. Maxwell, 210 N. C. 725, 188 S. E. 389; Powell v. Maxwell, 210 N. C. 211, 186 S. E. 326; Leonard v. Maxwell, 216 N. C. 89, 3 S. E. (2d) 316.

§ 105-168. Licenses; wholesale and retail sales tax rates; use tax on motor vehicles.—If any person, after the thirtieth day of June, one thousand nine hundred thirty-nine, shall engage or continue in any business for which a privilege tax is imposed by this article, such person shall apply for and obtain from the commissioner, upon the payment of the sum of one dollar ($1.00), a license to engage in and conduct such business upon the condition that such person shall pay the tax accruing to the state of North Carolina un-

der the provisions of this article; and he shall thereby be duly licensed to engage in and conduct such business. The license tax levied in this section shall be a continuing license until revoked for failure to comply with the provisions of this article. License issued under Article V, chapter four hundred forty-five, Public Laws of one thousand nine hundred thirty-three, for the year one thousand nine hundred thirty-four—one thousand nine hundred thirty-five; under chapter three hundred seventy-one, Public Laws of one thousand nine hundred thirty-five, for the biennium one thousand nine hundred thirty-five—one thousand nine hundred thirty-seven, and chapter one hundred twenty-seven, Public Laws of one thousand nine hundred thirty-seven, for the biennium one thousand nine hundred thirty-seven—one thousand nine hundred thirty-nine, shall be deemed a continuing license under this section.

An additional tax is hereby levied for the privilege of engaging or continuing in the business of selling tangible personal property, as follows:

(a) Wholesale Merchants.—Upon every wholesale merchant as defined in this article, an annual license tax of ten dollars ($10.00). Such annual license shall be paid in advance within the first fifteen days of July in each year or, in the case of a new business, within fifteen days after business is commenced. There is also levied on each wholesale merchant an additional tax of one-twentieth of one per cent (1/20th of 1%) of the total gross sales of the business.

The sale of any article of merchandise by any "wholesale merchant" to any one other than to a licensed retail merchant for resale shall be taxable at the rate of tax provided in this article upon the retail sale of merchandise. In the interpretation of this article the sale of any articles of commerce by any "wholesale merchant" to any one not taxable under this article as a "retail merchant," except as otherwise provided in this article, shall be taxable by the wholesale merchant at the rate of tax provided in this article upon the retail sale of merchandise. The commissioner of revenue is authorized to make appropriate regulations, consistent with this article, to prevent abuse with respect to existing regulations defining transactions entitled to the rate of tax levied on sales at wholesale.

(b) Retail Merchants.—Upon every retail merchant, as defined in this article, a tax of three per cent (3%) of the total gross sales of the business of every such retail merchant: Provided, however, the maximum tax that shall be imposed upon the sale of any single article of merchandise shall be fifteen dollars ($15.00).

(c) Motor Vehicles.—In addition to the taxes levied in this article or in any other law, there is hereby levied and imposed upon every person, for the privilege of using the streets and highways of this state, a tax of three per cent (3%) of the sales or purchase price of any new or used motor vehicle purchased or acquired for use on the streets and highways of this state requiring registration thereof under the Motor Vehicle Laws of this state, which said amount shall not exceed fifteen dollars ($15.00), and shall be paid to the commissioner of revenue at the time of applying for certificate of title or registration of such motor vehicle. No certificate of title or registration plate shall be issued for same unless and until said tax has been paid: Provided, however, if such person so applying for certificate of title or registration and license plate for such motor vehicle shall furnish to the commissioner of revenue a certificate from a motor vehicle dealer licensed to do business in this state, upon a form furnished by the commissioner, certifying that such person has paid the tax thereon levied in this article, the tax herein levied shall be remitted to such person to avoid in effect double taxation on said motor vehicle under this article. The term "motor vehicle" as used in this section shall include trailers. It is declared to have been the purpose of this subsection that whenever a motor vehicle chassis is or has been purchased separately from the body which is thereafter installed thereon, the maximum tax herein levied shall be imposed only on the sale of the chassis and no additional tax shall be imposed upon the body mounted upon the same. It is not the intention of this section to impose any tax upon a body mounted upon the chassis of a motor vehicle which temporarily enters the state for the purpose of having such body mounted thereon by the manufacturer thereof. The commissioner of revenue is authorized to cancel any taxes assessed contrary to the provisions hereof. (1939, c. 158, s. 405; 1943, c. 400, s. 5.)

Editor's Note.—The 1943 amendment added the last three sentences of subsection (c).

Cited in Best & Co. v. Maxwell, 311 U. S. 454, 61 S. Ct. 334, 85 L. Ed. 275.

§ 105-169. Exemptions.—The taxes imposed in this article shall not apply to the following:

(a) Sales by manufacturers or producers of their own manufactured products when sold to other manufacturers, producers, wholesale or retail merchants, for the purpose of resale except as this subsection is limited and modified by subsections four and five of § 105-167. The exemption in this subsection shall not extend to or include sales by manufacturers or producers of their own manufactured products when sold to users or consumers and not for the purpose of resale.

(b) It is not the intent of this article to exempt gasoline from the retail sales tax levied in this article, nor is it considered expedient to levy a tax upon the wholesale distribution of gasoline, payable at the source of distribution, and an additional tax upon the retail sale. Therefore, to carry out the intent of this article, a proportion of the tax of six cents per gallon, to be determined in the manner herein set out, shall be deemed in satisfaction of the tax upon retail sales levied in this article. The director of the budget, the chairman of the state highway and public works commission and the commissioner of revenue shall in the first fifteen days of each quarterly period, determine the total amount of gasoline sold in the state in the preceding three months, and the average retail price, inclusive of gasoline tax, and shall on this basis compute the amount of tax liability at the rate of tax levied in this article on retail sales, and the sum so computed shall be deducted from the tax of six cents per gallon, and credited by the state treasurer to the sales tax revenue levied in this article. These sums shall be available only after full provision

is made for the expense of collecting highway revenues, for the administration of the highway and public works commission, for the service of the debt, and for reasonable maintenance of state and county highways, nor shall the application herein made become available to the general fund unless the director of the budget shall find such sum to be reasonably necessary to meet appropriations from the general fund. The amount so allocated to the general fund shall not be transferred from the highway fund, or become a definite charge against it until the surplus in the general fund at the end of the present fiscal year, together with current revenues, shall have been exhausted, or until the director of the budget shall find as a fact that such transfer is necessary to prevent a deficit in the general fund; nor shall such transfer or any part thereof be made until the appropriations from the highway fund, hereinabove referred to, have been provided for. In construing this provision the director of the budget shall not be required to take into account an incidental credit balance of the general fund.

(c) Sale of commercial fertilizer on which the inspection tax is paid, and lime and land plaster used for agricultural purposes whether the inspection tax is paid or not.

(d) Sales made to the state of North Carolina or any of its subdivisions, including sales of merchandise and articles of commerce to agencies of state or local governments for distribution in public welfare or relief work. This exemption shall not apply to sales made to organizations, corporations, and institutions that are not governmental agencies, owned and controlled by the state or local governments. Sales of building material made directly to state and local governments in this state shall be exempt from the tax on building material levied in this article, and sales of building material to contractors to be used in construction work for state or local governments shall be construed as direct sales.

Where any person, firm or corporation has entered into a contract with the federal, state, or local governments, or any agency thereof, or with any private person, firm or corporation, or other party whatsoever, to manufacture or fabricate tangible personal property including ships, boats, aircraft, equipment, ordnance, or any other products or articles of commerce, for cost or for cost plus a fixed fee, sales to such manufacturer or fabricator of materials which shall enter into and become an ingredient or component part of the product manufactured or fabricated shall not be subject to retail sales tax or use tax.

(e) The gross receipts from sales of tangible personal property which the state is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state.

(f) Accounts of purchasers, representing taxable sales, on which the tax imposed by this article has been paid, that are found to be worthless and actually charged off for income tax purposes may, at corresponding periods, be deducted from gross sales in so far as they represent taxable sales made after July first, one thousand nine hundred thirty-three, and to be added to gross sales if afterwards collected.

(g) Sales of public school books on the adopted list and the selling price of which is fixed by state contract, and Holy Bibles.

(h) Sales of used articles taken in trade, or a series of trades, as a credit or part payment on the sale of a new article, provided the tax levied in this article is paid on the full gross sales price of the new article. In the interpretation of this subsection, new article shall be taken to mean the original stock in trade of the merchant, and shall not be limited to newly manufactured articles. The resale of articles repossessed by the vendor shall likewise be exempt from gross sales taxable under this article.

(i) Conditional exemptions; sales by retail merchants of food and food products for human consumption.—The term "food and food products for human consumption" shall be given its usual and ordinary meaning, but shall not include malt or vinous beverages, soft or carbonated drinks, sodas, or beverages such as are ordinarily sold or dispensed at stores, bars, stands or soda fountains or in connection therewith, candies or confectioneries, medicines, tonics, and preparations in liquid, powdered, granular, tablet, capsule, or pill form sold as dietary supplements; nor does "food and food products for human consumption" include prepared meals or foods sold or served on or off the premises by restaurants, cafes, cafeterias, hotel dining rooms, drug stores, or other places where prepared meals or foods are sold or served.

(j) Sales of ice, whether sold by the manufacturer, producer, wholesale or retail merchants.

(k) Sales of medicines sold on prescriptions of physicians, or medicines compounded, processed or blended by the druggist offering the same for sale at retail.

(l) Sales of products of farms, forests, mines, and waters when such sales are made by the producers in their original or unmanufactured state. Fish and sea foods shall be likewise exempt when sold by the fishermen.

(m) For the purposes of this article, sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants may be classified as wholesale sales and, therefore, only subject to the wholesale rate of tax.

(n) Sales of horses and/or mules.

(o) Sales of coffins or caskets which do not sell for more than one hundred dollars ($100.00).

(p) Sales of cotton, tobacco, peanuts and other farm products sold to manufacturers for further manufacturing or processing.

(q) Sales of tangible personal property to hospitals not operated for profit, churches, orphanages, and other charitable or religious institutions or organizations not operated for profit, and educational institutions principally supported by the state of North Carolina, when such tangible personal propery is purchased for use in carrying on the work of such institutions or organizations.

(r) Sales of crutches, and sales of artificial limbs, artificial eyes, artificial hearing devices, when the same are designed to be worn on the person of the owner or user, and sales of orthopedic appliances.

Every merchant selling merchandise to other merchants for resale shall deliver to the customer a bill of sale for each sale of merchandise, whether sold for cash or on credit, and shall make and retain a duplicate or carbon copy of each such

bill of sale, and shall keep a file of all such duplicate bills of sale for at least three years from date of sale, or until inspected and audited by a representative of the department of revenue. Failure to comply with the provisions of this paragraph shall subject the seller to liability for tax upon such sales at the rate of tax levied in this article upon retail sales.

Unless records are kept in such manner as will accurately disclose separate accounting of sales of taxable and non-taxable merchandise and in such form as may be accurately and conveniently checked by the representative of the department of revenue, the exemptions herein made shall not be allowed, and it shall be the duty of the commissioner or his agents to assess a tax upon the total gross sales at the rate of tax levied upon retail sales, and if records are not kept showing total gross sales, it shall be the duty of the commissioner or his agents to assess a tax upon an estimation of sales upon the best information obtainable. (1939, c. 158, s. 406; 1941, c. 50, s. 6; 1943, c. 400, s. 5.)

Editor's Note.—The 1941 amendment added the words "and Holy Bibles" at the end of subsection (g), changed subsection (i) and inserted subsections (p) and (q).

The 1943 amendment struck out references to the federal government in the third sentence of subsection (d) and added the second paragraph thereof. The amendment also struck out former subsection (p) relating to sales to trustees of churches, changed former paragraph (q) to (p) and inserted subsections (q) and (r). The amendment of subsection (d) became effective on April 1, 1943, and did not affect any lump sum or unit price contract which was awarded, or upon which bids were received, prior to that date.

§ 105-170. Taxes payable; failure to make return; duty and power of commissioner.—The taxes levied in this article shall be due and payable in monthly installments on or before the fifteenth day of the month next succeeding the month in which the tax accrues. Every taxpayer liable for the tax imposed by this article shall, on or before the fifteenth day of the month, make out or prepare a return on the blank report form furnished by the commissioner of revenue, showing the total gross sales, the sales exempted from the tax, the net taxable sales, the amount of tax covering sales in the preceding month, and shall mail same, together with the remittance for the amount of the tax, to the commissioner. Such monthly return shall be signed by the taxpayer or a duly authorized agent of the taxpayer. Every taxpayer who pays the tax imposed by this article and Article 8, Schedule I, shall be entitled to deduct from the amount of the tax for which he is liable and which he actually pays, a discount of three per cent (3%): Provided, however, the commissioner may deny a taxpayer the benefits of this subsection for failure to pay the full tax when due, as well as in cases of fraud, evasion, and failure to keep accurate and clear records as provided in § 105-169: Provided, further, that in order to secure the benefits of this subsection, the taxpayer must deduct the three per cent (3%) discount at the time of making his monthly remittance of tax to the department of revenue.

(a) Delayed Returns.—If a delinquent return or a return without remittance for the amount of tax shown to be due is received by the commissioner or his duly authorized agents, the taxpayer shall be assessed with a five per centum penalty plus interest at one-half of one per centum per month from the date the tax was due. The penalty provided in this subsection shall not be less than one dollar ($1.00).

(b) Failure to Make Returns.—If the taxpayer shall fail to make or refuse to make the returns required under this article, then such returns shall be made by the commissioner or his duly authorized agents from the best information available, and such returns shall be prima facie correct for the purposes of this article, and the amount of tax due thereby shall be a lien against all the property of the taxpayer until discharged by payments, and if payment not be made within thirty days after demand therefor by the commissioner or his duly authorized agents, there shall be added not more than one hundred per centum as damages, together with interest at the rate of one per centum per month from the time such tax was due. If such tax be paid within thirty days after notice by the commissioner, then there shall be added not more than ten per centum as damages, and interest at the rate of one per centum per month from the time such tax was due until paid.

(c) Not to Issue Certificate of Title or License.—As an additional means of enforcement of the payment of the tax herein levied the department of revenue shall not issue a certificate of title or a license plate for any new or used motor vehicle sold by any merchant or dealer licensed to do business in this state until the tax levied for the sale of same in this article has been paid, or a certificate, duly signed by a dealer licensed to do business in this state, is filed at the time the application for title or license plate is made for such motor vehicle; such certificate to be on such form as may be prescribed by the commissioner of revenue, and that such certificate shall show that the said licensed dealer has assumed the responsibility for the payment of the tax levied under this article and agrees to report and remit the tax in his next regular monthly sales tax report required to be filed under this article. (1939, c. 158, s. 407; 1943, c. 400, s. 5.)

Editor's Note.—The 1943 amendment added to the first paragraph the last sentence with provisos.

§ 105-171. Credit sales.—Any person taxable under this article having cash and credit sales may report such cash and credit sales separately, and upon making application therefor may obtain from the commissioner an extension of time for the payment of taxes due on such credit sales. Such extension shall be granted under such rules and regulations as the commissioner may prescribe. When such extension is granted, the taxpayer shall thereafter include in each monthly report all collections made during the month next preceding and shall pay taxes due thereon at the time of filing such report. (1939, c. 158, s. 408.)

§ 105-172. Forms for making returns. — The monthly returns required under this article shall be made upon forms to be prescribed and provided by the commissioner. (1939, c. 158, s. 411.)

§ 105-173. Extension of time for making returns.—The commissioner for good cause may extend the time for making any return required under the provisions of this article, and may grant such additional time within which to make such

return as he may deem proper, but the time for filing any such return shall not be extended beyond the fifteenth day of the month next succeeding the regular due date of such return. If the time for filing a return be extended, interest at the rate of one-half of one per centum per month from the time the return was required to be filed to the time of payment shall be added and paid. (1939, c. 158, s. 412.)

§ 105-174. Commissioner to correct error.—As soon as practicable after the return is filed the commissioner shall examine it; if it then appears that the correct amount of tax is greater or less than that shown in the return, the tax shall be recomputed.

Excessive Payments.—If the amount already paid exceeds that which should have been paid, on the basis of the tax so recomputed, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of this article.

Deficiency of Amount.—(a) If the amount already paid is less than the amount which should have been paid, the difference to the extent not covered by any credits under this article, together with interest thereon at the rate of one-half of one per centum per month from the time the tax was due, shall be paid upon notice and demand by the commissioner.

(b) If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations, with knowledge thereof, but without intent to defraud, there shall be added as damages ten per centum of the total amount of the deficiency in the tax, and interest in such a case shall be collected at the rate of one per centum per month of the amount of such deficiency in the tax from the time it was due, which interest and damages shall become due and payable upon notice and demand by the commissioner; provided, however, in the absence of fraud, no assessment authorized by this article shall extend to sales made more than three (3) years prior to the date of assessment; and in cases where an audit shall have been made under the direction of the commissioner of revenue any assessment in respect to such audit shall be made within one year after the completion of the audit.

(c) If any part of the deficiency is due to fraud with intent to evade the tax, then there shall be added as damages not more than one hundred per centum of the total amount of the deficiency in the tax, and in such case the whole amount of tax unpaid, including charges so added, shall become due and payable upon notice and demand by the commissioner, and an additional one per centum per month on the tax shall be added from the date such tax was due until paid.

(d) If the amount already paid is less than the amount which should have been paid, the commissioner or his duly authorized agent shall notify the taxpayer of the balance due, plus such interest and damages as are set forth in (a), (b), and (c) just preceding, and if this total amount is not paid or no appeal is taken within thirty days from the date of notice, such action shall be considered as a refusal on the part of the taxpayer to make a return, and the taxpayer shall be subject to such penalties or provisions as are provided in this article for failure to make a return.

If any taxpayer, subject to the provisions of this article, goes into bankruptcy, receivership, or turns over his stock of merchandise by voluntary transfer to creditors, the tax liability under this article shall constitute a prior lien on such stock of merchandise, subject to execution, and it shall be the duty of the transferee in any such case to retain the amount of the tax due from the first sales from such stock of merchandise and to pay the same to the commissioner of revenue. (1939 c. 158, s. 414; 1941, c. 50, s. 6.)

Editor's Note.—The 1941 amendment added the proviso to subsection (b).

§ 105-175. Taxpayer must keep records.—It shall be the duty of every person engaging or continuing in this state in any business for which a privilege tax is imposed by this article to keep and preserve suitable records of the gross income, gross receipts and/or gross receipts of sales of such business, and such other books or accounts as may be necessary to determine the amount of tax for which he is liable under the provisions of this article. And it shall be the duty of every such person to keep and preserve, for a period of three years, all invoices of goods and merchandise purchased for resale, and all such books, invoices, and other records shall be open for examination at any time by the commissioner or his duly authorized agent. (1939, c. 158, s. 415.)

§ 105-176. Tax shall be lien.—The tax imposed by this article shall be a lien upon the stock of goods and/or any other property of any person subject to the provisions hereof who shall sell out his business or stock of goods, or shall quit business, and such person shall be required to make out the return provided for under § 105-170 within thirty days after the date he sold out his business or stock of goods, or quit business, and his successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said taxes due and unpaid until such time as the former owner shall produce a receipt from the commissioner showing that the taxes have been paid, or a certificate that no taxes are due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, and the taxes shall be due and unpaid after the thirty-day period allowed, he shall be personally liable for the payment of the taxes accrued and unpaid on account of the operation of the business by the former owner. (1939, c. 158, s. 416.)

§ 105-177. Aggrieved person may file petition.—If any person having made the return and paid the tax as provided by this article feels aggrieved by the assessment made upon him by the commissioner, or, in the absence of a report, if an assessment has been made by the commissioner under the provisions of this article, the taxpayer may apply to the commissioner by petition, in writing, within thirty days after the notice is mailed to him, for a hearing and a correction of the amount of the tax so assessed upon him by the commissioner, in which petition he shall set forth the reasons why such hearing should be granted and the amount in which such tax should be reduced. The commissioner shall promptly consider such petition, and may grant such hearing or deny the same. If denied, the petitioner shall be forthwith notified thereof; if granted, the

commissioner shall notify the petitioner of the time and place fixed for such hearing. After such hearing the commissioner may make such order in the matter as may appear to him just and lawful, and shall furnish a copy of such order to the petitioner. Any person improperly charged with any tax and required to pay the same may recover the amount paid, together with interest, in any proper action or suit against the commissioner, and the superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to recover any tax improperly collected. In any suit to recover taxes paid or to collect taxes, the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

Either party to such suit shall have the right to appeal to the supreme court of North Carolina as now provided by law. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the state auditor, upon receipt of a certified copy of such final judgment, to issue a warrant directed to the state treasurer in favor of such taxpayer to pay such judgment, interest, and costs. It shall be the duty of the state treasurer to honor such warrant and pay such judgment out of any funds in the state treasury.

No injunction shall be awarded by any court or judge to restrain the collection of the taxes imposed by this article, or to restrain the enforcement of this article. (1939, c. 158, s. 417.)

§ 105-178. Warrant for collection of tax; tax shall constitute debt due state.—If any tax imposed or any portion of such tax be not paid within thirty days after the same becomes due, the commissioner shall proceed to enforce the payment of such tax in the manner provided by § 105-242. (1939, c. 158, s. 418, c. 370, s. 1.)

§ 105-179. Additional tax; remittances made to commissioner; records. — The tax imposed by this article shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder, except as in this article otherwise specifically provided. But no county, municipality, or district shall be authorized to levy any tax by virtue of the provisions of this article.

Remittances, How Made.—All remittances of taxes imposed by this article shall be made to the commissioner by bank draft, check, cashier's check, money order, or money, who shall issue his receipts therefor to the taxpayers, when requested, and shall deposit daily all monies received to the credit of the state treasurer as required by law for other taxes: Provided, no payment other than cash shall be final discharge of liability for the tax herein assessed and levied unless and until it has been paid in cash to the commissioner.

The commissioner shall keep full and accurate records of all monies received by him, and how disbursed; and shall preserve all returns filed with him under this article for a period of three years. (1939, c. 158, s. 420.)

§ 105-180. Letters in report not to be divulged.—Unless in accordance with the judicial order or as herein provided, the state department of revenue, its agents, clerks or stenographers, shall not divulge the gross income, gross proceeds of sales, or the amount of tax paid by any person as shown by the reports filed under the provisions of this article except to members and employees of the state department of revenue for the purpose of checking, comparing, and correcting returns, or to the governor, or to the attorney general, or any other legal representative of the state in any action in respect to the amount of tax due under the provisions of this article. (1939, c. 158, s. 421; 1941, c. 50, s. 6.)

Editor's Note.—The 1941 amendment struck out the former provision of the section relating to withholding certificate of dissolution of corporation until payment of tax levied under this article.

§ 105-181. Unlawful to refuse to make returns; penalty.—It shall be unlawful for any person to fail or refuse to make the return provided to be made in this article, or to make any false or fraudulent return or false statement in any return of the tax, or any part thereof, imposed by this article; or for any person to aid or abet another in any attempt to evade the payment of the tax, or any part thereof, imposed by this article; or for the president, vice-president, secretary or treasurer of any company to make or permit to be made for any company or association any false return, or any false statement in any return required by this article, with the intent to evade the payment of any tax hereunder; or for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the commissioner or his duly appointed agent, as required by this article, or to fail or refuse to permit the inspection or appraisal of any property by the commissioner or his duly appointed agent, or to refuse to offer testimony or produce any record as required in this article. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than five hundred dollars ($500.00) or imprisoned not exceeding six months, or punished by both such fine and imprisonment, at the discretion of the court within the limitations aforesaid. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent statement, with the intent aforesaid, shall be guilty of the offense of perjury, and, on conviction thereof, shall be punished in the manner provided by law. Any company for which a false return or a return containing a false statement shall be made as aforesaid, shall be guilty of a misdemeanor, and may be punished by a fine of not more than one thousand dollars ($1,000.00). (1939, c. 158, s. 422.)

§ 105-182. Commissioner to make regulations.—The commissioner shall from time to time promulgate such rules and regulations not inconsistent with this article for making returns and for the ascertainment, assessment, and collection of the tax imposed hereunder as he may deem necessary to enforce its provisions, and upon request shall furnish any taxpayer with a copy of such rules and regulations. (1939, c. 158, s. 423.)

§ 105-183. Commissioner or agent may examine books, etc.—The commissioner, or his authorized agents, may examine any books, papers, records, or other data bearing upon the correctness of any return, or for the purpose of making a return where none has been made, as required

by this article, and may require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons. If any person summoned as a witness shall fail to obey any summons to appear before the commissioner or his authorized agent, or shall refuse to testify or answer any material question or to produce any book, record, paper, or other data when required to do so, such failure or refusal shall be reported to the attorney general or the district solicitor, who shall thereupon institute proceedings in the superior court of the county where such witness resides to compel obedience to any summons of the commissioner, or his authorized agent. Officers who serve summonses or subpoenas, and witnesses attending, shall receive like compensation as officers and witnesses in the superior courts, to be paid from the proper appropriation for the administration of this article. (1939, c. 158, s. 424.)

§ 105-184. Excess payments; refund.—If upon examination of any monthly return made under this article it appears that an amount of tax has been paid in excess of that properly due, then the amount in excess shall be credited against any tax or installment thereof then due from the taxpayer, under any other subsequent monthly return, or shall be refunded to the taxpayer by certificate of over-payment issued by the commissioner to the state auditor, which shall be investigated and approved by the attorney general, and the auditor shall issue his warrant on the treasurer, which warrant shall be payable out of any funds appropriated for that purpose. (1939, c. 158, s. 425.)

§ 105-185. Prior rights or actions not affected by this subchapter.—Nothing in this subchapter shall affect or defeat any claim, assessment, appeal, suit, right or cause of action for taxes due, under the Revenue Act of one thousand nine hundred thirty-seven, prior to March 24, 1939, whether such assessment, appeal, suit, claim or action shall have begun before March 24, 1939 or shall thereafter be begun; and the sections of the Revenue Act of one thousand nine hundred thirty-seven, amended or repealed by this subchapter, are expressly continued in full force, effect, and operation for the purpose of assessment and collection of any taxes due under any such laws prior to March 24, 1939, and for the imposition of any penalties, forfeitures, or claims for a failure to comply therewith. (1939, c. 158, s. 426.)

§ 105-186. To prevent unfair trade practices, commissioner of revenue may require tax passed on to consumer.—In order that fair trade practices may be encouraged and any deleterious effect of the retail sales tax levy may be minimized, the commissioner of revenue is empowered and directed to devise, promulgate and enforce regulations under which retail merchants shall collect from the consumers, by rule uniform as to classes of business, the sales tax levied upon their business by this article: Provided, that the commissioner of revenue shall have the power to change the regulations and methods under which the merchants shall collect the tax from the consumers, from time to time, as experience may prove expedient and advisable. Methods for the passing on by merchants to their customers the retail sales tax on sales to said customers may include plans which require both more and less than the prescribed rate of the tax on the sale price, the purpose being to enable the merchants to collect approximately the amount of the tax imposed on their total sales volume. The commissioner of revenue is hereby authorized and empowered to make and adopt rules and regulations requiring merchants to use tokens or stamps, or other means, if found to be practical, which may be determined by the commissioner to provide a method whereby the amount of the tax collected by the merchant from the customer shall be as nearly as possible the prescribed rate of the tax on each purchase. Such regulations as herein authorized shall be promulgated by the commissioner of revenue to become effective after reasonable notice to the retail merchants and when so promulgated they shall have the full force and effect of law. Any merchant who violates such rules and regulations shall be guilty of a misdemeanor and upon conviction shall be fined not less than five dollars ($5.00) nor more than five hundred dollars ($500.00) or be imprisoned for not more than six months, or be both fined and imprisoned in the discretion of the court: Provided, however, that every such violation shall be a separate offense hereunder. It shall be the duty of the solicitors of the several judicial districts of the state to prosecute violations of this section.

The provisions of this section shall not affect in any manner the character or validity of the sales tax levy as a merchants' license tax, and they may not be pleaded or considered in the event any provision of this subchapter is attacked as unconstitutional. (1939, c. 262.)

Editor's Note.—See 12 N. C. Law Rev. 99, 102, for an article on "Sales Tax and Transactions."

§ 105-187. Tax on building materials.—There is hereby levied and there shall be collected from every person, firm or corporation, an excise tax of three per cent of the purchase price of all tangible personal property purchased or used subsequent to June thirtieth, one thousand nine hundred thirty-nine, which shall enter into or become a part of any building or any other kind of structure in this state, including all materials, supplies, fixtures and equipment of every kind and description which shall be annexed thereto or in any manner become a part thereof, except rough and dressed lumber (but not millwork), brick or hollow tile, sand, gravel, crushed stone, rock and granite.

The provisions of this section shall not apply:

(a) In respect to the use of any such article of tangible personal property, the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this section, whether under the laws of this state or of some other state or territory of the United States: Provided, that if the tax imposed on the sale or use of such tangible personal property imposed by other laws on the sale or use of such property is less than the tax imposed by this section, the provisions of this section shall apply, but at a rate measured by the difference between the rate herein fixed and the rate by which the previous tax upon the sale or use of such property was computed: Provided, that the tax upon the use of a single article of merchandise shall be limited as

provided in Schedule E, and shall not apply to tangible personal property exempt from tax and /or classified, when sold, as wholesale sales under the provisions of Schedule E preceding this section in Schedule E.

(b) In respect to such tangible personal property as shall enter into any building or structure erected or constructed under any contract with the state of North Carolina or any of its agencies or with any county or municipality in North Carolina or any of their agencies.

Every person liable for the tax imposed by this section shall report to the commissioner of revenue and pay the taxes herein levied in accordance with the provisions of Schedule E and in so far as the provisions of said article are appropriate and not inconsistent herewith, shall be liable for all penalties and shall be subject to all of the provisions of said article. The provisions of said article relating to the administration of said subchapter, auditing of returns and as to the authority and powers of the commissioner to make rules and regulations for the administration of this section, shall be deemed and taken as a part of this section. The definitions of terms, so far as may be applicable to this section, contained in Schedule E, shall be treated as definitions applicable to this section.

The taxes levied in this section shall be levied against the purchaser of the articles named. If purchases of building materials that are not exempt from tax are made by a contractor there shall be joint liability for the tax against both contractor and owner, but the liability of the owner shall be satisfied if affidavit is required of the contractor, and furnished by him, before final settlement is made, showing that the tax herein levied has been paid in full.

(c) A receipt given by a retail merchant maintaining a place of business in this state, showing thereon that the retail sales tax imposed by Schedule E, will be paid by such retail merchant on the articles of commerce included within said purchase, shall be sufficient to relieve the purchaser from further liability for tax imposed by this section: Provided further, that the commissioner may, by rule and regulation, provide that a similar receipt from a retailer who does not maintain a place of business in this state shall also be sufficient to relieve the purchaser of further liability for the tax to which such receipt may refer.

The term "retail merchant," as used in this subsection, shall include wholesalers, jobbers, manufacturers, or their agents, selling taxable building materials for use or consumption in this state to others than merchants for resale. (1939, c. 158, s. 427; 1943, c. 400, s. 5.)

Editor's Note.—The 1943 amendment struck out the words "with the federal government or any of its agencies, or" which formerly appeared after the word "contract" in the third line of subsection (b). The amendment became effective on April 1, 1943, and did not affect any lump sum or unit price contract which was awarded, or upon which bids were received, prior to that date.

Art. 6. Schedule G. Gift Taxes.

§ 105-188. Gift taxes; classification of beneficiaries; exemptions; rates of tax. — State gift taxes, as hereinafter prescribed, are hereby levied upon the shares of the respective beneficiaries in all property within the jurisdiction of this state, real, personal and mixed, and any interest therein which shall in any one calendar year pass by gift made after March 24, 1939.

The taxes shall apply whether the gift is in trust or otherwise and whether the gift is direct or indirect. In the case of a gift made by a nonresident, the taxes shall apply only if the property is within the jurisdiction of this state. The taxes shall not apply to gifts made prior to March 24, 1939.

The tax shall not apply to the passage of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a passage from the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a passage by donor of such income by gift.

Gifts to any one donee not exceeding a total value of one thousand dollars ($1,000.00) in any one calendar year shall not be considered gifts taxable under this article, and where gifts are made to any one donee in any one calendar year in excess of one thousand dollars ($1000.00), only that portion of said gifts exceeding one thousand dollars ($1000.00) in value shall be subject to the tax levied by this article.

The amount of tax on all gifts made taxable under this article shall be based on the relationship between the donor and donee, and graduated in proportion to the amount of such gifts. The rates of tax shall be as follows:

(a) Where the donee is lineal issue, or lineal ancestor, or husband, or wife of the donor, or child adopted by the donor in conformity with the laws of this state, or of any of the United States, or of any foreign kingdom or nation, or stepchild of the donor, (for each one hundred dollars ($100.00) or fraction thereof):

First $	10,000	above exemption	...	1 per cent
Over $	10,000	and to $ 25,000	...	2 per cent
Over $	25,000	and to $ 50,000	...	3 per cent
Over $	50,000	and to $ 100,000	...	4 per cent
Over $	100,000	and to $ 200,000	...	5 per cent
Over $	200,000	and to $ 500,000	...	6 per cent
Over $	500,000	and to $1,000,000	...	7 per cent
Over $1,000,000		and to $1,500,000	...	8 per cent
Over $1,500,000		and to $2,000,000	...	9 per cent
Over $2,000,000		and to $2,500,000	...	10 per cent
Over $2,500,000		and to $3,000,000	...	11 per cent
Over $3,000,000			.....	12 per cent

(b) Where the donee is the brother or sister, or descendant of the brother or sister, or is the uncle or aunt by blood of the donor (for each one hundred dollars ($100.00) or fraction thereof):

First $	5,000		.....	4 per cent
Over $	5,000	and to $ 10,000	...	5 per cent
Over $	10,000	and to $ 25,000	...	6 per cent
Over $	25,000	and to $ 50,000	...	7 per cent
Over $	50,000	and to $ 100,000	...	8 per cent
Over $	100,000	and to $ 250,000	...	10 per cent
Over $	250,000	and to $ 500,000	...	11 per cent
Over $	500,000	and to $1,000,000	...	12 per cent
Over $1,000,000		and to $1,500,000	...	13 per cent

Over $1,500,000	and to $2,000,000	14 per cent
Over $2,000,000	and to $3,000,000	15 per cent
Over $3,000,000		16 per cent

(c) Where the donee is in any other degree of relationship than is hereinbefore stated, or shall be a stranger in blood to the donor, or shall be a body politic or corporate (for each one hundred dollars ($100.00) or fraction thereof):

First $ 10,000		8 per cent
Over $ 10,000	and to $ 25,000	9 per cent
Over $ 25,000	and to $ 50,000	10 per cent
Over $ 50,000	and to $ 100,000	11 per cent
Over $ 100,000	and to $ 250,000	12 per cent
Over $ 250,000	and to $ 500,000	13 per cent
Over $ 500,000	and to $1,000,000	14 per cent
Over $1,000,000	and to $1,500,000	15 per cent
Over $1,500,000	and to $2,500,000	16 per cent
Over $2,500,000		17 per cent

A donor shall be entitled to a total exemption of twenty-five thousand dollars ($25,000.00) to be deducted from gifts made to donees named in subsection (a) of this section, less the sum of amounts claimed and allowed as an exemption in prior calendar years. The exemption, at the option of the donor, may be taken in its entirety in a single year, or may be spread over a period of years. When this exemption has been exhausted, no further exemption is allowable. When the exemption or any portion thereof is applied to gifts to more than one donee in any one calendar year, said exemption shall be apportioned against said gifts in the same ratio as the gross value of the gifts to each donee is to the total value of said gifts in the calendar year in which said gifts are made. No exemption shall be allowed to a donor for gifts made to donees named in subsections (b) and (c) of this section.

It is expressly provided, however, that the tax levied in this article shall not apply to so much of said property as shall so pass exclusively: (1) for state, county or municipal purposes within this state; (2) for charitable, educational, or religious purposes within this state; (3) to or for the exclusive benefit of any institution, association or corporation in this state, the property of which is exempt from taxation by the laws of this state; and (4) to or for the exclusive benefit of charitable, religious and educational corporations, foundations and trusts, not conducted for profit, incorporated or created or administered under the laws of any other state, when such other state levies no gift taxes upon property similarly passing from residents of such state to charitable, educational or religious corporations, foundations and trusts incorporated or created or administered under the laws of this state, or when such corporation, foundation or trust receives and disburses funds donated in this state for religious, charitable and educational purposes. (1939, c. 158, s. 600; 1943, c. 400, s. 7.)

Editor's Note.—The 1943 amendment added to the fourth paragraph the provision relating to gifts exceeding one thousand dollars. It also made changes in the second paragraph of subsection (c) by rewriting the second sentence and inserting the third and fourth sentences.

For article on gift tax, see 16 N. C. Law Rev. 194. For comment on this enactment, see 17 N. C. Law Rev. 389.

§ 105-189. Transfer for less than adequate and full consideration. — Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this article, be deemed a gift and shall be included in computing the amount of gifts made during the calendar year. (1939, c. 158, s. 601.)

§ 105-190. Gifts made in property. — If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. (1939, c. 158, s. 602.)

§ 105-191. Manner of determining tax; time of payment; application to department of revenue for correction of assessment. — The tax imposed by this article shall be paid by the donor on or before the fifteenth day of March following the close of the calendar year.

Report of the gifts shall be made by the donor to the state department of revenue on blank forms prepared by the state department of revenue and furnished on application to any taxpayer, and the amount of tax due shall be paid at the time such report is made. The department of revenue shall audit the returns made under this article, and if it is found that the amount of tax paid is less than the amount lawfully due under the provisions of this article shall forward a statement of the taxes determined to the person or persons primarily chargeable with the payment thereof, such additional taxes to be collected under the same rules and regulations contained in this subchapter for the collection of other taxes, and if an over-payment should be found to have been made, a refund of such over-payment shall be made to the taxpayer. Within one year after the tax has been determined, any person aggrieved by the determination, may apply in writing to the department of revenue, which may make such corrections of the taxes as it may determine proper: Provided, however, that the rejection of the application in whole or in part by the department of revenue shall not prevent any person from applying to the court, as hereinafter provided, for the correction of said taxes. (1939, c. 158, s. 603.)

§ 105-192. Penalties and interest.—In any case where a donor fails to file a return at the proper time, the department of revenue shall assess a penalty of ten per centum (10%) of the tax determined by it, together with interest upon such tax and penalty at the rate of six per centum (6%) per annum from the date when such report should have been filed until the date of the assessment.

If any tax, or any assessment of tax, penalties and interest, or any part thereof, be not paid when due it shall bear interest at six per centum (6%) per annum from the date of assessment until paid. (1939, c. 158, s. 604.)

§ 105-193. Lien for tax; collection of tax.— The tax imposed by this article shall be a lien upon all gifts that constitute the basis for the tax for a period of ten years from the time they are made. If the tax is not paid by the donor when due, each donee shall be personally liable, to the extent of their respective gifts, for so much of the tax as may have been assessed, or may be assessable thereon. Any part of the property comprised in the gift that may have been sold by the donee to a bona fide purchaser for an adequate and full

consideration in money or money's worth shall be divested of the lien hereby imposed and the lien, to the extent of the value of such gift, shall attach to all the property of the donee (including after-acquired property) except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

If the tax is not paid within thirty days after it has become due, the department of revenue may use any of the methods authorized in this subchapter for the collection of other taxes to enforce the payment of taxes assessed under this article.

In any proceeding by warrant or otherwise to enforce the collection of said tax, the donor shall be liable for the full amount of the tax due by reason of all the gifts constituting the basis for such tax, and each donee shall be liable only for so much of said tax as may be due on account of his respective gift. (1939, c. 158, s. 605.)

§ 105-194. Period of limitation upon assessment; assessment upon failure or refusal to file proper return. — Except as provided in the next succeeding paragraph the amount of taxes imposed by this article shall be assessed within three years after the return was filed.

In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed at any time.

If a donor should fail or refuse on demand to file a correct and proper return as required by this article, the department of revenue may make an estimate of the amount of taxes due the state by such donor, and by the respective donees, from any information in its possession, and assess the taxes, penalties and interest due the state by such taxpayers. (1939, c. 158, s. 606.)

§ 105-195. Tax to be assessed upon actual value of property; manner of determining value of annuities, life estates and interests less than absolute interest. — Said taxes shall be assessed upon the actual value of the property at the time of the transfer by gift. In every case where there shall be a gift to take effect in possession or enjoyment after the expiration of one or more life estates, or at any time in the future, the tax shall be assessed on the actual value of the property or the interest of the beneficiary therein at the time when he or she becomes entitled to the same in possession or enjoyment. The value of an annuity or a life interest in such property, or any interest therein less than an absolute interest, shall be determined by the annuity tables provided for by § 8-47, and upon the basis of six per centum (6%) of the gross value of the estate for the period of expectancy of the life tenant or for the period of the duration of said estate, if said estate is other than a life estate, in determining the value of the respective interests. In every case in which it is impossible to compute the present value of any interest in property so passing, the department of revenue may effect such settlement of the tax as it shall deem to be for the best interest of the state, and payment of the same so agreed upon shall be a full satisfaction of such taxes. (1939, c. 158, s. 607; 1943, c. 400, s. 7.)

Editor's Note.—The 1943 amendment added that part of the third sentence appearing after "§ 8-47."

§ 105-196. Application for relief from taxes assessed; appeal.—A taxpayer may apply to the commissioner of revenue for revision of the tax assessed against him at any time within three years from the time of the filing of the return or from the date of the notice of assessment of any additional tax. The commissioner shall grant a hearing thereon, and if upon such hearing he shall determine that the tax is excessive or incorrect, he shall resettle the same according to law and the facts, and adjust the computation of tax accordingly. The commissioner shall notify the taxpayer of his determination, and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due. The taxpayer shall have the right of appeal from any assessment, made by the commissioner of revenue in the same manner and form as set out in § 105-163 with respect to income taxes. (1939, c. 158, s. 608.)

§ 105-197. Returns; time of filing; extension of time for filing.—Any person who within the calendar year nineteen hundred thirty-nine, after March 24, 1939, or any calendar year thereafter, makes any gift or gifts taxed by this article shall report in duplicate, under oath, to the department of revenue, on forms provided for that purpose, showing therein an itemized schedule of all such gifts, the name and residence of each donee and the actual value of the gift to each, the relationship of each of such persons to the donor, and any other information which the department of revenue may require. Such returns shall be filed on or before the fifteenth day of March following the close of the calendar year. The department of revenue may grant a reasonable extension of time for filing a report whenever in its judgment good cause exists. (1939, c. 158, s. 609.)

Art. 7. Schedule H. Intangible Personal Property.

§ 105-198. Intangible personal property.—The intangible personal properties enumerated and defined in this article or schedule are hereby classified under authority of section three, Article V of the Constitution, and the taxes levied thereon are for the benefit of the state and the political subdivisions of the state as hereinafter provided and said taxes so levied for the benefit of the political subdivisions of the state are levied for and on behalf of said political subdivisions of the state to the same extent and manner as if said levies were made by the governing authorities of the said subdivisions for distribution therein as hereinafter provided. (1939, c. 158, s. 700.)

Editor's Note.—For comment on this enactment, see 17 N. C. Law Rev. 390.

County Board of Education Denied Recovery of Funds Allocated to Municipality from Intangible Tax.—In Board of Education v. Wilson, 215 N. C. 216, 1 S. E. (2d) 544, it was held that the county board of education was not entitled to recover from municipality funds allocated to it by state from intangible tax provided by this section, even though municipality is in nowise liable for maintenance of constitutional school term, since it could not expend the funds as agent of the municipality in discharging the debts of the municipality for school purposes since the municipality had no such debt, nor could it expend such funds for school purposes in any of its districts since there was no district coterminous with the municipal limits and such expenditure would take taxes collected from citizens of the municipality and expend same in part for the benefit of those living outside its limits, and since the act does not provide for distribution of the funds to the county board of education in such cases and such provisions may not be interpolated therein, and since by a proper construction of

the act the provision for expenditure for school purposes may relate to counties rather than to cities and towns.

§ 105-199. Money on deposit.—All money on deposit (including certificates of deposit and postal savings) with any bank or other corporation, firm or person doing a banking business, whether such money be actually in or out of this state, having a business, commercial or taxable situs in this state, shall be subject to an annual tax, which is hereby levied, of ten cents (10c) on every one hundred dollars ($100.00) of the total amount of such deposit without deduction for any indebtedness or liabilities of the taxpayer.

For the purpose of determining the amount of deposits subject to this tax every such bank or other corporation, firm or person doing a banking business shall set up the credit balance of each depositor on the fifteenth day of each March, June, September and December in the calendar year next preceding the due date of tax return, and the average of such quarterly credit balances shall constitute the amount of deposit of each depositor subject to the tax herein levied; for the purposes of this section accounts having an average of quarterly balances for the year of less than one hundred dollars ($100.00)) may be disregarded.

The tax levied in this section upon money on deposit shall be paid by the cashier, treasurer or other officer or officers of every such bank or other corporation, firm or person doing a banking business in this state by report and payment to the commissioner of revenue on or before March fifteenth of each year; any taxes so paid as agent for the depositor shall be recovered from the owners thereof by the bank or other corporation, firm or person doing a banking business in this state by deduction from the account of the depositor on December sixteenth of each year or on such date thereafter as in the ordinary course of business it becomes convenient to make such charge. The tax on deposits represented by time certificates shall be chargeable to the original depositor unless such depositor has given notice to the depository bank of transfer of such certificate of deposit. Accounts that have been closed during the year, leaving no credit balance against which the tax can be charged, may be reported separately to the commissioner of revenue and the tax due on such accounts shall become a charge directly against the depositor, and such tax may be collected by the commissioner of revenue from the depositor in the same manner as other taxes levied in this act; the bank or other corporation, firm or person doing a banking business in this state shall not be held liable for the payment of the tax due on accounts so reported. None of the provisions of this section shall be construed to relieve any taxpayer of liability for a full and complete return of postal savings and of all money on deposit outside this state having business, commercial or taxable situs in this state.

The tax levied in this section shall not apply to deposits by one bank in another bank, nor to deposits of the United States, state of North Carolina, political subdivisions of this state or agencies of such governmental units. Deposits representing the actual payment of benefits to World War veterans by the federal government, when not reinvested, shall not be subject to the tax levied in this section. (1939, c. 158, s. 701.)

§ 105-200. Money on hand. — All money on hand (including money in safe deposit boxes, safes, cash registers, etc.) on December thirty-first of each year, having a business, commercial or taxable situs in this state, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars ($100.00) of the total amount of such money on hand without deduction for any indebtedness or liabilities of the taxpayer. (1939, c. 158, s. 702.)

§ 105-201. Accounts receivable. — All accounts receivable on December thirty-first of each year, having a business, commercial or taxable situs in this state, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars ($100.00) of the face value of such accounts receivable: Provided, that from the face value of such accounts receivable there may be deducted the accounts payable of the taxpayer: provided further, that no deduction in any case shall be allowed under this section of any indebtedness of the taxpayer on account of capital outlay, permanent additions to capital or purchase of capital assets. The term "accounts payable" as used in this section shall not include: (a) reserves, secondary liabilities or contingent liabilities except upon satisfactory showing that the taxpayer will actually be compelled to pay the debt or liability; (b) taxes of any kind owing by the taxpayer; (c) debts owed to a corporation of which the taxpayer is parent or subsidiary or with which the taxpayer is closely affiliated by stock ownership or with which the taxpayer is subsidiary of same parent corporation unless the credits created by such debts are listed if so required by law for ad valorem or property taxation, for taxation at the situs of such credits; or (d) debts incurred to purchase assets which are not subject to taxation at the situs of such assets.

From the total face value of accounts receivable returned to this state for taxation by or in behalf of any taxpayer who or which also owns other such accounts receivable as have situs outside of this state, accounts payable of the taxpayer may be deducted only in the proportion which the total face value of accounts receivable taxable under this section bears to the total face value of all accounts receivable of the taxpayer.

The term "accounts payable" as used in this section shall be deemed to include current notes payable of the taxpayer incurred to secure funds which have been actually paid on his current accounts payable within one hundred and twenty days prior to the date as of which the intangible tax return is made. (1939, c. 158, s. 703; 1941, c. 50, s. 8.)

Editor's Note.—The 1941 amendment added the paragraph at the end of this section.

For comments on the amendments, see 19 N. C. Law Rev. 539.

§ 105-202. Bonds, notes, and other evidences of debt.—All bonds, notes, demands, claims and other evidences of debt however evidenced, whether secured by mortgage, deed of trust, judgment or otherwise, or not so secured, having a business, commercial or taxable situs in this state on December thirty-first of each year shall be subject to annual tax, which is hereby levied of fifty cents (50c) on every one hundred dollars ($100.00) of the actual value thereof: Provided, that from the

actual value of such bonds, notes, demands, claims and other evidences of debt there may be deducted like evidences of debt owed by the taxpayer on December thirty-first of the same year. The term "like evidences of debt" deductible under this section shall not include: (a) accounts payable; (b) taxes of any kind owing by the taxpayer; (c) reserves, secondary liabilities or contingent liabilities except upon satisfactory showing that the taxpayer will actually be compelled to pay the debt or liability; (d) evidences of debt owed to a corporation of which the taxpayer is parent or subsidiary or with which the taxpayer is closely affiliated by stock ownership or with which the taxpayer is subsidiary of same parent corporation, unless the credits created by such evidences of debt are listed, if so required by law for ad valorem or property taxation, for taxation at the situs of such credits; or (e) debts incurred to purchase assets which are not subject to taxation at the situs of such assets.

From the total actual value of bonds, notes, demands, claims and other evidences of debt returned to this state for taxation by or in behalf of any taxpayer who or which also owns other such evidences of debt as have situs outside of this state, like evidences of debt owed by the taxpayer may be deducted only in the proportion which the total actual value of evidences of debt taxable under this section bears to the total actual value of all like evidences of debt owned by the taxpayer.

The tax levied in this section shall not apply to bonds, notes and other evidences of debt of the United States, state of North Carolina, political subdivisions of this state or agencies of such governmental units, but the tax shall apply to all bonds and other evidences of debt of political subdivisions and governmental units other than those specifically excluded herein.

In every action or suit in any court for the collection on any bonds, notes, demands, claims or other evidences of debt, the plaintiff shall be required to allege in his pleadings or to prove at any time before final judgment is entered (1) that such bonds, notes or other evidences of debt have been assessed for taxation for each and every tax year, under the provisions of this article, during which the plaintiff was owner of same, not exceeding five years prior to that in which the suit or action is brought; or (2) that such bonds, notes or other evidences of debt sued upon are not taxable hereunder in the hands of the plaintiff; or (3) that the suitor has not paid, or is unable to pay such taxes, penalties and interest as might be due, but is willing for the same to be paid out of the first recovery on the evidence of debt sued upon. When in any action at law or suit in equity it is ascertained that there are unpaid taxes, penalties and interest due on the evidence of debt sought to be enforced, and the suitor makes it appear to the court that he has not paid or is unable to pay said taxes, penalties and interest, but is willing for the same to be paid out of the first recovery on the evidence of debt, the court shall have authority to enter as a part of any judgment or decretal order in said proceedings that the amount of taxes, penalties and interest due and owing shall be paid to the proper officer out of the first collection on said judgment or decree. The title to real estate heretofore or hereafter sold under a deed of trust shall not be drawn in question upon the ground that the holder of the notes secured by such deed of trust did not list and return the same for taxation as required by this article. (1939, c. 158, s. 704.)

Judgment Provision as to Payment of Taxes.—Nonpayment of taxes on a note in suit is nullified by a provision in the judgment on the note that taxes, penalties and interest due shall be paid to the proper officers out of the first collections on the judgment. This is in accord with this section. Roberts v. Grogan, 222 N. C. 30, 21 S. E. (2d) 829.

§ 105-203. Shares of stock. — All shares of stock owned by residents of this state or having business, commercial or taxable situs in this state on December thirty-first of each year, with the exceptions hereinafter provided, shall be subject to an annual tax, which is hereby levied, of thirty cents (30c) on every one hundred dollars ($100.00) of the total fair market value thereof.

The tax herein levied shall not apply to shares of stock in banks, banking associations, trust companies or insurance companies not exempted from an income tax under subsection 2(f) of § 105-134, which are otherwise taxed in this state, nor to shares of stock in building and loan associations which pay a tax as levied under § 105-73; nor shall the tax apply to shares of stock in corporations which pay to this state a franchise tax on their entire capital stocks, surplus and undivided profits or entire gross receipts as provided under Schedule C, §§ 105-114 to 105-129, together with the tax upon all of the net income, if any, of such corporations as provided under §§ 105-130 to 105-163. With respect to corporations which pay to this state a franchise tax on a part of their capital stock, surplus and undivided profits or part of their gross receipts as provided in Schedule C, §§ 105-114 to 105-129, and a tax upon a part of the net income of such corporations as provided under §§ 105-130 to 105-163, when such income is earned, there shall be exempt so much of the fair market value of such shares of stock as is represented by the percentage of net income on which tax is paid to this state.

Indebtedness incurred directly for the purchase of shares of stock may be deducted from the total value of such shares: Provided, the specific shares of stock so purchased are pledged as collateral to secure said indebtedness; provided, further, that only so much of said indebtedness may be deducted as is in the same proportion as the taxable value of said shares of stock is to the total value of said shares of stock. (1939, c. 158, s. 705; 1941, c. 50, s. 8.)

Editor's Note.—The 1941 Amendment added the paragraph at the end of this section.

§ 105-204. Beneficial interest in foreign trusts. —The beneficial or equitable interest on December thirty-first of each year of any resident of this state, or of a nonresident having a business, commercial or taxable situs in this state, in any trust, trust fund or trust account (including custodian accounts) held by a foreign fiduciary, shall be subject to an annual tax, which is hereby levied, of thirty cents (30c) on every one hundred dollars ($100.00) of the total actual value thereof. (1939, c. 158, s. 706; 1941, c. 50, s. 8.)

Editor's Note.—The 1941 amendment inserted the above in lieu of the former section.

§ 105-205. Funds on deposit with insurance

companies.—All funds on deposit with insurance companies on December thirty-first of each year, belonging to or held in trust for a resident of this state or having acquired a taxable situs in this state, shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25c) on every one hundred dollars ($100.00) thereof. The term "funds on deposit" as used in this section shall mean all funds accrued or accruing by virtue of the death of the insured or the original maturity of a policy contract where the party or parties entitled to receive such funds might withdraw same at their option upon stipulated notice; provided, that in the determination of the tax liability under this section the first twenty thousand dollars ($20,000.00) of such funds on deposit or paid over to and held by a bank as trustee shall be disregarded where such funds on deposit are payable wholly and exclusively to a widow and/or children of the person deceased whose death created such funds on deposit.

The tax levied in this section shall be paid by the treasurer, cashier or other officer or officers of every insurance company doing business in this state by report and payment to the commissioner of revenue on or before March fifteenth of each year; any taxes so paid as agent for the party or parties entitled to receive such funds shall be recovered from the owners thereof by deduction from the account of the owner on December thirty-first of each year or at such other time as in the ordinary course of business it becomes convenient to make such charge. (1939, c. 158, s. 707; 1941, c. 50, s. 8.)

Editor's Note.—The 1941 amendment inserted the proviso at the end of the first paragraph.

§ 105-206. When taxes due and payable; date lien attaches; non-residents; forms for returns; extensions.—All taxes levied in this article or schedule shall become due and payable on the fifteenth day of March of each year, and the lien of such taxes shall attach annually to all real estate of the taxpayer within this state as of December thirty-first next preceding the date that such taxes become due and payable, regardless of the time at which liability for the tax may arise or the exact amount thereof be determined; and said lien shall continue until such taxes, with any interest, penalty and costs which shall accrue thereon, shall have been paid.

Every person, firm, association, corporation, clerk of court, guardian, trustee, executor, administrator, receiver, assignee for creditors, trustee in bankruptcy or other fiduciary owning or holding any intangible personal properties defined and classified and/or liable for or required to pay any tax levied, in this article or schedule, either as principal or agent, shall make and deliver to the commissioner of revenue in such form as he may prescribe a full, accurate and complete return of such tax liability; such return, together with the total amount of tax due, shall be filed on or before the fifteenth day of March in each year.

For the purpose of protecting the revenue of this state and to avoid discrimination and prevent evasion of the tax imposed by this article, every resident or nonresident person, firm, association, trustee or corporation, foreign or domestic, engaged in this state, either as principal or as agent or representative of or on behalf of another, in buying, selling, collecting, discounting, negotiating or otherwise dealing in or handling any of the intangible property defined in this article, shall be deemed to be doing business in this state for the purposes of this article, and the principal, superior or person on whose behalf such business is carried on in this state shall likewise be deemed to be doing business in this state, for the purpose of this article, and where such business is carried on in this state by a corporation, foreign or domestic, it and its parent corporation or the corporation which substantially owns or controls it, by stock ownership or otherwise, shall be deemed to be doing business in this state, for the purpose of this article, and in all such cases the said intangible property acquired in the conduct of such business in this state, and outstanding on December 31 of each year, shall be deemed to have a situs in this state and subject to the tax imposed by this article, notwithstanding any transfer between any of such parties and notwithstanding that the same may be kept or may then be outside of this state, and any of the intangible property defined in this article and acquired in the conduct of any business carried on in this state, and/or having a business, commercial or taxable situs in this state, shall be subject to said tax and returned for taxation by the owner thereof or by the agent, person, or corporation in this state employed by such owner to handle or collect the same.

The commissioner of revenue shall cause to be prepared blank forms for said returns and shall cause them to be distributed throughout the state, and to be furnished upon application; but failure to receive or secure form shall not relieve any taxpayer from the obligation of making full and complete return of intangible personal properties as provided in this article or schedule.

The return required by this article or schedule shall be due on or before the date specified unless written application for extension of time in which to file, containing reasons therefor, is made to the commissioner of revenue on or before due date of return. The commissioner of revenue for good cause may extend the time for filing any such return, provided interest at the rate of six per cent (6%) per annum from due date of return is paid upon the total amount of tax due. (1939, c. 158, s. 708; 1941, c. 50, s. 8.)

Editor's Note.—The 1941 amendment rewrote the third paragraph of this section.

§ 105-207. Penalties; unlawful to refuse to make returns.—If any taxpayer, without intent to evade any tax imposed by this article or schedule, shall fail to file a return and pay the tax, if any be due, at the time required by or under the provisions of this article or schedule, but who shall voluntarily file a complete and correct return and pay the tax due within sixty days after due date, there shall be added to the tax an additional amount equal to five per cent (5%) thereof, said additional amount in no case to be less than one dollar ($1.00), together with interest at the rate of one-half of one per cent (½ of 1%) per month or fraction thereof from the time said return was required to be filed until paid.

If any taxpayer fails voluntarily to file a return and/or pay the tax, if any be due, within sixty days after due date as required by this article or schedule, there shall be added to the tax an addi-

tional amount equal to twenty-five per cent (25%) thereof, said additional amount in no case to be less than two dollars ($2.00), together with interest at the rate of one-half of one per cent (½ of 1%) per month or fraction thereof from time said return was required to be filed until paid.

If any taxpayer who has failed to file a return or has filed an incorrect or insufficient return, and who has been notified by the commissioner of revenue of such delinquency, refuses or neglects within thirty days after such notice to file a proper return, the commissioner of revenue shall determine the tax liability of such taxpayer, according to his best information and belief, and shall assess the same at double the amount so determined plus the penalties and interest provided in this section for failure voluntarily to file return within sixty days after due date; the assessment so made by the commissioner of revenue shall be prima facie correct.

It shall be unlawful for any person to fail or refuse to make the return provided for in this article or schedule, or to make any false or fraudulent return or false statement in any return of the tax, or any part thereof, imposed by this article; or for any person to aid or abet another in any attempt to evade the payment of the tax, or any part thereof, imposed by this article; or for the president, vice-president, secretary, or treasurer of any company to make or permit to be made for any company or association any false return, or any false statement in any return required by this article, with the intent to evade the payment of any tax hereunder; or for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the commissioner of revenue or his duly appointed agent, or to refuse to offer testimony or produce any record as required. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined not more than five hundred dollars ($500.00) or imprisoned not exceeding six months, or punished by both such fine and imprisonment, at the discretion of the court within the limitations aforesaid. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent statement, with the intent aforesaid, shall be guilty of the offense of perjury, and, on conviction thereof, shall be punished in the manner provided by law for the offense of perjury. Any company for which a false return shall be made or a return containing a false statement as aforesaid, shall be guilty of a misdemeanor, and may be punished by a fine of not more than one thousand dollars ($1,000.00). (1939, c. 158, s. 709.)

§ 105-208. Examination of returns; additional taxes.—As soon as practicable after the return is filed the commissioner of revenue shall examine same together with any other facts within his knowledge, and shall compute the tax, and the amount so computed shall be the tax. If the tax found due shall be greater than the amount theretofore paid, the deficiency shall be paid to the commissioner of revenue within thirty days after date of notice to the taxpayer of such deficiency, and any over-payment of tax shall be returned to the taxpayer within thirty days after it is ascertained.

If the return is made in good faith and the under-statement of the tax is not due to any fault of the taxpayer, there shall be no penalty or additional tax added because of such under-statement, but interest shall be added to the amount of the deficiency at the rate of six per cent (6%) per annum until paid. If the under-statement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added to the amount of the deficiency five per cent (5%) thereof, together with interest at the rate of six per cent (6%) per annum until paid. If the understatement is found by the commissioner of revenue to be false or fraudulent, with intent to evade the tax, any additional tax found to be due and payable shall be doubled together with interest at the rate of six per cent (6%) per annum upon the total amount of tax so found. The interest provided for in this section shall in all cases be computed from the date the tax was originally due to the date of payment.

If the commissioner of revenue discovers from the examination of the return or otherwise that the intangible personal property of any taxpayer, or any portion thereof, has not been assessed, he may, at any time within three years after the time when the return was due, give notice in writing to the taxpayer of such deficiency. Any taxpayer feeling aggrieved by such proposed assessment shall be entitled to a hearing before the commissioner of revenue, if within thirty days after giving notice of such proposed assessment he shall apply for such hearing in writing, explaining in detail his objections to same. If no request for such hearing is so made, such proposed assessment shall be final and conclusive. If the request for hearing is made, the taxpayer shall be heard by the commissioner of revenue, and after such hearing the commissioner of revenue shall render his decision. The taxpayer shall be advised of his decision and such amount shall be due within ten days after notice is given. The provisions of this article with respect to revision and appeal shall apply to the tax so assessed. The limitation of three years to the assessment of such tax or an additional tax shall not apply to the assessment of additional taxes upon fraudulent returns nor upon failure to file returns. (1939, c. 158, s. 710.)

§ 105-209. Information from the source; commissioner of revenue empowered to make regulations.—In addition to the other requirements of this article or schedule it shall be the duty of every domestic corporation and every foreign corporation doing business and/or owning property in this state, the shares of stock and bonds of which are subject to tax under the provisions of this article or schedule, to report not later than the fifteenth day of March of each year to the commissioner of revenue, in such form and manner as he may prescribe, the name and address of each registered stockholder or bondholder resident in this state as of the thirty-first day of December of each year; such report shall also include the number of shares of stock and/or the number of bonds, the par or face value of each, the dividends or interest paid on each such security during the calendar year next preceding date of report, all transfers of record made from residents of this state between the first and thirty-first days of December next preceding the date of the report herein required, and such other and further in-

formation as the commissioner of revenue may require.

The commissioner of revenue shall from time to time promulgate such rules and regulations, not inconsistent with this article or schedule for making returns and for the ascertainment, assessment and collection of the taxes imposed hereunder as he may deem necessary to enforce its provisions. (1939, c. 158, s. 711.)

§ 105-210. Moneyed capital coming into competition with the business of national banks.—On all moneyed capital coming into competition with the business of national banks there is hereby annually levied a tax at the same rate as is assessed upon the shares of stock of national banks located in this state at the place of residence of such national banks, less deduction of real estate otherwise taxed in this state, to the same extent and under the same corresponding conditions as this deduction is allowed in the assessment of such shares of stock of national banks located in this state: Provided, that bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business shall not be deemed moneyed capital within the meaning of this section. (1939, c. 158, s. 712.)

§ 105-211. Conversion of intangible personal property to evade taxation not to defeat assessment and collection of proper taxes; taxpayer's protection.—Any taxpayer who shall, for the purpose of evading taxation under the provisions of this article or schedule, within thirty days prior to December thirty-first of any year, either directly or indirectly, convert any intangible personal property taxable under the provisions of this article or schedule, or with like intent shall, either directly or indirectly, convert such intangible personal property into a class of property which is taxable in this state at a lower rate than the intangible personal property so converted, shall be taxable on such intangible personal property as if such conversion had not taken place; the fact that such taxpayer within thirty days after December thirty-first of any year, either directly or indirectly, converts such property non-taxable in this state or taxable at the lower rate in this state into intangible personal property taxable at the higher rate shall be prima facie evidence of intent to evade taxation by this state, and the burden of proof shall be upon such taxpayer to show that the first conversion was for a bona fide purpose of investment and not for the purpose of evading taxation by this state.

Taxpayers making a complete return on or before March fifteenth of each year of all their holdings of intangible personal property as provided by this article or schedule (or by similar provisions of prior Revenue Act) shall not thereafter be held liable for failure to list such intangible personal property with the local taxing units of this state in previous years; the taxes levied in this article or schedule shall be in lieu of all other property taxes in this state on such intangible personal property. (1939, c. 158, s. 713.)

§ 105-212. Institutions exempted; conditional and other exemptions.—None of the taxes levied in this article or schedule shall apply to religious, educational, charitable or benevolent organizations not conducted for profit, nor to any funds held irrevocably in trust exclusively for the maintenance and care of places of burial; insurance companies reporting premiums to the insurance commissioner of this state and paying a tax thereon under the provisions of § 105-121 shall not be subject to the provisions of §§ 105-201, 105-202 and 105-203; building and loan associations paying a tax under the provisions of § 105-73 shall not be subject to the provisions of §§ 105-201, 105-202 and 105-203; state credit unions organized pursuant to the provisions of subchaper III, chapter fifty-four, paying the supervisory fees required by law, shall not be subject to any of the taxes levied in this article or schedule; banks, banking associations and trust companies shall not be subject to the tax levied in this article or schedule on evidences of debt held by them when said evidences of debt represent investment of funds on deposit with such banks, banking associations and trust companies: provided, that each such institution must, upon request by the commissioner of revenue, establish in writing its claim for exemption as herein provided. The exemptions in this section shall apply only to those institutions, and only to the extent, specifically mentioned, and no other.

A clerk of any court of this state may, upon written application therefor, obtain from the commissioner of revenue a certificate relieving the depository bank of such clerk from the duty of collecting the tax levied in this article or schedule from deposits of said clerk: Provided, that such clerk of court shall be liable under his official bond for the full and proper remittance to the commissioner of revenue under the provisions of this article or schedule of taxes due on any deposits so handled. (1939, c. 158, s. 714; 1943, c. 400, s. 8.)

Editor's Note.—The 1943 amendment inserted the provision relating to state credit unions.

§ 105-213. Separate records by counties; disposition and distribution of taxes collected; purpose of tax.—The commissioner of revenue shall keep a separate record by counties of taxes collected under the provisions of this article or schedule, and shall not later than the twentieth day of July of each year submit to the state board of assessment an accurate account of such taxes collected during the fiscal year ending June thirtieth next preceding, showing separately by sections the total collections less refunds in each county of the state. The state board of assessment shall examine such reports and, if found to be correct, shall certify a copy of same to the state auditor and state treasurer. Twenty-five per cent (25%) of the total amount of such revenue shall be retained by the state for use in the maintenance and operation of the public school system of the state, and seventy-five per cent (75%) of such revenue shall be distributed to the counties and municipalities of the state on the following basis:

The amount distributable to each county and to the municipalities therein from the revenue collected under §§ 105-200, 105-201, 105-202 to 105-204 shall be determined upon the basis of the amounts collected in each county; the amount distributable to each county and to the municipali-

ties therein from the revenue collected under §§ 105-199 and 105-205 shall be determined upon the basis of population in each county as shown by the latest federal decennial census. The amounts so allocated to each county shall in turn be divided between the county and all municipalities therein in proportion to the total amount of ad valorem taxes levied by each during the fiscal year preceding such distribution. Upon certification by the state board of assessment of the allocations herein provided for, it shall be the duty of the state auditor to issue a warrant on the state treasurer to the treasurer or other officer authorized to receive public funds of each county and municipality in the amount so allocated to each such county and municipality. It shall be the duty of the chairman of the board of county commissioners of each such county and the mayor of each such municipality therein to report to the state board of assessment such information as it may request for its guidance in making said allotments to said units; and upon failure of any such county or municipality to make such report within the time prescribed by said state board of assessment, said board may disregard such defaulting unit in making said allotments. The amounts so allocated to each county and municipality shall be distributed and used by said county or municipality in proportion to other property tax levies made for the various funds and activities of the taxing unit receiving said allotment. (1939, c. 158, s. 715; 1941, c. 50, s. 8.)

Editor's Note.—The 1941 amendment changed the percentages in the last sentence of the first paragraph from "forty" and "sixty" to "twenty-five" and "seventy-five," respectively.

§ 105-214. Provision for administration. — For the administration of this article or schedule an appropriation is hereby made for the use of the department of revenue in addition to the appropriation in the Appropriation Act of a sum equal to four per cent (4%) of the total revenues collected under this article to be expended under allotments made by the director of the budget of such part of the whole appropriation as may be found necessary for the administration of this article.

The director of the budget may make estimates of the yield of revenue under this article and make advance appropriations based upon such estimate and to provide for the necessary expense of providing materials, supplies and other needful expenses to be incurred prior to the actual collection of taxes made under and by virtue of this article or schedule. The director of the budget may make such advance allotments from such estimates of revenue yield as he may find proper for the convenient and efficient administration of this article.

Out of the amounts which may become due and payable to the counties and municipalities there shall be deducted pro rata the cost of collection, enforcement and administration as determined by the director of the budget. (1939, c. 158, s. 716.)

§ 105-215. Unconstitutionality or invalidity; interpretation; repeal.—If any clause, sentence, paragraph, or part of this article or schedule shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this article or schedule, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. No caption of any section or set of sections shall in any way affect the interpretation of this act or any part thereof. All acts and parts of acts inconsistent with the provisions of this article or schedule are specifically hereby repealed. (1939, c. 158, s. 717.)

§ 105-216. Reversion to local units in case of invalidity.—If any clause, sentence, paragraph, or part of this article or schedule shall for any reason be adjudged by any court of competent jurisdiction to be invalid, and if by virtue of said judgment any one or all of the several taxes classified and levied in this article or schedule is/are held invalid, then the particular class or classes of intangible personal property affected by said judgment shall become subject to listing, assessment and taxation by the county, municipality, and other taxing jurisdictions in which said intangible personal property has situs in the same manner and at the same rates as applicable to real estate and other tangible properties: provided, that in such case said listing, assessment and taxation of such intangible personal property by said local taxing units shall become valid and effective as of the tax listing date next preceding March 24, 1939, and shall continue thereafter with full force and effect as if such properties were made taxable by the local taxing units by direct statutory enactment. (1939, c. 158, s. 718.)

§ 105-217. Power of attorney.—The commissioner of revenue shall have authority to require a proper power of attorney of each and every agent for any taxpayer under this article or schedule. (1939, c. 158, s. 719.)

Art. 8. Schedule I. Compensating Use Tax.

§ 105-218. Short title.—This article shall be known and may be cited as the "Compensating Use Tax Article." (1939, c. 158, s. 800; 1941, c. 50, s. 9.)

Editors Note.—The 1941 amendment struck out this article and inserted in lieu thereof the present article, effective as of July 1, 1941. The amendment provides that the former article, designated the "Compensation Use Tax Article of 1939," shall be and continue in full force and effect with respect to all acts and transactions done or occurring prior to July 1, 1941, or which ought to be affected by its terms and provisions, and with respect to all liabilities, criminal as well as civil, incurred, or which ought to have been incurred with respect to said acts and transactions done or occurring prior to July 1, 1941.

For comment on the 1939 enactment, see 17 N. C. Law Rev. 386.

§ 105-219. Definitions.—The following words, terms, and phrases when used in this article have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

(a) "Storage" means and includes any keeping or retention of possession in this state for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer.

(b) "Use" means and includes the exercise of any right or power or dominion whatsoever over tangible personal property by a purchaser thereof and includes, but is not limited to, any withdrawal from storage, installation, affixation to real or per-

sonal property, exhaustion or consumption of tangible personal property by the owner or purchaser thereof, but shall not include the sale of tangible personal property in the regular course of business.

(c) The word "sale" or "selling" shall mean any transfer of title or possession, or both, exchange, or barter of tangible personal property, conditional or otherwise, however affected and by whatever name called, for a consideration paid or to be paid, in installments or otherwise, and shall include any of said transactions whereby title or ownership is ultimately to pass notwithstanding the retention of title or possession, or both, for security or other purposes, and shall further mean and include any bailment, loan, lease, rental or license to use or consume tangible personal property for a consideration paid or to be paid, in installments or otherwise: Provided, the provisions of this subsection shall not apply to the lease or rental of motion picture films used for exhibition purposes and for which a tax of three per cent is paid on the total admission for such exhibitions.

(d) "Purchase" means the buying of, giving an order for, or offering to buy tangible personal property as a result of which there occurs a sale or delivery of tangible personal property by a retailer to a person for the purpose of storage, use, or consumption in this state, and includes the procuring of a retailer to erect, install, or apply tangible personal property for use in this state.

(e) "Sales price" means the total amount for which tangible personal property is sold, including all cost of transportation or delivery to the purchaser, whether paid by the purchaser to the retailer or to the carrier, and any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses, or any other expenses whatsoever: Provided, however, that the cost for labor or services rendered in erecting, installing, or applying property sold shall not be included as a part of the sales price: Provided, further, that where a manufacturer, producer or contractor erects, installs, or applies tangible personal property for the account of or under contract with the owner of realty or other property, the sales price shall be the fair market value of such property at the time and place of sale.

(f) "Person" means and includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit, and the plural as well as the singular number.

(g) "Retailer" means and includes every person engaged in the business of making sales of tangible personal property, or peddling the same, or soliciting or taking orders for sales, whether for immediate or future delivery, for storage, use or consumption in this state, and every manufacturer, producer, or contractor engaged in business in this state and selling, delivering, erecting, installing, or applying tangible personal property for use in this state notwithstanding that said property may be permanently affixed to a building or to realty or to other tangible personal property: Provided, however, that when in the opinion of the commissioner it is necessary for the efficient administration of this article to regard any salesmen, solicitors, representatives, consignees, peddlers, or canvassers as agents of the dealers, distributors, consignors, supervisors, principals or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, consignors, supervisors, principals, or employers, the commissioner may so regard them and may regard the dealers, distributors, consignors, supervisors, principals, or employers as retailers for purposes of this article.

(h) "Commissioner" means commissioner of revenue of the state of North Carolina.

(i) "Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses, but shall not include electricity, gas or water delivered by or through main lines or pipes either for commercial or domestic use or consumption.

(j) "Engaged in business in this state" shall mean the selling or delivering in this state or any activity in this state in connection with the selling or delivering in this state of tangible personal property for storage, use, or consumption in this state, and includes, but is not limited to, any of the following acts or methods of transacting business: Maintaining, occupying or using, permanently or temporarily, directly, indirectly, or through a subsidiary or agent, by whatever name called, any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business, or, permanently or temporarily, directly or through a subsidiary, having any representative, agent, salesman, canvasser, or solicitor operating in the state in such selling or delivering, and the fact that any corporate retailer, agent, or subsidiary, engaged in business in this state, may not be legally domesticated or qualified to do business in this state, shall be immaterial.

(k) "In this state" or "in the state" means within the exterior limits of the state of North Carolina, and includes all territory within such limits owned by or ceded to the United States of America. (1939, c. 158, s. 801; 1941, c. 50, s. 9.)

§ 105-220. Taxes levied.—An excise tax is hereby levied and imposed on the storage, use, or consumption in this state of tangible personal property purchased from a retailer within or without this state on or after July first, one thousand nine hundred and forty-one (1941), for storage, use or consumption in this state at the rate of three per cent of the sales price of such property, regardless of whether said retailer is or is not engaged in business in this state.

Where a retail sales tax has already been paid with respect to said property in this state by the purchaser thereof, then the amount of said tax shall be credited upon the tax imposed by this article.

Every person storing, using or otherwise consuming in this state tangible personal property purchased or received from a retailer either within or without this state shall be liable for the tax im-

posed by this article, and the liability shall not be extinguished until the tax has been paid to this state: Provided, however, that a receipt from a registered retailer engaged in business in this state given to the purchaser in accordance with the provisions of this article shall be prima facie sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer, and the liability of the purchaser shall be extinguished upon payment of the tax by any retailer from whom he has purchased said property.

The maximum tax imposed upon any single article of tangible personal property shall be limited as provided in § 105-168. (1939, c. 158, s. 802; 1941, c. 50, s. 9.)

§ 105-221. Exemptions.—The storage, use or consumption in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this article:

(a) Tangible personal property expressly specified and exempted from the retail sales tax imposed by Schedule E, §§ 105-164 to 105-187.

(b) Tangible personal property, the sale of which is classified as a wholesale sale under the provisions of Schedule E.

(c) Tangible personal property, the storage, use or consumption of which is exempt from taxation under the Constitution of North Carolina and the Constitution of the United States.

(d) Motor fuels defined and taxed in subchapter V, as now or hereafter amended or supplemented, and upon which the said gasoline tax has been paid.

(e) Tangible personal property purchased or acquired prior to coming into this state and brought into this state by a person a nonresident thereof for his, her, its or their own use or enjoyment while temporarily in this state. (1939, c. 158, s. 803; 1941, c. 50, s. 9.)

§ 105-222. Registration. — Every retailer, engaged in business in this state, except those registered under Schedule E, §§ 105-164 to 105-187, who shall thereby be deemed to be registered under this article, selling or delivering tangible personal property for storage, use or consumption in this state shall within thirty days after July 1, 1941, register with the commissioner and give the name and address of all agents operating in this state and the counties in this state in which they operate, the location of any and all distribution or sales houses or offices or other places of business in this state, the number, location and place of use of all motor vehicles, motorcycles, or other vehicles or conveyances, used or operated in this state by said retailer or in the business of said retailer, or for or under the authority of or under contract with or license from said retailer, and such other information as the commissioner may require. (1939, c. 158, s. 804; 1941, c. 50, s. 9.)

§ 105-223. Retailer to collect tax from purchaser.—Every retailer engaged in the business of selling, or delivering tangible personal property for storage, use, or consumption in this state shall at the time of selling or delivering said tangible personal property or collecting the sales price thereof, add to the sales price of such tangible personal property the amount of the tax on the sale thereof, and when so added said tax shall constitute a part of such price, shall be a debt from the purchaser to the retailer until paid, and shall be recoverable at law in the same manner as other debts. Said tax shall be stated and charged separately from the sales price and shown separately on the retailer's sales records, and shall be paid by the purchaser to the retailer as trustee for and on account of the state, and the retailer shall be liable for the collection thereof and for its payment to the commissioner, and the retailer's failure to charge to or collect said tax from the purchaser shall not affect such liability. It is the purpose and intent of this article that the tax herein levied and imposed shall be added to the sales price of tangible personal property when sold at retail and thereby be borne and passed on to the purchaser instead of being absorbed by the retailer.

Any retailer who shall by any character of public advertisement offer to absorb the tax levied in this article, or in any manner, directly or indirectly, advertise that the tax herein imposed is not considered as an element in the price to the purchaser, shall be guilty of a misdemeanor. Any violations of the provisions of this section reported to the commissioner of revenue shall be reported by him to the attorney general of the state to the end that such violations may be brought to the attention of the solicitor of the court of the county or district whose duty it is to prosecute misdemeanors in the jurisdiction. It shall be the duty of such solicitor to investigate such alleged violations and if he finds that this section has been violated, prosecute such violators in accordance with the law.

Every retailer engaged in business in this state, as defined in this article, shall collect said tax notwithstanding (a) that the purchaser's order or the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the retailer at a point outside of this state as a result of solicitation by the retailer through the medium of a catalog or other written advertisement, or (b) that the purchaser's order or the contract of sale is made or closed by acceptance or approval outside of this state or before said tangible personal property enters this state, or (c) that the purchaser's order or the contract of sale provides that said property shall be, or it is in fact, procured or manufactured at a point outside of this state and shipped directly to the purchaser from the point of origin, or (d) that said property is mailed to the purchaser in this state from a point outside this state or delivered to a carrier at a point outside this state, f.o.b., or otherwise, and directed to the purchaser in this state, regardless of whether the cost of transportation is paid by the retailer or by the purchaser, or (e) that said property is delivered directly to the purchaser at a point outside this state, if it is intended to be brought to this state for storage, use, or consumption in this state: Provided, that in the event of direct delivery to the purchaser at a point outside of this state the tax imposed by this article shall be credited with any retail sales tax lawfully imposed and paid with respect to said property in the state where such delivery occurred, or (f) any combination, in whole or in part, of any two or more of the foregoing statements of fact. (1939, c. 158, s. 805; 1941, c. 50, s. 9; 1941, c. 204, s. 1.)

Editor's Note.—This section was amended twice by Pub-

lic Laws 1941. As to the first amendment, see editor's note under § 105-218. The second amendment, which changed the third paragraph, is effective as of July 1, 1941.

§ 105-224. Taxes payable; when returns are to be filed by retailer.—The tax imposed by this article shall be due and payable to the commissioner monthly on or before the fifteenth day of the month next succeeding the month in which the tax accrues. Every retailer engaged in business in this state shall, on or before the fifteenth day of the month following the month in which the tax accrues, file with the commissioner a return for the preceding month, in such form as may be prescribed by the commissioner, showing the total sales price of the tangible personal property sold and/or delivered by the retailer during such preceding month, the storage, use or consumption of which is subject to the tax imposed by this article, and such other information as the commissioner may deem necessary for the proper administration of this article. The return shall be accompanied by a remittance of the amount of tax herein required to be paid by the retailer during the month covered by the return. Returns shall be signed by the retailer or his duly authorized agent but need not be verified by oath. (1939, c. 158, s. 807; 1941, c. 50, s. 9.)

§ 105-225. Taxes payable; when returns are to be filed by purchaser.—The commissioner of revenue shall have authority to require every person storing, using or consuming tangible personal property in this state to file with the commissioner a return for the preceding month in such form as may be prescribed by him showing the total sales price of the tangible personal property purchased or received by such person during such preceding month, the storage, use or consumption of which is subject to the tax imposed by this article, and such other information as the commissioner may deem necessary for the proper administration of this article. The return shall be accompanied by a remittance of the amount of tax herein imposed during the month covered by the return. Returns shall be signed by the person liable for the tax or his duly authorized agent but need not be verified by oath.

No return or report shall be required under this section, however, of any person storing, using or consuming tangible personal property purchased from a registered retailer engaged in business in this state to whom said person has paid the tax imposed by this article. (1939, c. 158, s. 808; 1941, c. 50, s. 9.)

§ 105-226. Sales presumed to be for storage, use or consumption.—For the purpose of the proper administration of this article and to prevent evasion of the tax and the duty to pay the same herein imposed, it shall be prima facie presumed that tangible personal property sold by any person for delivery in this state, however made and by carrier or otherwise, is sold for storage, use or other consumption in this state, and a like presumption shall apply to tangible personal property delivered without this state and brought to this state by the purchaser thereof. (1939, c. 158, s. 809; 1941, c. 50, s. 9.)

§ 105-227. Provisions of other articles applicable.—All provisions not inconsistent with this article in Schedule E, §§ 105-164 to 105-187, and Schedule J, §§ 105-229 to 105-269, relating to administration, auditing, and making returns, promulgation of rules and regulations by the commissioner, imposition and collection of tax and the lien thereof, assessments, refunds, and penalties, are hereby made a part of this article and shall be applicable hereto. (1939, c. 158, s. 810; 1941, c. 50, s. 9.)

§ 105-228. Failure to register and file returns misdemeanor.—Any retailer failing or refusing to register and give the information required in this article, and any retailer or other person failing or refusing to make any return required to be made under this article, or failing or refusing to make a supplemental return or to furnish other data or information required by the commissioner, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars ($500.00) for each such offense.

Any person required by this article to make, render or sign any return or report or to furnish other data or information, who makes any false or fraudulent return or report, or who furnishes any false data or information, with intent to defeat or evade the assessment or determination of any tax due under this article, shall be guilty of a misdemeanor, and shall for each such offense be fined not less than three hundred dollars ($300.00) and not more than five thousand dollars ($5,000.00) or be imprisoned not exceeding one year in the county jail or be subject to both said fine and imprisonment in the discretion of the court.

Any wilful violation of the provisions of this article, except as otherwise herein provided, shall be a misdemeanor and punishable as such. (1939, c. 158, s. 811; 1941, c. 50, s. 9.)

Art. 8A. Schedule I-A. Gross Earnings Taxes in Lieu of Ad Valorem Taxes.

§ 105-228.1. Defining taxes levied and assessed in this article.—The purpose of this article is to levy a fair and equal tax under authority of article V, section three of the constitution of North Carolina and to provide a practical means for ascertaining and collecting it. The taxes levied and assessed in this schedule shall be upon the gross earnings as defined in the article, and shall be in lieu of ad valorem taxes upon the properties of individuals, firms, or corporations so taxed herein. (1943, c. 400, s. 8.)

§ 105-228.2. Tax upon freight car line companies.—(1) For purposes of taxation under this section the property of freight line companies as defined is declared to constitute a special class of property. In lieu of all ad valorem taxes by either or both the state government and the respective local taxing jurisdictions, a tax upon gross earnings in the state as elsewhere defined shall be imposed.

(2) Any person or persons, joint stock association or corporation, wherever organized or incorporated, engaged in the business of operating cars or engaged in the business of furnishing or leasing cars not otherwise listed for taxation in this state, for the transportation of freight (whether such cars be owned by such company or any other person or company), over any railway or lines, in whole or in part, within this state, such line or

lines not being owned, leased or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture, or refrigerator car or by some other name, shall be deemed a freight line company.

(3) For the purposes of taxation under this section all cars used exclusively within the state, or used partially within and without the state, and a proportionate part of the intangible values of the business as a going concern, are hereby declared to have situs in this state.

(4) Every freight line company, as hereinbefore defined, shall pay annually a sum in the nature of a tax at three per centum upon the total gross earnings received from all sources by such freight line companies within the state, which shall be in lieu of all ad valorem taxes in this state of any freight company so paying the same.

(5) The term "gross earnings received from all sources by such freight line companies within the state" as used in this article is hereby declared and shall be construed to mean all earnings from the operation of freight cars within the state for all car movements or business beginning and ending within the state and a proportion, based upon the proportion of car mileage within the state to the total car mileage, or earnings on all interstate car movements or business passing through, or into or out of the state.

(6) Every railroad company using or leasing the cars of any freight line company shall, upon making payment to such freight line company for the use or lease, after June thirtieth, one thousand nine hundred and forty-three, of such cars withhold so much thereof as is designated in this section. On or before March first of each year such railroad company shall make and file with the commissioner of revenue a statement showing the amount of such payment for the next preceding twelve-month period ending December thirty-first, and of the amounts so withheld by it, and shall remit to the commissioner of revenue the amounts so withheld. If any railroad company shall fail to make such report or fail to remit the amount of tax herein levied, or shall fail to withhold the part of such payment hereby required to be withheld, such railroad company shall become liable for the amount of the tax herein levied and shall not be entitled to deduct from its gross earnings for purposes of taxation the amounts so paid by it to freight line companies.

It is not the purpose of this subdivision to impose an unreasonable burden of accounting on railroad companies operating in this state, and the commissioner of revenue is hereby authorized, upon the application of any railroad company, to approve any method of accounting which he finds to be reasonably adequate for determining the amount of mileage earnings by any car line company whose equipment is operated within the state by or on the lines of such railroad company. Further, if in the opinion of the revenue commissioner the tax imposed by this section can be satisfactorily collected direct from the freight line companies, he is hereby authorized to fix rules and regulations for such direct collection, with the authority to return at any time to the method of collection at source above provided in this subdivision.

(7) Every car line company shall file such additional reports annually, and in such form and as of such date as the commissioner of revenue may deem necessary to determine the equitable amount of tax levied under this section.

(8) Upon the filing of such reports it shall be the duty of the commissioner of revenue to inspect and verify the same and assess the amount of taxes due from freight line companies therein named. Any freight line company against which a tax is assessed under the provisions of this article may at any time within fifteen days after the last day for the filing of reports by railroad companies, appear before the commissioner of revenue at a hearing to be granted by the commissioner and offer evidence and argument on any matter bearing upon the validity or correctness of the tax assessed against it, and the commissioner shall review his assessment of such tax and shall make his order confirming or modifying the same as he shall deem just and equitable, and if any overpayment is found to have been made it shall be refunded by the commissioner.

(9) If any such freight line company or railroad company shall fail to pay the tax levied herein when due a penalty of ten (10%) per cent thereof shall immediately accrue and thereafter one (1%) per cent per month shall be added to such tax and penalty while such tax remains unpaid. All provisions of laws for enforcing payment of taxes levied in this article shall be applicable to the gross earnings taxes of freight line companies. Any freight line company against which a tax is assessed under the provisions of this article may appear and defend in any action brought for the collection of such tax.

(10) The provisions of this article shall apply to all freight line gross earnings accuring from and after June thirtieth, one thousand nine hundred and forty-three. (1943, c. 400, s. 8.)

Art. 9. Schedule J. General Administration—Penalties and Remedies.

§ 105-229. Failure of person, firm, corporation, public utility and/or public service corporation to file report.—If any person, firm, or corporation required to file a report under any of the provisions of Schedules B and C of this subchapter fails, refuses, or neglects to make such report as required herein within the time limited in said schedule for making such report he or it shall pay a penalty of ten dollars ($10.00) for each day's omission. (1939, c. 158, s. 900.)

§ 105-230. Charter canceled for failure to report.—If a corporation required by the provisions of this subchapter to file any report or return or to pay any tax or fee, either as a public utility (not as an agency of interstate commerce) or as a corporation incorporated under the laws of this state, or as a foreign corporation domesticated in or doing business in this state, or owning and using a part or all of its capital or plant in this state, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this subchapter for making such report or return, or for paying such tax or fee, the commissioner of revenue shall certify such fact to the secretary of state. The secretary of state shall thereupon suspend the articles of incorporation of any such corporation which is in-

corporated under the laws of this state by appropriate entry upon the records of his office, or suspend the certificate of authority of any such foreign corporation to do business in this state by proper entry. Thereupon all the powers, privileges, and franchises conferred upon such corporation by such articles of incorporation or by such certificate of authority shall cease and determine. The secretary of state shall immediately notify by registered mail every such domestic or foreign corporation of the action taken by him, and also shall immediately certify such suspension to the clerk of superior court of the county in which the principal office or place of business of such corporation is located in this state with instructions to said clerk, and it shall be the clerk's duty, to make appropriate entry upon the records of his office indicating suspension of the corporate powers of the corporation in question. (1939, c. 158, s. 901.)

§ 105-231. Penalty for exercising corporate functions after cancellation or suspension of charter.—Any person, persons or corporation who shall exercise or by any act attempt to exercise any powers, privileges, or franchises under articles of incorporation or certificate of authority after the same are suspended, as provided in any section of this subchapter, shall pay a penalty of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00), to be recovered in an action to be brought by the commissioner of revenue in the superior court of Wake county. Any corporate act performed or attempted to be performed during the period of such suspension shall be invalid and of no effect. (1939, c. 158, s. 902.)

§ 105-232. Corporate rights restored.—Any corporation whose articles of incorporation or certificate of authority to do business in this state has been suspended by the secretary of state, as provided in § 105-230, or similar provisions of prior Revenue Acts, upon the filing, within ten years after such suspension or cancellation under previous acts, with the secretary of state, of a certificate from the commissioner of revenue that it has complied with all the requirements of this subchapter and paid all state taxes, fees, or penalties due from it (which total amount due may be computed, for years prior and subsequent to said suspension or cancellation, in the same manner as if said suspension or cancellation had not taken place), and upon payment to the commissioner of revenue, to be transferred to the secretary of state, of an additional penalty of ten dollars ($10.00) to cover the cost of reinstatement, shall be entitled to exercise again its rights, privileges, and franchises in this state; and the secretary of state shall cancel the entry made by him under the provisions of § 105-230 or similar provisions of prior Revenue Acts, and shall issue his certificate entitling such corporation to exercise again its rights, privileges, and franchises, and certify such reinstatement to the clerk of superior court in the county in which the principal office or place of business of such corporation is located with instructions to said clerk, and it shall be his duty to cancel from his records the entry showing suspension of corporate privileges. (1939, c. 158, s. 903; 1939, c. 370, s. 1; 1943, c. 400, s. 9.)

Editor's Note.—The 1943 amendment struck out in line sixteen the words "secretary of state" and inserted in lieu thereof the words "commissioner of revenue, to be transferred to the secretary of state."

§ 105-233. Officers, agents, and employees; misdemeanor failing to comply with tax law.—If any officer, agent, and/or employee of any person, firm, or corporation subject to the provisions of this subchapter shall wilfully fail, refuse, or neglect to make out, file, and/or deliver any reports or blanks, as required by such law, or to answer any question therein propounded, or to knowingly and wilfully give a false answer to any such question wherein the fact inquired of is within his knowledge, or upon proper demand to exhibit to such commissioner of revenue or any of his duly authorized representatives any book, paper, account, record, memorandum of such person, firm, or corporation in his possession and/or under his control, he shall be guilty of a misdemeanor and fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) for each offense. (1939, c. 158, s. 904.)

§ 105-234. Aiding and/or abetting officers, agents, or employees in violation of this subchapter a misdemeanor.—If any person, firm, or corporation shall aid, abet, direct, cause or procure any of his or its officers, agents, or employees to violate any of the provisions of this subchapter, he or it shall be guilty of a misdemeanor, and fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) for each offense. (1939, c. 158, s. 905.)

§ 105-235. Every day's failure a separate offense.—The wilful failure, refusal, or neglect to observe and comply with any order, direction, or mandate of the commissioner of revenue, or to perform any duty enjoined by this subchapter, by any person, firm, or corporation subject to the provisions of this subchapter, or any officer, agent, or employee thereof, shall, for each day such failure, refusal, or neglect continues, constitute a separate and distinct offense. (1939, c. 158, s. 906.)

§ 105-236. Penalty for bad checks.—When any uncertified check is tendered in payment of any obligation to the department of revenue, and such check shall have been returned to the office of the commissioner of revenue unpaid on account of insufficient funds of the drawer of said check in the bank upon which same is drawn, then and in that event an additional tax shall be imposed equal to ten per cent (10%) of the tax due; and in no case shall the increase of said tax because of such failure be less than one dollar ($1.00) nor exceeding two hundred dollars ($200.00), and the said additional tax shall not be waived or diminished by the commissioner of revenue. This section shall apply to all taxes levied or assessed by the state. (1939, c. 158, s. 907.)

§ 105-237. Discretion of commissioner over penalties. — The commissioner of revenue shall have power, upon making a record of his reasons therefor, to reduce or waive any penalties provided for in this subchapter, except the penalty provided in § 105-236 relating to unpaid checks. (1939, c. 158, s. 908; 1939, c. 370, s. 1.)

§ 105-238. Tax a debt.—Every tax imposed by this subchapter, and all increases, interest, and

penalties thereon, shall become, from the time it is due and payable, a debt from the person, firm, or corporation liable to pay the same to the state of North Carolina. (1939, c. 158, s. 909.)

Cross Reference.—As to taxes not being a debt subject to set-off and counterclaim, see note to § 105-441.

For prior law see Worth v. Wright, 122 N. C. 335, 29 S. E. 361; Gatling v. Commissioners, 92 N. C. 536; Commissioners v. Hall, 177 N. C. 490, 491, 99 S. E. 372.

§ 105-239. Action for recovery of taxes.—Action may be brought at any time and in any court of competent jurisdiction in this state or other state, in the name of the state and at the instance of the commissioner of revenue, to recover the amount of any taxes, penalties, and interest due under this subchapter. This remedy is in addition to all other remedies for the collection of said taxes and shall not in any respect abridge the same. Any judgment shall be declared to have such preference and priority against the property of the defendant as is provided by law for taxes levied by this subchapter, and free from any claims for homestead or personal property exemption of the defendant therein. (1939, c. 158, s. 910.)

§ 105-240. Tax upon settlement of fiduciary's account.—No final account of a fiduciary shall be allowed by the probate court unless such account shows, and the judge of said court finds, that all taxes imposed by the provisions of this subchapter upon said fiduciary, which have become payable, have been paid, and that all taxes which may become due are secured by bond, deposit, or otherwise. The certificate of the commissioner of revenue and the receipt for the amount of tax herein certified shall be conclusive as to the payment of the tax to the extent of said certificate.

For the purpose of facilitating the settlement and distribution of estates held by fiduciaries, the commissioner of revenue, with the approval of the attorney general, may, on behalf of the state, agree upon the amount of taxes at any time due or to become due from such fiduciaries under the provisions of this subchapter, and the payment in accordance with such agreement shall be full satisfaction of the taxes to which the agreement relates. (1939, c. 158, s. 911.)

§ 105-241. Taxes payable in national currency; for what period, and when a lien.—The taxes herein designated and levied shall be payable in the existing national currency. State, county, and municipal taxes levied for any and all purposes pursuant to this subchapter shall be for the fiscal year of the state in which they become due, except as otherwise provided, and the lien of such taxes shall attach annually to all real estate of the taxpayer within the state on the date that such taxes are due and payable, and said lien shall continue until such taxes, with any interest, penalty, and costs which shall accrue thereon, shall have been paid; in the settlement of the estate of any decedent where, by any order of court or other proceeding, the real estate of the decedent has been sold to make assets to pay debts, such sale shall not have the effect of extinguishing the lien upon the land so sold for state taxes, nor shall the same be postponed in any manner to the payment of any other claim or debt against the estate, save funeral expenses and cost of administration.

Whenever the property of any taxpayer liable to any tax imposed by this subchapter or under its authority shall be taken into receivership, the lien of the taxes upon the real estate shall not thereby be in any manner disturbed, and the personal property of the taxpayer liable to said tax upon which there is no prior specific lien shall be subject to a lien for the taxes imposed by this subchapter, or under its authority, from the time the receivership went into effect, subject to prior payment of costs of the receivership only.

The provisions of this section shall not have the effect of releasing any lien for state taxes imposed by other law, nor shall they have the effect of postponing the payment of the said state taxes or depriving the said state taxes of any priority in order of payment provided in any other statute under which payment of the said taxes may be required. (1939, c. 158, s. 912.)

Power to Tax and Manner of Exercise.—The subject of taxation is regulated entirely by statute, and the revenues of this state are collected under the operation of what is known as the Machinery act. Wade v. Commissioners, 74 N. C. 81.

The general assembly have an unlimited right to tax all persons domiciled within the state, and all property within the state, except so far as this right has been limited by the provisions of the constitution, either expressly or by necessary implication. Pullen v. Commissioners, 66 N. C. 361.

Same—Delegation of Power.—The legislature may authorize a municipal corporation to lay taxes on the town property, the persons, and the subject of taxation incident to the persons, of those who have a business residence in town, though they have a residence also out of town. Worth v. Commissioners, 60 N. C. 617.

Statement of Object.—The North Carolina Const. Art. V, section 7, requires that every act levying taxes shall state the objects to which they shall be appropriated. This provision, however, has no application to taxes levied by county authorities for county purposes. Parker v. Commissioners, 104 N. C. 166, 10 S. E. 137.

Constitutional Provisions—Uniformity Required. — Under North Carolina Const. Art. V, section 3, the same rule of uniformity applies as to the taxing of "trades, professions, franchises and incomes" as to the other species of property therein named; and there must be also uniformity in the mode of assessment. Worth v. Petersburg R. Co., 89 N. C. 301. Uniformity, in its legal and proper sense, is inseparably incident to the power of taxation, whether applied to taxes on property or to those imposed on trades, professions, etc. State v. Moore, 113 N. C. 697, 698, 18 S. E. 342.

Fiscal Year and Tax Year.—Welding this and § 153-114 together by established rules of correct interpretation, the fiscal year and the tax year are coterminous and coincident, and the liability of the landowner for taxes for any year arises and begins on 1 July, of that year. State v. Champion Fibre Co., 204 N. C. 295, 297, 168 S. E. 207.

Applied in Winston-Salem v. Powell Paving Co., 7 F. Supp. 424.

§ 105-242. Warrant for the collection of taxes.—1. If any tax imposed by this subchapter, or any other tax levied by the state and payable to the commissioner of revenue, or any portion of such tax be not paid within thirty days after the same becomes due and payable, and after the same has been assessed, the commissioner of revenue shall issue an order under his hand and official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the taxpayer found within his county for the payment of the amount thereof, with the added penalties, additional taxes, interest, and cost of executing the same, and to return to the commissioner of revenue the money collected by virtue thereof within a time to be therein specified, not less than sixty days from the date of the order. The said sheriff shall, thereup-

on, proceed upon the same in all respects with like effect and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the order, to be collected in the same manner.

2. Bank deposits, rents, salaries, wages, and all other choses in action or property incapable of manual levy or delivery, hereinafter called the intangible, belonging, owing, or to become due to any taxpayer subject to any of the provisions of this subchapter, or which has been transferred by such taxpayer under circumstances which would permit it to be levied upon if it were tangible, shall be subject to attachment or garnishment as herein provided, and the person owing said intangible, matured or unmatured, or having same in his possession or control, hereinafter called the garnishee, shall become liable for all sums due by the taxpayer under this subchapter to the extent of the amount of the intangible belonging, owing, or to become due to the taxpayer subject to the set-off of any matured or unmatured indebtedness of the taxpayer to the garnishee. To effect such attachment or garnishment the commissioner of revenue shall serve or cause to be served upon the taxpayer and the garnishee a notice as hereinafter provided, which notice may be served by any deputy or employee of the commissioner of revenue or by any officer having authority to serve summonses. Said notice shall show:

(1) The name of the taxpayer and his address, if known:

(2) The nature and amount of the tax, and the interest and penalties thereon, and the year or years for which the same were levied or assessed, and

(3) Shall be accompanied by a copy of this subsection, and thereupon the procedure shall be as follows:

If the garnishee has no defense to offer or no set-off against the taxpayer, he shall, within ten days after service of said notice, answer the same by sending to the commissioner of revenue by registered mail a statement to that effect, and if the amount due or belonging to the taxpayer is then due or subject to his demand, it shall be remitted to the commissioner with said statement, but if said amount is to mature in the future, the statement shall set forth that fact and the same shall be paid to the commissioner upon maturity, and any payment by the garnishee hereunder shall be a complete extinguishment of any liability therefor on his part to the taxpayer. If the garnishee has any defense or set-off, he shall state the same in writing under oath, and, within ten days after service of said notice, shall send two copies of said statement to the commissioner by registered mail; if the commissioner admits such defense or set-off, he shall so advise the garnishee in writing within ten days after receipt of such statement and the attachment or garnishment shall thereupon be discharged to the amount required by such defense or set-off, and any amount attached or garnished hereunder which is not affected by such defense or set-off shall be remitted to the commissioner as above provided in cases where the garnishee has no defense or set-off, and with like effect. If the commissioner shall not admit the defense or set-off, he shall set forth in writing his objections thereto and shall send a copy thereof to the garnishee within ten days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time he shall file a copy of said notice, a copy of the garnishee's statement, and a copy of his objections thereto in the superior court of the county where the garnishee resides or does business where the issues made shall be tried as in civil actions.

If judgment is entered in favor of the commissioner of revenue by default or after hearing, the garnishee shall become liable for the taxes, interest and penalties due by the taxpayer to the extent of the amount over and above any defense or set-off of the garnishee belonging, owing, or to become due to the taxpayer, but payments shall not be required from amounts which are to become due to the taxpayer until the maturity thereof, nor shall more than ten per cent of any taxpayer's salary or wages be required to be paid hereunder in any one month. The garnishee may satisfy said judgment upon paying said amount, and if he fails to do so, execution may issue as provided by law. From any judgment or order entered upon such hearing either the commissioner of revenue or the garnishee may appeal as provided by law. If, before or after judgment, adequate security is filed for the payment of said taxes, interest, penalties, and costs, the attachment or garnishment may be released or execution stayed pending appeal, but the final judgment shall be paid or enforced as above provided. The taxpayer's sale remedies to question his liability for said taxes, interest, and penalties shall be those provided in this subchapter, as now or hereafter amended or supplemented. If any third person claims any intangible attached or garnished hereunder and his lawful right thereto, or to any part thereof, is shown to the commissioner, he shall discharge the attachment or garnishment to the extent necessary to protect such right, and if such right is asserted after the filing of said copies as aforesaid, it may be established by interpleader as now or hereafter provided by law in cases of attachment and garnishment. In case such third party has no notice of proceedings hereunder, he shall have the right to file his petition under oath with the commissioner at any time within twelve months after said intangible is paid to him and if the commissioner finds that such party is lawfully entitled thereto or to any part thereof, he shall pay the same to such party as provided for refunds by § 105-407, and if such payment is denied, said party may appeal from the determination of the commissioner to the superior court of Wake county or to the superior court of the county wherein he resides or does business and the provisions of § 105-163 shall apply on such appeal. The intangibles of a taxpayer shall be paid or collected hereunder only to the extent necessary to satisfy said taxes, interest, penalties, and costs. Except as hereinafter set forth, the remedy provided in this section shall not be resorted to unless a warrant for collection or execution against the taxpayer has been returned unsatisfied: Provided, however, if the commissioner is of opinion that the only effective remedy is that

herein provided, it shall not be necessary that a warrant for collection or execution shall be first returned unsatisfied, and in no case shall it be a defense to the remedy herein provided that a warrant for collection or execution has not been first returned unsatisfied: Provided, however, that no salary or wage at the rate of less than two hundred dollars ($200.00) per month, whether paid weekly or monthly, shall be attached or garnished under the provisions of this section.

3. In addition to the remedy herein provided, the commissioner of revenue is authorized and empowered to make a certificate setting forth the essential particulars relating to the said tax, including the amount thereof, the date when the same was due and payable, the person, firm, or corporation chargeable therewith, and the nature of the tax, and under his hand and seal transmit the same to the clerk of the superior court of any county in which the delinquent taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county to docket the said certificate and index the same on the cross-index of judgments, and execution may issue thereon with the same force and effect as an execution upon any other judgment of the superior court (said tax shall become a lien on realty only from the date of the docketing of such certificate in the office of the clerk of the superior court and on personalty only from the date of the levy on such personalty and upon the execution thereon no homestead or personal property exemption shall be allowed).

4. The remedies herein given are cumulative and in addition to all other remedies provided by law for the collection of said taxes. (1939, c. 158, s. 913; 1941, c. 50, s. 10.)

Cross Reference.—As to interpleader in cases of attachment and garnishment, see § 1-471.

Editor's Note.—The 1941 amendment inserted subsection 2 and numbered the original paragraphs of the section as 1, 3 and 4.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 541.

§ 105-243. Taxes recoverable by action.—Upon the failure of any corporation to pay the taxes, fees, and penalties prescribed by this subchapter, the commissioner of revenue may certify same to the sheriff of the county in which such company may own property, for collection as provided in this subchapter; and if collection is not made, such taxes or fees and penalties thereon may be recovered in an action in the name of the state, which may be brought in the superior court of Wake county, or in any county in which such corporation is doing business, or any county in which such corporation owns property. The attorney general, on request of the commissioner of revenue, shall institute such action in the superior court of Wake county, or of any such county as the commissioner of revenue may direct. In any such action it shall be sufficient to allege that the tax, fee, or penalty sought to be recovered is delinquent, and that the same has been unpaid for the period of thirty days after due date. (1939, c. 158, s. 914.)

§ 105-244. Additional remedies. — In addition to all other remedies for the collection of any taxes or fees due under the provisions of this subchapter, the attorney general shall, upon the request of the commissioner of revenue, whenever any taxes, fees, or penalties due under this subchapter from any public utility (not an agency of interstate commerce) or corporation shall have remained unpaid for a period of ninety days, or whenever any corporation or public utility (not an agency of interstate commerce) has failed or neglected for ninety days to make or file any report or return required by this subchapter, or to pay any penalty for failure to make or file such report or return, apply to the superior court of Wake county, or of any county in the state in which such public utility (not an agency of interstate commerce) or corporation is located or has an office or place of business, for an injunction to restrain such public utility (not an agency of interstate commerce) or corporation from the transaction of any business within the state until the payment of such taxes or fees and penalties thereon, or the making and filing of such report or return and payment of penalties for failure to make or file such report or return, and the cost of such application, which shall be fixed by the court. Such petition shall be in the name of the state; and if it is made to appear to the court, upon hearing, that such public utility (not an agency of interstate commerce) or corporation has failed or neglected, for ninety days, to pay such taxes, fees, or penalties thereon, or to make and file such reports, or to pay such penalties, for failure to make or file such reports or returns, such court shall grant and issue such injunction. (1939, c. 158, s. 915.)

§ 105-245. Failure of sheriff to execute order.—If any sheriff of this state shall wilfully fail, refuse, or neglect to execute any order directed to him by the commissioner of revenue and within the time provided in this subchapter, the official bond of such sheriff shall be liable for the tax, penalty, interest, and cost due by the taxpayer. (1939, c. 158, s. 916.)

§ 105-246. Actions, when tried.—All actions or processes brought in any of the superior courts of this state, under provisions of this subchapter, shall have precedence over any other civil causes pending in such courts, and the courts shall always be deemed open for trial of any such action or proceeding brought therein. (1939, c. 158, s. 917.)

§ 105-247. Municipalities not to levy income and inheritance tax.—No city, town, township, or county shall levy any tax on income or inheritance. (1939, c. 158, s. 918.)

§ 105-248. State taxes; purposes.—The taxes levied in this subchapter are for the expenses of the state government, the appropriations to its educational, charitable, and penal institutions, pensions for Confederate soldiers and widows, the interest on the debt of the state, for public schools, and other specific appropriations made by law, and shall be collected and paid into the general fund of the state treasurer.

The taxes levied under authority of Section four hundred ninety-two of chapter four hundred twenty-seven of the Public Laws of one thousand nine hundred thirty-one, and remaining unpaid, shall be collected in the same manner as other county taxes and accounted for in the same manner as other taxes under the Daily Deposit Act. The

county treasurer or other officer receiving such taxes in each county shall remit to the treasurer of the state on the first and fifteenth days of each month all taxes collected up to the time of such remittance under the levy therein provided for, and such remittance to the state treasurer shall also include the proportion of all poll taxes collected required by the constitution of the state to be used for educational purposes.

The tax levy therein provided for shall be subject to the same discounts and penalties as provided by law for other county taxes, and there shall be allowed the same percentage for collecting such taxes as for other county taxes. The obligation to the state under the levy therein provided for shall run against all taxes that become delinquent; and with respect to any property that may be sold for taxes, any public officer receiving such delinquent taxes, when and if such property may be redeemed or such tax obligations in any manner satisfied, shall remit such proportionate part of such tax levy to the state treasurer within fifteen days after receipt of same. At the end of each fiscal year the county accountant shall furnish the state treasurer a statement of the total amount of taxes levied in accordance with the provisions of this section, that are uncollected at the end of the fiscal year.

Whenever in any law or act of incorporation, granted either under the general law or by special act, there is any limitation or exemption of taxation, the same is hereby repealed, and all the property and effects of all such corporations, other than the bonds of this state and of the United States government, shall be liable to taxation, except property belonging to the United States and to municipal corporations, and property of churches, religious societies, charitable, educational, literary, or benevolent institutions or orders, and also cemeteries: Provided, that no property whatever, held or used for investment, speculation, or rent, shall be exempt, other than bonds of this state and of the United States government, unless said rent or the interest on or income from such investment shall be used exclusively for religious, charitable, educational, or benevolent purposes, or the interest upon the bonded indebtedness of said religious, charitable, or benevolent institutions. (1939, c. 158, s. 919.)

Cross Reference.—As to authorization for adjustment of claims for taxes arising pursuant to corresponding section of Public Laws of 1931, see Public Laws 1939, c. 206.

Editor's Note.—See 12 N. C. Law Rev. 23.

§ 105-249. Free privilege licenses for blind people.—Any blind person of the age of twenty-one years or more, desiring to operate a legitimate business of any kind to provide a livelihood for himself and dependents, if any, may apply to the welfare officer of the county in which he resides for free privilege license.

No one shall be eligible to the benefits provided for in this section who is not a blind person (the term "blind person" shall for the purposes of this section be construed to mean one who has suffered the total loss of his eyesight, or whose eyesight is so impaired as to unfit the person applying for the benefits under this section to engage in any labor, profession, or ordinary work in competition with his fellowmen with any degree of success, and/or any person suffering with impaired visions likely to produce total blindness), or who has an income of any kind amounting to twelve hundred ($1200.00) dollars, or more net per annum, or whose husband or wife has an income of any kind amounting to twelve hundred ($1200.00) dollars or more net per annum.

It shall be the duty of the county commissioners upon receipt of application from anyone applying for the benefits under this section, to make a thorough investigation to determine whether or not the applicant is entitled to the privilege or other license as provided for in this section. When the commissioners are satisfied that the applicant is capable of operating the business for which said privilege or other license is asked and that he is a deserving person, the commissioners shall then present to the state license department a letter requesting necessary privilege or other license to operate the aforesaid business, and the state license department shall issue free of charge the license requested. The commissioners shall present to the county license department a letter requesting county privilege license necessary to operate the aforesaid business, and the county license department shall likewise issue free of charge the privilege license requested. The county commissioners shall also present, when necessary, to the municipal license department a letter requesting city privilege license necessary to operate aforesaid business, and the municipal license department shall issue free of charge privilege license requested: Provided, that the free privilege license of this section shall not apply to the sale of any kind of fireworks.

Any veteran of the United States armed forces to whom a privilege license was issued free under this section prior to one thousand nine hundred and forty-one shall be entitled to free privilege licenses hereunder so long as such veteran shall continue to be visually handicapped. (1933, c. 53; 1935, c. 162; 1939, c. 306; 1943, c. 122.)

Editor's Note.—The amendment of 1935 added the proviso at the end of the third paragraph.

The 1939 amendment directed that the words "or other" be inserted between the words "privilege" and "license" where they occur in lines five, nine, twelve and fourteen of what is the third paragraph of this section. Such words do not occur together in line fourteen, and hence the insertions were made in only lines five, nine and twelve. However, such words appear in several other lines of the section and it may have been the legislative intent to make insertions in such instances.

The 1943 amendment added the last paragraph.

§ 105-249.1. Members of armed forces and merchant marine exempt from license taxes and fees.—(a) License Taxes.—Any person serving in any branch of the armed forces of the United States or in the merchant marine during the period of such service shall be exempt from liability for any and all license taxes levied by the state or by any county or city in the state for the privilege of engaging in or carrying on any trade or profession in the state, which trade or profession such a person immediately prior to being called into such service was engaged in: Provided, that nothing herein contained shall relieve such person of any license tax for carrying on any trade or profession conducted through agents or employees or which is conducted in the name of and under the license of such person so entering into the service of the United States.

(b) License Fees.—Any person entering into the armed forces of the United States or in the merchant marine shall be during the period of such service exempt from paying any license fees to any licensing board or commission or to the state of North Carolina in which the payment of such license fees is by law required as a condition to the continuance of the privilege to engage in any trade or profession. Such a person upon being discharged from such service shall have all the rights and privileges to engage in such profession upon payment of such fees as may thereafter become due, to the same extent as though such activity had not been suspended during the period of such service. (1943, c. 438, ss. 1, 2.)

§ 105-250. Law applicable to foreign corporations.—All foreign corporations, and the officers and agents thereof, doing business in this state, shall be subject to all the liabilities and restrictions that are or may be imposed upon corporations of like character, organized under the laws of this state, and shall have no other or greater powers. (1939, c. 158, s. 920.)

§ 105-251. Information must be furnished. — Each company, firm, corporation, person, association, co-partnership, or public utility shall furnish the commissioner of revenue in the form of returns prescribed by him, all information required by law and all other facts and information in addition to the facts and information in this act specifically required to be given, which the commissioner of revenue may require to enable him to carry into effect the provisions of the laws which the said commissioner is required to administer, and shall make specific answers to all questions submitted by the commissioner of revenue. (1939, c. 158, s. 921.)

§ 105-252. Returns required.—Any company, firm, corporation, person, association, co-partnership, or public utility receiving from the commissioner of revenue any blanks, requiring information, shall cause them to be properly filled out so as to answer fully and correctly each question therein propounded, and in case it is unable to answer any question, it shall, in writing, give a good and sufficient reason for such failure.

The answers to such questions shall be verified under oath by such persons, or by the president, secretary, superintendent, general manager, principal accounting officer, partner, or agent, and returned to the commissioner of revenue at his office within the period fixed by the commissioner of revenue. (1939, c. 158, s. 922.)

§ 105-253. Personal liability of officers, trustees, or receivers.—Any officer, trustee, or receiver of any corporation required to file report with the commissioner of revenue, having in his custody funds of the corporation, who allows said funds to be paid out or distributed to the stockholders of said corporation without having satisfied the state board of assessment or commissioner of revenue for any state taxes which are due or have accrued, shall be personally responsible for the payment of said tax, and in addition thereto shall be subject to a penalty of not more than the amount of the tax, nor less than twenty-five per cent (25%) of such tax found to be due or accrued.

The secretary of state shall withhold the issuance of any certificate of dissolution to, or withdrawal of, any corporation, domestic or foreign, until the receipt by him of a notice from the commissioner of revenue to the effect that any such corporation has met the requirements with respect to reports and taxes required by this subchapter. (1939, c. 158, s. 923; 1941, c. 50, s. 10.)

Editor's Note.—The 1941 amendment added the paragraph at the end of this section.

§ 105-254. Blanks furnished by commissioner of revenue. — The commissioner of revenue shall cause to be prepared suitable blanks for carrying out the purposes of the laws which he is required to administer, and, on application, furnish such blanks to each company, firm, corporation, person, association, co-partnership, or public utility subject thereto. (1939, c. 158, s. 924.)

§ 105-255. Commissioner of revenue to keep records.—The commissioner of revenue shall keep books of account and records of collections of taxes as may be prescribed by the director of the budget; shall keep an assessment roll for the taxes levied, assessed, and collected under this subchapter, showing in same the name of each taxpayer, the amount of tax assessed against each, when assessed, the increase or decrease in such assessment; the penalties imposed and collected, and the total tax paid; and shall make monthly reports to the director of the budget and to the auditor and/or state treasurer of all collections of taxes on such forms as prescribed by the director of the budget. (1939, c. 158, s. 925.)

§ 105-256. Publication of statistics.—The commissioner of revenue shall prepare and publish annually statistics reasonably available, with respect to the operation of this subchapter, including amounts collected, classifications of taxpayers, income and exemptions, and such other facts as are deemed pertinent and valuable. (1939, c. 158, s. 926.)

§ 105-257. Report on system of other states. —The commissioner of revenue shall biennially make report to the general assembly, the said report to contain all available data that may be assembled by his department with respect to the tax laws and systems of this and other states, and making such recommendations as may be useful in improving the tax laws and system of this state. (1933, c. 88, s. 2.)

Editor's Note.—For the compiling of such report, outside assistance seems almost a necessity, in view of the present load of the Commissioner of Revenue. See 11 N. C. Law Rev. 250.

§ 105-258. Powers of commissioner of revenue; assistant commissioner may sign and verify pleadings, etc.—The commissioner of revenue, for the purpose of ascertaining the correctness of any return or for the purpose of making an estimate of the tax due by any taxpayer under this subchapter, shall have the power to examine or cause to be examined, by any agent or representative designated by him for that purpose, any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the taxpayer or of any other person having knowledge in the premises, and may take testimony and require proof ma-

terial for his information, and may administer oaths to such person or persons.

In any action, proceeding, or matter of any kind, to which the commissioner of revenue is a party or in which he may have an interest, all pleadings, legal notices, proofs of claim, warrants for collection, certificates of tax liability, executions, and other legal documents may be signed and verified by the assistant commissioner on behalf of the commissioner. (1939, c. 158, s. 927; 1943, c. 400, s. 9.)

Editor's Note.—The 1943 amendment added the second paragraph.

§ 105-259. Secrecy required of officials—penalty for violation.—Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for the commissioner of revenue, any deputy, agent, clerk, other officer, employee, or former officer or employee, to divulge and make known in any manner the amount of income, income tax or other taxes, set forth or disclosed in any report or return required under this subchapter.

Nothing in this section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof; the inspection of such reports or returns by the governor, attorney general, or their duly authorized representative; or the inspection by a legal representative of the state of the report or return of any taxpayer who shall bring an action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted to recover any tax or penalty imposed by this subchapter; nor shall the provisions of this section prohibit the department of revenue furnishing information to other governmental agencies, of persons and firms properly licensed under Schedule B, §§ 105-33 to 105-113. The department of revenue may exchange information with the officers of organized associations of taxpayers under Schedule B, §§ 105-33 to 105-113, with respect to parties liable for such taxes and as to parties who have paid such license taxes.

Reports and returns shall be preserved for three years, and thereafter until the commissioner of revenue shall order the same to be destroyed.

Any person, officer, agent, clerk, employee, or former officer or employee violating the provisions of this section shall be guilty of a misdemeanor, and fined not less than two hundred dollars ($200.00) nor more than one thousand dollars ($1,000.00) and/or imprisoned, in the discretion of the court; and if such offending person be an officer or employee of the state, he shall be dismissed from such office or employment, and shall not hold any public office or employment in this state for a period of five years thereafter.

Notwithstanding the provisions of this section, the commissioner of revenue may permit the commissioner of internal revenue of the United States, or the revenue officer of any other state imposing any of the taxes imposed in this subchapter, or the duly authorized representative of either, to inspect the report or return of any taxpayer; or may furnish such officer or his authorized agent an abstract of the report or return of any taxpayer; or supply such officer with information concerning any item contained in any report or return, or disclosed by the report of any investigation of such report or return of any taxpayer. Such permission, however, shall be granted or such information furnished to such officer, or his duly authorized representative, only if the statutes of the United States or of such other state grants substantially similar privilege to the commissioner of revenue of this state or his duly authorized representative. (1939, c. 158, s. 928.)

§ 105-260. Deputies and clerks.—The commissioner of revenue may appoint such deputies, clerks and assistants under his direction as may be necessary to administer the laws relating to the assessment and collection of all taxes provided for in this subchapter; may remove and discharge same at his discretion, and shall fix their compensation within the rules and regulations prescribed by law. (1939, c. 158, s. 929.)

§ 105-261. Commissioner and deputies to administer oaths.—The commissioner of revenue and such deputies as he may designate shall have the power to administer an oath to any person or to take the acknowledgment of any person in respect to any return or report required by this subchapter or under the rules and regulations of the commissioner of revenue, and shall have access to all the books and records of any person, firm, corporation, county, or municipality in this state. (1939, c. 158, s. 930.)

§ 105-262. Rules and regulations.—The commissioner of revenue may, from time to time, make, prescribe, and publish such rules and regulations, not inconsistent with this subchapter, as may be needful to enforce its provisions. (1939, c. 158, s. 931.)

§ 105-263. Time for filing reports extended.—The commissioner of revenue, when he deems the same necessary or advisable, may extend to any person, firm, or corporation or public utility a further specified time within which to file any report required by law to be filed with the commissioner of revenue, in which event the attaching or taking effect of any penalty for failure to file such report or to pay any tax or fee shall be extended or postponed accordingly. Interest at the rate of six per cent (6%) per annum from the time the report or return was originally required to be filed to the time of payment shall be added to and paid with any tax that might be due on returns so extended. (1939, c. 158, s. 932.)

§ 105-264. Construction of the subchapter; population.—It shall be the duty of the commissioner of revenue to construe all sections of this subchapter imposing either license, franchise, inheritance, income, or other taxes. Such decisions by the commissioner of revenue shall be prima facie correct, and a protection to the officers and taxpayers affected thereby. Where the license tax is graduated in this subchapter according to the population, the population shall be the number of inhabitants as determined by the last census of the United States government: Provided, that if any city or town in this state has extended its limits since the last census period, and thereafter has taken a census of its population in these increased limits by an official enumeration, either through the aid of the United States government or otherwise, the population thus ascertained shall

be that upon which the license tax is to be graduated. (1939, c. 158, s. 933.)

Authority of Commissioner to Construe.—The Commissioner of Revenue is given authority to administratively construe, in the first instance, all sections of the revenue law. Powell v. Maxwell, 210 N. C. 211, 186 S. E. 326.

Stated in Clark v. Greenville, 221 N. C. 255, 20 S. E. (2d) 56.

§ 105-265. Authority for imposition of tax.— This subchapter shall constitute authority for the imposition of taxes upon the subject herein revised, and all laws in conflict with it are hereby repealed, but such repeal shall not affect taxes listed or which ought or should have been listed, or which may have been due, or penalties or fines incurred from failure to make the proper reports, or to pay the taxes at the proper time under any of the schedules of existing law, but such taxes and penalties may be collected, and criminal offenses prosecuted under such law existing on March 24, 1939, notwithstanding this repeal. (1939, c. 158, s. 935.)

§ 105-266. Overpayment of taxes to be refunded with interest. — If the commissioner of revenue discovers from the examination of any return, or otherwise, that any taxpayer has overpaid the correct amount of tax (including penalties, interests and costs, if any), such overpayment shall be refunded to the taxpayer within sixty days after it is ascertained together with interest thereon at the rate of six per cent (6%) per annum: Provided, that interest on any such refund shall be computed from a date ninety (90) days after date tax was originally paid by the taxpayer: Provided, further, that demand for such refund is made by the taxpayer within three years from the date of such overpayment. (1939, c. 158, s. 937; 1941, c. 50, s. 10.)

Editor's Note.—The 1941 amendment added the second proviso.

§ 105-267. Taxes to be paid; suits for recovery of taxes. — No court of this state shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and notify such officer in writing that he pays same under protest. Such payment shall be without prejudice to any defense of rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the commissioner of revenue of the state, if a state tax, or if a county, city, or town tax, from the treasurer thereof for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such official in the courts of the state for the amount so demanded. Such suit, if against the state commissioner of revenue, must be brought in the superior court of Wake county, or in the county in which the taxpayer resides, if the sum demanded is upwards of two hundred dollars ($200.00), and if for two hundred dollars ($200.00) or less, before any state court of competent jurisdiction in Wake county. If for a county, city or town tax, suit must be brought in a state court of competent jurisdiction in the county where the tax is collectible, and the defendant official has his official residence. If upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of state taxes for which judgment shall be rendered in such action shall be refunded by the state. (1939, c. 158, s. 936.)

Cross References.—As to refund of taxes illegally collected, see § 105-407 and note thereto. For similar provision, see § 105-406, which seems to have been superseded by this section.

Editor's Note.—See 12 N. C. Law Rev. 23.

Since a debtor may direct application of payment, and if neither debtor nor creditor makes application before institution of suit, the law will apply a payment to the unsecured or most precariously secured debt, when a taxpayer makes anticipatory payment not under protest, and thereafter pays under protest the balance of the taxes levied against his property, in his action under this section, to recover the taxes the entire amount paid under protest may be recovered when unlawful levies equal such amount, and the recovery will not be limited to the proportionate part which the unlawful levies bear to the entire tax levy, since it will not be presumed that the county intended to make an unlawful levy or that the taxpayer intended to pay tax illegally levied. Nantahala Power, etc., Co. v. Clay County, 213 N. C. 698, 197 S. E. 603.

To Recover Tax Illegally Collected Statutory Procedure Must Be Complied with.—In order for a taxpayer to avoid the payment of a tax claimed by him to have been illegally assessed by the State, he must comply with the procedure provided in the statute and where the statute specifies that he must pay the tax to the proper officer and notify him in writing that he pays under protest, and at any time within thirty days demand its refund from the State Commissioner in writing, and if not refunded in ninety days, bring action to recover the amount, the remedy given must be followed in order for the taxpayer to recover the amount, and the failure of the taxpayer to make the demand required until nearly two years after the payment of the tax is fatal; section 105-407, requiring the State Auditor to issue his warrant in certain instances, has no application. Bunn v. Maxwell, 199 N. C. 557, 155 S. E. 250.

In an action under the Revenue Act of 1933 it was held that an allegation that the tax was paid under compulsion was a mere conclusion of the pleader, and a demurrer of the Commissioner of Revenue was sustained. Metro-Goldwyn-Mayer Distributing Corp. v. Maxwell, 209 N. C. 47, 182 S. E. 724.

Suit in Equity.—The remedy provided by this section cannot, in case of a class suit instituted in behalf of a large number of taxpayers, be deemed an adequate remedy as compared with the suit in equity which eliminates so much useless and cumbersome litigation. Gramling v. Maxwell, 52 F. (2d) 256, 261.

A suit in equity to enjoin the collection of state tax, alleged to be violative of the Fourteenth Amendment on the ground of an arbitrary and excessive assessment, will not lie in the federal court, since the plaintiff has a plain, adequate, and complete remedy at law by first paying the tax and then suing to recover it. Catholic Society, etc. v. Madison County, 74 F. (2d) 848, 850.

Section Provides Adequate Remedy at Law.—A suit to enjoin the collection of the photographer's tax imposed by § 105-41 was held not maintainable as there is an adequate remedy at law under the provisions of this section. Lucas v. Charlotte, 14 F. Supp. 163.

Applied in Piedmont Memorial Hospital v. Guilford County, 221 N. C. 308, 20 S. E. (2d) 332.

§ 105-268. Reciprocal comity.—The courts of this state shall recognize and enforce liabilities for taxes lawfully imposed by other states which extend a like comity to this state. (1939, c. 158, s. 938.)

Editor's Note.—For an analysis of this section, see 13 N. C. Law Rev. 405.

§ 105-269. Extraterritorial authority to enforce payment.—The commissioner of revenue, with

the assistance of the attorney general, is hereby empowered to bring suits in the courts of other states to collect taxes legally due this state. The officials of other states which extend a like comity to this state are empowered to sue for the collection of such taxes in the courts of this state. A certificate by the secretary of state, under the Great Seal of the state, that such officers have authority to collect the tax shall be conclusive evidence of such authority. (1939, c. 158, s. 939.)

Art. 10. Liability for Failure to Levy Taxes.

§ 105-270. Repeal of laws imposing liability upon governing bodies of local units.—All laws and clauses of laws, statutes and parts of statutes, imposing civil or criminal liability upon the governing bodies of local units, or the members of such governing bodies, for failure to levy or to vote for the levy of any particular tax or rate of tax for any particular purpose, are hereby repealed, and said governing bodies and any and all members thereof are hereby freed and released from any civil or criminal liability heretofore imposed by any law or statute for failure to levy or to vote for the levy of any particular tax or tax rate for any particular purpose. (1933, c. 418.)

Applied in State v. Davis, 214 N. C. 787, 199 S. E. 927, treated under § 18-1.

SUBCHAPTER II. ASSESSMENT, LISTING AND COLLECTION OF TAXES.

Art. 11. Short Title and Definitions.

§ 105-271. Official title.—This subchapter may be cited as the Machinery Act. (1939, c. 310, s. 1.)

Editor's Note.—The annotations under this subchapter relate to similar provisions of former statutes.

For provision for codification, printing and distribution of Machinery Act of 1939, as amended, and presumption of correct compilation, see Public Laws 1941, c. 204, § 3.

§ 105-272. Definitions. — When used in this subchapter (unless otherwise specifically indicated by the context):

(1) The term "person" means an individual, trust, estate, partnership, firm or company.

(2) The term "corporation" includes associations, joint-stock companies, insurance companies, and limited partnerships where shares of stock are issued.

(3) The term "domestic" when applied to corporations or partnerships means created or organized under the laws of the state of North Carolina.

(4) The term "foreign" when applied to corporations or partnerships means a corporation or partnership not domestic.

(5) The term "commissioner" means the commissioner of revenue.

(6) The term "deputy" means an authorized representative of the commissioner of revenue or other commissioner or of the state board of assessment.

(7) The term "taxpayer" means any person or corporation subject to a tax or duty imposed by the Revenue Act or Machinery Act, or whose property is subject to any ad valorem tax levied by the state or its political subdivisions.

(8) The term "state license" means a license issued by the commissioner of revenue, usable, good and valid in the county or counties named in the license.

(9) The term "state-wide license" means a license issued by the commissioner of revenue, usable, good and valid in each and every county in this state.

(10) The term "intangible property" means patents, copyrights, secret processes and formulae, good will, trademarks, trade brands, franchises, stocks, bonds, cash, bank deposits, notes, evidences of debt, bills and accounts receivable, and other like property.

(11) The term "tangible property" means all property other than intangible.

(12) The term "public utility" as used in this subchapter means and includes each person, firm, company, corporation and association, their lessees, trustees or receivers, elected or appointed by any authority whatsoever, and herein referred to as express company, telephone company, telegraph company, Pullman car company, freight line company, equipment company, electric power company, gas company, railroad company, union depot company, water transportation company, street railway company, and other companies exercising the right of eminent domain, and such term, "public utility," shall include any plant or property owned or operated by any such persons, firms, corporations, companies or associations.

(13) The term "express company" means a public utility company engaged in the business of conveying to, from, or through this state, or part thereof, money, packages, gold, silver, plate, or other articles and commodities by express, not including the ordinary freight lines of transportation of merchandise and property in this state.

(14) The term "telephone company" means a public utility company engaged in the business of transmitting to, from, through or in this state, or part thereof, telephone messages or conversations.

(15) The term "telegraph company" means a public utility company engaged in the business of transmitting to, from, through, or in this state, or a part thereof, telegraphic messages.

(16) The term "Pullman car company" means a public utility company engaged in the business of operating cars for the transportation, accommodation, comfort, convenience, or safety of passengers, on or over any railroad line or lines or other common carrier lines, in whole or in part within this state, such line or lines not being owned, leased, and/or operated by such railroad company, whether such cars be termed sleeping, Pullman, palace, parlor, observation, chair, dining or buffet cars, or by any other name.

(17) The term "freight line company" means a public utility company engaged in the business of operating cars for the transportation of freight or commodities, whether such freight and/or commodities is owned by such company or any other person or company, over any railroad or other common carrier line or lines in whole or in part within this state, such line or lines not being owned, leased and/or operated by such railroad company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture, refrigerator, fruit, meat, oil, or by any other name.

(18) The term "equipment company" means a public utility company engaged in the business of furnishing and/or leasing cars, of whatsoever kind or description, to be used in the operation of any railroad or other common carrier line or lines, in whole or in part within this state, such line or

lines not being owned, leased, or operated by such railroad company.

(19) The term "electric power company" means a public utility company engaging in the business of supplying electricity for light, heat and/or power purposes to consumers within this state.

(20) The term "gas company" means a public utility company engaged in the business of supplying gas for light, heat, and/or power purposes to consumers within this state.

(21) The term "waterworks company" means a public utility company engaged in the business of supplying water through pipes or tubing and/or similar manner to consumers within this state.

(22) The term "union depot company" means a public utility company engaged in the business of operating a union depot or station for railroads or other common carrier purposes.

(23) The term "water transportation company" means a public utility company engaged in the transportation of passengers and/or property by boat or other water craft, over any waterway, whether natural or artificial, from one point within this state to another point within this state, or between points within this state and points without this state.

(24) The term "street railway company" means a public utility company engaged in the business of operating a street, suburban or interurban railway, either wholly or partially within this state, whether cars are propelled by steam, cable, electricity, or other motive power.

(25) The term "railroad company" means a public utility company engaged in the business of operating a railroad, either wholly or partially within this state, or rights of way acquired or leased and held exclusively by such company or otherwise.

(26) The terms "gross receipts" or "gross earnings" mean and include the entire receipts for business done by any person, firm, or corporation, domestic or foreign, from the operation of business or incidental thereto, or in connection therewith. The gross receipts or gross earnings for business done by a corporation engaged in the operation of a public utility shall mean and include the entire receipts for business done by such corporation, whether from the operation of the public utility itself or from any other source whatsoever.

(27) The terms "bank", "banker", "broker", "stock jobber" mean and include any person, firm, or corporation who or which has money employed in the business of dealing in coin, notes, bills of exchange, or in any business of dealing, or in buying or selling any kind of bills of exchange, checks, drafts, bank notes, acceptances, promissory notes, bonds, warrants or other written obligations, or stocks of any kind or description whatsoever, or receiving money on deposit.

(28) The terms "collector" and "collectors" mean and include county, township, city or town tax collectors, and sheriffs.

(29) The terms "list takers" and "assessors" mean and include list takers, assessors and assistants.

(30) The terms "real property", "real estate", "land", "tract", or "lot" mean and include not only the land itself, but also all buildings, structures, improvements and permanent fixtures thereon, and all rights and privileges belonging or in any wise appertaining thereto, except where the same may be otherwise denominated by this subchapter or the Revenue Act.

(31) The terms "shares of stock" or "shares of capital stock" mean and include the shares into which the capital or capital stock of an incorporated company or association may be divided.

(32) The terms "tax" or "taxes" mean and include any taxes, special assessments, costs, penalties, and/or interest imposed upon property or other subjects of taxation. (1939, c. 310, s. 2.)

Article 12. State Board of Assessment.

§ 105-273. Creation; officers.—The director of the department of tax research, the commissioner of revenue, the chairman of the public utilities commission, the attorney general, and the director of local government are hereby created the state board of assessment with all the powers and duties prescribed in the subchapter. The director of the department of tax research shall be the chairman of the said board, and shall, in addition to presiding at the meetings of the board, exercise the functions, duties, and powers of the board when not in session. The board may employ an executive secretary, whose entire time may be given to the work of the said board, and is authorized to employ such clerical assistance as may be needed for the performance of its duties; all expenses of said board shall be paid out of funds appropriated out of the general fund to the credit of the department of revenue of the state. (1939, c. 310, s. 200; 1941, c. 327, s. 6.)

Cross Reference.—As to Department of Tax Research, see §§ 105-450 to 105-457.

Editor's Note.—The 1941 amendment, which substituted the above in lieu of the former section, is effective as of July 1, 1941.

Suits against State Board of Assessment.—The corporation commission (under the prior law constituting the board) acts as a body and in a corporate capacity and an action or proceeding to compel that body to perform its ministerial duties must be brought against it in that capacity and not against its members, for its functions are not individual or personal, but corporate. Hence, mandamus to compel the refund of taxes alleged to have been paid under an excessive valuation of property will not be against two of the commissioners as individuals. Jenkins Bros. Shoe Co. v. Travis, 168 N. C. 599, 84 S. E. 1036. This would seem to be applicable to the board as now constituted.

Cited in Catholic Society, etc. v. Madison County, 74 F. (2d) 848.

§ 105-274. Oath of office.—The members of the board shall take and subscribe to the constitutional oath of office and file the same with the secretary of state. (1939, c. 310, s. 201.)

Cross Reference.—As to form of oath, see § 11-7.

Cited in Catholic Society, etc. v. Madison County, 74 F. (2d) 848, 849.

§ 105-275. Duties of the board. — The state board of assessment shall exercise general and specific supervision of the systems of valuation and taxation throughout the state, including counties and municipalities, and in addition it shall be and constitute a state board of equalization and review of valuation and taxation in this state. It shall be the duty of said board:

(1) To confer with and advise boards of county commissioners, tax supervisors, assessing officers, list takers, and all others engaged in the valuation and assessment of property, in the preparation and keeping of suitable records, and in the levying and collection of taxes and revenues, as

to their duties under this subchapter or any other act passed with respect to valuation of property, assessing, levying or collection of revenue for counties, municipalities and other subdivisions of the state, to insure that proper proceedings shall be brought to enforce the statutes pertaining to taxation and for the collection of penalties and liabilities imposed by law upon public officers, officers of corporations, and individuals failing, refusing or neglecting to comply with this subchapter; and to call upon the attorney general or any prosecuting attorney in the state to assist in the execution of the powers herein conferred.

(2) To prepare a pamphlet or booklet for the instruction of the boards of county commissioners, tax supervisors, assessing officers, list takers, and all others engaged in the valuation of property, preparing and keeping records, and in the levying and collecting of taxes and revenue, and have the same ready for distribution at least thirty (30) days prior to the date fixed for listing taxes. The said pamphlet or booklet shall, in as plain terms as possible, explain the proper meaning of this subchapter and the revenue laws of this state; shall call particular attention to any points in the law or in the administration of the laws which may be or which have been overlooked or neglected; shall advise as to the practical working of the revenue laws and the Machinery Act, and shall explain and interpret any points that seem to be intricate and upon which county or state officers may differ.

(3) To hear and to adjudicate appeals from boards of county commissioners and county boards of equalization and review as to property liable for taxation that has not been assessed or of property that has been fraudulently or improperly assessed through error or otherwise, to investigate the same, and if error, inequality, or fraud is found to exist, to take such proceedings and to make such orders as to correct the same. In case it shall be made to appear to the state board of assessment that any tax list or assessment roll in any county in this state is grossly irregular, or any property is unlawfully or unequally assessed as between individuals, between sections of a county, or between counties, the said board shall correct such irregularities, inequalities and lack of uniformity, and shall equalize and make uniform the valuation thereof upon complaint by the board of county commissioners under rules and regulations prescribed by it, not inconsistent with this subchapter: Provided, that no appeals shall be considered or fixed values changed unless notice of same is filed within sixty (60) days after the final values are fixed and determined by the board of county commissioners or the board of equalization and review, as hereinafter provided: Provided, further, that each taxpayer or ownership interest shall file separate and distinct appeals; no joint appeals shall be considered except by and with consent of the state board of assessment.

(4) To require from the register of deeds, auditor, county accountant, tax clerk, clerk of the court or other officer of each county, and the mayor, clerk or other officer of each municipality, on forms prepared and prescribed by the said board, such annual and other reports as shall enable said board to ascertain the assessed valuation of all property listed for taxation in this state under this or any other act, the rate and amount of taxes assessed and collected, the amount returned delinquent, tax sales, certificates of purchase at such tax sales held by the state, county or municipality, and such other information as the board may require, to the end that it may have full, complete, and accurate statistical information as to the practical operation of the tax and revenue laws of the state.

(5) To require the secretary of state, and it shall be his duty, to furnish monthly to the said board a list of all domestic corporations incorporated, charter amended or dissolved, all foreign corporations domesticated, charter amended, dissolved or domestication withdrawn during the preceding month, in such detail as may be prescribed by said board.

(6) To make diligent investigation and inquiry concerning the revenue laws and systems of taxation of other states, so far as the same are made known by published reports and statistics and can be ascertained by correspondence with officers thereof.

(7) To report to the general assembly at each regular session, or at such other times as it may direct, the total amount of revenue or taxes collected in this state for state, county, and municipal purposes, classified as to state, county, township, and municipality, with the sources thereof; to report to the general assembly the proceedings of the board and such other information and recommendations concerning the public revenues as required by the general assembly or that may be of public interest; to cause two thousand copies of said report to be printed on or before the first day of January in the year of the regular session of the general assembly, and place at the disposal of the state librarian one hundred (100) copies of said report for distribution and exchange, if and when funds are available for said purpose; and to forward a copy of said report to each member of the general assembly as soon as printed.

(8) To discharge such other duties as may be prescribed by law, and take such action, do such things, and prescribe such rules and regulations as may be needful and proper to enforce the provisions of this subchapter and the Revenue Act.

(9) To prepare for the legislative committee of succeeding general assemblies such suggestions of revision of the revenue laws, including the Machinery Act, as it may find by experience, investigation, and study to be expedient and wise.

(10) To report to the governor, on or before the first day of January of each year, the proceedings of said board during the preceding year, with such recommendations as it desires to submit with respect to any matters touching taxation and revenue.

(11) To keep full, correct and accurate records of its official proceedings.

(12) To properly administer the duties prescribed by Schedule H, §§ 105-198 to 105-217, with respect to division and certification of taxes collected thereunder; the state board of assessment shall hear and pass upon any matters relative thereto.

(13) To perform the duties imposed upon it with respect to the classification and assessment of property. (1939, c. 310, s. 202.)

Unless the land is properly listed for taxation, it is not

subject to sale by the sheriff for non-payment of taxes. Stone v. Phillips, 176 N. C. 457, 97 S. E. 375.

Where Entry Copied from Former Tax Book.—In Rexford v. Phillips, 159 N. C. 213, 74 S. E. 213, neither the owner nor his agent had given in the land, and list taker had copied the entry from the former tax book, and it was held that the land was not rightfully on the tax list, and a sale for taxes pursuant thereto was invalid. This case is discussed with approval in the Stone case, supra.—Ed. Note.

Review of Assessment. — Under the prior law original proceedings before the State Board of Assessment to have the value of property reduced for taxation will be disregarded and considered as a nullity when the question involved is solely as to whether such value theretofore fixed and agreed upon be reduced. Caldwell County v. Doughton, 195 N. C. 62, 141 S. E. 289.

Appeal from Assessment—Sufficiency of Board's Report.—The method provided by statute for assessment and appeal from the assessment must be followed. In the instant case the Board reported results of the appraisement and did not report the individual items upon which the appraisement was made, and the appraisement of the value of the stock held in a foreign corporation was not so separated from the other property as to permit a variation of this rule. Manufacturing Co. v. Commissioners of Pender, 196 N. C. 744, 147 S. E. 284.

Applied in Catholic Society, etc. v. Madison County, 74 F. (2d) 848.

§ 105-276. Powers of the board.—To the end that the board may properly discharge the duties placed upon it by law, it is hereby accorded the following powers:

(1) It may, in its discretion, prescribe the forms, books, and records that shall be used in the valuation of property and in the levying and collection of taxes, and how the same shall be kept; to require the county tax supervisors, clerks or boards of county commissioners, or auditor of each county to file with it, when called for, complete abstracts of all real and personal property in the county, itemized by townships and as equalized by the county board of equalization and review; and to make such other rules and regulations, not included in this subchapter or the Revenue Act, as said board may deem needful effectually to promote the purposes for which the board is constituted and the systems of taxation provided for in this and the Revenue Act.

(2) The board, its members or any duly authorized deputy shall have access to all books, papers, documents, statements, records and accounts on file or of records in any department of state, county or municipality, and is authorized and empowered to subpoena witnesses upon a subpoena signed by the chairman of the board, directed to such witnesses, and to be served by any officer authorized to serve subpoenas; to compel the attendance of witnesses by attachment to be issued by any superior court upon proper showing that such witness or witnesses have been duly subpoenaed and have refused to obey such subpoena or subpoenas; and to examine witnesses under oath to be administered by any member or authorized agent of the board.

(3) The board, its members or any duly authorized deputy are authorized and empowered to examine all books, papers, records or accounts of persons, firms and corporations, domestic and foreign, owning property liable to assessment for taxes, general or specific, levied by this state or its subdivisions. Said board, its members or any duly authorized deputy are also given power and authority to examine the books, papers, records or accounts of any person, firm or corporation where there is ground for believing that information contained in such books, papers, records and accounts is pertinent to the decision of any matter pending before said board, regardless of whether such person, firm or corporation is a party to the proceeding before the board. Books, papers, records or accounts examined under authority of this subdivision of this section shall be examined only after service of a proper subpoena, signed by the chairman of the board and served by an officer authorized to serve subpoenas upon the person having the custody of such books, papers, records or accounts.

Any person, persons, member of a firm, or any officer, director or stockholder of a corporation, bank or trust company who shall refuse permission to inspect any books, papers, documents, statements, accounts or records demanded by the state board of assessment, the members thereof, or any duly authorized deputy provided for in this subchapter or the Revenue Act, or who shall willfully fail, refuse, or neglect to appear before said board in response to its subpoena or to testify as provided for in this subchapter and the Revenue Act, shall, in addition to all other penalties imposed in this subchapter or the Revenue Act, be guilty of a misdemeanor and fined and/or imprisoned in the discretion of the court.

(4) The board is authorized and empowered to direct any member or members of the board to hear complaints, to make examinations and investigations, and to report his or their findings of fact and conclusions of law to the board. Upon demand of any party to an appeal pending before the board, the board shall send one of its members or a special representative designated by it to make an actual examination of the property and other similar property in the same county and report to the board. The cost of making said examination shall be advanced by the county: Provided, that in cases in which the examination is demanded by a taxpayer, if the board's decision does not substantially affirm the contentions of the taxpayer, the board in its decision shall direct that the county advancing the cost may add such cost to the taxes levied against the property.

(5) The board shall have power to certify copies of its records and proceedings, attested with its official seal, and copies of records or proceedings so certified shall be received in evidence in all courts in this state with like effect as certified copies of other public records.

(6) The board may, upon its own motion or upon request of any tax supervisor or county board of commissioners, transmit or make available to a supervisor or duly authorized representative of such board of commissioners any information contained in any report to said state board, or in any report to the department of revenue or other state department to which said state board may have access, or any other information which said state board may have in its possession when, in the opinion of said board, such information will assist said supervisor or representative of the commissioners in securing an adequate listing of property for taxation or in assessing taxable property.

Except as herein specified, and except to the governor or his authorized agent or solicitor or authorized agent of the solicitor of a district in which such information would affect the listing or valuation of property for taxes, the state board shall not divulge or make public the reports made

to it or to other state departments: Provided, this shall not interfere with the publication of assessments and decisions made by said board or with publication of statistics by said board; nor shall it prevent presentation of such information in any administrative or judicial proceedings involving assessments or decisions of said board.

Information transmitted or made available to local tax authorities under this section shall not be divulged or published by such authorities, and shall be used only for the purposes of securing adequate tax lists, assessing taxable property and presentation in administrative or judicial proceedings involving such lists or assessments.

(7) The board is authorized to exercise all powers reasonably necessary to perform the duties imposed upon it by this subchapter or other acts of this state. (1939, c. 310, s. 203.)

§ 105-277. Sessions of board, where to be held.—The regular sessions of the state board of assessment shall be held in the city of Raleigh at the office of the chairman, and other sessions may be called at any place in the state to be decided by the board. (1939, c. 310, s. 204.)

Art. 13. Quadrennial and Annual Assessment.

§ 105-278. Listing and assessing in quadrennial years.—In one thousand nine hundred forty-one, and quadrennially thereafter, all property, real and personal, subject to taxation, shall be listed and assessed for ad valorem tax purposes: Provided, that in one thousand nine hundred forty-one, and quadrennially thereafter, the county boards of commissioners may determine whether real property in the respective counties and townships shall be revalued by horizontal increase or reduction or by actual appraisal thereof, or both. Where the horizontal method is used, the provisions of § 105-279 shall also apply: Provided, that the boards of county commissioners of the various counties of the State may, in their discretion, defer or postpone the revaluation and reassessment of real property required herein in the year one thousand nine hundred and forty-one, and all proceedings and actions heretofore taken by said board of county commissioners in any county in the State as to postponement, or as to increases or reductions or by actual appraisal thereof, are hereby in all respects ratified, validated, and confirmed; any such board of county commissioners may, in its discretion, defer or postpone any such revaluation, reassessment, or reappraisal for the years one thousand nine hundred and forty-two and one thousand nine hundred and forty-three. But this second proviso shall not apply to any county for which a revaluation board of assessors or a board of equalization and review has been created or provided for by any act of the General Assembly of one thousand nine hundred and forty-one. Provided, further, that if the board of commissioners of any county shall neglect to provide for a general revaluation of all real property in the county in any revaluation year, such neglect shall not have the effect of invalidating existing valuations and tax levies. (1939, c. 310, s. 300; 1941, c. 282, ss. 1, 1½; 1943, c. 634, s. 1.)

Local Modification.—Ashe, Rowan: 1941, c. 282, s. 2.

Editor's Note.—The 1941 amendment added the second proviso. The amendment further provided that it shall not repeal or affect any public-local or private act of the general assembly of 1941.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 525.

The 1943 amendment added the proviso at the end of the section.

Deferring Revaluation.—Under the 1941 amendment to this section the commissions of a county are authorized to defer the revaluation due to be made in the year 1941 to the year 1942, or to any year prior to the revaluation due to be made in the year 1945. Moore v. Sampson County, 220 N. C. 232, 17 S. E. (2d) 22.

§ 105-279. Listing and assessing in years other than quadrennial years.—In the year one thousand nine hundred thirty-nine and in other than quadrennial years all property, real and personal, subject to taxation, shall be listed for ad valorem tax purposes. Property not subject to reassessment in such years shall be listed at the value at which it was assessed at the last quadrennial assessment. In all such years the following property shall be assessed or reassessed:

(1) All personal property (which for purposes of taxation shall include all personal property whatsoever, tangible or intangible, except personal property expressly exempted by law).

(2) All machinery, service station equipment, merchandise and trade fixtures, barber shop equipment, meat market equipment, restaurant and cafe fixtures, drug store equipment and similar property not permanently affixed to the real estate.

(3) All real property (which for purposes of taxation shall include all lands within the state and all buildings and fixtures thereon and appurtenances thereto) which:

(a) Was not assessed at the last quadrennial assessment.

(b) Has increased in value to the extent of more than one hundred dollars ($100.00) by virtue of improvements or appurtenances added since the last assessment of such property.

(c) Has decreased in value to the extent of more than one hundred dollars ($100.00) by virtue of improvements or appurtenances damaged, destroyed or removed since the last assessment of such property.

(d) Has increased or decreased in value since the last assessment of such property by virtue of some extraordinary circumstances, such circumstances being those of unusual occurrence in trade or business, and the facts in connection with which shall be found by the board of equalization in each case and entered upon the proceedings of said board.

(e) Has been subdivided into lots located on streets already laid out and open, and sold or offered for sale as lots, since the date of the last assessment of such property. This shall apply to all cases of subdivision into lots, regardless of whether the land is situated within or without an incorporated municipality: Provided, that where lands have been subdivided into lots, and more than five acres of any such subdivision remain unsold by the owner thereof, the unsold portion may be listed as land acreage, in the discretion of the tax supervisor.

(f) Was last assessed at an improper figure as the result of a clerical error.

(g) Was last assessed at a figure which manifestly is unjust by comparison with the assessment placed upon similar property in the county: Provided, that the power to reassess under this

subdivision shall be exercised only by the board of equalization and review, subject to appeal to the state board of assessment. (1939, c. 310, s. 301.)

§ 105-280. Date as of which assessment is to be made.—All property, real and personal, shall be listed or listed and assessed, as the case may be, in accordance with ownership and value as of the first day of April, one thousand nine hundred thirty-nine, and thereafter all property shall be listed or listed and assessed in accordance with ownership and value as of the first day of January each year. (1939, c. 310, s. 302.)

When Lien Attaches.—The lien for taxes attaches to realty on the first day of April of each year, the date on which land is required to be listed in the name of the owner. Bemis Hardwood Lbr. Co. v. Graham County, 214 N. C. 167, 198 S. E. 843.

§ 105-281. Property subject to taxation.—All property, real and personal, within the jurisdiction of the state, not especially exempted, shall be subject to taxation. (1939, c. 310, s. 303.)

Editor's Note.—For cases construing former § 7971(18), now repealed, which defined what should be included as personal property see Lawrence v. Shaw, 210 N. C. 352, 361, 186 S. E. 504; Mecklenburg County v. Sterchi Bros. Stores, 210 N. C. 79, 185 S. E. 454.

Taxation of Personal Property of Nonresidents Is Constitutional.—The taxation of personal property of nonresidents by this state when such personal property has acquired a taxable situs here does not violate the provisions of the 14th Amendment of the Federal Constitution, the rule that personal property follows the domicile of the owner being subject to an exception when such personalty is held in such a manner as to create a "business situs" for the purpose of taxation. Mecklenburg County v. Sterchi Bros. Stores, 210 N. C. 79, 185 S. E. 454, construing former § 7971(18), now repealed.

§ 105-282. Article subordinate to sections 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 304.)

Art. 14. Personnel for County Tax Listing and Assessing.

§ 105-283. Appointment and qualifications of tax supervisors.—At or before the regular meeting next preceding the date as of which property is to be listed and assessed, the board of county commissioners of each county shall appoint as tax supervisor some person who shall be a freeholder in the county, who shall for one year immediately preceding the appointment, have been a resident of the county, and whose experience in the valuation of real and personal property is satisfactory to the board.

In counties in which there is an auditor, tax clerk, county accountant, all-time chairman of the board of county commissioners, or other similar officer, either may be designated as supervisor by the board of county commissioners. (1939, c. 310, s. 400.)

§ 105-284. Term of office and compensation of supervisors.—The tax supervisor shall serve for one year or for such shorter period of time as the board may designate. In the case he is appointed for one year, he shall serve until his successor is appointed and has qualified, subject to removal for cause by the board of commissioners at any time. Any vacancy shall be filled by appointment by the board of commissioners.

The compensation of the supervisor shall be fixed by the board of commissioners, and he shall be allowed such expenses as the commissioners may approve. (1939, c. 310, s. 401.)

§ 105-285. Oath of office of supervisor.—Immediately after his appointment, and before entering upon the duties of his office, the supervisor shall file with the clerk of the board of commissioners the following oath, subscribed and sworn to before the chairman of the board of commissioners or some other officer qualified to administer oaths:

"I, ..., County Tax Supervisor for ..... County, North Carolina, for the year ....., do solemnly swear (or affirm) that I will discharge the duties of my office as supervisor according to the laws in force governing such office; so help me, God.

....."

(Signature)

(1939, c. 310, s. 402.)

§ 105-286. Powers and duties of tax supervisor.—(1) The supervisor shall have general charge of the listing and assessing of all property in the county in accordance with the provisions of law.

(2) He shall appoint the list takers and assessors, subject to the approval of the commissioners, as hereinafter provided.

(3) He shall, on the second Monday preceding the date as of which property is to be assessed or at some time during the week which includes said Monday, convene the list takers and assessors for general consideration of methods of securing a complete list of all property in the county, and of assessing, in accordance with law, all property which is to be assessed during the approaching listing period.

(4) He shall visit each list taker at least once during the period of listing, and shall confer with each list taker during said period as often as he or the list taker deems necessary, to the end that all property shall be listed and assessed according to law, and that assessments shall be equalized as between the various townships.

(5) He shall have power to subpoena any person for examination under oath and to subpoena any books, papers, records or accounts whenever he has reasonable grounds for the belief that such person has knowledge of such books, papers, records and accounts containing information which is pertinent to the discovery or the valuation of any property subject to taxation in the county, or which is necessary for compliance with the requirements as to what the tax list shall contain, hereinafter set forth. The subpoena shall be signed by the chairman of the county board of equalization and served by an officer qualified to serve subpoenas.

(6) He may require that any or all persons, firms and corporations, domestic and foreign, engaged in operating any business enterprise in the county shall submit, in connection with his or its regular tax list, a detailed inventory, statement of assets and liabilities, or other similar information pertinent to the discovery of valuation of property taxable in the county. Inventories, statements of assets and liabilities or other information not expressly required by this subchapter to be shown on the tax list itself, secured by the supervisor un-

der the terms of this subdivision, shall not be open to public inspection.

Any supervisor or other official disclosing information so obtained, except as such disclosure may be necessary in listing or assessing property or in administrative or judicial proceedings relating to such listing or assessing, shall be guilty of a misdemeanor and punishable by fine not exceeding fifty dollars ($50.00).

(7) He shall have power, for good cause, and prior to the first meeting of the board of equalization and review, to change the valuation placed upon any property by the list taker, provided such property is subject to assessment for the current year, and provided that notice of such change is given to the taxpayer prior to the meeting of said board.

(8) He shall perform such other duties as may be imposed upon him by law, and shall have and exercise all powers reasonably necessary in the performance of his duties, not inconsistent with the constitution or the laws of this state. (1939, c. 310, s. 403.)

§ 105-287. Appointment, qualifications, and number of list takers and assessors.—Subject to the approval of the county commissioners, the supervisor, on or before the second Monday preceding the date as of which property is to be assessed, shall appoint some competent person to act as list taker and assessor in each township. With the approval of the commissioners he may appoint more than one such person for any township in which is situated an incorporated town or part of an incorporated town. In quadrennial years three such persons shall be appointed in each township, and more than three may be appointed in townships in which is located an incorporated town or part of an incorporated town; and in such years, at the time of their appointment, such appointees shall have been resident freeholders of the county for at least twelve months: Provided, that in any county adopting the horizontal method of revaluations in one thousand nine hundred forty-one, and quadrennially thereafter, the commissioners may appoint less than three list takers and assessors per township: Provided, further, that in quadrennial years the board of county commissioners may appoint one list taker and assessor in each township if in addition thereto at least two county-wide list takers and assessors are appointed; or said board may appoint not more than three qualified assessors to assess all real estate in the county. In every year the persons appointed shall be persons of character and integrity, and shall have such experience in the valuation of types of property commonly owned in the county as shall satisfy the supervisor and the commissioners. (1939, c. 310, s. 404.)

§ 105-288. Term of office and compensation of list takers and assessors.—The list takers and assessors shall serve for such period as may be fixed by the commission. They shall receive for their services such compensation as the commissioners may fix. No list taker shall receive compensation until the supervisor has checked over the lists accepted by him, as hereinafter required, and certified that his work has been satisfactory. Each list taker shall make out his account in detail, specifying each day's services, which account shall be audited by the county accountant and approved by the commissioners. (1939, c. 310, s. 405.)

§ 105-289. Oath of list takers and assessors.—Before entering upon his duties each list taker and assessor shall take the following oath, which shall be filed with the clerk to the board of commissioners after having been subscribed and sworn to before some officer qualified to administer oaths:

"I, ..., List Taker and Assessor for ..... Township, ... County, North Carolina, do hereby solemnly swear (or affirm) that I will discharge the duties of my office according to the laws in force that govern said office; so help me, God.

....."

(Signature)

(1939, c. 310, s. 406.)

§ 105-290. Powers and duties of list takers and assessors.—(1) At least ten days before the date as of which property is to be assessed, each list taker shall post, in five or more public places in his township, a notice containing at least the following: (a) The date as of which property is to be assessed; (b) the date on which listing will begin; (c) the date on which the listing will end; (d) the times and places between the last two dates mentioned at which lists will be accepted; (e) a notice that all persons who, on the date as of which property is to be assessed, own property subject to taxation must list such property within the period set forth in the notice, and that failure to do so will subject such persons to the penalties prescribed by law.

In townships in which more than one list taker has been appointed the posting of these notices shall be the duty of one of them, to be designated by the supervisor.

In case the period of listing in any township shall be extended by the commissioners, as hereinafter permitted, it shall be the duty of the list taker who first posted the notices to post new notices in the same places, giving notice of the extension and notice of the times and places at which lists will be accepted during the extended period.

(2) Each list taker shall attend the meeting referred to in subdivision three of § 105-286.

(3) The list takers and assessors, under the supervision of the supervisor, shall secure lists of all real and personal property and polls subject to taxation in their townships, and shall assess all such property as is subject to assessment under the provisions of this subchapter. To this end they shall secure from each taxpayer or person whose duty it is to list property or poll in their respective townships a list containing the information hereinafter specified, and shall have the authority to visit any such person or his property, to investigate the value of any such property, and to examine under oath any such person present before them for the purpose of listing property. The supervisor may, in his discretion, require any list taker and assessor to visit each person in his township whose property or poll is subject to taxation.

(4) Each list taker and assessor shall have power to subpoena any person for examination under oath whenever he has reasonable grounds for belief that such person has knowledge which

is pertinent to the discovery or valuation of property subject to taxation in his township or which is necessary for compliance with the requirements, hereinafter set forth, as to what the tax list shall contain.

(5) The list takers and assessors shall perform such duties in connection with the making up of the tax records and in connection with the discovery of unlisted property as hereinafter specified.

(6) The list takers and assessors shall perform such other duties as may be by law imposed upon them; and they shall have and exercise all powers necessary to the proper discharge of their duties not inconsistent with the constitution or the statutes of this state. (1939, c. 310, s. 407.)

§ 105-291. Employment of experts.—The board of county commissioners in each county, at the request of the county supervisor of taxation, may in their discretion employ one or more persons having expert knowledge of the value of specific kinds or classes of property within the county, such as mines, factories, mills and other similar property, to aid and assist the county supervisor of taxation and the list takers and assessors in the respective townships, or to advise with, aid and assist the board of equalization and review in arriving at the true value in money of the property in the county. Such expert, or experts, so employed by the board of county commissioners shall receive for their services such compensation as the board of county commissioners shall designate. (1939, c. 310, s. 408.)

§ 105-292. Clerical assistants. — The county commissioners may, in their discretion, upon recommendation of the supervisor, employ such clerical assistants to the supervisor as they deem proper, and at such compensation and for such terms as they deem proper. Such assistants shall perform such duties as the commissioners or the supervisor may assign to them. (1939, c. 310, s. 409.)

§ 105-293. Tax commission.—In all counties having a tax commission, said commission shall do and perform all the duties required by this subchapter to be performed by county commissioners except levying taxes, and all expenses incurred by said tax commission or its appointees in accordance with this subchapter shall be paid by the county commissioners out of the general county funds. (1939, c. 310, s. 410.)

Art. 15. Classification, Valuation and Taxation of Property.

§ 105-294. Taxes to be on uniform ad valorem basis as to class.—All property, real and personal, shall as far as practicable, be valued at its true value in money, and taxes levied by all counties, municipalities and other local taxing authorities shall be levied uniformly on valuations so determined. The intent and purpose of this subchapter is to have all property and subjects of taxation assessed at their true and actual value in money, in such manner as such property and subjects are usually sold, but not by forced sale thereof, and the words "market value," "true value," or "cash value," whenever used in the tax laws of this state, shall be held to mean for what the property and subjects can be transmuted into cash when sold in such manner as such property and subjects are usually sold: Provided, nothing in this section shall be construed as conflicting with or modifying the provisions of Schedule H, §§ 105-198 to 105-217, or the provisions of this subchapter classifying other property.

It is hereby declared to be the policy of this state so to use its system of real estate taxation as to encourage the conservation of natural resources and the beautification of homes and roadsides, and all tax assessors are hereby instructed to make no increase in the tax valuation of real estate as a result of the owner's enterprise in adopting any one or more of the following progressive policies:

1. Planting and care of lawns, shade trees, shrubs and flowers for non-commercial purposes.
2. Repainting buildings.
3. Terracing or other methods of soil conservation, to the extent that they preserve values already existing.
4. Protection of forests against fire.
5. Planting of forest trees on vacant land for reforestation purposes (for ten years after such planting). (1939, c. 310, s. 500.)

Cited in Belk's Department Store v. Guilford County, 222 N. C. 441, 451, 23 S. E. (2d) 897 (dis. op.).

§ 105-295. Land and buildings.—In determining the value of land the assessors shall consider as to each tract, parcel or lot separately listed at least its advantages as to location, quality of soil, quantity and quality of timber, water power, water privileges, mineral or quarry or other valuable deposits, fertility, adaptability for agricultural, commercial or industrial uses, the past income therefrom, its probable future income, the present assessed valuation, and any other factors which may affect its value.

In determining the value of a building the assessors shall consider at least its location, type of construction, age replacement cost, adaptability for residence, commercial or industrial uses, the past income therefrom, the probable future income, the present assessed value, and any other factors which may affect its value. Buildings partially completed shall be assessed in accordance with the degree of completion on the day as of which property is assessed. (1939, c. 310, s. 501.)

Art. 16. Exemptions and Deductions.

§ 105-296. Real property exempt.—The following real property, and no other, shall be exempted from taxation:

(1) Real property owned by the United States or this state, and real property owned by the state for the benefit of any general or special fund of the state, and real property lawfully owned and held by counties, cities, townships, or school districts, used wholly and exclusively for public or school purposes. The repeal of the exemption of real property indirectly owned by federal, state or local governments shall be effective for the tax year one thousand nine hundred and forty-three, and such property indirectly owned shall be placed upon the tax books for one thousand nine hundred and forty-three and subject to the tax rates levied on real estate in the year one thousand nine hundred and forty-three.

(2) Real property, tombs, vaults and mauso-

leums set apart for burial purposes, except such as are owned and held for purposes of sale or rental.

(3) Buildings, with the land upon which they are situated, lawfully owned and held by churches or religious bodies, wholly and exclusively used for religious worship or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building.

(4) Buildings, with the land actually occupied, wholly devoted to educational purposes, belonging to, actually and exclusively occupied and used for public libraries, colleges, academies, industrial schools, seminaries, or any other institutions of learning, together with such additional adjacent land owned by such libraries and educational institutions as may be reasonably necessary for the convenient use of such buildings, and also buildings thereon used as residences by the officers or instructors of such educational institutions.

(5) Real property belonging to, actually and exclusively occupied by Young Men's Christian Associations and other similar religious associations, orphanages, or other similar homes, hospitals and nunneries not conducted for profit, but entirely and completely as charitable.

(6) Buildings, with the land actually occupied, belonging to the American Legion or Post of the American Legion or any benevolent, patriotic, historical, or charitable association used exclusively for lodge purposes by said societies or associations, together with such additional adjacent land as may be necessary for the convenient use of the buildings thereon.

(7) The exemptions granted in subsections three, four, five, six and ten, of this section shall apply to real property of foreign religious, charitable, educational, literary, benevolent, patriotic or historical corporations, institutions or orders when such property is exclusively used for religious, charitable, educational or benevolent purposes within this state.

(8) The real property of Indians who are not citizens, except lands held by them by purchase.

(9) Real property falling within the provisions of § 55-11, appropriated exclusively for public parks and drives.

(10) Real property actually used for hospital purposes, including homes for nurses employed by or in training in such hospitals, held for or owned by hospitals organized and operated as non-stock, non-profit, charitable institutions, without profit to the members or their successors, notwithstanding that patients able to pay are charged for services rendered: Provided, all revenues or receipts of such hospitals shall be used, invested, or held for the purposes for which they are organized; and provided, further, that where hospital property is used partly for such hospital purposes and partly rented out for commercial and business purposes, then only such proportion of the value of such building and the land on which it is located shall be exempt from taxation as is actually used for such hospital purposes. The provisions of this section shall be effective as to taxes for the year one thousand nine hundred and thirty-six and subsequent years. (1939, c. 310, s. 600; 1941, c. 125, ss. 1, 2; 1943, c. 634, s. 2.)

Cross References.—As to extent of power of the legislature to exempt, see note of United Brethren v. Forsyth County Com'rs, 115 N. C. 489, 20 S. E. 626, under N. C. Const., Art. V, § 5. As to the use to which property devoted being controlling, see note of State v. Oxford Seminary Const. Co., 160 N. C. 582, 76 S. E. 640, under N. C. Const., Art. V, § 5.

Editor's Note.—The 1941 amendment added subsection (11) and inserted reference thereto in subsection (8). For comment on this amendment, see 19 N. C. Law Rev. 520.

The 1943 amendment rewrote subsection (1) and struck out former subsection (7). It also struck out the words "or the income therefrom is exclusively used for" formerly appearing after the word "for" in line six of subsection (7).

By an interpretation of Michie's Code of 1935, § 7971(17) which some thought to be unnecessarily literal, the court had held foreign eleemosynary corporations deprived of the exemptions otherwise granted to such organizations on property used in their work in the state. Catholic Soc. v. Gentry, 210 N. C. 579, 187 S. E. 795. The exemptions are now granted in specific terms by subsection (7) of this and the following section. 15 N. C. Law Rev. 391.

For article on exemption of property owned by the state and municipal corporations, see 16 N. C. Law Rev. 309.

Property Used for Religious, Charitable, etc., Purposes.—It is fundamental that the property of these institutions, to be exempt, must be used exclusively for the purposes enumerated, Southern Assembly v. Palmer, 166 N. C. 75, 82 S. E. 18, and the rents arising from such property must be so applied. Id. See also, United Brethren v. Commissioners, 115 N. C. 489, 20 S. E. 626.

The former exemptions contained in subsection (7), though broad enough in their terms to exempt business property owned by an educational institution and rented for offices and business purposes to private enterprises, the net profit derived therefrom being devoted exclusively to educational purposes, they were, when applied to the facts, beyond the scope of the constitutional grant of permissive power of exemption contained in Art. V, § 5 of the Constitution, and therefore the property was subject to ad valorem assessment and taxation. Rockingham County v. Board of Trustees, 219 N. C. 342, 13 S. E. (2d) 618.

Plaintiff association was empowered by its charter inter alia to hold real estate provided the profits therefrom, if any, were used for the benefit of widows and orphans of deceased members or for such charitable and benevolent purposes as it deemed necessary or expedient to the successful prosecution of its charter provisions. During the years 1934 through 1939 it owned a building in which it maintained its lodge rooms and rented the remainder of the building for use as offices and stores on the basis of a commercial enterprise and used the entire rents therefrom for repairs and the payment of the mortgage indebtedness on the building. Held: Since the building is held for business or commercial purposes it is subject to the assessment of ad valorem taxes of the city and county in which it is situate for the years in question. Sir Walter Lodge, etc. v. Swain, 217 N. C. 632, 9 S. E. (2d) 365.

Same—Income from Solvent Credits.—The income from the solvent credits held by a religious society, if devoted and applied exclusively to educational, religious and charitable purposes, are exempt from taxation. United Brethren v. Commissioners, 115 N. C. 489, 20 S. E. 626.

Subsection eleven was made retroactive. Piedmont Memorial Hospital v. Guilford County, 221 N. C. 308, 314, 20 S. E. (2d) 332.

Property of Hospital Not Exempt.—The property of a hospital organized as a business corporation and charging all patients according to a fixed schedule is not exempt from taxation, under this section or those immediately following, although patients unable to pay were relieved of payment and classed as charity patients, and although its stockholders, though not waiving their right to dividends, did not expect to receive dividends when they subscribed for stock, and no dividends were paid thereon for the years for which taxes were assessed, the hospital not being a charitable corporation, nor its property used entirely for charitable purposes. Salisbury Hospital v. Rowan County 205 N. C. 8, 169 S. E. 805.

Land Adjacent to Church.—A lot purchased by trustees of a church for the purpose of erecting a new church, and pending the accumulation of sufficient funds to erect the new church, used exclusively for religious purposes, is properly adjacent to the church property and reasonably necessary for the convenient use of the church property within the meaning of subsection (3) exempting such property from taxation, even though the lot purchased, because of unavailability of adjoining land, is four or five blocks distant from the church, the word "adjacent" meaning lying close to-

gether but not necessarily in contact. Harrison v. Guilford County, 218 N. C. 718, 12 S. E. (2d) 269.

Cited in Madison County v. Catholic Society of Religious, etc., Education, 213 N. C. 204, 195 S. E. 354; Guilford College v. Guilford County, 219 N. C. 347, 13 S. E. (2d) 622.

§ 105-297. Personal property exempt.—The following personal property, and no other, shall be exempt from taxation:

(1) Personal property, directly or indirectly owned by this state and by the United States, and that lawfully owned and held by the counties, cities, towns, and school districts of the state, used wholly and exclusively for county, city, town, or public school purposes.

(2) The furniture and furnishings of buildings lawfully owned and held by churches or religious bodies, wholly and exclusively used for religious worship or for the residence of the minister of any church or religious body, and private libraries of such ministers and the teachers of the public schools of this state.

(3) The furniture, furnishings, books, and instruments contained in buildings wholly devoted to educational purposes, belonging to and exclusively used by churches, public libraries, colleges, academies, industrial schools, seminaries, or other institutions.

(4) The endowment and invested funds of churches and other religious associations, charitable, educational, literary, benevolent, patriotic or historical institutions, associations or orders, when the interest or income from said funds shall be used wholly and exclusively for religious, charitable, educational or benevolent purposes, or to pay the principal or interest of the indebtedness of said associations.

(5) Personal property belonging to Young Men's Christian Associations and other similar religious associations, orphan and other similar homes, reformatories, hospitals, and nunneries which are not conducted for profit and entirely and completely used for charitable and benevolent purposes.

(6) The furniture, furnishings, and other personal property belonging to any American Legion, or Post of American Legion, patriotic, historical, or any benevolent or charitable association, when used wholly for lodge purposes and meeting rooms by said association or when such personal property is used for charitable or benevolent purposes.

(7) The exemptions granted in subsections two, three, four, five, six and eleven of this section shall apply to personal property of foreign religious, charitable, educational, literary, benevolent, patriotic or historical corporations, institutions or orders when such property is exclusively used or the income therefrom is exclusively used for religious, charitable, educational or benevolent purposes within this state.

(8) Wearing apparel, household and kitchen furniture, the mechanical and agricultural instruments of farmers and mechanics, libraries and scientific instruments, provisions and live stock, not exceeding the total value of three hundred dollars ($300.00), and all growing crops: Provided, that said three hundred dollars ($300.00) exemption shall be limited to: (1) each household, consisting of the head of the household and all the dependents, one three hundred dollars ($300.00) exemption to be distributed among the members of the household as they see fit; and (2) each single person, not residing with persons on whom he is dependent, as to eligible property actually owned by him.

(9) The intangible personal property referred to in Schedule H, §§ 105-198 to 105-217, which said intangible personal property shall be taxed or exempt in accordance with the provisions of said Schedule H, §§ 105-198 to 105-217: Provided, that the provisions of this subsection shall not be construed to modify the provisions of Article 25 or Article 26 of this subchapter.

(10) Tangible personal property held at any seaport destined for and awaiting foreign shipment.

(11) The furniture, furnishings, books, instruments, and all other tangible or intangible personal property held for or owned by hospitals organized and operated as non-stock, non-profit, charitable institutions, notwithstanding that patients of such hospitals able to pay are charged for services rendered: Provided, all revenues or receipts of such hospitals shall be used, invested, or held for the purposes for which they are organized. The provisions of this section shall be effective as to any assessment for taxes for the year one thousand nine hundred and thirty-six and subsequent years.

(12) All cotton, tobacco or other farm products owned by the original producer, or held by the original producer in any public warehouse and represented by warehouse receipts, or held by the original producer for any cooperative marketing or grower's association, shall be exempt from taxation for the year following the year in which grown, but not for any year thereafter. (1939, c. 310, s. 601; 1941, c. 125, ss. 3, 4; 1941, c. 221, s. 2.)

Editor's Note.—The first 1941 amendment added subsection (11) and inserted reference thereto in subsection (7). The second 1941 amendment added subsection (12).

For comment on the 1941 amendment, see 19 N. C. Law Rev. 523.

It may be questioned whether postal savings are not a federal governmental instrumentality immune from state taxation. However, the postal savings system seems more of a business function than a governmental function. See 11 N. C. Law Rev., 260.

School bonds of a city in this state in the hands of an investor residing in a county in this state held not subject to be locally assessed for taxation. Mecklenburg County v. Piedmont Fire Ins. Co., 210 N. C. 171, 178, 185 S. E. 654, construing former § 7971(19), which was similar to the instant section.

Hospital Property.—Where plaintiff's hospital was organized solely for charity but collected from patients able to pay, and defendant county levied personal property taxes on plaintiff's hospital beds, equipment and furnishings, only the personal property used exclusively for charitable purposes is exempt from taxation under subsection (5). Piedmont Memorial Hospital v. Guilford County, 218 N. C. 673, 12 S. E. (2d) 265.

Cited in Madison County v. Catholic Society of Religious, etc., Education, 213 N. C. 204, 195 S. E. 354.

§ 105-298. Deductions and credits.—(a) Private hospitals shall not be exempt from property taxes and other taxes lawfully imposed, but in consideration of the large amount of charity work done by them, the boards of commissioners of the several counties are authorized and directed to accept, as valid claims against the county, the bills of such hospitals for attention and services voluntarily rendered to afflicted or injured residents of the county who are indigent and likely to become public charges, when such bills are duly itemized and sworn to and are approved by the county physician or health officer as necessary or proper;

and the same shall be allowed as payments on and credits against all taxes which may be or become due by such hospital on properties strictly used for hospital purposes, but to that extent only will the county be liable for such hospital bills: Provided, that the board of aldermen or other governing boards of cities and towns shall allow similar bills against the municipal taxes for attention and services voluntarily rendered by such hospitals to paupers or other indigent persons resident in any such city or town: Provided further, that the governing boards of cities and towns shall require a sworn statement to the effect that such bills have not and will not be presented to any board of county commissioners as a debt against that county, or as a credit on taxes due that county. The provisions of this subsection shall not apply to public hospitals or to hospitals organized and operated as non-stock, non-profit, charitable institutions, which, for the purposes of this subchapter, shall be deemed public hospitals: Provided, however, that nothing in this subsection shall affect the liability of counties, cities, and towns to public hospitals, as herein defined, for services heretofore or hereafter rendered indigent patients or public charges and for which such counties, cities, or towns are or may be otherwise liable.

(b) All bona fide indebtedness incurred in the purchase of fertilizer and fertilizer materials owing by a taxpayer as principal debtor may be deducted from the total value of all fertilizer and fertilizer materials as are held by such taxpayer for his own use in agriculture during the current year: Provided, further, that from the total value of cotton stored in this state there may be deducted by the owner thereof all bona fide indebtedness incurred directly for the purchase of said cotton and for the payment of which the cotton so purchased is pledged as collateral. (1939, c. 310, s. 602; 1941, c. 125, s. 5, c. 221, s. 3.)

Local Modification.—Buncombe, Rockingham: 1939, c. 310, s. 602.

Editor's Note.—The first 1941 amendment inserted the next to the last sentence in subsection (a). The second 1941 amendment changed subsection (b).

Amendment Prospective. — The 1941 amendment which provides that this section should not apply to nonprofit hospitals is prospective in effect and not retroactive. Piedmont Memorial Hospital v. Guilford County, 221 N. C. 308, 20 S. E. (2d) 332.

Plaintiff hospital instituted suit to recover ad valorem taxes for the year 1940, paid by it under protest. On appeal it was held that the hospital was liable for taxes for that year, and final judgment was entered in accordance therewith. Thereafter the hospital, upon the same agreed facts, instituted suit to recover the same taxes, upon its contention that the 1941 amendment exempted its property from taxation retroactively. It was held that the act of 1941, insofar as the status of plaintiff hospital for taxes for the year 1940 was concerned, was an attempt to annul the effect of a final judgment, and was unconstitutional and void. Id.

It contains no provision authorizing refund of taxes theretofore paid by such hospitals nor machinery for the recovery of such taxes, and therefore a hospital which paid real property taxes for 1940 under protest and unsuccessfully sued for their recovery under § 7880(194) is not empowered by the act of 1941 to maintain another suit for the recovery of the same taxes. Piedmont Memorial Hospital v. Guilford County, 221 N. C. 308, 20 S. E. (2d) 332.

Real Property of Private Hospitals Controlled by Section.—The real property of private hospitals is made a separate and distinct classification under subsection (a) of this section and it is the legislative intent that the provisions of this section should control rather than the provisions of § 105-296, subsection (7), exempting from taxation property of churches, religious societies and charitable institutions and orders, the language of said subsection (7), strictly construed, not being sufficiently broad to include property of private hospitals in view of the fact that subsection (a) specifically deals with property of such institutions. Piedmont Memorial Hospital v. Guilford County, 218 N. C. 673, 12 S. E. (2d) 265.

Use of Building.—Where the first floor of plaintiff's building is rented out for stores and shops, the second floor is rented for offices for physicians and surgeons, the third and fourth floors are used for a hospital, as to the first two floors, the general assembly is without authority to grant any exemption from taxation, and as to the third and fourth floors, subsection (a) is applicable, and in accordance with its provisions, bills for services rendered the indigent poor may be allowed as a credit on taxes levied against this part of its property, but it is not exempt from taxation. Piedmont Memorial Hospital v. Guilford County, 218 N. C. 673, 12 S. E. (2d) 265.

Distinction between Private and Public Hospitals.—In determining the question of exemption from taxation, a nonprofit hospital established solely for charitable purposes through individual donations and which is governed by a self-perpetuating board of trustees named by the incorporators, is a private hospital as contradistinguished from a public hospital, which is one supported, maintained and controlled by public authority, and the distinction observed between charitable hospitals and those operated for gain or profit in determining liability for negligence, has no bearing in determining the question of tax exemption. Piedmont Memorial Hospital v. Guilford County, 218 N. C. 673, 12 S. E. (2d) 265.

§ 105-299. Article subordinate to sections 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 603.)

Art. 17. Real Property—Where and in Whose Name Listed.

§ 105-300. Place for listing real property.—All real property subject to taxation, and not hereinafter required to be assessed originally by the state board of assessment, shall be listed in the township or place where such property is situated. (1939, c. 310, s. 700.)

§ 105-301. In whose name real property to be listed; information regarding ownership; permanent listing.—(1) Except as hereinafter specified, real property shall be listed in the name of its owner; and it shall be the duty of the owner to list the same. To this end the board of county commissioners in any county may require the register of deeds, when any transfer of title is recorded, other than a mortgage or deed of trust, to certify the same to the supervisor (or if there be no supervisor acting at the time, to the person in charge of the tax records), and the record of the transfer shall be entered upon the tax records. The certification from the register to the supervisor or other person shall include the name of the person conveying the property, the name of the person to whom it is conveyed, the township in which the property is situated, a description of the property sufficient to identify it, and a statement as to whether the parcel is conveyed in whole or in part. For his services in this respect the register shall be allowed, if on fees, the sum of ten cents (10c) per transfer certified, to be paid by the county, and if on salary, such allowance as may be made by the board of commissioners.

It shall also be within the power of any board of commissioners, in its discretion, to require that each person recording such conveyance of real property shall, before presenting it to the register

of deeds, present it to the person in charge of the tax records, in order that the conveyance may be noted on the tax records and in order that adequate information concerning the location of the property may be obtained from the person recording the conveyance. If such presentation is required by the commissioners of any county, the register of deeds of that county shall not accept for recording any conveyance which has not first been submitted to the person in charge of the tax records and such person has obtained information for the tax records which he regards as satisfactory. The commissioners may allow the person in charge of the tax records such compensation for this service as they deem appropriate, but they shall not require the person presenting the deed to pay any fee therefor.

It shall also be within the power of the commissioners to authorize the installation of a system for the permanent listing of real estate, under which all real estate may be carried forward by the supervisor, the list takers or some person or persons designated by the supervisor, in the name of the proper person as defined by this subchapter, without requiring that such real estate be listed each year by such person. No such system shall be installed without the approval of the state board of assessment; and when such a system is installed, with the approval of the board, the board may authorize the commissioners to make such modifications of the listing requirements of this subchapter as the board may deem necessary: Provided, that nothing herein shall require the board's approval for any such system installed prior to April 3, 1939.

Any county may, in the discretion of the commissioners, require that all real estate be listed only in the name of the owner of record at the close of the day as of which property is listed and assessed.

(2) For purposes of tax listing and assessing, the owner of the equity of redemption in any property which is subject to a mortgage or deed of trust shall be considered the owner of such real estate.

(3) Real property of which a decedent died possessed, not under the control of an executor or administrator, may be assessed to the heirs or devisees of the deceased without naming them until they have given notice of their respective names to the supervisor and of the division of the estate. It shall be the duty of any executor or administrator having control of real property to list it in his fiduciary capacity until he shall have been divested of control of such property. The right of an administrator, administering upon the estate of an intestate decedent, to petition for the sale of real estate to make assets shall not be considered as control of such real estate for purposes of this subdivision.

(4) A trustee, guardian or other fiduciary having legal title to real property shall be regarded as the owner of such property for purposes of tax listing, except as elsewhere in this section provided, and he shall list such property in his fiduciary capacity.

(5) Where undivided interests in real property are owned by tenants in common, not being copartners, the supervisor, upon request and in his discretion, may allow the property to be listed by the respective owners in accordance with their respective undivided interests.

(6) Real property belonging to a partnership or unincorporated association shall be listed in the name of such partnership or association.

(7) Real property owned by a corporation shall be listed in the name of the corporation.

(8) When land is owned by one party and improvements thereon or mineral, timber, quarry, water power, or similar rights therein are owned by another party, the parties may list their interests separately or may, in accordance with contractual relations between them, have the entire property listed in the name of the owner of the land. Where in such a case the land and improvements or rights are listed by the separate owners, the taxes levied on the improvements, or rights, shall be a lien on the land, and the land shall be subject to foreclosure for non-payment of such taxes in the same manner as if such taxes were levied directly against said land: Provided, nothing herein contained shall prevent said taxes from being also a lien on said improvements, or rights.

(9) A life tenant or tenant for the life of another shall be considered the owner of real property for purposes of tax listing, but he shall indicate when listing such property that he is a life tenant. The taxes levied on property listed in the name of a life tenant shall be a lien on the entire fee: Provided, that this shall not prevent the life tenant from being liable for the taxes under § 105-410.

(10) If the owner or person in whose name the real property should properly be listed, as set forth in the foregoing subdivisions of this section, is unknown, the property may be listed in the name of the occupant, and either or both shall be liable for the taxes; and if there be no occupant, then it may be listed as property the owner of which is unknown: Provided, that wherever the property is so listed against the occupant or an unknown owner, or through error the property has been listed against some person other than the owner as defined in this section, and the name of the true owner is subsequently ascertained, the tax records may be changed so as to list said property against the owner, and the change shall have the same force and effect as if the property has been listed against the owner in the first instance. (1939, c. 310, s. 701.)

In Whose Name Listed.—Land should be listed for taxation in the name of the individual owners and not in the name of the "estate" of one deceased. Morrison v. McLauchlin, 88 N. C. 251.

Same—Improper Listing as Affecting Purchaser's Title.—A tax-title devised by a purchaser at a sheriff's sale of land listed in the name of the "estate" of one deceased is defective. Morrison v. McLauchlin, 88 N. C. 251.

Cited in Bemis Hardwood Lbr. Co. v. Graham County, 214 N. C. 167, 198 S. E. 843.

Art. 18. Personal Property—Where and in Whose Name Listed.

§ 105-302. Place for listing tangible personal property.—(1) In general, all tangible personal property and polls shall be listed at the residence of the owner, except as otherwise provided in this section. For purposes of this section the residence of a person who has two or more places in which he occasionally dwells shall be the place at which he resided for the longest period of time during the year preceding the date as of which

property is assessed. The residence of a corporation, partnership or unincorporated association, domestic or foreign, shall be the place of its principal office in this state, and if a corporation, partnership or unincorporated association has no principal office in this state, its tangible personal property may be listed at any place at which said property is situated provided said property has a taxable situs within the state.

(2) Farm products produced in this state, owned by the producers, shall be listed where produced.

(3) Tangible personal property taxable in this state, owned by an individual nonresident of this state, shall be listed where situated.

(4) Subject to the provisions of subsection two of this section, tangible personal property shall be listed at the place where such property is situated, rather than at the residence of the owner, if the owner or person having control thereof hires or occupies a store, mill, dockyard, piling ground, place for the sale of property, shop, office, mine, farm, place for storage, manufactory or warehouse therein for use in connection with such property. Property stored in public warehouses and merchandise in the possession of a consignee or broker shall be regarded as falling within the provisions of this subdivision.

(5) The tangible personal property of a decedent whose estate is in the process of administration or has not been distributed shall be listed at the place at which it would be listed if the decedent were still alive and still residing at the place at which he resided at the time of his death.

(6) Tangible personal property held by a trustee, guardian or other fiduciary having legal title thereto shall be listed at the place where such property would be listed if the beneficiary were the owner; and if there are several beneficiaries in a case in which such property would be listed at the residence of the owner, the value of the property shall be listed at the various residences of the beneficiaries in accordance with their respective interests. This subdivision shall effect only cases in which the beneficiaries are residents of this state, but it shall apply whether the fiduciary is a resident or nonresident of this state. Property delivered by executors or administrators to themselves or others as testamentary trustees shall be controlled by this subsection rather than by subsection five of this section.

(7) In any case where the beneficiary is a nonresident of this state, tangible personal property having a taxable situs in this state, held by a trustee, guardian or other fiduciary having legal title, shall be listed at the place it would be listed if the trustee or other fiduciary were the beneficial owner of such property. (1939, c. 310, s. 800.)

Generally.—The rules and regulations fixed by the "Revenue Act" and the "Machinery Act" for the guidance of the officers charged with the listing and assessment of property for purposes of state taxation govern and control the action of county and other municipal officers charged with the listing and assessment of property for municipal taxation. Wiley v. Commissioners, 111 N. C. 397, 400, 16 S. E. 542 and cases there cited. The conclusion, therefore, is that the legislature has adopted a "uniform rule" which must be observed. Id.

Fixing Situs of Property.—It is for the legislature to determine the situs of personal property for purposes of taxation, and it may provide different rules for different kinds of property, change them from time to time, and the courts may not, for consideration of expediency, disregard the legislative will. Planters Bank, etc., Co. v. Lumberton, 179 N. C. 409, 102 S. E. 629.

Same—Application of Maxim Mobilia Personam Sequentur.—In Alvany v. Powell, 55 N. C. 51, Chief Justice Pearson declares that the true principle upon which to determine whether personal property is liable to be taxed, is the situs of the property, and that the distinction attempted to be made between personalty and real estate, depending upon the domicile of the owner, is based upon a fiction which has no application to questions of revenue.

Where Domicile and Residence Separate.—This section clearly makes the residence of the taxpayer the place where his personalty shall be listed. Ordinarily a person's residence is at the place of domicile, but this is not necessarily true, and where they are at separate and distinct places then he is to list his property at the place at which he has resided the greater part of the year regardless of whether such place is considered as his domicile or residence. In view of this fact it is doubtful whether or not the distinction between the two terms can ever be material with reference to this section, and this notwithstanding that the court has drawn the distinction in its reasoning in at least one case. See the decision in Roanoke Rapids v. Patterson, 184 N. C. 135, 113 S. E. 603, which turned upon the fact that the defendant had actually dwelt at one place a greater part of the year. See also Ransom v. Board, 194 N. C. 237, 139 S. E. 232, to the same effect.

Property of Corporation Taxable at Principal Office.—Where a corporation has its place of business in one town, with a part of the personal property located in another town, such property is only taxable in the town where its place of business is located. Winston v. Salem, 131 N. C. 404, 42 S. E. 889. The same is true of a partnership. Id.

Shares of Stock—Taxable at Principal Office.—The property in shares of stock in a corporation doing business outside the corporate limits of a town, and owned by persons residing therein does not follow and is not fixed by the situs of the residence of its owner, but is fixed by the legislature prescribing where and how it shall be listed and taxed, i. e., at its principal place of business. Wiley v. Commissioners, 111 N. C. 397, 16 S. E. 542.

§ 105-303. Intangible personal property.—The listing, assessing, and taxation of intangible personal properties and the administration relative thereto shall be subject to the provisions of Schedule H, §§ 105-198 to 105-217. (1939, c. 310, s. 801.)

§ 105-304. In whose name personal property should be listed.—(1) In general, personal property shall be listed in the name of the owner thereof on the day as of which property is assessed; and it shall be the duty of the owner to list the same. The owner of the equity of redemption in personal property subject to a chattel mortgage shall be considered the owner of the property; and the vendee of personal property under a conditional bill of sale, or under any other sale contract by virtue of which title to the property is retained in the vendor as security for the payment of the purchase price, shall be considered the owner of the property, provided he has possession of such property or the right to use the same.

(2) Personal property of a corporation, partnership, firm or unincorporated association shall be listed in the name of such corporation, partnership, firm, or unincorporated association.

(3) Personal property of which a decedent died possessed, not under the control of an executor or administrator, may be assessed to the next of kin or legatees of the decedent without naming them until they have given notice of their respective names to the supervisor and have likewise given notice of the distribution of the estate; and for this purpose such next of kin or legatees may be designated as "heirs." It shall be the duty of an executor or administrator having control of

such property to list it in his fiduciary capacity until he shall have been divested of such control.

(4) A trustee, guardian, or other fiduciary having legal title to personal property shall be regarded as the owner thereof for purposes of this section.

(5) In cases in which two or more persons are joint owners of personal property, each shall list the value of his interest.

(6) If any dispute shall arise as to the true owner of personal property, the person in possession thereof shall be regarded as the owner unless the list taker or supervisor shall be convinced that some other person is the true owner. (1939, c. 310, s. 802.)

§ 105-305. Article subordinate to sections 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 803.)

Art. 19. What the Tax List Shall Contain and Miscellaneous Matters Affecting Listing.

§ 105-306. What the tax list shall contain.—Each taxpayer or person whose duty it is to list property for taxation shall file with the proper list taker a tax list setting forth, as of the day on which property is assessed, the following information:

(1) The name and residence address of the taxpayer.

(2) The age of the taxpayer, if he is a male taxpayer, listing in the township of his residence.

(3) Each parcel of real property owned or controlled in the township, not subdivided into lots, together with the number of acres cleared for cultivation, waste land, woods and timber, mineral, quarry lands, and lands susceptible of development for water power, and the total acreage. Each separate parcel shall be described by name, if it has one, and by specifying at least two adjoining landowners, or by such other description as shall be sufficient to locate and identify said land by parol testimony. If all or part of such land shall lie within the boundaries of any incorporated town or any district in which a special tax is levied, such fact shall be specified.

(4) Each parcel of manufacturing property owned or controlled in the township, not subdivided into lots, together with the number of acres in said parcel or the dimensions thereof, the name of such parcel, if any, and the names of at least two adjoining land owners, or such other description as shall be sufficient to locate and identify said property by parol testimony. If all or part of such land shall lie within the boundaries of any incorporated town or any district in which a special tax is levied, such fact shall be specified.

(5) Each lot owned or controlled in the township together with the dimensions of said lot, the location of said lot, its street number, if any, its number or location on any map filed in the office of the register of deeds or such other description as shall be sufficient to locate and identify it by parol testimony. If any such lot shall lie within the boundaries of an incorporated town or any district in which a special tax is levied, such fact shall be specified.

(6) In conjunction with the listing of any real property listed under subdivisions (3), (4), or (5) of this section, a short description of any improvements thereon, belonging to the taxpayer listing such real property, shall be given. And if some person other than the taxpayer listing such real property shall own mineral, quarry, timber, water power or other separate rights with respect thereto, or shall own any improvements thereon, such fact shall be specified, together with the name of the person owning such rights or improvements, and a short description of such rights or improvements; though the owner of the land may or may not list such separate rights or improvements for taxes in accordance with the provisions of this subchapter.

(7) All mineral, quarry, timber, water power or other separate rights owned by the taxpayer with respect to the lands of another, and all improvements owned by such taxpayer located upon the lands of another. Such rights or improvements shall be listed separately with respect to each parcel or lot of land which is listed separately by the owner thereof, and such parcel or lot shall be identified in the same manner as it is identified on the tax list of the person listing the same: Provided, that such rights or improvements shall not be taxed against the owner thereof if, under the provisions of this subchapter, they are listed for taxes by the owner of the land.

(8) Every person listing real property shall list, in connection with each parcel or lot, every encumbrance thereon, together with the amount due on such encumbrance and the name and address of the person to whom such amount is due.

(9) The amount and value of all machinery and fixtures.

(10) A special description of any improvements, having a value in excess of one hundred dollars ($100.00), which have been begun, erected, damaged or destroyed since the time of the last assessment of such property.

(11) A list of horses, mules, jacks and jennets, cattle, hogs, sheep, goats and other live stock, poultry and dogs, with the number and value of each class shown separately.

(12) The number of open female dogs and the number of other dogs.

(13) The amount and value of farm machinery, farm utensils, and carriages, carts, wagons, buggies, or other vehicles and harness.

(14) The amount and value of household and kitchen furniture, libraries, scientific instruments, tools of mechanics, wearing apparel, and provisions of all kinds.

(15) The amount and value of merchandise, manufactured goods, or goods in the process of manufacture. This subdivision is intended to include all tangible personal property whatever held for the purpose of sale or exchange or held for use in the business of the taxpayer.

(16) The amount and value of all office furniture, fixtures and equipment.

(17) The number and value of all motor vehicles, tractors, trailers, bicycles, flying machines, pleasure boats of any and all kinds, and their appliances.

(18) The number and value of all seines, nets, fishing tackle, boats, barges, schooners, vessels, and all other floating property.

(19) The number and value of billboards and

signboards and the value of other property used in outdoor advertising.

(20) The number and value of radios, talking machines and musical instruments.

(21) The value of plated or silverware, clocks, watches, firearms and jewelry.

(22) The amount and value of all cotton, tobacco or other farm products owned by the original producer, or held by the original producer in any public warehouse and represented by warehouse receipts, or held by the original producer for any cooperative marketing or grower's association, together with a statement of the amount of any advance against said products: Provided, the same need not be listed if grown in the preceding year, and shall not be subject to taxation for the year following the year in which grown, but shall be listed and taxed for any year thereafter.

(23) The amount and value of all other cotton, tobacco or other farm products.

(24) The amount and value of all fertilizer and fertilizer materials.

(25) The value and a description of all other property whatever, not especially exempted by law.

(26) An itemized list of any type of personal property when such itemization is required by the list taker or supervisor.

(27) A statement setting forth a list of license taxes for which the person, firm or corporation listing may be liable to the state under the provisions of Schedule "B", §§ 105-33 to 105-113; and also a statement of liability for tax on intangible personal property owned.

(28) The oath of the taxpayer hereinafter set forth. (1939, c. 310, s. 900; 1941, c. 221, s. 1.)

Editor's Note.—The 1941 amendment added the proviso to subsection (22).

Compliance with Statutory Procedure Essential. — The listing of property must be done in the manner prescribed by this section. Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337. This means that the listing must be done by the owner or by his duly accredited agent in cases where listing by an agent is permissible. Stone v. Phillips, 176 N. C. 457, 97 S. E. 375.

Listing by Guardian or Executor.—Where a testator appointed executors of his will who were also therein named as trustees for certain beneficiaries, who in May of a certain year moved to another town, after the matters of executorship had been closed, leaving those of the trusteeship continuing, it was held, the personal property should have been listed at the place of residence of the beneficiaries in June of that year; and the taxes not having been listed at all, it was proper for the commissioners of the town of residence of the beneficiaries to cause the personalty to be listed there and impose the penalty prescribed by former section 7924. Smith v. Dunn, 160 N. C. 174, 76 S. E. 242.

Funds in Custodia Legis—Listing by Clerk.—The clerk of the court is both a "receiver" and "accounting officer" of funds paid into his hands in the course of litigation, within the meaning of the statute, and thereunder should properly list such funds for taxation on May first of each year, when no adjudication as to the rightful owners has been made. Edgecombe County v. Walston, 174 N. C. 55, 93 S. E. 460.

Time of Making List.—Property can be listed for taxation only in the year, and for the year, in which taxes are due. North Carolina R. Co. v. Commissioners, 77 N. C. 4; Johnson v. Royster, 88 N. C. 194.

Sufficiency of Description.—The listing of land as a certain number of acres lying in a named township is too vague to support a valid assessment, the land being insufficiently described. Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337.

Same—As between Taxpayer and Purchaser.—A description on a tax list made under the direction of the taxpayer in the words, "Tax list in No. 2 township, C. county, for the year 1893," was held sufficient, as between the taxpayer and a purchaser of his land at a tax sale, where it was the only land owned by the former in the townships. Fulcher v. Fulcher, 122 N. C. 101, 29 S. E. 91.

Under the Act of 1784 if the owner fails to attend at the time and place appointed to receive the lists of taxable property, the justice may make out a list for himself to the best of his knowledge. Tores v. Justices, 6 N. C. 167.

Where land, listed in the name of one person, belonging to another, has been sold for unpaid taxes and it is discovered, before the deed has been accepted, that the real owner has not listed it as required by this section, the deed is insufficient to pass title, for the methods provided by this section must be followed. Wake County v. Faison, 204 N. C. 55, 167 S. E. 391.

An amount set apart by a mutual insurance company as a reserve for the rebate of unearned premiums to its policyholders upon cancellation of policies in accordance with its by-laws is properly deducted by the insurance company in listing its solvent credits for taxation. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N. C. 69, 185 S. E. 449, construing former § 7971(46), now repealed.

§ 105-307. Duty to list; penalty for failure.— It shall be the duty of every person, firm or corporation, in whose name any property or poll is to be listed under the terms of this subchapter, to list said property or poll with the proper list taker or the supervisor, within the time allowed by law, on a list setting forth the information required by this subchapter. In addition to all other penalties prescribed by law, any person, firm or corporation whose duty it shall be to list any poll or property, real or personal, who willfully fails, refuses or neglects to list the same within the time allowed by law, or who removes or conceals property for the purpose of evading taxation, shall be guilty of a misdemeanor; and any person, firm or corporation aiding or abetting the removal or concealment of property for the purpose of evading taxation shall be guilty of a misdemeanor. The failure to list shall be prima facie evidence that such failure was wilful, and the board of county commissioners shall present the names of all such persons, firms and corporations to the grand jury. (1939, c. 310, s. 901.)

Failure to List Solvent Credits.—The failure to list solvent credits does not destroy the cause of action, but postpones recovery thereon until they are listed and the tax thereon is paid; this is because the statute does not make the failure to list an absolute bar to their recovery. Martin v. Knight, 147 N. C. 564, 61 S. E. 447. The court said: "It was not the purpose of the legislature to release the debtor for failure to list by the creditor, but to postpone the recovery of the debt, if subject to taxation, until the tax is paid."

Subsection 3 of this section will not be construed to work a forfeiture, and does not prevent a recovery on evidence of debt not listed, but postpones the recovery of judgment thereon until listed and the taxes paid, and where in an action on a note this defense is pleaded, the trial court has the power to allow the plaintiff to list it and pay taxes thereon during the trial and give judgment. Wooten v. Bell, 196 N. C. 654, 146 S. E. 705.

Same—How Pleaded.—Unless the failure to list a note and due bill for taxation, "with a view to evade the payment of taxes thereon," is pleaded, it may not be made the subject of an issue. Martin v. Knight, 147 N. C. 564, 61 S. E. 447. Whether or not this is an affirmative defense which must be set up in the answer or whether it may be taken advantage of upon the general denial is left undecided.

Payment into Court.—The amount of taxes due upon solvent credits may be paid into court, Corey v. Hooker, 171 N. C. 229, 232, 88 S. E. 236, and when this is done it permits the party to proceed to judgment. Hyatt v. Holloman, 168 N. C. 386, 84 S. E. 407.

A possessory action to recover a horse secured by chattel mortgage, brought by the assignee of the mortgage note against one to whom the mortgagee had sold the horse, is not an action upon the note upon which the statute requires that the taxes be given in and paid before the owner may be permitted to sue thereon. Hyatt v. Holloman, 168 N. C. 386, 84 S. E. 407.

A former statute which made it a misdemeanor for "any person to evade the payment of taxes by surrendering or exchanging certificates of deposit in any bank of this State or elsewhere for nontaxpaying securi-

ties" did not apply to the purchase before the tax listing date of nontaxable United States or State bonds by funds subject to taxation, and thereafter selling the bonds and redepositing the amount, when the transaction was made in good faith and the bonds were bought and sold on the open market and the title thereto passed absolutely in both transactions, and the purchaser of the bonds could not be taxed on the purchase price. Trust Co. v. Nash County, 196 N. C. 704, 146 S. E. 861.

§ 105-308. Oath of the taxpayer.—Before accepting any completed tax list, it shall be the duty of the list taker to read and actually to administer the following oath (or so much thereof as may be pertinent) which shall be subscribed by the person filing the list:

"I, ..., do solemnly swear (or affirm) (that I am an officer or agent of the taxpayer named on the attached list, that as such I am duly authorized to submit said list, that I am familiar with the extent and value of all said taxpayer's property subject to taxation in this township) that the above and foregoing list is a full, true and complete list of all and each kind of property which it is the duty of the above named taxpayer to list as owner or fiduciary, as said list indicates, in ..... Township, ... County, North Carolina; and that I have not in any way connived at the violation or evasion of requirements of law in relation to the assessment of property; so help me, God.

....."

(Signature)

So much of the foregoing oath as appears in the second parentheses shall be used only in cases in which the list is submitted by an officer or agent. Any list taker who accepts a list without administering said oath shall be guilty of a misdemeanor. (1939, c. 310, s. 902.)

§ 105-309. Listing by agents. — Corporations, partnerships, firms and unincorporated associations, females, nonresidents of the township in which the property is to be listed, and persons physically unable to attend and file a list may have their lists submitted and sworn to by an officer or agent; but the list shall be filed in the name of the principal. (1939, c. 310, s. 903.)

Editor's Note.—As to irregularity in listing taxes by agent as affecting tax sales, see Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337.

§ 105-310. Listing by mail.—All tax lists submitted by mail must be accompanied by the oath of the taxpayer, as prescribed in this subchapter, duly sworn to before a notary public or other officer authorized to administer oaths, and must be mailed to the supervisor. The supervisor may accept or reject any such list in his discretion. (1939, c. 310, s. 904.)

§ 105-311. Length of the listing period; preliminary work.—Tax listing shall begin on the day as of which property is assessed (or on the first business day thereafter if said day is a Sunday or a holiday) and shall continue for thirty days. The board of county commissioners of any county may extend the time for listing for not more than an additional thirty days: Provided, that in years of quadrennial assessment the board of county commissioners may extend the time for listing for not more than an additional sixty days.

Nothing in this section shall be construed to prevent any preparatory work, prior to the beginning of listing, which may be necessary or expedient in connection with an efficient listing or assessing of property; nor shall it prevent the assessment of real property by the list takers prior to the actual time at which it is listed by its owner or carried forward on the tax records: Provided, that no final assessment shall be made by a list taker prior to the day as of which property is required by law to be assessed. (1939, c. 310, c. 905.)

§ 105-312. Records of tax exempt property.—The person making up the tax records shall enter, in regular order, the name of the owner, a clear description of all real and personal property exempt from taxation, together with a statement of its value, for what purpose used, and the rent, if any, obtained therefrom. Each list taker shall secure the necessary information with respect to such property in his township. The list of such exempt property, when completed, shall be delivered by the county supervisor of taxation to the register of deeds of the county on or before the first day of October, and the register of deeds, on or before the first day of November, shall make duplicates thereof and transmit such duplicates to the state board of assessment and shall file the original list of exempt property in his office. (1939, c. 310, s. 906.)

§ 105-313. Forms for listing and assessing property.—All forms and books used in the listing and assessing of property for taxation shall have the approval of the state board of assessment. The board may, in its discretion, design and prescribe such forms and make arrangements for their purchase and distribution through the division of purchase and contract, the cost of same being billed to the counties. (1939, c. 310, s. 907.)

§ 105-314. Article subordinate to sections 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 908.)

§ 105-314.1. Certain new motor vehicles in dealers' stock may be assessed at reduced value during war.—While the existing state of war continues between the United States and any foreign nation, any dealer in motor vehicles who has in stock on January first a new model motor vehicle, the sale of which is subject to priorities, rationing and restrictions by federal government regulations on account of the war, shall be classified as war restricted motor vehicles and the governing bodies of the tax assessing units of the several counties are hereby authorized in their discretion to assess same for taxation at a reduced value. (1943, c. 81.)

Art. 20. Special Provisions Affecting Motor Vehicle Owners, Warehousemen, etc.

§ 105-315. Information to be given by motor vehicle owners applying for license tags.—Every motor vehicle owner applying to the state department of motor vehicles for motor vehicle license tags shall specify in the application the county in which each such motor vehicle is subject to ad valorem taxation. If any such vehicle is not subject to ad valorem taxation in any county of this state, such fact, with the reason therefor,

shall be stated in the application. No state license tags shall be issued to any applicant until the requirements of this subdivision have been met. The commissioner of motor vehicles shall, upon request from any county, send to the supervisor of such county a list of motor vehicles subject to ad valorem taxation in such county as shown by the commissioner's records of applications filed during the year preceding the day as of which property is to be assessed, and shall charge the county the sum of thirty cents (30c) per hundred names for the same, said amount to be used by the commissioner as compensation for the preparation of said list. (1939, c. 310, s. 1000; 1941, c. 36, s. 4.)

§ 105-316. Warehouses and co-operative growers' or marketing associations to furnish lists.—(1) Every warehouse company or corporation and every growers' or marketing association receiving for storage cotton, tobacco or other products, commodities or property, and issuing warehouse receipts for same, shall, on the day as of which property is assessed, furnish to the supervisor of the county in which such property is stored a full and complete list of all persons, corporations, partnerships, firms or associations for whom such property is stored, except in cases in which farm produce is stored for its original producer who is a resident of another county in this state, together with the amount of such property stored for each owner and the amount advanced against such property by the warehouse or association. In all cases in which farm produce is stored for its original producer, who is a resident of another county in this state, the names of such producers shall be sent to the supervisors of the respective counties in which such producers reside, together with the amount of such produce stored for them and the amount advanced against such produce by the warehouse or association.

(2) Warehouse companies and corporations and growers' and marketing associations shall not be liable for taxation on the property stored with them by others, provided lists of the owners and amounts of such property are furnished to the respective supervisors under the provisions of subdivision (1) of this section. If such lists are not so furnished within fifteen days after the day as of which property is assessed, such warehouse or association shall be liable to the respective counties for the tax upon the full value of such property; and if failure to furnish such list is continued for ten days after demand for same by the supervisor of any county, such warehouse or association shall be liable for a penalty of two hundred fifty dollars ($250.00), in addition to the taxes, to be recovered by the proper county in an action in the superior court, and both tax and penalty may be recovered in the same action. (1939, c. 310, s. 1001.)

§ 105-317. Reports by consignees and brokers.—Every person, corporation, partnership, or unincorporated association in possession of property on consignment, and all brokers dealing in tangible personal property who have in their possession such property belonging to others, shall file with the supervisor of taxation of the county in which such property is located a full and complete list of the owners of such property, together with the amount of such property owned by each: Provided, that if such property is farm produce owned by the original producer, who is a resident of this state, the name of the owner and the amount of such property shall be reported to the supervisor of the county of which such owner is a resident. Consignees and brokers failing to make such reports shall be liable to payment of the tax, and a penalty of two hundred fifty dollars ($250.00), in the same manner and under the conditions set forth in subdivision (2) of § 105-316. (1939, c. 310, s. 1002.)

§ 105-318. Private banks, bankers, brokers and security brokers.—Every bank (not incorporated), banker, broker or security broker, at the time fixed by this subchapter for listing and assessing all real and personal property, shall make out and furnish to the list takers and assessors a sworn statement showing:

(1) The amount of property on hand and in transit.

(2) The amount of funds owned in the hands of other banks, bankers or brokers.

(3) The amount of checks or other cash items, the amount of which is not included in either of the preceding items.

(4) The amount of bills receivable, discounted or purchased, bonds and other credits due or to become due, including interest receivable and accrued, but not due, and interest due and unpaid.

(5) All other property appertaining to said business, other than real estate, which real estate shall be listed under this subchapter.

(6) The amount of deposits made with them by any other person, firm or corporation.

(7) The amount of all accounts payable, other than current deposit accounts. (1939, c. 310, s. 1003.)

§ 105-319. Persons, firms, banks and corporations dealing in securities on commission taxed as a private banker.—No person, bank, or corporation, without a license authorized by law, shall act as a stockbroker or private banker. Any person, bank, or corporation that deals in foreign or domestic exchange, certificates of debt, shares in any corporation or charter companies, bank or other notes, for the purpose of selling the same or any other thing for commission or other compensation, or who negotiates loans upon real estate securities, shall be deemed a security broker. Any person, bank, or corporation engaged in the business of negotiating loans on any class of security or in discounting, buying or selling negotiable or other papers or credits, whether in an office for the purpose or elsewhere, shall be deemed to be a private banker. Any person, firm, or corporation violating this section shall pay a fine of not less than one hundred nor more than five hundred dollars for each offense. (1939, c. 310, s. 1004.)

§ 105-320. Partnerships; liability of partners for tax.—For the purpose of listing and assessing property, a copartnership shall be treated as an individual, and its property, real and personal, shall be listed in the name of the firm. Each partner shall be liable for the whole tax. (1939, c. 310, s. 1005.)

§ 105-321. Article not to be construed in conflict with sections 105-198 to 105-217.—None of the provisions contained in any of the sections of this

article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 1006.)

Art. 21. Procedure Subsequent to the Close of the Tax Listing Period.

§ 105-322. Review of abstracts by supervisor and list takers.—After the close of the list taking period, and not later than the first meeting of the board of equalization and review, the supervisor shall examine the abstracts turned in by each list taker, and, unless he is satisfied that said list taker has satisfactorily performed the duties of a list taker, shall not approve payment of any compensation to said list taker.

The supervisor shall meet with each of the list takers not later than the first meeting of the board of equalization, for the purpose of reviewing the abstracts generally to ascertain if the same scales of value have been used in all townships in the county, and if property has been listed at the valuation prescribed by law. (1939, c. 310, s. 1100.)

§ 105-323. Making up the tax records.—The list takers for their respective townships, or such other persons as the commissioners may designate, shall make out, on forms approved by the state board of assessment, tax records which may consist of a scroll designed primarily to show tax valuations and a tax book designed primarily to show the amount of taxes or may consist of one record designated to show both valuations and taxes. Such records for each township shall be divided into four parts: (1) White individual taxpayers (including lists filed by corporate fiduciaries for white individual beneficiaries); (2) colored individual taxpayers (including lists filed by corporate fiduciaries for colored individual beneficiaries); (3) Indian individual taxpayers (including lists filed by corporate fiduciaries for Indian individual beneficiaries); and (4) corporations, partnerships, business firms and unincorporated associations. Such records shall show at least the following information:

(a) The name of each person whose property is listed and assessed for taxation, entered in alphabetical order.

(b) The amount of valuation of real property assessed for county-wide purposes (divided into as many classes as the state board may prescribe).

(c) The amount of valuation of personal property assessed for county-wide purposes (divided into as many classes as the state board may prescribe).

(d) The total amount of real and personal property valuation assessed for county-wide purposes.

(e) The amount of ad valorem tax due by each taxpayer for county-wide purposes.

(f) The amount of poll tax due by each taxpayer.

(g) The amount of dog tax due by each taxpayer.

(h) The amount of valuation of property assessed in any special district or subdivision of the county for taxation.

(i) The amount of tax due by each taxpayer to any special district or subdivision of the county.

(j) The total amount of tax due by the taxpayer to the county and to any special district, subdivision or subdivisions of the county.

All changes in valuations affected between the close of the listing period and the meeting of the board of equalization and review shall be reflected on such records, and so much of such records as may have been prepared shall be submitted to the board at its meetings. Changes made by said board shall also be reflected upon such records, either by correction, rebate or additional charge. (1939, c. 310, s. 1101.)

§ 105-324. Tax receipts and stubs.—Such persons as the county commissioners may designate shall fill out the receipts and stubs for all taxes charged upon the tax books. The form of such receipts and stubs shall be approved by the state board of assessment and shall show at least the following:

(a) The name of the taxpayer charged with taxes.

(b) The amount of valuation of real property assessed for county-wide purposes.

(c) The amount of valuation of personal property assessed for county-wide purposes.

(d) The total amount of valuations of real and personal property assessed for county-wide purposes.

(e) The rate of tax levied for each county-wide purpose, the total rate for all county-wide purposes, and the rate levied for any special district or subdivision of the county, which tax is charged to the taxpayer.

(f) The amount of the valuation of property assessed in any special district or subdivision of the county.

(g) The amount of ad valorem tax due by the taxpayer for county-wide purposes.

(h) The amount of poll tax due by the taxpayer.

(i) The amount of dog tax due by the taxpayer.

(j) The amount of tax due by the taxpayer to any special districts or subdivisions of the county.

(k) The total amount of tax due by the taxpayer to the county and to any special district, subdivision or subdivisions of the county.

(l) Amount of discounts.

(m) Amount of penalties. (1939, c. 310, s. 1102.)

§ 105-325. Disposition of tax records and receipts.—The tax records shall be filed in the office of the supervisor or official computing the taxes of the office of the accountant or clerk to the board of commissioners, as the commissioners may direct. The tax receipts and stubs shall be delivered to the sheriff or tax collector on or before the first Monday in October of the year one thousand nine hundred thirty-nine, and annually thereafter, provided he has made settlement as by law required, and the sheriff or tax collector shall receipt for the same. In the discretion of the commissioners, a duplicate copy of the tax books may be made and delivered to the sheriff or tax collector at the same time.

A list of all appeals pending before the state board of assessment shall be delivered with said receipts; and there shall be delivered with said receipts an order, a copy of which shall be spread upon the minutes of the commissioners, directing the sheriff or tax collector to collect said taxes,

which order shall have the force and effect of a judgment and execution against the property, real and personal, charged in the tax book and receipts, and shall be in substantially the following form:

"North Carolina, ... County, ... City. To the Sheriff of Tax Collector of ..... County, or ..... City, or Town:

You are hereby authorized, empowered and commanded to collect the taxes set forth in the tax books, filed in the office of ....., and in the tax receipts herewith delivered to you, in the amounts and from the taxpayers likewise therein set forth, and such taxes are hereby declared to be a first lien on all real property of the respective taxpayers in ..... County, or ..... City or Town, and this order shall be a full and sufficient authority to direct, require and enable you to levy on and sell any real or personal property of such taxpayers, for and on account thereof, in accordance with law.

Witness my hand and official seal, this ..... day of ....., 19.....

.....(Seal)

Chairman, Board of Commissioners.

Attest:

.....

Clerk of Board." (1939, c. 310, s. 1103.)

Cross Reference.—See annotations under § 156-105.

§ 105-326. Compensation of officer computing taxes.—The board of county commissioners shall make an order for the payment to the register of deeds, auditor, tax clerk, supervisor, or other official such sum as may be in their discretion a proper compensation for the work of computing taxes, making out the tax book and copies thereof, and the making of such reports as may be required by the state board of assessment; but the compensation allowed for computing the taxes and making out the tax book is not to exceed ten cents (10c.) for each name appearing on the tax book, which shall include the original and duplicate tax book and also the receipts and stubs provided for in this subchapter. (1939, c. 310, s. 1104.)

§ 105-327. County board of equalization and review.—(1) Personnel.—The county board of equalization and review of each county shall be composed of the board of county commissioners. Nothing in this subchapter shall be construed as repealing any law creating a special board of equalization and review, or creating any board charged with the duty of equalization and review in any county.

(2) Compensation.—The members of the board of equalization and review shall be allowed the same per diem compensation and traveling expense, while actually engaged in the performance of their duties, as is ordinarily paid to the members of the board of county commissioners, such compensation to be paid by the county.

(3) Oath.—Before entering upon their duties each member of the board of equalization and review shall take and subscribe to the following oath and file the same with the clerk of the board of county commissioners: "I do solemnly swear (or affirm) that I will faithfully discharge my duties as a member of the Board of Equalization and Review of ..... County, North Carolina; and that I will not allow my actions as a member of said board to be influenced by personal or political friendships or obligations.

....."

(Signature.)

(4) Clerk.—The supervisor shall act as clerk to said board, shall be present at all meetings and give to the board such information as he may have or can obtain with respect to the valuation of taxable property in the county.

(5) Time of Meeting.—Said board shall hold its first meeting on the eleventh Monday following the day on which tax listing began, and may adjourn from time to time as its duties may require; but it shall complete its duties not later than the third Monday following its first meeting.

(6) Notice of Meeting.—Notice of the time, place and purpose of the first meeting of said board shall be given by publishing said notice at least three times in some newspaper published in the county, the first publication to be at least ten days prior to said meeting.

(7) Powers and Duties.—(a) It shall be the duty of the board of equalization and review to equalize the valuation of all property in the county, to the end that such property shall be listed on the tax records at the valuation required by law; and said board shall correct the tax records for each township so that they will conform to the provisions of this subchapter.

(b) The board shall, on request, hear any and all taxpayers who own or control taxable property assessed for taxation in the county in respect to the valuation of such property or the property of others.

(c) The board shall examine and review the tax lists of each township for the current year; shall, of its own motion or on sufficient cause shown by any person, list and assess any real or personal property or polls subject to taxation in the county omitted from said lists; shall correct all errors in the names of persons, in the description of property, and in the assessment and valuation of any taxable property appearing on said lists; shall increase or reduce the assessed value of any property which in their opinion shall have been returned below or above the valuation required by law; and shall cause to be done whatever else shall be necessary to make said lists comply with the provisions of this subchapter: Provided, that said board shall not change the valuation of any real property from the value at which it was assessed for the preceding year except in accordance with the terms of §§ 105-278, and 105-279.

(d) The board may appoint committees, composed of its own members or other persons, to assist it in making any investigations necessary in its work. It may also employ expert appraisers in its discretion. The expense of the employment of committees or appraisers shall be borne by the county: Provided, that the board may, in its discretion, require the taxpayer to pay the cost of any appraisal by experts demanded by him when said appraisal does not result in material reduction of the valuation of the property appraised and where such valuation is not subsequently reduced materially by the board or by the state board of assessment.

(e) The board may subpoena witnesses, or

books, records, papers and documents reasonably considered to be pertinent to the decision of any matter pending before it; and any member of the board may administer oaths to witnesses in connection with the taking of testimony. The chairman of the board shall sign the subpoena, and such subpoena shall be served by any officer qualified to serve subpoenas. (1939, c. 310, s. 1105.)

Local Modification.—Mecklenburg: 1941, c. 209; Wayne: 1941, c. 69.

Editor's Note.—The 1941 amendment added the proviso to subsection (5).

Purpose of Notice.—The notice required before the meeting in June is general, and has reference to a general revision of the lists of the whole county, with a view to an equal and uniform assessment among the several townships, and it is to give opportunity to all who may be dissatisfied with the valuation of their property to make complaint and have it corrected. Commissioners v. Atlanta, etc., Ry. Co., 86 N. C. 541, 544.

Valuation by Owner Subject to Review by Board.—The valuation upon personal property is made by the taxpayer when he lists his property, and is binding upon the list-taker, but it may be corrected by the county commissioner or board of equalization at the dates fixed by the statute, upon due notice to the taxpayer. Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 260, 90 S. E. 202.

Revision without Notice Void.—Where the value of the solvent credits of a taxpayer are increased without due notice to him or his agent, such increase in value is a nullity. Wolfeden v. Commissioners, 152 N. C. 83, 67 S. E. 319.

Designated Date of Meeting Exclusive of Others.—See Wolfenden v. Commissioners, 152 N. C. 83, 67 S. E. 319.

Before Whom Complaint Made.—The complaint against excessive valuation must be made before the board of county commissioners, and the aldermen of the city have no jurisdiction to change such valuation. Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 261, 90 S. E. 202.

Requisites of Complaint.—The complaint in an action against a city to recover for taxes paid must allege that the valuation complained of is greater than that fixed by the county board of equalization, or the tax he was forced to pay was greater than it would have been if correctly computed at the legal rate on the valuation properly ascertained, or a demurrer thereto will be sustained. Pocomoke Guano Co. v. New Bern, 172 N. C. 258, 90 S. E. 202.

Decision of Board Final.—The county commissioners have exclusive original jurisdiction to grant relief against excessive valuation of property for taxation, and unless they proceed upon some erroneous principle, there is no appeal. Wade v. Commissioners, 74 N. C. 81 and cases cited.

When Duties and Powers Cease.—After the board of county commissioners has completed the revision of the tax lists as authorized by this section its duties and powers as a revising board, cease and determine until the time appointed by the statute for the next succeeding year. Wolfenden v. Commissioners, 152 N. C. 83, 67 S. E. 319.

Cited in Brooks v. Brooks, 220 N. C. 16, 16 S. E. (2d) 403.

§ 105-328. Giving effect to the decisions of the board.—All changes in names, descriptions or valuations made by the board of equalization shall be reflected upon the tax records by correction. rebate or additional charge; and when all such changes have been given effect, and the scroll or tax book has been totaled, the members of the board of equalization, or a majority thereof, shall sign a statement at the end of the scroll or tax book to the effect that the scroll is the fixed and permanent tax list and assessment roll for the current year, subject to the provisions of this subchapter. The omission of such endorsement shall not affect the validity of said scroll or tax book, or of any taxes levied on the basis of the valuations appearing in it. (1939, c. 310, s. 1106.)

§ 105-329. Appeals from the board of equalization and review to the state board of assessment.—Any property owner, taxpayer, or member of the board of county commissioners may except to the order of the board of equalization and review and appeal therefrom to the state board of assessment by filing a written notice of such appeal with the clerk of the board of county commissioners within sixty days after the adjournment of the board of equalization and review. At the time of filing such notice of appeal the appellant shall file with the clerk to the board of county commissioners a statement in writing of the grounds of appeal, and shall, within ten days after filing such notice of appeal with the clerk to the board of county commissioners, file with the state board of assessment a notice of such appeal and attach thereto a copy of the statement of the grounds of appeal filed with the clerk to the board of county commissioners. Each taxpayer or ownership interest shall file separate and distinct appeals; no joint appeals shall be considered except by and with consent of the state board of assessment.

The state board of assessment shall fix a time for the hearing of such appeal, and shall hear the same in the city of Raleigh, or such other place within the state as the said board may designate; shall give notice of time and place of such hearing to the appellant, appellee, and to the clerk to the board of county commissioners at least ten days prior to the said hearing; shall hear all the evidence or affidavits offered by the appellant, appellee, and the board of county commissioners, shall reduce, increase, or confirm the valuation fixed by the board of equalization and review and enter it accordingly, and shall deliver to the clerk of the board of county commissioners a certified copy of such order, which valuation shall be entered upon the fixed and permanent tax records and shall constitute the valuation for taxation. (1939, c. 310, s. 1107.)

Valuation Final and Conclusive.—This section contemplates that valuation fixed by the state board shall be final and conclusive where no error of law or abuse of discretion is alleged. Belk's Department Store v. Guilford County, 222 N. C. 441, 448, 23 S. E. (2d) 897.

§ 105-330. Powers of the commissioners with respect to the records after adjournment of the board of equalization.—After the board of equalization has finished its work and the changes effected by it have been given effect on the tax records, the board of county commissioners may not authorize any changes to be made on said records except as follows:

(1) To give effect to the decision of the state board of assessment on appeal.

(2) To add to the records any valuation certified by the state board of assessment with respect to property assessed in the first instance by said state board, or to give effect to any valid corrections made in such assessments by the state board.

(3) To correct the name of any taxpayer appearing on said records erroneously, or to substitute the name of the person who should have listed property for the name appearing on the records as listing said property, or to correct descriptions on said records, and any such corrections or substitutions shall have the same force and effect as if the name of the taxpayer or the description had been correctly listed in the first instance.

(4) To correct valuations or taxes appearing erroneously on the records as the result of clerical errors.

(5) To add any discovered property under the provisions of this subchapter.

(6) To reassess property when the supervisor reports that, since the completion of the work of the board of equalization, facts have come to his attention which render it advisable to raise or lower the assessment of some particular property of a given taxpayer: Provided, that no such reassessment shall be made unless it could have been made by the board of equalization had the same facts been brought to the attention of said board of equalization: Provided further, that this shall not authorize reassessment because of events or circumstances not taking place or arising until after the tax listing day.

(7) The board of county commissioners may give the supervisor general authority to make any changes under this section except those under subsection (six); but neither the board nor the supervisor shall make any changes under subsection (three) or (six) which adversely affect the interests of any taxpayer without giving such taxpayer written notice and an opportunity to be heard prior to final determination. (1939, c. 310, s. 1108.)

§ 105-331. Discovery and assessment of property not listed during the regular listing period. —(1) Duty of Commissioners, Supervisors and List Takers; Carrying Forward Real Estate.—It shall be the duty of the members of the board of commissioners, the supervisor and the list takers to be constantly looking out for property and polls which have not been listed for taxation. After any tax list or abstract has been delivered to a list taker, the supervisor or the board of county commissioners, and such list taker, supervisor or board of county commissioners shall have reason to believe or sufficient evidence upon which to form a belief that the person, firm or corporation making such list or abstract, in person or by agent, has other personal property, tangible or intangible, money, solvent credits, or other thing liable for taxation, they or either of them shall take such action as may be needful to get such property on the tax list.

Either the list takers for the respective townships, the clerical assistants to the supervisor or the supervisor, as the supervisor may designate, shall examine the tax lists for the current year and the tax records for the preceding year, and carry forward all real property which was listed for the preceding year which has not been listed for the current year. In the discretion of the supervisor, such property may be listed on an abstract signed by the official or employee carrying it forward in the name of the taxpayer, or may be entered directly on the tax scroll or tax book by such official or employee. When such property is so listed in the name of the owner or in the name of the person last listing the same, the listing shall be as valid in every respect as if made by the owner; provided, that such listing shall not render any person individually liable to pay the taxes who is not under a duty to list such property.

(2) Procedure upon Discovery.—When property or polls are discovered they shall be listed in the name of the taxpayer by the supervisor or some person designated by him. The clerk to the board of commissioners or the supervisor shall mail a notice to the taxpayer at his last known address (or, if unknown, to the occupant or person in possession of such property) to the effect that the board of equalization at a designated meeting (or the county commissioners at their next regular meeting, in case the discovery is not made in time for consideration by the board of equalization) will assess the value of said property or approve the listing of said poll. At such meeting the board shall hear any objections presented by said taxpayer, render its decision and, if necessary under said decision, assess said property, subject to appeal to the state board of assessment, or approve the listing of said poll. Said property and polls may then be added to the regular tax records or placed in a separate record designated "Late Listings," which shall have the same force and effect as the regular records: Provided, nothing herein shall prevent valuation of such property or listing of such polls by agreement between the supervisor and taxpayer without action by the board of equalization or board of commissioners: Provided, further, nothing herein shall prevent the carrying forward of real estate, listed for the prior year in accordance with the terms of this subchapter, without notice to the owner or last person listing said realty unless, in years other than revaluation years, the valuation of such property is raised.

All property and polls not listed during the regular listing period shall, when eventually listed under this section or by the person carrying forward real estate, immediately be subject to the taxes for the various years for which listed or assessed, together with the penalties hereinafter set forth.

(3) Assessment for Previous Years; Penalties. —The county commissioners may assess any such property or list such poll for the preceding years during which it escaped taxation, not exceeding five, in addition to the current year. When real property is discovered which should have been listed for the current year, it shall be presumed that it should have been listed by the same taxpayer for the preceding five years unless the taxpayer shall produce satisfactory evidence that such property was actually listed for taxes during those years or some of them; provided, that this presumption shall not apply when real property is carried forward from the preceding year's records.

When personal property is discovered which should have been listed for the current year, it shall be presumed that such property should have been listed by the same taxpayer for the preceding five years, unless the taxpayer shall produce satisfactory evidence that such property was not in existence, that it was actually listed for taxation or that it was not his duty to list the same during said years or some of them. Where it is shown that such property should have been listed by some other taxpayer during a part or all of such preceding years, it may be assessed against such other taxpayer for the proper years, with the penalties as hereinafter prescribed.

In a proper case, property may be listed for one or more prior years during which it escaped taxation, even though it has been regularly listed for the current years, is no longer in existence or is no longer subject to taxation in this state.

The penalty for failure to list property or a poll before the close of the regular listing period shall

be ten per cent (10%) of the tax levied for the current year on such property or poll. Where such property or poll is taxed for years preceding the current year, the penalty, in addition to that for the current year, shall be ten per cent (10%) per annum. The minimum penalty shall be one dollar ($1.00). Taxes assessed for years preceding the current year shall be assessed at the rate of tax prevailing in the various preceding years.

The taxes and penalties for each year shall be shown separately on the records, but for the purpose of tax collection and foreclosure the total of all such taxes and penalties shall be regarded as taxes for the current year; and the schedule of discounts and penalties for payment or nonpayment of current taxes shall apply to such taxes and penalties for failure to list, despite the fact that such taxes and penalties for failure to list may not have been levied until the penalties for failure to pay have already accrued.

(4) Commissioners' Power to Compromise.—The board of county commissioners or the governing body of any municipal corporation is hereby authorized and empowered to settle or adjust all claims for taxation arising under this section or any other section authorizing them to place on the tax list any property omitted therefrom.

(5) Application to Cities and Towns.—The provisions of this section shall extend to all cities, towns and other municipal corporations having power to tax property or polls, and the power conferred and the duties imposed upon the board of county commissioners shall be exercised and performed by the governing body of the municipal corporation.

(6) Power to Employ Searchers.—The county commissioners, either separately or in conjunction with one or more municipal corporations in the county, may employ one or more competent men to make a diligent search and to discover and report to the board or the supervisor any unlisted property within the county, to the end that the same may be listed and assessed for taxation as provided in this section: Provided, nothing herein shall be construed as allowing a board of commissioners to appoint a tax collector unless it is otherwise authorized to do so by law.

(7) Tax Receipts.—Tax receipts for the taxes and penalties assessed against the property discovered shall be made up under the provisions of this subchapter, shall be delivered to the sheriff or tax collector, who shall be charged with the same, and shall have the same force and effect and shall be a lien on the property in the same manner as if they had been delivered to the sheriff or tax collector at the time of the delivery of the regular tax bills for the current year.

(8) Appeals.—Appeals may be had from the assessment fixed by the board of equalization or commissioners to the state board of assessment. Notice of said appeal must be served upon the clerk to the board of commissioners within sixty days after the assessment is fixed, and said appeal shall be in conformity with the provisions of this subchapter respecting appeals from boards of equalization. Each taxpayer or ownership interest shall file separate and distinct appeals; no joint appeals shall be considered except by and with consent of the state board of assessment.

(9) Classified Property.—Any property, discovered and listed under the provisions of this section, entitled to classification under the provisions of this subchapter, shall be classified and assessed in accordance with said provisions. (1939, c. 310, s. 1109.)

Editor's Note.—The cases in the following note construe the somewhat similar provisions of former § 7971(50), now repealed.

Discovery and Listing of Omitted Property.—This section provides for discovery of taxable property not listed, by certain tax authorities, and listing same. Hardware Mut. Fire Ins. Co. v. Stinson, 210 N. C. 69, 77, 185 S. E. 449.

Where the plaintiff guardian paid taxes on property of his ward, and thereafter, in accordance with a ruling that the property was nontaxable, obtained a refund of the tax and did not list the property again, and the property of the ward was not exempt from taxation, it was held that the prior ruling of the county commissioners to the effect that the property was nontaxable does not prevent them from listing the property for taxation for the prior five years, including the year for which the tax was refunded. Lawrence v. Shaw, 210 N. C. 352, 186 S. E. 504.

Compromise Settlement Is Binding Unless Made in Bad Faith.—In the absence of a finding that the board of commissioners acted in bad faith in making a compromise settlement of a tax, or abused its discretion in so doing, mandamus to compel the commissioners to list and assess will be denied. Stone v. Board of Com'rs, 210 N. C. 226, 186 S. E. 342.

Construed as Whole.—The court in Madison County v. Coxe, 204 N. C. 58, 167 S. E. 486, construing Public Laws, 1927, c. 71, § 73, (superseded by this section) declared that the section must be construed as a whole, not piecemeal.

Rebuttal of Presumption.—The presumption created by statute, that the person who was in possession of the personal property involved in this controversy was the owner and in possession of said property on 1 April of the five preceding years, is rebutted by the facts of this case. Coltrane v. Donnell, 203 N. C. 515, 516, 166 S. E. 397.

Stated in Pocomoke Co. v. New Bern, 172 N. C. 258, 90 S. E. 202.

Applied in Smith v. Dunn, 160 N. C. 174, 76 S. E. 242.

Art. 22. Assessment Procedure of Cities and Towns.

§ 105-332. Status of property and polls listed for taxation.—All property and polls validly listed for taxation in any county, municipal corporation or taxing district shall be thereby also validly listed for taxation by any county, municipal corporation or taxing district in which it has a taxable situs. Said situs shall be determined by the rules prescribed in this subchapter. (1939, c. 310, s. 1200.)

§ 105-333. Tax lists and assessment powers of cities and towns.—All cities and towns may obtain their tax lists from the county records without securing lists signed by the taxpayers, or may set up their own machinery for securing lists from the taxpayers, in the discretion of the governing body.

All cities and towns not situated in more than one county shall accept the valuations fixed by the county authorities, as modified by the state board of assessment, under the provisions of this subchapter: Provided, that nothing in this section shall be construed to modify the authority given to cities and towns under this subchapter with respect to discovered property.

With the exception of the provisions relating to dog taxes, the provisions of §§ 105-323 to 105-326 shall apply to cities and towns; and city and town governing bodies shall have the same powers conferred and the duties imposed by said sections upon the board of county commissioners, and wherever counties are referred to in said sec-

tions it shall be construed to include also cities and towns. (1939, c. 310, s. 1201.)

§ 105-334. Cities and towns situated in more than one county.—For the purpose of municipal taxation, all real and personal property and polls subject to taxation by cities and towns situated in two or more counties shall be listed and assessed as hereinafter set forth.

(1) The governing body of each such city or town shall, in quadrennial years, on or before the date fixed for the appointment of the county supervisor, appoint a city supervisor of taxation, and two or more persons to act as list takers and assessors, each of whom, including the supervisor, shall have been resident freeholders in such city or town for a period of not less than twelve months. In years other than quadrennial years such governing body shall, on or before the date fixed for appointment of the county supervisor, appoint one resident freeholder as city supervisor of taxation and, in its discretion, one or more persons to act as list takers and assessors, each of whom shall have been a resident of such city or town for at least twelve months.

(2) With respect to property to be listed for taxation in the city or town the city supervisor shall have the same powers and duties given to the county supervisor under the terms of this subchapter; and the city list takers and assessors shall have the same powers and duties given to county list takers and assessors under the terms of this subchapter; and the procedure of listing and assessing shall be, as nearly as possible, the same as that specified for county listing and assessing under the terms of this subchapter.

(3) The governing body of each such city or town may designate some officer or employee of the city or appoint some other person to supervise the preparation of the tax records and receipts, and to make such reports as the state board of assessment may request or require, and may employ such clerical assistance in this connection as it may deem advisable.

Such governing body shall also be vested with the same powers and duties, with respect to the listing of property for city taxation, as are vested by this subchapter in the county commissioners with respect to the listing of property for county taxation, and shall, with the city supervisor as chairman, sit as a board of equalization and review; and appeals may be taken from said city board of equalization to the state board of assessment in the same manner as provided in this subchapter for appeals from the county boards of equalization.

(4) The intent and purpose of this section is to provide such cities and towns as lie in two or more counties only with the machinery necessary for listing and assessing taxes for municipal purposes. The powers to be exercised by and the duties imposed on such boards of aldermen, boards of commissioners or other governing bodies, boards of equalization and review, city supervisor of taxation, list takers and assessors, city clerk and taxpayers shall be the same, and they shall be subjected to the same penalties as provided in this subchapter for all boards of county commissioners, county auditors, registers of deeds, clerks of boards of county commissioners, county supervisors, list takers and assessors. The county commissioners in their discretion may adopt the tax lists, scroll, or assessment roll of such city or town as fixed and determined by the board of equalization and review of such cities or towns, and when so adopted, shall be considered to all intent and purpose the correct and valid list and the fixed and determined assessment roll for the purpose of county taxation.

(5) All expenses incident to the listing and assessing of the property for the purpose of municipal taxation as aforesaid shall be borne by the city or town for whose benefit the same is undertaken; provided, that where the county or counties in which such city or town lies shall adopt the list and the fixed, determined assessment of the city board of equalization and review, the county board of commissioners may reimburse the governing body in such amounts as in their discretion may be proper. (1939, c. 310, s. 1202.)

Art. 23. Reports to the State Board of Assessment and Local Government Commission.

§ 105-335. Report of valuation and taxes.—The clerk of the board of county commissioners, auditor, tax supervisor, tax clerk, county accountant or other officer performing such duties shall, at such time as the board may prescribe, return to the state board of assessment on forms prescribed by said board an abstract of the real and personal property of the county by townships, showing the number of acres of land and their value, the number of town lots and their value, the value of the several classes of live stock, the number of white and negro polls, separately, and specify every other subject of taxation and the amount of county tax payable on each subject and the amount payable on the whole. At the same time said clerk, auditor, supervisor or other officer shall return to the state board of assessment an abstract or list of the poll, county and school taxes payable in the county, setting forth separately the tax levied on each poll and on each hundred dollars value of real and personal property for each purpose, and also the gross amount of every kind levied for county purposes, and such other and further information as the state board of assessment may require. (1939, c. 310, s. 1300.)

§ 105-336. Clerks of cities and towns to furnish information.—The clerk or auditor of each city and town in this state shall annually make and transmit to the state board of assessment, on blanks furnished by said board, a full, correct, and accurate statement showing the assessed valuation of all property, tangible and intangible, within his city or town, and separately the amount of all taxes levied therein by said city or town, including school district, highway, street, sidewalk, and other similar improvement taxes for the current year, and the purposes for which the same were levied; and shall annually furnish to the local government commission a complete and detailed statement of the bonded and other indebtedness of the city or town, the accrued interest on the same, whether not due or due and unpaid, and the purposes for which said indebtedness was incurred. (1939, c. 310, s. 1301.)

§ 105-337. County indebtedness to be reported.—The auditor or county accountant of each

county in this state shall make and deliver annually to the local government commission a full, correct and accurate statement of the bonded and other indebtedness of his county, including township, school districts, and special tax districts, the purposes for which the same was incurred, and all accrued interest, whether not due or due and unpaid. (1939, c. 310, s. 1302.)

§ 105-338. Penalty for failure to make report.—Every register of deeds, auditor, county accountant, supervisor of taxation, assessor, sheriff, clerk of superior court, clerk of board of county commissioners, county commissioners, board of Aldermen or other governing body of a city or town, mayor, clerk of city or town, or any other public officer, who shall willfully fail, refuse, or neglect to perform any duty required, to furnish any report to the state board of assessment or local government commission as prescribed in this subchapter or the revenue act, or who shall wilfully and unlawfully hinder, delay or obstruct said board in the discharge of its duties, shall, for every such failure, neglect, refusal, hindrance or delay, in addition to the other penalties imposed in this subchapter and the revenue act, pay to the state board of assessment or local government commission for the general fund of the state the sum of one hundred dollars ($100.00), such sum to be collected by said board or local government commission. A delay of thirty days to make and furnish any report required or to perform a duty imposed shall be prima facie evidence that such delay was wilful. (1939, c. 310, s. 1303.)

Art. 24. Levy of Taxes and Penalties for Failure to Pay Taxes.

§ 105-339. Levy of taxes.—The tax levying authorities of the several counties, cities, towns and special districts shall, not later than Wednesday after the third Monday in August, levy such rate of tax for the general county purposes as may be necessary to meet the general expense of the county, not exceeding the legal limitation, and such rates for other purposes as may be authorized by law. (1939, c. 310, s. 1400.)

§ 105-340. Date as of which lien attaches.—The lien of taxes levied on property and polls listed pursuant to this subchapter shall attach to real estate as of the day as of which property is listed, regardless of the time at which liability for the tax may arise or the exact amount thereof be determined.

All penalties, interest and costs allowed by law shall automatically be added to the amount of such lien and shall be regarded as attaching at the same time as the lien for the principle amount of the taxes. Said lien shall attach to all real property of the taxpayer in the taxing unit.

Taxes, interest, penalties and cost shall be a lien on personal property from and after levy on or attachment and garnishment of such property. (1939, c. 310, s. 1401.)

Editor's Note.—A modification of the law to meet an unacceptable interpretation of the former statute is found in this section which fixes a lien as of the date the property is listed. Under the old law no lien attached until July first and a transfer between April first and July first seemed to shed the burden of taxes entirely under the decision of the court in State v. Champion Fibre Co., 204 N. C. 295, 168 S. E. 207. No reason appears why a lien cannot be effective to cover obligations yet to be ascertained and it is believed the new section cures a glaring defect in our tax law. 15 N. C. Law Rev. 391.

Cited in Bemis Hardwood Lbr. Co. v. Graham County, 214 N. C. 167, 198 S. E. 843.

§ 105-341. Levy of poll tax.—(1) There shall be levied by the board of county commissioners in each county a tax of two dollars ($2.00) on each taxable poll or male person between the ages of twenty-one and fifty years, and the taxes levied and collected under this section shall be for the benefit of the public school fund and the poor of the county.

(2) The board of county commissioners of every county shall have the power to exempt any person from the payment of poll taxes on account of indigency, and when any such person has been once exempted he shall not be required to renew his application unless the commissioners shall revoke the exemption. When such exemption shall have been made, the clerk of the board of county commissioners shall furnish the person with a certificate of such exemption, and the person to whom it is issued shall be required to list his poll, but upon exhibition of such certificate the list taker shall annually enter in the column intended for the poll the word "exempt," and the poll shall not be charged in computing the list.

(3) Cities and towns may levy a poll tax not exceeding that authorized by the constitution, and poll taxes so levied and collected may be used for any purpose permitted by law.

(4) While the existing state of war between the United States and any foreign nation continues and for the next tax listing period thereafter, members of the armed forces of the United States and members of the United States merchant marine shall be exempt from all poll taxes and no county or city shall levy any poll tax on such persons, and poll tax which such person was required to list prior to induction into the armed forces of the United States or joining the merchant marine which has not been paid, shall be cancelled and such person relieved of such liability to pay the same. (1939, c. 310, s. 1402; 1943, c. 3.)

Editor's Note.—The 1943 amendment added subsection (4). See 12 N. C. Law Rev. 23, 33.

§ 105-342. What veterans exempt from poll tax; world war veterans. — Any honorably discharged veteran of any of the wars of the United States, now a resident of, and subject to capitation or poll tax in this State, and who received injuries in the line of duty in the military service, whether compensable or not, and all such honorably discharged veterans that have been, or are now, receiving compensation from the Federal Government for disability of service connected origin, shall be conclusively considered and presumed as having physical infirmities sufficient to warrant exemption from the payment of the capitation or poll tax under Article five, section one, of the Constitution of North Carolina: Provided, however, that with respect to veterans of the World War, this section and § 105-343 shall apply only to those who served not less than ninety days during the period between April sixth, one thousand nine hundred seventeen, and November eleventh, one thousand nine hundred eigh-

teen, or to those of such veterans who served with the United States forces in Russia during the period between April sixth, one thousand nine hundred seventeen, and April first, one thousand nine hundred twenty. (1931, c. 193, s. 1.)

§ 105-343. Proof of service and injury must be furnished; exemption by county commissioners. — The veteran or soldier claiming exemption under § 105-342 shall furnish proof of such service and injury by producing to the board of commissioners of his county his or her discharge or release or certificate of such service or injury, signed by a recognized official of the United States War Department or the Adjutant General's office of this State, and said discharge, release or certificate shall be recorded with the register of deeds of such county prior to tax listing date in the year in which exemption is claimed under §§ 105-342 and 105-343. It shall be the duty of the register of deeds at or before tax listing time in each county, to notify the board of county commissioners of the registration with him of such discharge, release or certificate and thereupon, upon application of the veteran, said board of county commissioners may take the action authorized by §§ 105-342 and 105-343. (1931, c. 193, s. 2.)

§ 105-344. Exemption of pensions or compensations from taxation.—Every person receiving a pension or compensation from the state, or United States, or any foreign country or government, for and on account of wounds or physical disabilities contracted or sustained during the late war between the United States and Germany, and any of the allied countries coöperating with the United States, shall not be required to pay any tax of any kind upon such pension or compensation, but the same shall be exempted from any and all taxes. This section shall apply to all such taxes for the year one thousand nine hundred and twenty-three, and thereafter. (1923, c. 259; C. S. 5168(aa).)

§ 105-345. Penalties and discounts for nonpayment of taxes.—All taxes assessed or levied by any county, city, town, special district or other political subdivision of this state, in accordance with the provisions of this subchapter, shall be due and payable on the first Monday of October of the year in which they are so assessed or levied, and if actually paid in cash:

(1) On or before the first day of November next after due and payable, there shall be deducted a discount of one-half of one per cent (½ of 1%).

(2) After the first day of November and on or before the first day of February next after due and payable, the tax shall be paid at par or face value.

(3) After the first day of February and on or before the first day of March next after due and payable, there shall be added to the tax a penalty of one per cent (1%).

(4) After the first day of March and on or before the first day of April next after due and payable, there shall be added to the tax a penalty of two per cent (2%).

(5) On and after the second day of April the penalty shall be, in addition to said two per cent (2%), one-half of one per cent per month or fraction thereof until paid from said day on the principal amount of such taxes, which shall continue to accrue on taxes not included in a certificate of sale and which, on taxes included in a certificate of sale, shall continue to accrue until the date of such certificate.

(6) Should any taxpayer desire to make a prepayment of his taxes between July first and October first of any year, he may do so by making payment to the county or city accountant, city clerk, auditor or treasurer, as the governing body may determine, and shall be entitled to the following discounts: If paid on or before July first, a deduction of two per cent (2%); if paid during the month of July, a deduction of one and one-half per cent (1½%); if paid during the month of August, a deduction of one per cent (1%); if paid during the month of September, a deduction of one per cent (1%). (1939, c. 310, s. 1403; 1943, c. 667.)

Local Modification.—Beaufort: 1937, c. 65; Camden: 1943, c. 705; Franklin (towns of Louisburg, Bunn and Youngsville): 1943, c. 293; Iredell: 1941, c. 332; Surry (and towns of Mount Airy and Elkin): 1943, c. 710, s. 1.

Editor's Note.—The 1943 amendment added at the end of subsection (6) the words "if paid during the month of September, a deduction of one per cent (1%)."

Discrimination between Different Counties.—A statute which discriminates between the different counties of the State, as to the times when the payment of taxes can be compelled, is not unconstitutional, since its provisions affect every one alike in the localities, to which they are applicable and contain no violation of the principle of equation of taxation. State v. Jones, 121 N. C. 616, 28 S. E. 347.

Art. 25. Banks, Banking Associations, Trust Companies and Building and Loan Associations.

§ 105-346. Banks, banking associations and trust companies.—The value of shares of stock of banks, banking associations, and trust companies shall be determined as follows:

(1) Every bank, banking association, industrial bank, savings institution, trust company, or joint-stock land bank located in this state shall list its real estate and tangible personal property, except money on hand, in the county in which such real estate and tangible personal property is located for the purpose of county and municipal taxation, and shall, during the second calendar month following the month in which local tax listing begins each year, list with the state board of assessment, on forms provided by the said state board, in the name of and for its shareholders, all the shares of its capital stock, whether held by residents or nonresidents, at its actual value on the day as of which property is assessed under this subchapter.

(2) The actual value of such shares for the purpose of this section shall be ascertained by adding together the capital stock, surplus, and undivided profits, and deducting therefrom the assessed value of such real and tangible personal property which such banking institutions shall have listed for taxation in the county or counties of this state wherein such real and tangible personal property is located, together with an amount according to its proportion of tax value of any buildings and lands wholly or partially occupied by such banking associations, institutions

or trust companies, owned and listed for taxation by a North Carolina corporation in which such banking associations or institutions own ninety-nine per cent (99%) of the capital stock.

(3) In addition to the deductions allowed in item two of this section, there may be deducted from the items of surplus and undivided profits an amount not exceeding five per cent (5%) of the bills and notes receivable of such banking associations, institutions, or trust companies to cover bad or insolvent debts, investments in North Carolina state bonds, United States government bonds, joint-stock land bank bonds, and federal land bank bonds, at the actual cost of said bonds owned on and continuously for at least ninety days prior to the day as of which property is assessed in the current year. The value of such shares of capital stock of such banking associations, institutions, or trust companies shall be found by dividing the net amount ascertained above by the number of shares in the said banking associations, institutions or trust companies.

(4) If the state board of assessment shall have reason to believe that the actual value of such shares of stock of such banking associations, institutions, or trust companies, as listed with it, is not the true value in money, then the said board shall ascertain such true value by such an examination and investigation as seems proper, and increase or reduce the value as so listed to such an amount as it ascertains to be the true value for the purposes of this section.

(5) The value of the capital stock of all such banking associations, institutions, and trust companies as found by the state board of assessment, in the manner herein described, shall be certified to the county and municipality in which such bank or institution is located: Provided, that if any such banking association, institution, or trust company shall have one or more branches, the state board of assessment shall make an allocation of the value of the capital stock so found as between the parent and branch bank or banks or trust company in proportion to the deposits of the parent and branch bank, banks, or trust company, and certify the allocated values so found to the counties and municipalities in which the parent and the branch bank, banks, or trust company are located.

(6) The taxes assessed upon the shares of stock of any such banking associations, institutions, or trust companies shall be paid by the cashier, secretary, treasurer, or other officer or officers thereof, and in the same manner and at the same time as other taxes are required to be paid in such counties, and in default thereof such cashier, secretary, treasurer, or other accounting officer, as well as such banking association, institution, or trust company, shall be liable for such taxes, and in addition thereto for a sum equal to ten per cent (10%) thereof. Any taxes so paid upon any such shares may, with the interest thereon, be recovered from the owners thereof by the banking association, institution, or trust company or officers thereof paying them, or may be deducted from the dividends accruing on such shares. The taxation of such shares of capital stock shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of this state coming in competition with the business of such banking associations, institutions, or trust companies.

(7) In case of the failure or refusal of any bank, banking association or trust company to make and deliver to the state board of assessment any statement or statements required by this subchapter, such bank, banking association or trust company shall forfeit and pay to the state of North Carolina the sum of one hundred dollars ($100.00) for each additional day such report is delinquent beyond the last day of the month in which said report is required to be made, such penalty to be sued for and recovered in any proper form of action in the name of the state of North Carolina on the relation of the state board of assessment, and such penalty, when collected, shall be paid into the general fund of the state. (1939, c. 310, s. 1500.)

Where Capital Invested in State Bonds.—Bank stock is taxable at its full value after deducting the assessed value of the bank's real and personal property, though the capital of the bank be invested in North Carolina state bonds. Pullen v. Corporation Comm., 152 N. C. 548, 68 S. E. 155.

Listing Bank Stock.—This section changes the policy of the State as declared in ch. 234, sec. 42, Laws of 1917, as to the listing shares of bank stock by the holders where they reside, and fixing the situs of the shares for the purpose of county schools and municipal taxation at the residence of the owner, by omitting entirely the requirements of the Act of 1917 that the owner of the shares shall list them at the place of his residence, and by imposing this duty on the cashier of the bank, requiring him to pay the State, county, special and municipal taxes, the intent of the statute being to require the bank to pay all taxes on the shares of its stock where it is located, and to relieve the owners from listing or paying them, except as he may be required to reimburse the bank. Planters Bank, etc., Co. v. Lumberton, 179 N. C. 409, 102 S. E. 629.

Deduction of Indebtedness.—In the taxation of shares of stock in a national bank, under the Revenue Act of 1885, the owner of such shares has the right to deduct from the assessed value thereof the amount of his bona fide indebtedness, as in case of other investments of moneyed capital. McAden v. Board, 97 N. C. 355, 2 S. E. 670.

Fixing Amount of Capital Stock.—Notes due a corporation are to be considered in estimating the value of the capital stock, and not as a separate item for taxation. Caldwell Land, etc., Co. v. Smith, 151 N. C. 70, 65 S. E. 641.

The imposition upon a corporation of a tax on its "capital stock" in addition to a requirement that it shall list for taxation and pay the taxes assessed on the shares of its stock-holders, does not make "double taxation." Board v. Blackwell Durham Tobacco Co., 116 N. C. 441, 21 S. E. 423.

The tax on shares of stock of a bank is payable by the bank under the provisions of this section, it being required that the cashier or other proper officer of the bank pay the tax to the municipality levying it. Rockingham v. Hood, 204 N. C. 618, 169 S. E. 191.

Effect of Failure to Follow Prescribed Procedure. — Where the method prescribed by this section for determining the value of bank stock for taxation, has not been followed, a bank may restrain the board of commissioners of a county from listing its shares of stock for taxation. Virginia-Carolina Joint Stock Land Bank v. Board of County Com'rs, 207 N. C. 50, 175 S. E. 705.

§ 105-347. Building and loan associations.—(1) The secretary of each building and loan association organized and/or doing business in this state shall list with the local assessors all the tangible real and personal property owned on the day as of which property is assessed each year, which shall be assessed and taxed as like property of individuals.

(2) All foreign building and loan associations doing business in this state shall list for taxation, during the second calendar month following the month in which local tax listing begins each year, with the state board of assessment, through

their respective agents, its stock held by citizens of this state, with the name of the county, city, or town in which the owners of said stock reside. In listing said stock for taxation the withdrawal value as fixed by the by-laws of each such association shall be furnished to the said board, and the stock shall be valued for taxation at such withdrawal value.

Any association or officer of such association doing business in the state who shall fail, refuse or neglect to so list shares owned by citizens of this state for taxation shall be barred from doing business in this state; any local officer or other person who shall collect dues, assessments, premiums, fines, or interest from any citizen of this state for any such association which has failed, neglected, or refused to so list for taxation the stock held by citizens of this state shall be guilty of a misdemeanor, and fined and/or imprisoned in the discretion of the court.

The value of the shares of stock so held by citizens of this state, as found by the state board of assessment, shall be certified to the register of deeds of the county in which such shareholders reside, shall be placed on the assessment roll in the name of such holders thereof, and taxed as other property is taxed. (1939, c. 310, s. 1501.)

Capital Stock as Property.—The capital stock of a building and loan association is property and hence is taxable according to the uniform ad valorem system established by the constitution. Loan Ass'n v. Commissioners, 115 N. C. 410, 20 S. E. 526.

The payment of a privilege tax under section 105-68 does not bar the ad valorem tax imposed by this section. Loan Ass'n v. Commissioners, 115 N. C. 410, 20 S. E. 526.

§ 105-348. Article not to conflict with sections 105-198 to 105-217.—None of the provisions contained in any of the sections of this article shall be construed to conflict with Schedule H, §§ 105-198 to 105-217, but rather shall they be subordinate thereto. (1939, c. 310, s. 1502.)

§ 105-349. State board to keep record of all corporations, etc.; secrecy enjoined.—The state board of assessment shall prepare and keep a record book in which it shall enter a correct list of all the corporations, limited partnerships, joint-stock associations, banks, banking associations, industrial banks, savings institutions, and trust companies which it has assessed for taxation, and said record shall show the assessed valuation placed upon them; and the state board of assessment shall not divulge or make public any report of such corporation, partnership, or association required to be made to it, except as provided in this subchapter or the Revenue Act. (1939, c. 310, s. 1503.)

Art. 26. Public Service Companies.

§ 105-350. Telegraph companies.—Every joint-stock association, company, copartnership or corporation, whether incorporated under the laws of this state or any other state or any foreign nation, engaged in transmitting to, from, through, in, or across the state of North Carolina telegraph messages shall be deemed and held to be a telegraph company; and every such telegraph company shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the state board of assessment a statement, verified by oath of the officer or agent of such company making such statement, with reference to the day as of which property is assessed next preceding, showing:

First. The total capital stock of such association, company, copartnership, or corporation.

Second. The number of shares of capital stock issued and outstanding, and the par value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the day as of which property is assessed next preceding; and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures, and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the state, and the location and assessed value thereof in each county where the same is assessed for local taxation.

Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership, or corporation situated outside the state of North Carolina and not directly used in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of lines of said association or company; (b) the total length of so much of their lines as is outside of the state of North Carolina; (c) the length of the lines and wire mileage within each of the counties, townships, and incorporated towns within the state of North Carolina.

Ninth. Such other and further information as the state board of assessment may require. (1939, c. 310, s. 1600.)

Editor's Note.—See 12 N. C. Law Rev. 34.

§ 105-351. Telephone companies.—Every telephone company doing business in this state, whether incorporated under the laws of this state or any other state, or of any foreign nation, shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the state board of assessment of this state a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the day as of which property is assessed next preceding, showing:

First. The total capital stock of such association, company, copartnership, or corporation invested in the operation of such telephone business.

Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the day as of which property is assessed next preceding; and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures, and appliances owned by said association, company, copartnership, or corporation and subject to local taxation within the state, and the location and assessed value thereof in each county where the same is assessed for local taxation.

Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership, or corporation, situated outside of the state of North Carolina, and not used directly in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines of said association or company; (b) the total length of so much of their lines as is outside of the state of North Carolina; (c) the length of the lines and wire mileage within each of the counties, townships, and incorporated towns within the state of North Carolina.

Ninth. Such other and further information as the state board of assessment may require. (1939, c. 310, s. 1601.)

§ 105-352. Express companies. — Every joint-stock association, company, copartnership, or corporation, incorporated or acting under the laws of this state or any other state, or any foreign nation, engaged in carrying to, from, through, in or across this state, or any part thereof, money, packages, gold, silver, plate, merchandise, freight, or other articles, under any contract, expressed or implied, with any railroad company or the managers, lessees, agents or receivers thereof, provided such joint-stock association, company, copartnership or corporation is not a railroad company, shall be deemed and held to be an express company within the meaning of this subchapter; and every such express company shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the state board of assessment a statement, verified by the oath of the officer or agent of such association, company, copartnership or corporation making such statement, with reference to the day as of which property is assessed next preceding, showing:

First. The total capital stock or capital of said association, copartnership or corporation.

Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share; and in case no shares of capital stock are issued, in what manner the capital stock thereof is divided, and in what manner such holdings are evidenced.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the day as of which property is assessed next preceding; and if such shares have no market value, then the actual value thereof; and in case no shares of stock have been issued, state the market value, or the actual value in case there is no market value, of the capital thereof, and the manner in which the same is divided.

Fifth. The real estate, structures, machinery, fixtures and appliances owned by the said association, company, copartnership or corporation, and subject to local taxation within the state of North Carolina, and the location and assessed value thereof in each county where the same is assessed for local taxation.

Sixth. The specific real estate, together with the improvements thereon, owned by the association, company, copartnership or corporation situated outside the state of North Carolina, and not used directly in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines or routes over which such association, company, copartnership or corporation transports such merchandise, freight, or express matter; (b) the total length of such lines or routes as are outside the state of North Carolina; (c) the length of such lines or routes within each of the counties, municipalities and townships within the state of North Carolina.

Ninth. Such other and further information as the state board of assessment may require. (1939, c. 310, s. 1602.)

§ 105-353. Sleeping-car companies. — Every joint-stock association, company, copartnership or corporation incorporated or acting under the laws of this or any other state, or of any foreign nation, and conveying to, from, through, in or across this state, or any part thereof, passengers or travelers in palace cars, drawingroom cars, sleeping cars, dining cars, or chair cars, under any contract, expressed or implied, with any railroad company or the managers, lessees, agents or receivers thereof, shall be deemed and held to be a sleeping-car company for the purposes of this subchapter, and shall hereinafter be called "sleeping-car company"; and every such sleeping car company doing business in this state shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the state board of assessment a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the day as of which property is assessed next preceding, showing:

First. The total capital stock of such sleeping car company invested in its sleeping-car business.

Second. The number of shares of such capital stock devoted to the sleeping-car business issued and outstanding and the par or face value of each share.

Third. Under the laws of what state it is incorporated.

Fourth. Its principal place of business.

Fifth. The names and post office addresses of its president and secretary.

Sixth. The actual cash value of the shares of such capital stock devoted to its sleeping-car

business on the day as of which property is assessed next preceding such report.

Seventh. The real estate, structures, machinery, fixtures, and appliances owned by said sleeping-car company and subject to local taxation within this state, and the location and assessed value thereof in each county within this state where the same is asesssed for local taxation.

Eighth. All mortgages upon the whole or any part of its property, and the amounts thereof, devoted to its sleeping-car business.

Ninth. (a) The total length of the main line of railroad over which cars are run; (b) the total length of so much of the main lines of railroad over which the said cars are run outside of the state of North Carolina; (c) the length of the lines of railroads over which said cars are run within each of the counties within the state of North Carolina: Provided, that where the railroads over which said cars run have double tracks, or a greater number of tracks than a single track, the statement shall only give the mileage as though such tracks were but single tracks; and in case it shall be required, such statement shall show in detail the number of miles of each or any particular railroad or system within the state. When the assessment shall have been made by the state board of assessment in accordance with § 105-358, the board shall thereupon notify the officer attesting such report of the amount assessed against it, and such sleeping-car company shall have twenty days within which to appear and make objection, if any it shall have, to said assessment. If no objection be made within twenty days, the state board of assessment shall certify to the county commissioners of the several counties through which such cars are used the value of the property of such sleeping-car company within such county in the proportion that the number of miles of railroad over which such cars are used in said county bears to the number of miles of railroad over which such cars are used within the state, together with the name and postoffice address of the officers attesting such report of such sleeping-car company, with the information that tax bills, when assessed, are to be sent to him by mail; and such value, so certified, shall be assessed and taxed the same as other property within said county. And when the assessment shall have been made in such county, the sheriff or county tax collector shall send to the address given by the state board of assessment to the county commissioners a bill for the total amount of all taxes due to such county, and such sleeping-car company shall have sixty days thereafter within which to pay said taxes; and upon failure of and refusal to do so such taxes shall be collected the same as other delinquent taxes are, together with a penalty of fifty per cent (50%) added thereto, and costs of collection. (1939, c. 310, s. 1603.)

§ 105-354. Refrigerator and freight-car companies.—Every person, firm, or corporation owning refrigerator or freight cars operated over or leased to any railroad company in this state or operated in the state shall be taxed in the same manner as hereinbefore provided for the taxing of sleeping-car companies, and the collection of the tax thereon shall be followed in assessing and collecting the tax on the refrigerator and freight cars taxed under this section: Provided, if it appears that the owner does not lease the cars to any railroad company, or make any contract to furnish it with cars, but they are furnished to be run indiscriminately over any lines on which shipper or railroad companies may desire to send them, and the owner receives compensation from each road over which the car runs, the state board of assessment shall ascertain and assess the value of the average number of cars which are in use within the state as a part of the necessary equipment of any railroad company for the year ending with the day as of which property is assessed, next preceding the report, and the tax shall be computed upon this assessment. In making distribution of any taxable valuation by virtue of the provisions of this section, the state board of assessment shall give primary consideration to the county or counties in which the taxpayer has the greater car mileage. The operation of this section shall be suspended during the continuance of § 105-228.2, prescribing a method of taxing freight car line companies on the basis of their gross receipts from operation of their properties in this state. If for any reason such method of taxing freight car line companies prescribed in § 105-228.2 should be held to be invalid, the provisions of this section shall again become operative, as if it had not been suspended, and it shall be the duty of the state board of assessment to assess for ad valorem taxation all properties of freight line companies subject to tax under this section and all properties of such freight line companies not heretofore assessed under this section. (1939, c. 310, s. 1604; 1943, c. 634, s. 3.)

Editor's Note.—The 1943 amendment added the last two sentences.

§ 105-355. Street railway, waterworks, electric light and power, gas, ferry, bridge, and other public utility companies.—Every street railway company, waterworks company, electric light and power company, gas company, ferry company, bridge company, canal company, and other corporations exercising the right of eminent domain, shall, during the second calendar month following the month in which local tax listing begins each year, make out and deliver to the state board of assessment a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the copartnership or corporation, showing:

First. The total capital stock of such association, company, copartnership, or corporation.

Second. The number of shares of capital stock issued and outstanding and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the day as of which property is assessed next preceding; and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures, and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the state, and the location and assessed value thereof in each county, municipality and township where the same is assessed for local taxation.

Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership, or corporation situate outside of the state of North Carolina and not directly used in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situate.

Seventh. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines of said association or company; (b) the total length of so much of their lines as is outside of the state of North Carolina; (c) the length of lines within each of the counties, municipalities and townships within the state of North Carolina.

Ninth. Such other and further information as the state board of assessment may require. (1939, c. 310, s. 1605.)

§ 105-356. State board of assessment may require additional information. — Upon the filing of the statements required in the preceding sections the state board of assessment shall examine the same and, if the board shall deem the same insufficient, or in case it shall deem that other information is requisite, it shall require such officer to make such other and further statements as said board may call for. In case of the failure or refusal of any bank, association, company, copartnership, or corporation to make out and deliver to the state board of assessment any statement or statements required by this subchapter, such bank, association, company, copartnership, or corporation shall forfeit and pay to the state of North Carolina one hundred dollars ($100.00) for each additional day such report is delayed beyond the last day of the month in which required to be made, to be sued for and recovered in any proper form of action in the name of the state of North Carolina on the relation of the state board of assessment, and such penalty, when collected, shall be paid into the general fund of the state. (1939, c. 310, s. 1606.)

§ 105-357. State board of assessment shall examine statements.—The state board of assessment shall thereupon value and assess the property of each association, company, copartnership, or corporation in the manner hereinafter set forth, after examining such statements and after ascertaining the value of such properties therefrom and upon such other information as the board may have or obtain. For that purpose it may require the agents or officers of said association, company, copartnership, or corporation to appear before it with such books, papers, and statements as it may require, or may require additional statements to be made, and may compel the attendance of witnesses in case the board shall deem it necessary to enable it to ascertain the true cash value of such property. (1939, c. 310, s. 1607.)

§ 105-358. Manner of assessment.—Said state board of assessment shall first ascertain the true cash value of the entire property owned by the said association, company, copartnership, or corporation from said statement or otherwise for the purpose, taking the aggregate value of all the shares of capital stock, in case shares have a market value, and in case they have none, taking the actual value thereof or of the capital of said association, company, copartnership, or corporation in whatever manner the same is divided, in case no shares of capital stock have been issued: Provided, however, that in case the whole or any portion of the property of such association, company, copartnership, or corporation shall be encumbered by a mortgage or mortgages, such board shall ascertain the true cash value of such property by adding to the market value of the aggregate shares of stock, or to the value of the capital in case there should be no such shares, the aggregate amounts of such mortgage or mortgages, and the result shall be deemed and treated as the true cash value of the property of such association, company, copartnership, or corporation. Such state board of assessment shall, for the purpose of ascertaining the true cash value of property within the state of North Carolina, next ascertain from such statements or otherwise the assessed value for taxation, in the localities where the same is situated, of the several pieces of real estate situated within and without the state of North Carolina and not in any manner used in the general business of such associations, companies, copartnerships or corporations, which assessed value for taxation shall be by said board deducted from the gross value of the property as above ascertained. Said state board of assessment shall next ascertain and assess the true cash value of the property, including intangible personal property, of the associations, companies, copartnerships, or corporations within the state of North Carolina by taking as a guide, as far as practicable, the proportion of the whole aggregate value of said associations, companies, copartnerships as above ascertained, after deducting the assessed value of such real estate without the state which the length of lines of said associations, companies, copartnerships or corporations, in the case of telegraph and telephone companies, within the state of North Carolina bears to the total length thereof, and in the case of express companies and sleeping-car companies the proportion shall be in proportion of the whole aggregate value after such deduction, which the length of lines or routes within the state of North Carolina bears to the whole length of lines or routes of such associations, companies, copartnerships or corporations, and such amounts so ascertained shall be deemed and held as the entire value of the property of said associations, companies, copartnerships or corporations within the state of North Carolina: Provided, the board shall, in valuing the fixed property in this state, give due consideration to the amount of gross and net earnings per mile of line in this state, and any other factor which would give a greater or less value per mile in this state than the average value for the entire system. From the entire value of the property within the state so ascertained there shall be deducted by the state board of assessment the assessed value for taxation of all real estate, structures, machinery, and appliances within the state listed with the local taxing authorities of this state if used in the general business of the taxpayer and subject to local taxation in the

counties, as hereinbefore described in §§ 105-352 to 105-357, inclusive, and the assessed value for taxation of all intangible personal property returned and assessed under the provisions of Schedule H, §§ 105-198 to 105-217, and the residue of such value as ascertained, after deducting therefrom the assessed value of such properties, shall be by said board assessed to said associations: Provided, the state board of assessment shall also assess the value for taxation of all structures, machinery, appliances, pole lines, wire and conduit of telephone and telegraph companies within the state subject to local taxation, but land and buildings located thereon owned by said companies shall be assessed in like manner and by the same officials as though such property was owned by individuals in this state. (1939, c. 310, s. 1608.)

§ 105-359. Value per mile.—Said state board of assessment shall thereupon ascertain the value per mile of the property within the state by dividing the total value as above ascertained, after deducting the specific properties locally assessed within the state, by the number of miles within the state, and the result shall be deemed and held as value per mile of the property of such association, company, copartnership, or corporation within the state of North Carolina: Provided, the value per mile of telephone and telegraph companies shall be determined on a wire mileage basis. (1939, c. 310, s. 1609.)

§ 105-360. Total value for each county and municipality.—Said board of assessment shall thereupon, for the purpose of determining what amount shall be assessed by it to said association, company, copartnership, or corporation in each county in the state through, across, and into or over which the lines of said association, company, copartnership or corporation extend, multiply the value per mile, as above ascertained, by the number of miles in each of such counties as reported in said statements or as otherwise ascertained, and the result thereof shall be by the secretary of said state board certified to the chairman of the board of county commissioners, respectively, of the several counties through, into, over, or across which the lines or routes of said association, company, copartnership, or corporation extend: Provided, the total value of street railways, electric light, power and gas companies, as determined in § 105-358 to be certified to each county, shall be the proportion which the locally assessed value of the physical property in each county bears to the total assessed value of the physical property in the state. Distribution and certification by the state board of assessment to the municipalities and other local taxing jurisdictions shall follow the same general rules governing such distribution to the several counties of the state with respect to value per mile and total value as herein set out. All taxes due the state from any corporation taxed under the preceding sections shall be paid by the treasurer of each company direct to the commissioner of revenue. (1939, c. 310, s. 1610.)

§ 105-361. Companies failing to pay tax; penalty.—In case any such association, company, copartnership, or corporation as named in this subchapter shall fail or refuse to pay any taxes assessed against it in any county, municipality or other taxing jurisdiction in this state, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the state of North Carolina by the solicitors of the different judicial districts of the state on the relation of the board of commissioners of the different counties of this state and the judgment in said action shall include a penalty of (50%) of the amount of taxes as assessed and unpaid, together with reasonable attorney's fees for the prosecution of such action, which action may be prosecuted in any county into, through, over or across which the lines or routes of any association, company, copartnership, or corporation shall extend, or in any county where such association, company, copartnership, or corporation shall have an office or agent for the transaction of business. In case such association, company, copartnership, or corporation shall have refused to pay the whole of the taxes assessed against the same by the state board of assessment, or in case such association, company, copartnership, or corporation shall have refused to pay the taxes or any portion thereof assessed to it in any particular county or counties, such action may include the whole or any portion of the taxes so unpaid in any county or counties; but the attorney general may, at his option, unite in one action the entire amount of the tax due, or may bring separate actions to each separate county or adjoining counties, as he may prefer. All collection of taxes for or on account of any particular county made in any such suit or suits shall be by said board accounted for as a credit to the respective counties for or on account of which such collections were made by the said board at the next ensuing settlement with such county, but the penalty so collected shall be credited to the general fund of the state, and upon such settlement being made the treasurers of the several counties shall, at their next settlement, enter credits upon the proper duplicates in their offices, and at the next settlement with such county, report the amount so received by him in his settlement with the state, and proper entries shall be made with reference thereto: Provided, that in any such action the amount of the assessments fixed by said state board of assessment and apportioned to such county shall not be controverted. (1939, c. 310, s. 1611.)

§ 105-362. State board made appraisers for public utilities. — The state board of assessment herein established is constituted a board of appraisers and assessors for railroad, canal, steamboat, hydroelectric, street railway, and all other companies exercising the right of eminent domain. (1939, c. 310, s. 1612.)

§ 105-363. Returns to state board by railroads, etc., companies.—The president, secretary, superintendent or other principal accounting officer within this state of every railroad, telegraph, telephone, street railway company, whether incorporated by the laws of this state or not, shall, during the second calendar month following the month in which local tax listing begins each year, return to the state board of assessment, verified by the oath or affirmation of the officer making the return, all the following described property belonging to such corporation within the state, viz:

The number of miles of such railroad lines in each county and municipality in this state, and the total number of miles in the state, including the roadbed, right-of-way and super structures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses and the land upon which they are situated and necessary to their use, water stations and land, coal chutes and land, and real estate and personal property of every character necessary for the construction and successful operation of such railroad, or used in the daily operation, whether situated on the charter right-of-way of the railroad or on additional land acquired for this purpose, except as provided below, including, also, if desired by the state board of assessment, Pullman or sleeping cars or refrigerator cars owned by them or operated over their lines: Provided, however, that all machines and repair shops, general office buildings, storehouses and contents thereof, located outside of the right-of-way shall be listed for purposes of taxation by the principal officers or agents of such companies with the list takers of the county where the real and personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property. A list of such property shall be filed by such company with the state board of assessment. It shall be the duty of the tax supervisor, county accountant and register of deeds, if requested so to do by the state board of assessment, to certify and send to the said board a statement giving a description of the property mentioned in the foregoing proviso, and showing the assessed valuation thereof, which value shall be deducted from the total value of the property of such railroad company as arrived at by the board in accordance with § 105-365, before the apportionment is made to the counties and municipalities. The tax supervisor, county accountant and register of deeds shall also certify to the board the local rate of taxation for county purposes as soon as the same shall be determined, and such other information obtained in the performance of the duties of their offices as the said board shall require of them; and the mayor of each city or town shall cause to be sent to the said board the local rate of taxation for municipal purposes. (1939, c. 310, s. 1613.)

Section Constitutional.—This section is not in conflict with N. C. Const., Art. V, sec. 3, providing that such assessment be uniform and ad valorem. Atlantic, etc., R. Co. v. New Bern, 147 N. C. 165, 60 S. E. 925.

Taxation of Accessories, etc.—The railroad, right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, etc., by reasonable interpretation and under constitutional powers, are included in the language of this section, delegating to the Corporation Commission the power to assess railroad properties, and such are excluded from the power of local tax assessors. Atlantic, etc., R. Co. v. New Bern, 147 N. C. 165, 60 S. E. 825.

The word "superstructures" covers all buildings situated on the right of way. Atlantic, etc., R. Co. v. New Bern, 147 N. C. 165, 169, 60 S. E. 925.

Province of Local Officers.—In assessing railroad property, local officers only list and assess such property as is off the right of way. Caldwell Land Co. v. Smith, 151 N. C. 70, 74, 65 S. E. 641.

§ 105-364. Railroads; annual schedule of rolling stock, etc., to be furnished to state board. — The movable property belonging to a railroad company shall be denominated, for the purposes of taxation, "rolling stock." Every person, company, or corporation owning, constructing, or operating a railroad in this state shall, during the second calendar month following the month in which local tax listing begins each year, return a list or schedule to the state board of assessment which shall contain a correct detailed inventory of all the rolling stock belonging to such company, and which shall distinctly set forth the number of locomotives of all classes, passenger cars of all classes, sleeping cars and dining cars, express cars, horse cars, cattle cars, coal cars, platform cars, wrecking cars, pay cars, hand-cars, and all other kinds of cars, and the value thereof, and a statement or schedule as follows:

(1) The amount of capital stock authorized and the number of shares into which such capital stock is divided; (2) the amount of capital stock paid up; (3) the market value, or, if no market value, then the actual value of shares of stock; (4) the length of line operated in each county and total in the state; (5) the total assessed value of all tangible property in the state. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the board, and with reference to amounts and value on the day as of which property is assessed for the year for which the return is made. (1939, c. 310, s. 1614.)

The rolling stock of a railroad company, used upon the branch roads, or roads otherwise acquired, ascertained by a pro rata standard based on the relative length thereof to the whole time is liable to taxation. Wilmington, etc., R. Co. v. Alsbrook, 110 N. C. 137, 14 S. E. 652, construing prior law.

§ 105-365. Railroads; tangible and intangible property assessed separately. — (a) At such dates as real estate is required to be assessed for taxation the said board of assessment shall first determine the value of the tangible property of each division or branch of such railroad or rolling stock and all the other physical or tangible property. This value shall be determined by a due consideration of the actual cost of replacing the property, with a just allowance for depreciation on rolling stock, and also of other conditions, to be considered as is in the case of private property.

(b) They shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted) as evidenced by the market value of all capital stock, certificates of indebtedness, bonds, or any other securities, the value of which is based upon the earning capacity of the property.

(c) The aggregate value of the physical or tangible property, and the franchise, as thus determined, shall be the true value of the property for the purpose of ad valorem taxation, and shall be apportioned in the same proportion that the length of such road in such county bears to the entire length of each division or branch thereof, and the state board of assessment shall certify, on or before the first day of September, or as soon thereafter as practicable, to the chairman of the county commissioners and to the mayor of each city or incorporated town the amounts apportioned to his county, city or town. The board of county commissioners of each county through which said railroad passes shall assess against the same only the tax imposed for county, township, or other taxing

district purposes, the same as is levied on other property in such county, township, or special taxing districts. (1939, c. 310, s. 1615.)

§ 105-366. Railroads; valuation where road both within and without state.—When any railroad has part of its road in this state and part thereof in any other state, the said board shall ascertain the value of railroad track, rolling stock, and all other property liable to assessment by the state board of assessment of such company as provided in § 105-365, and divide it in the proportion to the length such main line of road in this state bears to the whole length of such main line of road and determine the value in this state accordingly: Provided, the board shall, in valuing the fixed property in this state, give due consideration to the character of roadbed and fixed equipment, number of miles of double track, the amount of gross and net earnings per mile of road in this state, and any other factor which would give a greater or less value per mile of road in this state than the average value for the entire system. On or after the first Monday in the month following the month in which said reports are required to be made, the said board shall give a hearing to all the companies interested, touching the valuation and assessment of their property. The said board may, if they see fit, require all argument and communications to be presented in writing. (1939, c. 310, s. 1616.)

§ 105-367. Railroads; in cases of leased roads.—If the property of any railroad company be leased or operated by any other corporation, foreign or domestic, the property of the lessor or company whose property is operated shall be subject to taxation in the manner hereinbefore directed; and if the lessee or operating company, being a foreign corporation, be the owner or possessor of any property in this state other than that which it derives from the lessor or company whose property is operated, it shall be assessed in respect to such property in like manner as any domestic railroad company. (1939, c. 310, s. 1617.)

§ 105-368. Railroads; board may subpoena witnesses and compel production of records; penalty for failure to furnish required information.—The state board of assessment shall have power to summon and examine witnesses and require that books and papers shall be presented to them for the purpose of obtaining such information as may be necessary to aid in determining the valuation of any railroad company. Any president, secretary, receiver, or accounting officer, servant or agent of any railroad or steamboat company having any proportion of its property or roadway in this state who shall refuse to attend before the said board when required to do so, or refuse to submit to the inspection of said board any books or papers of such railroad company in his possession, custody, or control, or shall refuse to answer such questions as may be put to him by said board, or order touching the business or property, monies and credits, and the value thereof, of said railroad company, shall be guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be confined in the jail of the county not exceeding thirty days, shall be fined in any sum not exceeding five hundred dollars ($500.00) and costs, and any president, secretary, accounting officer, servant, or agent aforesaid so refusing as aforesaid shall be deemed guilty of contempt of such board, and may be confined, by order of said board, in the jail of the proper county until he shall comply with such order and pay the cost of his imprisonment. (1939, c. 310, s. 1618.)

§ 105-369. Taxes on railroads shall be a lien on property of the same.—The taxes upon any and all railroads in this state, including roadbed, right-of-way, depots, side tracks, ties, and rails, now constructed or hereafter to be constructed, are hereby made a perpetual lien thereupon, commencing from the day as of which property is assessed in each current year, against all claims or demands whatsoever of all persons or bodies corporate except the United States and this state, and the above described property or any part thereof may be taken and held for payment of all taxes assessed against said railroad company in the several counties of this state. (1939, c. 310, s. 1619.)

§ 105-370. Board of assessment to certify apportionment of valuation to counties and municipalities; payment of local taxes.—The state board of assessment shall, upon completion of the assessment directed in the preceding sections, certify to the register of deeds or tax supervisor of the counties and the clerk of the board of commissioners of the municipalities through which said companies operate the apportionment of the valuations as hereinbefore determined and apportioned by the board, and the board of county commissioners and taxing authorities of municipalities or other taxing jurisdictions respectively, shall assess against such valuation the same tax imposed for county, township, town, or other tax district purposes, as that levied on all other property in such county, township, town, or other taxing districts. This tax shall be paid to the sheriff or tax collector of the county and municipality. (1939, c. 310, s. 1620.)

§ 105-371. Canal and steamboat companies.—The property of all canal and steamboat companies in this state shall be assessed for taxation as above provided for railroads. In case any officer fails to return the property provided in this section, the board shall ascertain the length of such property in this state, and shall assess the same in proportion to the length at the highest rate at which property of that kind is assessed by them. (1939, c. 310, s. 1621.)

Art. 27. Collection and Foreclosure of Taxes.

§ 105-372. Definitions.—As used in this article, unless the context otherwise indicates:

(1) "Tax collector" or "collector" means sheriffs, tax collectors and all other officials charged with the duty of collecting taxes levied by or for counties, cities, school districts, road districts or other political subdivisions of this state.

(2) "Taxes" means property taxes (other than taxes levied under Schedule H, §§ 105-198 to 105-217), poll taxes and dog taxes levied by or for counties, cities, school districts, road districts or other political subdivisions of this state.

(3) "Taxing unit" means any county, city, school district, road district or other political subdivision of this state by or for which taxes are levied.

(4) "City" means any incorporated city or town.

(5) "District" means any taxing unit other than counties and cities.

(6) "Person" means any individual, firm, corporation, company, partnership, trust, estate, or fiduciary. (1939, c. 310, s. 1700.)

§ 105-373. Appointment, terms, qualifications and bond of city tax collectors.—The governing body of each city in this state shall appoint a tax collector, who shall be some person of character and integrity, with experience in business or in collection work, to collect taxes levied by the city governing body. The governing body may, in its discretion, designate some official or employee of the city who has other duties, to perform also the duties of tax collector. The governing body shall fix the compensation of said collector and, subject to the provisions of this article, shall prescribe the amount of his bond and approve the sureties thereon. Any premiums on said bond shall be paid in such manner as the governing body may direct. No tax collector shall be allowed to begin his duties until he shall have furnished bond satisfactory to the governing body; nor shall any collector be permitted to continue collecting taxes after his bond has expired without renewal; nor shall any collector be allowed to collect any taxes not covered by his bond.

The collector shall serve for a term of one year and until his successor has been appointed and has qualified. The governing body may, during his term, remove him from office, for good cause shown, upon notice in writing and after giving him an opportunity to appear and be heard at a public session of said governing body: Provided, that no hearing shall be necessary in case of removal for failure to meet the conditions prerequisite prescribed by this article for the delivery of the tax books. Any vacancy caused by removal, resignation, death or otherwise shall be filled, for the unexpired term, by appointment of the governing body, unless otherwise provided by this article.

Appointments under this article shall be made during the first week in July, one thousand nine hundred thirty-nine, and annually thereafter. Until the first such appointments are made, city taxes shall be collected by the collectors now provided by law, notwithstanding any repealing clauses contained in this article.

Nothing in this section shall be construed to change the manner of appointment or term of any collector who collects both city and county taxes, or of any city collector whose manner of appointment or term is governed by the city charter. (1939, c. 310, s. 1701.)

§ 105-374. County sheriffs and tax collectors.—County and district taxes shall be collected by the sheriffs or tax collectors as provided by law: Provided, that district taxes levied by county commissioners and collected by county officials may, for collection and foreclosure purposes, be treated in the same manner as county taxes. (1939, c. 310, s. 1702.)

§ 105-375. General duties of tax collectors. — It shall be the duty of each tax collector to employ all lawful means for the collection of all taxes in his hands; to give such bond as may be required of him; to perform such duties in connection with the preparation of the tax records, receipts and stubs as the governing body may direct; to keep adequate records of all collections; and to account for all moneys coming into his hands. At each regular meeting of the governing body he shall submit a report of the amount collected on each year's taxes in his hands, the amount remaining uncollected, and the steps he is taking to encourage or enforce payment. The governing body may, at any time, require him to make settlement in full for all taxes in his hands. The governing body may also, at any time, require the collector to send out tax bills or notices, make personal calls upon delinquent taxpayers, or proceed to enforce payment by any lawful means. In addition to the taxes hereinbefore in this article defined, all license, privilege and franchise taxes levied by the taxing unit by which he is employed shall be collected by the collector.

The successor in office of any tax collector may continue and complete any process of tax collection, or any proceeding authorized by this article, begun by his predecessor. (1939, c. 310, s. 1703.)

§ 105-376. The tax lien and discharge thereof.—(a) Priority of the Tax Lien on Real Property.—(1) The lien of taxes shall attach to real property at the time hereinbefore in this subchapter prescribed.

(2) The liens of taxes of all taxing units shall be of equal dignity and shall be superior to all other assessments, charges, rights, liens, and claims of any and every kind in and to said property, regardless of by whom claimed and regardless of whether acquired prior or subsequent to the attachment of said lien for taxes: Provided, that nothing herein shall be construed as affecting such relative priority as may be prescribed by the Revenue Act for the lien of state taxes.

(3) The priority of the lien shall not be affected by transfer of title to the real property after the lien has attached, nor shall it be affected by death, receivership or bankruptcy of the owner of said property.

(b) Discharge of the Lien on Realty; Release of Separate Parcels.—The tax lien shall continue until the taxes, plus interest, penalties, and costs as allowed by law, have been fully paid.

When the lien of taxes of any taxing unit for any year attaches to two or more parcels of real estate owned by the same taxpayer, said lien may be discharged as to any parcel, at any time prior to advertisement of tax foreclosure sale, in the following manner: (1) Upon payment, by or on behalf of the listing taxpayer, of the taxes for said year on the parcel or parcels sought to be released, with penalties and interest thereon, plus all personal property, poll and dog taxes owed by said taxpayer for the same year, with interest and penalties thereon, and all costs allowed by law; or (2) upon payment, by or on behalf of any person (other than said listing taxpayer) having an interest in said property, of the taxes for said year on the parcel or parcels sought to be released, with interest and penalties thereon, plus a proportionate part of personal property, poll and dog taxes owed by said listing taxpayer for the same year, with interest and penalties thereon, and a proportionate part of costs allowed by law. The

proportionate parts shall be determined by the percentage of the total assessed value of the taxpayer's real estate represented by the assessed value of the parcel or parcels sought to be released.

Nothing in this section shall be construed to affect the rights of any holder of a tax sale certificate, other than a taxing unit, with respect to any certificate held on April 3, 1939.

When real estate listed as one parcel is subdivided, a part thereof may be released in the same manner, after the value of such part for tax purposes has been determined by the county tax supervisor or, if there is no supervisor, by the county accountant, and certified by him to the collector.

It shall be the duty of every collector accepting a payment, made under this section for the purpose of releasing less than all of the taxpayer's real property, to give the person making the payment a receipt setting forth the description of such property appearing on the tax list and bearing a statement that such property is being released; and it shall also be his duty to indicate the property released on the official records of his office. In case of failure on the part of the collector to issue such receipt or make such record, the omission may be supplied at any time.

When any parcel of real estate has been released, under this section, from the lien of taxes of any taxing unit for any year, such property shall not thereafter be subject to the lien of any other regularly assessed taxes of the same taxing unit for the same year, whether such other taxes be levied against the listing owner of said property or against some other person acquiring title thereto. No tax foreclosure judgment for such other taxes shall become a lien on such released property; and, upon appropriate request and satisfactory proof of release by any interested person, the clerk of the superior court shall indicate on the judgment docket that such judgment is not a lien on said released property: Provided, that failure to make such entry shall not have the effect of making said judgment a lien on said released property.

(c) Priority of Lien on Personal Property.—The tax lien, when it attaches to personal property, shall, in so far as it represents taxes assessed against the property to which it attaches, be superior to all other liens and rights, whether such other liens and rights are prior or subsequent to the tax lien in point of time. In so far as said tax lien represents taxes not assessed against such property, said tax lien on personal property shall be inferior to prior valid liens and superior to all subsequent liens. As between the liens of different taxing units, the lien first attaching shall be superior.

(d) Preference Accorded Taxes in Liquidation of Debtor's Estates.—In all cases in which a taxpayer's assets are in the hands of a receiver or assignee for the benefit of creditors, or are otherwise being liquidated or managed for the benefit of creditors, the taxes owed by such debtor, together with interest, penalties and costs, shall be a preferred claim, second only to administration expenses and specific liens: Provided, that this shall not be construed to modify or reduce the priority by this subchapter given to tax liens on real property or, in case of levy or attachment, the priority by this subchapter given to tax liens on personal property. (1939, c. 310, s. 1704.)

Duration of Lien.—The general assembly, pursuant to the constitution, has established the procedure for levying and collecting taxes, and when levied "The tax lien shall continue until the taxes, plus interest, penalties and costs, as allowed by law, have been fully paid." Charlotte v. Kavanaugh, 221 N. C. 259, 266, 20 S. E. (2d) 97.

§ 105-377. All interested persons charged with notice of taxes.—All persons who have or may acquire any interest in any property which may be or may become subject to a lien for taxes are hereby charged with notice that such property is or should be listed for taxation, that taxes are or may become a lien thereon, and that if taxes are not paid such proceedings may be taken against said property as are allowed by law. Such notice shall be conclusively presumed, whether such persons have actual notice or not. (1939, c. 310, s. 1705.)

§ 105-378. Prepayments.—Payments on taxes, made before the tax books have been turned over to the collector, shall be made to such official as the governing body of the taxing unit may designate, and the official so designated shall give bond satisfactory to said governing body. If, at the time of such prepayment, the tax rate has not been finally fixed or the valuation of the taxpayer's property has not been finally determined, the prepayment may be made on the basis of the best information available to the collecting official. If it subsequently develops that there has been an overpayment, the excess shall be refunded by the taxing unit, without interest. If it develops that there has been an underpayment, the taxpayer shall be required to pay the balance due, and shall be allowed the same discount or charged the same penalty on such balance as in force with respect to other taxes for the same year at the time such balance is paid. Receipts issued for payments made on the basis of an estimate shall so state, and such receipts shall not release property from the tax lien; but official and final receipts, effecting such release, shall be made available to the taxpayer as soon as possible after determination that the tax has been fully paid. (1939, c. 310, s. 1706.)

§ 105-379. Delivery of tax books to collector; prerequisites thereto; procedure upon default.—(a) Time of Delivery.—The tax books shall be delivered to the collector, upon order of the governing body, on or before the first Monday in October, as hereinbefore in § 105-325 provided.

(b) Settlement and Bond as Prerequisites; Prepayments.—The tax books for the current year shall not be delivered to the collector until he shall have: (1) delivered to the chief accounting officer of the taxing unit the duplicates or stubs of such receipts as he may have issued for prepayments lawfully received by him; (2) demonstrated to the satisfaction of said chief accounting officer that all moneys received by him as such prepayments have been deposited to the credit of the taxing unit; (3) made his annual settlement, as hereinafter defined, for all taxes in his hands for collection; and (4) provided bond or bonds for the current taxes and all prior taxes in his hands for collection satisfactory to the governing body: Provided, that this shall not authorize any governing body of any unit to accept a bond of lesser

amount than that prescribed by any valid local statute applying to said unit.

Any other official who has accepted prepayments shall, prior to the delivery of the tax books to the collector, deliver the prepayment receipt duplicates or stubs to the chief accounting officer of the unit and shall demonstrate to the satisfaction of said chief accounting officer that all moneys received by him as such prepayments have been deposited to the credit of the taxing unit: Provided, that where said chief accounting officer has himself lawfully accepted prepayments, he shall, not later than the day on which the tax books are delivered to the collector, make settlement therefor with the governing body in such manner and form as said governing body may prescribe.

It shall be the duty of said chief accounting officer: (1) to reduce the original charge made against the tax collector by deducting from the total amount of taxes levied so much of the amount received as prepayments as need not be refunded under the provisions of this article; (2) to secure and retain in his office, available to the taxpayers upon request, the regular receipts for taxes paid in full by prepayments, and to credit such payments on the tax books or accounts delivered to the collector; (3) to prepare refunds for overpayments made by way of prepayment (such disbursements to be made in the same manner as other disbursements of funds of the taxing unit are made); and (4) to credit all partial prepayments as partial payments on the regular receipts or tax accounts.

(c) Procedure upon Default.—If, on or before the first Monday in October, the regular tax collector shall not meet the requirements prescribed in subsection (b), the governing body is hereby required immediately to appoint a special collector, not connected with the regular collector, and deliver to him the tax books for the current year. Said special collector shall give satisfactory bond in the same amount as would be required of the regular collector. He shall receive as compensation two per cent (2%) of his collections or such amount as may be fixed by the governing body; and the compensation received by him and the cost of his bond may, in the discretion of the governing body, be deducted from the compensation of the regular collector. If and when the regular collector shall meet the requirements specified in the preceding subsection, the special collector shall make full settlement, in the manner hereinafter provided for collectors retiring from office, and shall then turn over the tax books to the regular collector.

(d) Civil and Criminal Penalties.—(1) Any member of the governing body of any taxing unit who shall vote to deliver the tax books or tax receipts to a tax collector, before said collector has met the requirements prescribed in this section, shall be individually liable for the amount of taxes due by said collector; and any such member so voting, or who willfully fails to perform any duty imposed by this section, shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court.

(2) Any tax collector or other official who shall fail to account for prepayments received in the manner prescribed by this section, and any chief accounting officer failing to perform the duties imposed upon him by this section, shall be guilty of a misdemeanor, subject to fine or imprisonment, or both, in the discretion of the court. (1939, c. 310, s. 1707.)

§ 105-380. Installment payments. — The governing body of any taxing unit may, in its discretion, allow payment of taxes in not more than four equal installments, the last of which shall be payable not later than the week preceding the day fixed for the beginning of advertisement of the tax sale. The governing body of any unit permitting such installment payments, shall: (a) provide that, upon default in any installment, penalties shall accrue immediately upon the entire balance remaining unpaid at the same rate which would have accrued had such installment plan not been adopted; or (b) provide that, upon default in any installment, penalties shall accrue upon the amount of such installment at the same rate which would have accrued had such installment plan not been adopted. Payments made to taxing units adopting installment plans shall not be credited on any installment until all prior installments, together with any penalties thereon, have been paid.

It shall be the duty of each governing body and each collector of a taxing unit adopting an installment plan to indicate, on the tax receipts and on any bills or notices sent to taxpayers, the due dates of the installments and the method by which penalties will be ascertained upon default in payment of any installment: Provided, that failure to fulfill this requirement shall not affect the validity of the taxes. (1939, c. 310, s. 1708.)

§ 105-381. Partial payments. — Unless otherwise directed by the governing body, the tax collector shall, at any time, accept partial payments on taxes and issue a partial payment receipt therefor. In crediting a payment on the tax for any year or on any instaliment, the payment shall first be applied to accrued penalties, interest and costs and then to the principal amount of such tax or installment. (1939, c. 310, s. 1709.)

§ 105-382. Payment of taxes; notes and checks. —Taxes shall be payable in existing national currency.

No tax collector shall accept a note of the taxpayer in payment of taxes.

Any collector may, in his discretion and at his own risk, accept checks in payment of taxes, and either issue the tax receipt immediately or withhold said receipt until the check has been collected. In any case in which a collector accepts a check and issues a receipt, and said check is thereafter returned unpaid, without negligence on the part of said collector in presenting said check for payment, the taxes for which said check was given shall be deemed unpaid; and the collector shall immediately correct his records and shall proceed to collect said taxes either by civil suit on the check or by the use of any remedy allowed for the collection of taxes: Provided, that the lien for said taxes shall be inferior to the rights of purchasers for value and of persons acquiring liens of record for value, when such purchasers or lienholders acquire their rights, in good faith and without actual knowledge that such check has not been collected, after examination of the

collector's records during the time such records showed the taxes as paid or after examination of the official receipt issued to the taxpayer.

In addition to penalties for nonpayment of taxes provided by this subchapter, and in addition to any criminal penalties provided by law for the giving of worthless checks, the penalty for giving, in payment of taxes, a check which is returned because of insufficient funds or nonexistence of an account of the drawer, shall be ten per cent (10%) of the amount of such check, which shall be added to and collected in the same manner as such taxes. (1939, c. 310, s. 1710.)

Editor's Note.—For acts authorizing counties and municipalities to accept deeds for real property in payment of taxes or special assessments and to sell such property, see Session Laws 1943, c. 465 (Catawba county and municipalities therein); c. 418 (Guilford county); c. 577 (Durham county and city of Durham); c. 533 (city of High Point).

Failure to Follow Statutory Procedure upon Return of Check.—The fact that a county tax collector accepted a check in payment of taxes, and the check was returned, and he paid the taxes in his settlement with the board of county commissioners does not give him a lien which may be foreclosed under § 105-414. The collector, having failed to correct the tax record so as to show the check had been returned and that the taxes were not paid, the tax lien was not reinstated. He could have protected himself and preserved the tax lien if he had followed the procedure outlined in this section; this he failed to do and the returned check was but a simple promise to pay. Since the provisions of this section enacted for the protection of the collector were not complied with and he elected to hold the returned check as evidence of the nonpayment of the taxes, he is in no better position than if he had accepted a note in lieu of the check. Miller v. Neal, 222 N. C. 540, 542, 23 S. E. (2d) 852.

§ 105-383. Statements of amount of taxes due.—Any tax collector shall, at the request of the owner or occupant of any land within the taxing unit, or of any person having a lien thereon or interest or estate therein, or of the duly authorized agent or attorney of any such person, furnish a written certificate of the amount of the taxes and assessments levied upon such land for the current year, if such amount has been definitely determined, and for all prior years for which taxes and assessments may be due, together with penalties, interest and costs accrued thereon: Provided, that this shall not require any collector to furnish information regarding taxes not in his hands for collection: Provided, further, that the person making such request shall specify in whose name said land was listed for taxation for each year for which such information is sought.

Any collector failing or refusing to furnish such certificate, upon request in good faith made as herein provided, shall be liable for a penalty of fifty dollars ($50.00). (1939, c. 310, s. 1711.)

§ 105-384. Place for collection of taxes.—Taxes shall be payable at the office of the collector: Provided, that the governing body of any taxing unit may for the convenience of the taxpayers, require the collector, in person or by deputy, to attend at other places, at times to be designated by said governing body, for the collection of taxes. Fifteen days' notice of such times and places shall be given by the collector by advertisement published in some newspaper published in the county, and, if there be no such newspaper published in the county, then by posting such notice at three or more places in said unit. (1939, c. 310, s. 1712.)

§ 105-385. Remedies against personal property.—(a) Time for.—From the first day of the fiscal year until taxes become due the collector shall not proceed against the personal property of the taxpayer, in the manner herein provided, unless there is reasonable ground for believing that the taxpayer is about to remove his property from the state. The collector may proceed against such personal property, in the manner herein provided, at any time after taxes are due and before filing of a tax foreclosure complaint or docketing of a judgment for said taxes as hereinafter provided. Every official charged with the duty of collecting taxes, current or delinquent, shall have power and authority to proceed against such personal property in the manner herein provided.

(b) Relation between Remedies against Personal Property and Remedies against Real Property.—The collector may proceed against the personal property of the taxpayer, as herein provided, in his discretion; and he shall proceed against such property: (1) if directed so to do by the governing body; or (2) upon demand by the taxpayer, mortgagee or other person holding a lien upon the real property of the taxpayer: Provided, that said taxpayer, mortgagee or other person making said demand shall furnish the collector with a written memorandum describing such personal property and stating where it can be found.

After the sale of a tax sale certificate, no person shall be allowed to attack the validity of the sale on the ground that the tax should have been procured from personal property; but this shall not be construed as prohibiting proceedings against personal property after said sale.

(c) Levy upon Personal Property.—Subject to the provisions of this article governing the priority of the lien acquired, the following property may be levied upon and sold for failure to pay taxes: (1) any personal property of the taxpayer, regardless of the time at which it was acquired and regardless of the existence or date of creation of mortgages or other liens thereon; (2) any personal property transferred by the taxpayer to relatives of the taxpayer; (3) personal property in the hands of a receiver for the taxpayer and in such cases it shall not be necessary for the collector to apply for an order of the court directing payment or authorizing the levy, but said collector may proceed as if the property were not in the hands of a receiver or in the custody of the law; (4) personal property of a deceased taxpayer: Provided, the levy is made prior to final settlement of the estate; (5) personal property transferred by the taxpayer, after the taxes levied for were due, by any type of transfer other than those hereinbefore mentioned in this subsection and other than by bona fide sale for value: Provided, the levy is made within sixty days after such transfer.

The levy and sale shall be governed by the laws regulating levy and sale under execution: Provided, that it shall not be necessary for said levy to be made or said sale to be conducted by the sheriff, and the collector is hereby given the same authority as a sheriff to make said levy and conduct said sale. The collector shall be entitled to fifty cents for each levy and fifty cents for each actual sale. Said fees, plus actual advertising

costs, shall be added to and collected in the same manner as the taxes. The advertising costs, when collected, shall be used to reimburse the taxing unit, which shall advance the cost of said advertising; and the levy and sale fees, when collected, shall be treated in the same manner as other fees collected by said official.

(d) Attachment and Garnishment.—Subject to the provisions of this article governing the priority of rights acquired, the collector may attach wages or other compensation, rents, bank deposits, the proceeds of property subject to levy and sale, or other property incapable of manual delivery: Provided, the same belongs to the taxpayer or has been transferred to another under circumstances which would permit it to be levied upon if it were tangible, or is due to the taxpayer or may become due to him within the calendar year; and the person owing same or having same in his possession shall become liable for the taxes to the extent of the amount he owes or has in his possession: Provided, that not more than ten per cent of wages or other compensation for personal services shall be liable to attachment and garnishment for failure to pay taxes.

To proceed under this subsection, the collector shall serve or cause to be served upon the taxpayer and the person owing or having in his possession the wages, rents, debts or other things sought to be attached, a notice showing at least: (1) the name of the taxpayer; (2) the amount of the taxes, penalties and costs (including the fees allowed by this subsection) and year or years for which such taxes were levied; (3) the name of the taxing unit or units by which such taxes were levied; (4) a brief description of the thing sought to be attached; and (5) a statement that the person served has the right to appear, within ten days after service, before some designated justice of the peace or (if the amount is beyond the jurisdiction of a justice of the peace) the superior court in the county in which the taxing unit lies, and show cause why he should not be compelled to pay said taxes, penalties and costs.

Notices concerning two or more taxpayers may be combined if they are to be served upon the same person, but in such case the taxes, penalties and costs charged against each taxpayer must be set forth separately.

A copy of each notice shall be retained by the collector and a copy shall be filed, not later than the first business day following the day of service, with the justice or court before which the notice is returnable, together with a notation of service. Upon entry of judgment, by default or after appearance and hearing, in favor of the taxing unit, the person so served shall become liable for the taxes, penalties and costs: Provided, that payment shall not be required from amounts which are to become due to the taxpayer until they actually become due.

The fee for serving said notice shall be fixed by the governing body of the taxing unit, not exceeding twenty-five cents if the tax is less than ten dollars and fifty cents if the tax is ten dollars or more: Provided, if the taxes of more than one taxpayer are included in the notice, the service fee shall not exceed fifteen cents per taxpaper. The justice's fee shall be twenty-five cents if the tax is less than ten dollars and one dollar if the tax is ten dollars or more plus one dollar for each hearing actually held, but no justices' fees shall be charged except in cases in which judgment is actually entered. Costs in the superior court shall be the same as in other proceedings therein. Fees and costs shall be added to and collected as part of the taxes: Provided, that if judgment is rendered against the taxing unit such costs and fees shall be paid by the taxing unit. All fees collected by officers shall be disposed of in the same manner as other fees collected by such officers.

(e) Employees of State and Its Subdivisions.—Tax collectors may proceed against the wages, salary or other compensation of officials and employees of this state and its agencies and instrumentalities and officials and employees of political subdivisions of this state and their agencies and instrumentalities in the manner provided by subsection (d) of this section. In such cases the notice shall be served upon the treasurer of the employing government or agency or instrumentality and, if there is no treasurer, then upon the chief financial officer thereof. In the case of notices served upon the state treasurer, the notice shall state the place and character of the taxpayer's employment.

(f) Lists of Employees.—Any person, firm or corporation who shall, after written demand therefor, refuse to give the tax collector or tax supervisor a list of all employees of such person, firm or corporation who may be liable for taxes, shall be guilty of a misdemeanor. (1939, c. 310, s. 1713.)

Sale by Assignee Prior to Levy.—Where an assignee for the benefit of the creditors of a taxpayer sells personal property of his assignor, on which a tax had been assessed, but not levied, prior to the assignment, the proceeds in the hands of the assignee are not subject to garnishment for the payment of the tax, but belong to the creditors. Shelby v. Tiddy, 118 N. C. 792, 24 S. E. 521.

§ 105-386. Collection of taxes outside the taxing unit.—If a taxpayer has no property in the taxing unit to which the taxes are due, but does have property in some other unit, or if the taxpayer has removed from the taxing unit in which the taxes are due and has left no property there and is known to be in some other unit in this state, it shall be the duty of the collector to send a copy of the tax receipt, with a certificate stating that such taxes are unpaid, to the collector of the unit in which such property is located or in which such taxpayer is known to be. Such receipt and certificate shall have the force and effect of a tax list of his own unit in the hands of the collector receiving it, and it shall be the duty of such collector to proceed immediately to collect such taxes by any means by which he could lawfully collect taxes of his own unit. The collector receiving such receipt and certificate shall report, within thirty days after such receipt, to the collector who sent the same, either that he has collected the same or is unable to collect the same by any lawful means or that he has begun proceedings for the collection of same. All collections made under this section shall be remitted to the unit levying the tax within five days after such collection, but the collector making collection shall retain ten per centum of the amount thereof, which shall be for his personal use. All reports under this section, reporting that the tax is uncollectible, shall be under oath and shall state

that the collector has used due diligence and is unable to collect said taxes by levy, garnishment or otherwise. Upon failure to make such sworn report the collector receiving such receipt and certificate shall be liable on his bond for such taxes.

It shall be the duty of the governing body of each taxing unit to require reports from the tax collector, at such times as it may prescribe (but not less frequently than in connection with each annual settlement), concerning the efforts he has made to locate taxpayers who have removed from the unit, the efforts he has made to locate property in other units belonging to delinquent taxpayers, and the efforts he has made under this section to collect the taxes. (1939, c. 310, s. 1714.)

§ 105-387. Sales of tax liens on real property for failure to pay taxes.—(a) Report of Delinquent Taxes Which Are Liens on Real Property. —The tax collector of each county and district shall, on the first Monday in April each year, and the tax collector of each city shall, on the second Monday in April each year, report a list of all taxpayers owing taxes for the current year which are liens on real property, and the governing body shall thereupon order sale of the tax lien on said real property of said taxpayers to be held at one of the times hereinafter prescribed. For purposes of all subsections of this section, district taxes collected by city tax collectors shall be regarded as city taxes.

(b) Date of Sale; Effect of Delay.—The county and district sale shall be held on the first Monday, and the city sale on the second Monday, in May or in any of the four succeeding months. Failure to hold said sale within the time prescribed shall not affect the validity of the taxes or the tax liens, nor shall it affect the validity of the sale when thereafter held. All sales held shall begin, in the case of county and district taxes, on the first Monday of the month and, in the case of city taxes, on the second Monday in the month: Provided, that where county and city taxes are collected by the same collector, the sale may be held on either of said Mondays.

No sale shall be delayed or restrained by order of any court of this state.

(c) Advertisement of Sale.—Public notice of the time, place and purpose of such sale shall be given by advertisement at the door of the courthouse or city hall for four successive weeks preceding such sale, and by advertisement once each week for four successive weeks preceding such sale in some newspaper published in the county. If there be no newspaper published in the county, such advertisement shall be posted in at least one public place in each township, in the case of county taxes, and in at least three public places in the city in the case of city taxes.

Said advertisement shall set forth, in addition to the time, place and purpose of such sale: (1) the name of each taxpayer owing taxes which are a lien on real estate; (2) a brief description of the land listed in the name of each; (3) the principal amount of the taxes owed by each. Failure to include penalties and costs in the amount advertised shall not be construed as a waiver of same, but such advertisement shall state generally that the amounts advertised are subject to be increased by such penalties and costs.

(d) Place and Hour of Sale. — All county and district sales shall be held at the courthouse door, and city sales shall be held at the courthouse door or at the city hall door as the collector may advertise. All sales shall begin at such hour as may be specified in the advertisement, and they may be continued from day to day, if continuance is necessary in order to complete the sales, without further advertisement.

(e) Manner of Sale.—The sale may be conducted by the collector or any deputy designated by him for the purpose. The tax liens on all parcels advertised against one taxpayer shall be sold as one lot at public outcry to the highest bidder: Provided, that in case of county sales, liens on parcels in different townships may be sold separately. The collector may, in his discretion, demand immediate payment from any successful bidder, and reject such bid upon failure to comply with said demand. No bid shall be received unless for an amount at least equal to the principal amount of the taxes plus all penalties and costs accrued thereon. In the absence of a bid at least equal to such sum the taxing unit shall become the purchaser, without submitting a formal bid, for an amount equal to such sum.

In all cases in which bids are accepted which exceed such sum the tax collector shall immediately report such excess to the governing body, and said governing body shall order such excess paid directly to the person entitled thereto or order it paid to the clerk of superior court for distribution as the court may direct.

(f) Costs of Sale.—Costs of sale, which shall be included in the minimum sale price, shall consist of actual advertising cost and a sale fee not exceeding fifty cents (50c) per parcel. Actual advertising cost per parcel shall be determined by the collector, and may be determined upon an advertising lineage basis or an average cost per insertion basis or by any other reasonable method. The taxing unit shall pay all advertising expense, and all advertising cost collected shall be paid to it for use as its governing body may direct. All sale fees collected shall be treated in the same manner as other fees collected by said collector.

(g) Payments during the Advertising Period.— At any time between the beginning of the advertisement and the time of actual sale, any parcel may be withdrawn from the sale list by payment of taxes and penalties as required by law and a proportionate part of the advertising cost as determined by the collector. Thereafter, such parcel shall be eliminated from the advertisement: Provided, that failure to eliminate such parcel shall not subject the collector to liability if the lien on said parcel is not thereafter actually sold.

(h) Failure of Collector to Attend Sale.—If any collector shall fail to attend any duly advertised sale, in person or by competent deputy, he shall be guilty of a misdemeanor and liable on his bond to a penalty of three hundred dollars.

(i) Land Listed in Wrong Name. — No sale shall be void because such real estate was charged in the name of any other person than the rightful owner, if such real estate be in other respects correctly described on the tax list: Provided, no sale of the lien on real estate listed in the name of the wrong person shall be valid when the rightful owner has listed the same and paid the taxes thereon.

(j) Irregularities Immaterial.—No irregularities in making assessments or in making the returns thereof in the equalization of property as provided by law, or in any other proceeding or requirement, shall invalidate the sale of tax liens on real estate or sale of real estate in tax foreclosure proceedings, nor in any manner invalidate the tax levied on any property or charged against any person. The following defects, omissions, and circumstances occurring in the assessment of any property for taxation, or in the levy of taxes, or elsewhere in the course of the proceedings, shall be deemed to be irregularities within the meaning of this subsection; the failure of the assessors to take or subscribe an oath or attach an oath to an assessment roll; the omission of a dollar mark or other designation descriptive of the value of figures used to denote an amount assessed, levied, or charged against any property or the valuation of any property upon any record; the failure to make or serve any notice mentioned in this chapter; the failure or neglect of the collector to offer any tax lien or real estate for sale at the time mentioned in the advertisement or notice of such sale; failure of the collector to adjourn the sale from day to day, or any irregularity or informality in such adjournment; any irregularity or informality in the order or manner in which tax liens or real estate may be offered for sale; the failure to assess any property for taxes or to levy any tax within the time prescribed by law; any irregularity, informality or omission in any such assessment or levy; any defect in the description, upon any assessment book, tax list, sales book, or other record, of real or personal property, assessed for taxation, or upon which any taxes are levied, or which may be sold for taxes, provided such description be sufficiently definite to enable the collector, or any person interested, to determine what property is meant or intended by the description, and in such cases a defective or indefinite description, on any book, list, or record, or in any notice or advertisement, may be made definite by the collector at any time by correcting such book, list or record, or may be made definite by using a correct description in any tax foreclosure proceeding authorized by this subchapter, and any such correction shall have the same force and effect as if said description had been correct on the tax list; any other irregularity, informality, or omission or neglect on the part of any person or in any proceedings, whether mentioned in this subsection or not; the neglect or omission to tax or assess for taxation any person or property; the overtaxation of persons or property liable to be taxed.

(k) Acts of De Facto Officers.—In all actions, proceedings, and controversies involving the title to real property held under and by virtue of a tax sale or any tax foreclosure proceedings authorized by this article, all acts of assessors, clerks, sheriffs, collectors, supervisors, commissioners and other officers de facto shall be deemed and construed to be of the same validity as acts of officers de jure.

(l) Proof of Sale.—The books and records of the office of the collector making the sale, or copies thereof properly certified, shall be deemed sufficient evidence to prove the sale of the tax lien on any real property under this section, the redemption thereof or the payment of taxes thereon.

(m) Wrongful Sale.—Any collector or deputy collector who shall sell, or assist in selling, the tax lien on any real property, knowing the same not to be subject to taxation, or that the taxes for which the lien is sold have been paid, or shall knowingly and willingly sell or assist in selling the tax lien on any real property for payment of taxes to defraud the owner of such real property, or shall knowingly and willingly cause foreclosure proceedings to be instituted against real property so sold, shall be guilty of a misdemeanor, and be liable to a fine of not less than one thousand nor more than three thousand dollars, or to imprisonment not exceeding one year, or to both fine and imprisonment, and to pay the injured party all damages sustained by such act; and all such sales shall be void.

When by mistake or wrongful act of the collector a tax lien on real property has been sold on which no tax was due, the taxing unit shall reimburse the purchaser by paying to him the amount expended by him in such purchase, with interest thereon at six per cent per annum; and the collector shall be liable to the taxing unit upon his bond for all amounts so expended by it in excess of the amount received by it from said sale. Any amount paid by a taxing unit under this section for state taxes shall, on proper certificate from the chairman of the governing body, be allowed by the auditor and paid by the treasurer of the state, and the state shall have the right of recovery against the collector on his bond to the amount so paid.

(n) Joint Sales by Several Taxing Units.—Wherever the taxes of two or more taxing units are collected by the same collector, one sale shall be held for the taxes of both at such time as is prescribed by law for sales by either; and in the absence of bids the larger unit may become the purchaser, or such units may become joint purchasers, for the benefit of all according to their respective interests: Provided, that this shall not repeal any local law designating the purchaser in case of joint sales. (1939, c. 310, s. 1715.)

Local Modification.—Wayne: 1941, c. 40; Cumberland: 1941, c. 44, s. 1(a).

The power to sell real estate for taxes was repealed by chapter 310, Public Laws 1939, and the sheriff or tax collector is limited to the sale of the tax lien. Crandall v. Clemmons, 222 N. C. 225, 227, 22 S. E. (2d) 448.

The tax lien can be enforced only by an action in the superior court in the county in which the land is situated in the nature of an action to foreclose a mortgage. Crandall v. Clemmons, 222 N. C. 225, 227, 22 S. E. (2d) 448. See § 105-391.

Power of Redemption.—Under this section the first sale by the sheriff has no more significance than to put the purchaser in the position of a lienor as represented by his certificate of sale, which he must enforce, as in the case of mortgage, by a foreclosure of the equity of redemption. The imminence of injury to the remainderman by "disherison" or loss of his estate through operation of the first sale has been almost altogether removed, since, to secure foreclosure, the purchaser must institute and carry to conclusion a suit in which all interested persons must be made parties and notified, and thereby the period of redemption for the life tenant and others interested is necessarily greatly enlarged. Cooper v. Cooper, 220 N. C. 490, 493, 17 S. E. (2d) 655 (dis. op.).

§ 105-388. Certificates of sale.—(a) Issued to Private Purchasers.—As soon as possible after

sale, but not earlier than payment of the purchase price, the collector shall issue to each successful bidder, other than taxing units, a certificate of sale, for the tax lien on real property of each delinquent, purchased by him, dated as of the day of sale. Property held jointly by two or more owners shall be construed as the property of one delinquent for this purpose. Said certificate shall be in substantially the following form:

"North Carolina, ... (taxing unit) .....

I, ... tax collector of ..... (taxing unit) ..... do hereby certify that the tax lien on the following described real property in said taxing unit, to wit: ..... (describing the same) ....., was, on the ..... day of ....., ..., duly sold by me in the manner provided by law, for the delinquent taxes of ..... for the year ....., amounting to $....., including penalties thereon and costs allowed by law, when and where ..... (name of purchaser) ..... purchased said lien on said real property at the price of $ ....., said amount being the highest and best bid for same. And I further certify that unless payment of said lien is made, within the time and in the manner provided by law, said ..... (name of purchaser) ....., his heirs or assigns, shall have the right to foreclose said real property by any proceeding allowed by law.

"In witness whereof, I have hereunto set my hand this ..... day of .....

Tax Collector."

A copy of each such certificate shall be retained by the collector in a special book or file designated "Certificates of Sale for Taxes for the Year .....". All payments made on any such certificate shall be made to the collector for the use of the owner of such certificate, and all such payments shall be credited by the collector on the copy of the certificate in his possession, and shall be remitted to the owner of the certificate upon proper receipt therefor. For failure to account for and pay over any such payments the collector shall be liable on his bond to the person entitled thereto. The copies of such certificates in the collector's office shall be the official records for the purpose of determining whether a lien exists in favor of any certificate owner other than a taxing unit. The owner of a certificate may assign it at any time, but said assignment shall not be effective until the collector shall have actually received written notice thereof from the assignor. Each such purchaser, his heirs or assignees, shall have a lien on the real property for the amount of the purchase price, plus interest thereon at the rate of eight per centum per annum, of the same dignity as similar liens owned by taxing units, and shall have the right to foreclose said lien, by action in the nature of an action to foreclose a mortgage, in the manner hereinafter prescribed: Provided, that the eight per cent per annum interest herein provided shall accrue only on so much of the purchase price as represents the amount of the tax, penalties to the date of sale, and the costs of advertising and sale. Each such purchaser, his heirs and assignees, shall also have a lien for other taxes and assessments levied against said property, paid by him after acquisition of said certificate, whether such taxes or assessments were charged before or after such acquisition. Said lien shall be entitled to the same priorities as the original lien of the taxes and assessments so paid.

(b) Issued to Taxing Units.—The governing body of each taxing unit which becomes the purchaser at a tax sale, as hereinbefore provided, shall determine whether or not it is necessary to issue certificates to and in the name of such unit. If, in the opinion of said governing body, the issuance of such certificates is not necessary in order to provide adequate records of tax liens and tax collections, the said certificates may be dispensed with and the collector ordered to mark or stamp the original tax receipts or accounts "Sold to ..... (name of tax unit) .....". If issuance of certificates is deemed necessary, they shall be issued in substantially the form set forth in subsection (a) of this section, with stubs or duplicates on which shall be reflected all payments or assignments. In either case, the taxing unit shall have the right to foreclose the real property by any method authorized by law; and in either case interest at the rate of eight per cent per annum shall accrue, on the amount bid by said unit, from the date of the sale.

(c) Prima Facie Case.—A certificate issued, or a tax receipt or account marked or stamped, in accordance with the provisions of subdivisions (a) or (b) of this section, shall be presumptive evidence of the regularity of all prior proceedings incident to the sale and of the due performance of all things essential to the validity thereof. (1939, c. 310, s. 1716.)

Local Modification.—Camden: 1943, c. 705; Cumberland: 1941, c. 44, s. 1(b); Franklin (towns of Louisburg, Bunn and Youngsville): 1943, c. 293; Surry (and towns of Mount Airy and Elkin): 1943, c. 710, s. 6.

§ 105-389. Assignment of liens by taxing unit after sale.—At any time after the sale hereinbefore provided for, any taxing unit may assign any lien owned by it to any person who pays an amount which, if paid by the taxpayer, would be sufficient to discharge said lien. If a certificate has already been issued to the taxing unit, it shall be assigned to the person making the payment, and the copy of stub of such certificate or a copy of such stub, showing such assignment, shall be filed in the manner provided for certificates originally issued to private purchasers. If no certificate has been issued to the taxing unit, a certificate shall immediately be so issued, and said certificate shall be assigned to the person making such payment in the manner set forth in the preceding sentence. The collector to whom the payment is made shall have authority to make all such assignments and issue all such certificates.

The provisions of this section shall be construed as being in addition to the provisions of this article with respect to release of individual parcels of real property from the tax lien. The person making a payment, after the sale hereinbefore provided for, shall have the right to pay the entire amount or to pay an amount sufficient under the provisions of this article to release one or more specified parcels; and such person shall

also have the right to demand either assignment of the lien on the property for which the payment is made or to demand complete release of such property from the lien, in his discretion. In cases in which an assignment is made upon payment of an amount less than the amount of the lien on all the real property in one certificate, new certificates may be made to effect the separation. (1939, c. 310, s. 1717.)

Local Modification.—Cumberland: 1941, c. 44, s. 1(c).

§ 105-390. Settlements. — (a) Annual Settlement of Tax Collector.—(1) Preliminary report. On the second Monday following the sale of certificates, the tax collector shall, under oath, report to the governing body: (1) action with respect to such sale; and (2) a list of those not listing land for taxes whose taxes remain unpaid, making oath that he has made diligent effort to collect such taxes out of the personal property of such taxpayers or by other means open to him for collection of such taxes, and reporting such other information as to such taxpayers as may be of interest to or required by the governing body (including a report on his efforts to make collection outside the taxing unit under the provisions of this article.)

(2) Insolvents. The governing body shall, upon receipt of said report, enter upon its minutes the list of such taxpayers listing no land as may be found by said governing body to be insolvents, and shall by resolution designate said list so entered in the minutes as the insolvent list to be credited to the collector in his settlement.

(3) Settlement for current taxes. On the first Monday of the month following sale of certificates, but not earlier than the first Monday of July, the collector shall make full settlement with the governing body of the taxing unit for all taxes, in his hands for collection, for the year involved in said sale. In such settlement the collector shall be charged with: (1) the total amount of all taxes for said year, in his hands for collection, including amounts originally charged to him and all subsequent amounts charged on account of discovered property; (2) all penalties, interest and costs collected by him in connection with taxes for said year; and (3) all other sums to be collected by said collector. He shall be credited with: (1) all sums deposited by him to the credit of the taxing unit, or receipted for by the proper official of said unit, on account of taxes for said year; (2) releases allowed by the governing body as prescribed by statute; (3) the principal amount of taxes included in certificates sold to the taxing unit, for which he shall produce certificates duly executed or receipts or accounts duly stamped in accordance with the provisions of this article; (4) the principal amount of taxes for said year included in the insolvent list, determined as hereinbefore provided; (5) discounts allowed by law; and (6) commissions, if any, lawfully payable to him as compensation. For any deficiency the collector shall be liable on his bond, and, in addition, thereto, shall be liable to all criminal penalties provided by law.

Said settlement, together with the action of the governing body with respect thereto, shall be entered in full upon the minutes of said governing body.

(4) Disposition of tax books after settlement. Uncollected taxes allowed as credits in the settlement prescribed in the preceding subsection, whether represented by sales to the taxing unit or included in the list of insolvents, shall be recharged to the collector or charged to some other person, in accordance with the provisions of any valid local statute governing tax collection in the particular taxing unit. In the absence of any local statute determining the matter: (1) Such taxes in cities, and in counties having tax collectors other than sheriffs, shall be recharged to the collector; and (2) such taxes, in counties having sheriffs as tax collectors, shall be charged to such other county officer or employee as the governing body may designate to perform the duties of delinquent tax collector.

The person so charged or recharged shall give bond satisfactory to the governing body; shall receive the tax receipts, certificates and records representing such uncollected taxes; shall have and exercise and perform all powers and duties conferred or imposed by law upon tax collectors; and shall receive such compensation as may be fixed by valid local statute or, in the absence of such statute, as the governing body may determine.

(b) Settlements for Delinquent Taxes. — Annually, at the time prescribed for the settlement hereinbefore in this section provided, all persons having in their hands for collection any taxes for years prior to the year involved in said settlement hereinbefore provided, shall settle with the governing body of the taxing unit for collections made on the taxes for each such prior year. Such settlement for the taxes of prior years shall be in such form as may be satisfactory to the chief accounting officer and the governing body of the taxing unit, and shall be entered in full upon the minutes of the governing body.

(c) Settlement at End of Term.—Whenever any tax collector or other person collecting taxes, current or delinquent, shall fail to succeed himself at the end of his term of office, he shall, on the last business day of his term, make full and complete settlement for all taxes in his hands and deliver the tax records, receipts and accounts to his successor in office. Such settlement shall be in such manner and form as may be satisfactory to the chief accounting officer and governing body of the taxing unit, and shall be entered in full upon the minutes of the governing body.

(d) Settlement upon Vacancy During Term.—In case of voluntary resignation of any person collecting taxes he shall, upon his last day in office, make full settlement for all taxes in his hands in the same manner as required herein for settlements made at the end of a term of office. In default of such settlement, or in case of a vacancy occurring during a term for any other reason, it shall be the duty of the chief accounting officer or, in the discretion of the governing body, of some duly qualified person appointed by it, immediately to prepare and submit to the governing body a report in the nature of a settlement made on behalf of the ex-collector; and such report, together with the action of the gov-

erning body, shall be entered in full upon the minutes of the governing body. In such cases the governing body may turn over the tax books to the successor collector immediately upon occurrence of the vacancy, or may make such temporary arrangements for collection of taxes as may be expedient: Provided, that no person shall be permitted to collect taxes until he shall have given bond satisfactory to the governing body.

(e) Effect of Approval.—Approval of any settlement by the governing body shall not relieve the collector or his bondsmen of liability for any shortage actually existing and thereafter discovered; nor shall it relieve the collector of any criminal liability.

(f) Penalties.—In addition to all other civil and criminal penalties, provided by law, any member of a governing body, collector, person collecting taxes, or chief accounting officer failing to perform any duty imposed upon him by this section shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. (1939, c. 310, s. 1718.)

Local Modification.—Cumberland: 1941, c. 44, s. 1(d), (e).

Cross Reference.—For earlier statute relating to settlement, see § 105-424.

Legislative Power to Penalize. — The Legislature has the power to impose penalties on the sheriff for his delay or failure to make settlement with the proper county authorities within a stated time. State v. Gentry, 183 N. C. 825, 112 S. E. 427. The court said: "The power to coerce prompt collection and settlement of taxes is no less necessary than the power to levy and assess them, and both are essential to the maintenance of the government."

An extension of time within which a sheriff may settle state taxes, does not exonerate the sureties upon his bond. Worth v. Cox, 89 N. C. 44.

Applied in Berry v. Davis, 158 N. C. 170, 73 S. E. 900.

§ 105-391. Foreclosure of tax liens by action in nature of action to foreclose a mortgage.—(a) Time for Beginning Such Action.—Actions for the foreclosure of tax liens brought under this section shall be brought not less than six months after the sale hereinbefore provided for.

(b) Private Purchasers. — Foreclosure under this section shall be the sole remedy of certificate owners other than taxing units.

(c) Taxing Units.—Taxing units may proceed under this section, either on the original tax lien or the lien acquired at the tax sale hereinbefore provided for, with or without a certificate of sale, and the amount of recovery in either case shall be the same. To this end it is hereby declared that the original attachment of the tax lien is sufficient to support a tax foreclosure action by a taxing unit, that the issuance of tax sale certificates to a taxing unit is a matter of convenience in record keeping, within the discretion of the governing body of such unit, and that issuance of such certificates is not a prerequisite to perfection of said tax lien.

(d) General Nature of the Action.—The foreclosure action shall be an action in superior court, in the county in which the land is situated, in the nature of an action to foreclose a mortgage.

(e) Parties.—The listing taxpayer and spouse, if any, the current owner, all other taxing units having tax liens, all other lien-holders of record, and all persons who would be entitled to be made parties to a court action (in which no deficiency judgment is sought) to foreclose a mortgage on such property, shall be made parties and served with summons in the manner provided by § 1-89: Provided, that alias summonses may be issued or service by publication begun at any time within one year after the issuance of the original summons.

The fact that the listing taxpayer or any other defendant is a minor, is incompetent or is under any other disability shall not prevent or delay the collector's sale or the foreclosure of the tax lien; and all such defendants shall be made defendants and served with summons in the same manner as in other civil actions.

Persons who have disappeared or cannot be located and persons whose names and whereabouts are unknown, and all possible heirs or assignees of such persons may be served by publication; and such persons, their heirs and assignees may be designated by general description or by fictitious names in such action. It is hereby declared that service of summons by publication against such persons, in the manner provided by law, shall be as valid in all respects as such service against known persons who are non-residents of this state.

(f) Complaint as a Lis Pendens.—The complaint in an action brought under this section shall, from the time of the filing thereof in the office of the clerk of superior court, serve as notice of the pendency of such action, and every person whose interest in such property is subsequently acquired or whose interest therein is subsequently registered or recorded shall be bound by all proceedings taken in such action after the filing of said complaint in the same manner as if said persons had been made parties to such action. It shall not be necessary to have said complaint cross indexed as a notice of action pending to have the effect prescribed by this subsection.

(g) Subsequent Taxes.—The complaint in a tax foreclosure action brought under this section by a taxing unit shall, in addition to alleging the tax lien on which the action is based, include a general allegation of subsequent taxes which are or may become a lien on the same property in favor of the plaintiff unit. Thereafter it shall not be necessary to amend said complaint to incorporate said taxes by specific allegation. In case of redemption before judgment of confirmation, the person redeeming shall be required to pay, before said action is discontinued, at least all taxes on said property which have at the time of discontinuance been due to plaintiff unit for more than one year, plus interest, penalties and costs thereon. Immediately prior to judgment of sale in such action, if there has been no redemption, the tax collector, or the attorney for plaintiff unit, shall file in said action a certificate setting forth all taxes which are a lien on said property in favor of the plaintiff unit, other than taxes the amount of which has not been definitely determined.

Any plaintiff in a tax foreclosure action, other than a taxing unit, may include in his complaint, originally or by amendment, all other taxes and assessments paid by him which were liens on the same property.

(h) Joinder of Parcels.—All real estate within one township, subject to liens for taxes levied against the same taxpayer by the same taxing unit for the first year involved in the action, shall be joined in one action: Provided, that where

property is transferred by the listing taxpayer subsequent to such year, all subsequent taxes, penalties, interest and costs, for which said property is ordered sold under the terms of this subchapter, shall be prorated to such property in the same manner as if payments were being made to release such property under the provisions of this subchapter.

(i) Special Benefit Assessments.—A cause of action for the foreclosure of the lien of any special benefit assessment may be included in any complaint filed under this section.

(j) Joint Foreclosure by Two or More Taxing Units.—Liens of different taxing units on the same parcel, representing taxes in the hands of the same collector, shall be foreclosed in one action. Liens of different taxing units of the same parcel, representing taxes in the hands of different collectors, may be foreclosed in one action in the discretion of the governing bodies.

Liens of taxing units made parties defendant in any such action shall be alleged in an answer filed by such unit, and the collector of each such answering unit shall, prior to judgment, file a certificate of subsequent taxes similar to that filed by the collector of the plaintiff unit, and the taxes of each such answering unit shall be of equal dignity with the taxes of the plaintiff unit; and any such answering unit may, in case of payment of the plaintiff's taxes, continue such action until all taxes due to it for more than one year have been paid. It shall not be necessary for any such defendant unit to file a separate foreclosure action or proceed under § 105-392 with respect to any such taxes.

All taxes of any taxing unit which is properly served as a party defendant in such action, and which does not answer and file the certificate as aforesaid, shall be barred by the judgment of sale except to the extent that the purchase price at foreclosure sale, after payment of costs and of the liens of all taxing units whose liens are properly alleged by complaint or answer and certificates, may be sufficient to pay said taxes: Provided, that if a defendant unit is plaintiff in another action pending against the same property, or has begun a proceeding under § 105-392, its answers may allege said fact in lieu of alleging its liens, and the court, in its discretion, may order consolidation of such actions or such other disposition thereof, and such disposition of the costs therein, as it may deem advisable: And provided, further, that any such order may be made by the clerk of the superior court, subject to appeal in the same manner as appeals are taken from other orders of said clerk.

(k) Costs.—Costs may be taxed in any action brought under this section in the same manner as in other civil actions, subject to the provisions of this subsection; and upon collection of said costs, either upon redemption or upon payment of the purchase price at foreclosure sale, the fees allowed officers shall be paid to those entitled to receive the same: Provided, that the fees allowed any officer, whether for the personal use of such officer or for the benefit of the unit of which he is an official shall not exceed one-half the fees allowed in other civil actions: Provided, further, that no process tax for the use of the state shall be levied or collected in tax foreclosure actions, and, where the plaintiff is a taxing unit, no prosecution bond shall be required in such actions.

Said costs may include one reasonable attorney's fee for the plaintiff, which shall not exceed five dollars: Provided, that the governing body of any unit may, in its discretion, pay a greater sum to its attorney as a suit fee and said governing body may, in its discretion, allow a reasonable commission to its attorney on delinquent taxes collected by him after said taxes have been placed in his hands; or said governing body may arrange with its attorney for the handling of tax suits on a salary basis or make such other reasonable agreement with its attorney or attorneys as said governing body may approve; and any arrangement made may provide that attorney's fees collected as costs be collected for the use of the taxing unit: And provided, further, that when any taxing unit is made a party defendant in a tax foreclosure action and files answer therein, there may be included in the costs an attorney's fee for said defendant not exceeding three dollars.

In any action in which real property is actually sold after judgment, costs shall include a commissioner's fee to be fixed by the court, not exceeding five per centum of the purchase price; and in case of redemption between the date of sale and judgment of confirmation, said fee shall be added to the amount otherwise necessary for redemption. In case more than one sale is made of the same property in any action, the commissioner's fee may be based on the highest amount bid, but said commissioner shall not be allowed a separate fee for each such sale. The governing body of any plaintiff unit may request the court to appoint as commissioner a salaried official, attorney or employee of the unit and, if such appointment is made, may require that such commissioner's fees, when collected, be paid to plaintiff unit for use as it may direct.

(l) Contested Actions. — Any action brought under this section, in which an answer raising an issue requiring trial is filed within the time allowed by law, shall be entitled to a preference as to time of trial over all other civil actions.

(m) Judgment of Sale.—Any judgment in favor of the plaintiff or any defendant taxing unit in an action brought under this section shall order the sale of the property, or so much thereof as may be necessary for the satisfaction of: (1) taxes adjudged to be liens in favor of the plaintiff, other than taxes the amount of which has not been definitely determined, together with interest, penalties and costs thereon; and (2) taxes adjudged to be liens in favor of other taxing units, other than taxes the amount of which has not yet been definitely determined, if said taxes have been alleged in answers filed by said units, together with interest, penalties and costs thereon.

Said judgment shall appoint a commissioner to conduct said sale and shall order that the property be sold in fee simple, free and clear of all interests, rights, claims and liens whatever, except that said sale shall be subject to taxes the amount of which cannot be definitely determined at the time of said judgment, subject to taxes and assessments of taxing units which are not parties to said action, and, in the discretion of the court, subject to taxes alleged in other tax foreclosure actions or proceedings pending against the same property.

In all cases in which no answer is filed within the time allowed by law, and in cases in which answers filed do not seek to prevent sale of said property, the clerk of the superior court may render said judgment, subject to appeal in the same manner as appeals are taken from other judgments of said clerk.

(n) Advertisement of Sale.—The sale shall be advertised, and all necessary resales shall be advertised, in the manner provided by §§ 1-327, 1-328, or by such statute as may be enacted in substitution therefor.

(o) Sale.—The sale shall be by public auction to the highest bidder, and shall, in accordance with the judgment, be held at the courthouse door on any day of the week except a Sunday or legal holiday: Provided, that in actions brought by any city which is not a county seat the court may, in its discretion, direct said sale to be held at the city hall door. The commissioner conducting such sale may, in his discretion, require from any successful bidder a deposit equal to not more than twenty per centum of his bid, which said deposit, in the event that said bidder refuses to take title and a resale becomes necessary, shall be applied to pay the costs of sale and any loss resulting: Provided, that this shall not deprive the commissioner of the right to sue for specific performance of the contract.

(p) Report of Sale.—Within three days following said sale the commissioner shall report said sale to the court, giving full particulars thereof.

(q) Exceptions and Increased Bids.—At any time within twenty days after the filing of said report of sale any person having an interest in the property may file exceptions to said report, and at any time within said period an increased bid may be filed in the amount specified by and subject to the provisions (other than provisions in conflict herewith) of § 45-28, or to the provisions (other than provisions in conflict herewith) of any law enacted in substitution for said section.

(r) Judgment of Confirmation.—At any time after the expiration of said twenty days, if no exception or increased bid has been filed, the commissioner may apply for judgment of confirmation; and in like manner he may apply for such judgment after the court has passed upon any exceptions filed, or after any necessary resales have been held and reported and twenty days have elapsed: Provided, that the court may, in its discretion, order resale of the property, in the absence of exceptions or increased bids, whenever it deems such resale necessary for the best interests of the parties.

Said judgment of confirmation shall direct the commissioner to deliver the deed upon payment of the purchase price.

Said judgment may be rendered by the clerk of superior court, subject to appeal in the same manner as appeals are taken from other judgments of said clerk.

(s) Application of Proceeds of Sale; Final Commissioner's Report.—After delivery of the deed and collection of the purchase price, the commissioner shall apply the proceeds as follows; first, to payment of all costs of the action, including commissioner's fee and attorney's fee, which said costs shall be paid to the officials or funds entitled thereto; then to the payment of taxes, penalties and interest for which said property was ordered to be sold, and in case the funds remaining are insufficient for this purpose they shall be distributed pro rata to the various taxing units for whose taxes the property was ordered sold; then pro rata to the payment of any special benefit assessments for which said property was ordered sold, together with interest and costs thereon; then pro rata to payment of taxes, penalties, interest and costs of taxing units which were parties to said action but which filed no answers therein; then pro rata to payment of special benefit assessments of taxing units which were parties to said action but which filed no answers therein, together within interest and costs on said assessments; and any balance then remaining shall be paid in accordance with any directions given by the court and, in the absence of such directions, shall be paid into court for the benefit of the persons entitled thereto. The commissioner in all such cases shall make a full report to the court, within five days after delivery of the deed, showing delivery of the deed, receipt of the purchase price, and the disbursement of the proceeds, accompanied by receipts evidencing all such disbursements.

In case the purchaser is a taxing unit such unit may proceed in accordance with the provisions hereinafter set forth in this section; and the commissioner shall make report accordingly.

(t) Bids by Taxing Units.—Any taxing unit, or two or more units jointly, may bid at foreclosure sale, and any taxing unit which becomes the successful bidder may assign its bid, or portion thereof, at any time, by private sale, for not less than the amount thereof.

(u) Payment of Purchase Price by Taxing Units; Status of Property Purchased by Taxing Units.—Any taxing unit which becomes the purchaser at final tax foreclosure sale may, in the discretion of its governing body, pay only such part of the purchase price as would not be distributed to itself and other taxing units on account of taxes, interest, penalties and such costs as accrued prior to the beginning of the foreclosure action. Thereafter, in such case, it shall hold said property for the benefit of all taxing units which have an interest in such property as hereinafter in this subsection defined. All net income from said property and the proceeds thereof, when resold, shall be first used to reimburse the purchasing unit for disbursements actually made by it in connection with the foreclosure action and the purchase of said property, and any balance remaining shall be distributed to the taxing units having an interest therein in proportion to their interests. The total interest of each taxing unit, including the purchasing unit, shall be determined by adding: (1) taxes of such unit, with interest, penalties and costs (other than costs already reimbursed to the purchasing unit), to satisfy which said property was ordered sold; (2) other taxes of such unit, with interest, penalties and costs, which would have been paid from the purchase price had said purchase price been paid in full; (3) taxes of such unit, with interest, penalties and costs, to which said sale was made subject; and (4) the principal amount of all taxes which may become liens on said property after purchase at foreclosure sale or which would have

become liens but for such purchase: Provided, that no amount shall be included under clause (4) hereof for taxes for years in which, on the tax listing day, said property is being used by said purchasing unit for a public purpose.

If the amount of net income and proceeds of resale distributable exceeds the total interests of all units hereinbefore defined, the remainder shall be applied to any special benefit assessments to satisfy which said sale was ordered or to which said sale was made subject, and any balance then remaining shall accrue to the purchasing unit.

When any property, purchased as hereinbefore provided in this subsection, is permanently dedicated for use for a public purpose, the purchasing unit shall make settlement with other taxing units having an interest in such property, as hereinbefore defined, in such manner and in such amount as may be agreed upon by the governing bodies; and if no agreement can be reached the amount to be paid shall be determined by the resident judge of the superior court.

Nothing in this subsection shall be construed as requiring the purchasing unit to secure the approval of other interested taxing units before reselling said property or as requiring said purchasing unit to pay said other units in full if the net income and resale price are insufficient to make such payments.

Any taxing unit purchasing property at foreclosure sale may, in the discretion of its governing body, instead of following the foregoing provisions of this subsection, make full payment of the purchase price and thereafter it shall hold said property as sole owner in the same manner as it holds other real property, subject only to taxes and assessments, with interest, penalties and costs, to which said sale was made subject.

(v) Resale of Property Purchased by Taxing Units.—Property purchased at tax foreclosure sale by a taxing unit may be resold at any time for such price as the governing body may approve. Such resales shall be conducted in the manner provided by law for sales of other property of the various taxing units: Provided, that a city may, in the discretion of its governing body, resell such property to former owner or other person formerly having an interest in said property, at private sale, for an amount not less than its interest therein, if it holds said property as sole owner, or for an amount not less than the total interests of all taxing units (other than assessments due the city holding title), if it holds said property for the benefit of all such units. (1939, c. 310, s. 1719.)

Local Modification.—Cumberland: 1941, c. 44, s. 1(f); High Point: 1941, c. 174.

Cross Reference.—For earlier statute governing foreclosure of tax liens, see § 105-414.

The court has authority to reject the bid made at the foreclosure sale of a tax sale certificate and order a resale, even in the absence of exceptions or an increased bid, under the provisions of subsection (r). Bladen County v. Squires, 219 N. C. 649, 14 S. E. (2d) 665.

§ 105-392. Alternative method of foreclosure.—(a) Docketing Taxes as a Judgment.—In lieu of following the procedure set forth in § 105-391, the governing body of any taxing unit may order the collecting official to file, not less than six months or more than two years (four years as to taxes of the principal amount of five dollars or less) following the collector's sale of certificates, with the clerk of superior court a certificate showing the name of the taxpayer listing the real estate on which such taxes are a lien, together with the amount of taxes, interest, penalties and costs which are a lien thereon, the year for which such taxes are due, and a description of such real property sufficient to permit its identification by parol testimony. The clerk of superior court shall enter said certificate in a special book entitled "Tax Judgment Docket for Taxes for the Year ....." and shall index the same therein in the name of the listing taxpayer. Immediately upon said docketing and indexing, said taxes, interest, penalties and costs shall constitute a valid judgment against said property, with the priority hereinbefore provided for tax liens, which said judgment, except as herein expressly provided, shall have the same force and effect as a duly rendered judgment of the superior court directing sale of said property for the satisfaction of the tax lien, and which judgment shall bear interest at the rate of six per cent per annum. The clerk shall be allowed fifty cents per certificate for such docketing and indexing, payable when such taxes are collected or such property is sold, and shall account for said fees in the same manner as other fees of his office are accounted for: Provided, that the governing body of any county, if said clerk is on salary, or said clerk, if he is on fees or salary plus fees, may require such fees to be advanced by the taxing unit.

The collecting official filing said certificate shall, at least two weeks prior to the docketing of said judgment, send a registered letter to the listing taxpayer, at his last known address, stating that the judgment will be docketed and that execution will issue thereon in the manner provided by law. However, receipt of said letter by said listing taxpayer, or receipt of actual notice of the proceeding by said taxpayer or any other interested person, shall not be required for the validity or priority of said judgment or for the validity or priority, as hereinafter provided, of the title acquired by the purchaser at the execution sale. It is hereby expressly declared to be the intention of this section that proceedings brought under it shall be strictly in rem. It is further declared to be the intention of the section to provide a simple and inexpensive method of enforcing payment of taxes necessarily levied, to the knowledge of all, for the requirements of local governments in this State; and to recognize, in authorizing such proceeding, that all those owning interests in real property know, or should know, without special notice thereof, that such property may be seized and sold for failure to pay such lawful taxes.

Nothing in this section shall be construed as a limitation of time on the right to foreclose a tax lien under § 105-391.

(b) Motion to Set Aside.—At any time prior to issue of execution, any person having an interest in said property may appear and move to set aside said judgment on the ground that the tax has been paid or that the tax lien on which said judgment is based is invalid.

(c) Issue of Execution.—At any time after six months and before two years from the indexing of said judgment, execution shall be issued at the request of the governing body of the taxing unit, in the same manner as executions are issued upon other judgments of the superior court, and said property shall be sold by the sheriff in the same

manner as other property is sold under execution: Provided, that no debtor's exemption shall be allowed; and provided, further, that in lieu of any personal service of notice on the owner of said property, registered mail notice shall be mailed to the listing taxpayer, at his last known address, at least one week prior to the day fixed for said sale. The purchaser at said sale shall acquire title to said property in fee simple, free and clear of all claims, rights, interest and liens except the lien of other taxes and assessments not paid from the purchase price and not included in the judgment: Provided, that if a taxing unit has, by virtue of the taxes included in such a judgment, been made a defendant in a foreclosure action brought under § 105-391, it shall file answer therein and thereafter all proceedings shall be governed by order of court in accordance with the provisions of that section.

(d) Cancellation upon Payment.—Upon payment in full of any judgment docketed under this section, together with interest thereon and costs accrued to the date of payment, it shall be the duty of the collecting official receiving such payment immediately to certify the fact of such payment to the clerk of superior court, who shall thereupon cancel the judgment, the fee for such cancellation to be fifty cents (50c), which fee shall be included as part of accrued costs.

(e) Consolidation of Liens.—By agreement between the governing bodies, two or more taxing units may consolidate their liens for purposes of docketing judgment, or may have one execution issued for separate judgments, against the same property. In like manner one execution may issue for separate judgments in favor of one or more taxing units against the same property for different years' taxes.

In any advertisement or posted notice of sale under execution the sheriff may (and, at the request of the governing body of the taxing unit, shall) combine the advertisements or notices for properties to be sold under executions, against the properties of different taxpayers, in favor of the same taxing unit or group of units: Provided, that the property included in each judgment shall be separately described and the name of the listing taxpayer specified in connection with each.

(f) Special Assessments.—Street, sidewalk and other special assessments may be included in any judgment for taxes taken under this section; or such assessments may be included in a separate judgment docketed under this section, which is hereby declared to be made available as a method of foreclosing the lien of such assessments.

(g) Purchase and Resale by Taxing Unit.—Any taxing unit may become a bidder at said sale under execution, and may assign its bid by private sale, for not less than the amount of such bid. Property purchased by any taxing unit may be resold at any time in the manner provided by law for sale of other property of such unit: Provided, a city may resell property to the former owner or other person formerly having an interest therein, at private sale, for not less than the amount of said unit's interest in such property (other than special assessments).

(h) Procedure if Section Declared Unconstitutional.—If any provisions of this section are declared invalid or unconstitutional by a court of competent jurisdiction, all taxing units which have proceeded under this section shall have one year from the date of the filing of such opinion (or, in case of appeal, from the date of the filing of the opinion on appeal) in which to institute foreclosure actions under § 105-391 for all taxes included in judgments taken under this section and for subsequent taxes due or which, but for purchase of such property by the taxing unit, would have become due; and such opinion shall not have the effect of invalidating the tax lien or disturbing the priority thereof. (1939, c. 310, s. 1720.)

Local Modification.—Cumberland: 1941, c. 44, s. 1(g).

§ 105-393. Time for contesting validity of tax foreclosure title.—No action or proceeding shall be brought to contest the validity of any title to real property acquired, by a taxing unit or by a private purchaser, in any tax foreclosure action or proceeding authorized by this subchapter or by other laws of this state in force at the time of acquisition of said title, nor shall any motion to reopen or set aside the judgment in any such tax foreclosure action or proceeding be entertained, after one year from the date on which the deed is recorded: Provided, that in cases of deeds recorded prior to April 3, 1939, such action or proceeding may be brought or motion entertained within one year after said date: Provided, further, that this shall not be construed as enlarging the time within which to bring such action or proceeding or entertain such motion. (1939, c. 310, s. 1721.)

§ 105-394. Facsimile signatures.—In the institution or prosecution of any suits or other proceedings under this subchapter, or in tax foreclosure proceedings under laws heretofore or hereafter in force, and in the giving of any notice preliminary to the institution thereof, it shall be sufficient and a compliance with the law that where any official or attorney required to sign summons, complaints, verifications of pleadings, notices, judgments or other papers, the name of said official or attorney may be affixed to said documents by stamping thereon the facsimile of the signature of said official or attorney with a rubber stamp by any person authorized by said official or attorney so to do; and said documents so stamped shall have the same legal force and effect as if said signature had been written by said official or attorney with his own hand, and all such signatures stamp as aforesaid shall be conclusively presumed to have been so stamped at the direction of the official or attorney whose signature it purports to be. (1939, c. 310, s. 1722.)

§ 105-395. Application of article.—All provisions of this article shall apply to all taxes originally due within fiscal years beginning on or after July first, one thousand nine hundred thirty-nine. With the exception of the provisions of §§ 105-378 to 105-380, the provisions of this article shall also apply to all taxes uncollected on April 3, 1939, originally due within the fiscal year beginning July first, one thousand nine hundred thirty-eight. Sections 105-373 to 105-377, 105-381 to 105-386, 105-390, 105-393, 105-394, and subsections (k) to (v), inclusive, of § 105-391 shall also apply, to the extent that such application does not affect any action already taken or affect private rights already vested on April 3, 1939, to all taxes, due and owing to taxing units on April 3, 1939, originally due within fiscal years beginning on

or before July first, one thousand nine hundred thirty-seven, whether such taxes have heretofore been included in tax sales certificates or not, and whether such taxes are included in pending foreclosure actions or not; and § 105-392, and subsections (a) to (j), inclusive, of § 105-391 shall also apply to all taxes, due and owing to taxing units on April 3, 1939, originally due within fiscal years beginning on or before July first, one thousand nine hundred thirty-seven, which have not been included in any tax foreclosure proceedings pending or completed on April 3, 1939: Provided, that with respect to such taxes originally due within the fiscal years beginning on or before July first, one thousand nine hundred thirty-seven, the provisions of said § 105-392, and subsections (a) to (j), inclusive, of § 105-391 shall be in addition to, and not in substitution for, the provisions of laws in force immediately prior to April 3, 1939: Provided, further, that proceedings may be begun under the provisions of §§ 105-391 and 105-392, with respect to such taxes originally due within the fiscal years beginning on or before July first, one thousand nine hundred thirty-seven, at any time after six months and within one year following April 3, 1939 or within a longer period otherwise permitted by the terms of this article.

Except as in this section provided, the collection and foreclosure of taxes originally due within fiscal years beginning on or before July first, one thousand nine hundred thirty-eight, shall be under the provisions of laws in force immediately prior to April 3, 1939, including § 105-414. In all actions which may be brought under the provisions of section eight thousand thirty-seven of the Consolidated Statutes of North Carolina, the general advertisement, or six months' notice, prescribed by said section need not be made; and the failure to make such advertisement in any action heretofore brought under said section is hereby ratified, confirmed and approved, and, despite such failure, such action, with respect to defendants served with process in such action, either by personal service or service by publication, is hereby validated to the same extent as if said advertisement had been made.

Section 105-414 is hereby preserved in full force and effect as an alternative method for the foreclosure of taxes orginally due within fiscal years beginning on or after July first, one thousand nine hundred thirty-eight: Provided, that the provisions of subsections (f) to (v), inclusive, of § 105-391 shall apply in any such foreclosure action brought under said § 105-414.

Nothing in this section or this article shall be construed to require foreclosure of any taxes under the provisions of § 105-392, and subsections (a) to (j), inclusive, of § 105-391, if such taxes have been or by the terms of this section may be included in any action instituted under laws in force immediately prior to April 3, 1939, whether such taxes be included in said action by the original complaint or by amendment thereto.

To the extent indicated in this section the laws in force immediately prior to April 3, 1939, are hereby preserved in full force and effect, any repeal clauses contained in this article or subchapter to the contrary notwithstanding. (1939, c. 310, s. 1723.)

Art. 28. General Provisions.

§ 105-396. Foreign corporations not exempt.—Nothing in this subchapter shall be construed to exempt from taxation at the value prescribed by law any property situated in this state belonging to any foreign corporation, unless the context clearly indicates the intent to grant such exemption. (1939, c. 310, s. 1800.)

Determining Liability.—A nonresident corporation is liable for taxation for such proportion of its capital stock as the value of its tangible property within the state bears to the value of all its tangible property. Commissioners v. Old Dominion Steamship Co., 128 N. C. 558, 39 S. E. 18.

Cited in Madison County v. Catholic Society of Religious, etc., Education, 213 N. C. 204, 195 S. E. 354.

§ 105-397. General purpose of subchapter.—It is the purpose of this subchapter except as otherwise herein provided to provide the machinery for the listing and valuing of property, and the levy and collection of taxes, for the year one thousand nine hundred thirty-nine, and annually thereafter, and to that end this subchapter shall be liberally construed, subject to the provisions set out in Schedule H, §§ 105-198 to 105-217. (1939, c. 310, s. 1802.)

Art. 29. Validation of Listings.

§ 105-398. Real property listings validated.—Listings of any real estate not otherwise listed, which have been carried forward on the tax list of any person by the county supervisor of taxation, list taker or assessor, at the same assessed value of said property as it was valued at in the last quadrennial assessment of taxes, unless the value thereof has been changed by the board of county commissioners as provided by law, are hereby validated, and are hereby declared to be legal and valid listings of the same as if listed by the owner or owner's agent or by the chairman of the board of county commissioners or otherwise, as provided by law.

This section shall be retroactive so as to include the period of time from the first day of May, one thousand nine hundred twenty-seven, to and including the eleventh day of May, one thousand nine hundred thirty-five.

The counties of Alamance, Ashe, Beaufort, Bertie, Brunswick, Cabarrus, Camden, Carteret, Clay, Currituck, Dare, Durham, Greene, Halifax, Harnett, Henderson, Hertford, Hoke, Hyde, Iredell, Johnston, Macon, Moore, Northampton, Pasquotank, Pitt, Polk, Randolph, Richmond, Robeson, Rowan, Rutherford, Sampson, Surry, Transylvania, Wake, Warren, and Wayne are hereby exempted from the provisions of this section. (1937, c. 259, ss. 1-3.)

Local Modification.—Nash: 1939, c. 298.

SUBCHAPTER III. COLLECTION OF TAXES.

Art. 30. General Provisions.

§ 105-399. Subchapter to remain in force.—The provisions of this subchapter shall continue in force whether or not brought forward in subsequent acts to raise revenue or acts to provide for the assessment and collection of taxes, commonly called "revenue acts" and "machinery acts," unless and until expressly repealed or amended by, or clearly inconsistent with, subsequent legislation; it being the intention of the general assembly that this subchapter shall be a standing provision for the government of the matters embraced herein, and not to be repealed by implication because omitted in whole or in

part from subsequent legislation on the subject of taxation. (Rev., s. 2849; C. S. 7972.)

§ 105-400. Application and construction.—The provisions of this subchapter shall apply to all taxes as defined in this chapter, whether state, county, town, city, or other municipal subdivision; and shall be liberally construed in favor of, and in furtherance of, the collection of such taxes. (Rev., s. 2850; C. S. 7973.)

§ 105-401. Terms defined.—Unless such construction or definition would be manifestly inconsistent with or repugnant to the context, the words and phrases following, whenever used in this subchapter, shall be construed to include in their meaning the definitions set opposite the same in this section:

1. "Tax," "taxes." Any taxes, special assessments or costs, interest or penalty imposed upon property or polls.

2. "He." Male, female, company, corporation, firm, society, singular or plural number.

3. "Real property." Real estate, land, tract, lot—not only the land itself, whether laid out in town or city lots or otherwise with all things therein, but also all buildings, structures, and improvements and other permanent fixtures of whatever kind thereon, and all rights and privileges belonging or in any wise appertaining thereto, and all estates therein.

4. "Sheriff." Every person who is by law authorized to collect taxes, either state or municipal. (Rev., s. 2851; C. S. 7974.)

§ 105-402. Sheriff includes tax collector.—Whenever in this chapter a duty is imposed upon the sheriff of a county of which a tax collector has been or may be appointed, it shall be incumbent upon the tax collector to perform such office instead of the sheriff, and such tax collector shall collect all the taxes, have all the emoluments and be subject to all the penalties as provided in case of sheriffs in this chapter, and it shall be the duty of all persons having tax moneys in hand to account for and settle with such tax collector. (Rev., s. 5263; 1917, c. 234, s. 111; 1919, c. 92, s. 111; C. S. 7975.)

§ 105-403. No taxes released. — No board of county commissioners, or council, or board of aldermen or commissioners of any city or town shall have power to release, discharge, remit, or commute any portion of the taxes assessed and levied against any person or property within their respective jurisdictions for any reason whatever; and any tax so discharged, released, remitted, or commuted may be recovered by civil action from the members of any such board at the suit of any citizen of the county, city, or town, as the case may be, and when collected shall be paid to the proper treasurer. Nothing in this section shall be construed to prevent the proper authorities from refunding taxes as provided in this chapter; nor to interfere with the powers of any officers or boards sitting as a board of equalization of taxes; nor construed to exempt any taxpayer or property from liability for taxes released, discharged, remitted, or commuted in violation of this section. (Rev., s. 2854; 1901, c. 558, s. 31; C. S. 7976.)

Duty of Commissioner to Rescind.—It is not only competent, but the duty of county commissioners to rescind an order improvidently granted to release one from the assessment of a legal tax upon property. Lemly v. Commissioners, 85 N. C. 379.

§ 105-404. Uncollected inheritance taxes remitted after 20 years.—All inheritance taxes levied by the State which remain uncollected twenty years or more after the death of the person upon whose estate said taxes were levied shall be, and they are hereby remitted. (1935, c. 483.)

§ 105-405. Taxing authorities authorized to release or remit taxes.—The board of county commissioners or city council or board of aldermen or city commissioners, or any other governing body in any city or town, shall have power to release, discharge, remit or commute any portion of the taxes assessed and levied against any person or property within their respective jurisdictions when there has been destruction or partial destruction or any damage to the property assessed for valuation when such destruction, partial destruction or damage occurs between midnight of April first and midnight of June thirtieth of any year, and when said destruction or partial destruction or damage has been caused by tornado, cyclone, hurricane or other wind or windstorm: Provided, application for release, discharge, remission or commutation is made to the aforesaid governing body within one year of the date of said destruction, partial destruction or damage: Provided further, that in cases of applicants for such relief who have received, or may receive, reimbursements for such damage or destruction from insurance policy contracts or otherwise, or whose property has been restored or rehabilitated, wholly or partially, by the Red Cross or any public welfare agency or organization without full value having been paid therefor by the property owner, such applicant shall, as a condition precedent to the relief herein provided for, list for taxation for the year for which relief is asked the equivalent in value of such reimbursement or restoration or rehabilitation; and provided further, that such governing body shall apply this section uniformly to all persons and property within its jurisdiction. This section shall be retroactive to and including April first, one thousand nine hundred and thirty-six. (1937, c. 15.)

§ 105-405.1. Governing boards of counties, cities and towns authorized to refund taxes illegally collected.—The board of county commissioners of any county or the governing body of any city or town, upon the passage and recording in the minutes of a proper resolution finding as a fact that any funds received by such municipality were required to be paid through clerical error or by a tax illegally levied and assessed, is authorized and empowered to remit and refund the same upon the taxpayer making demand in writing to the proper board for such remission and refund within two years from the date the same was due to be paid. (1943, c. 709.)

§ 105-406. Remedy of taxpayer for unauthorized tax.—Unless a tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part, nor to restrain the sale of any property for the nonpayment thereof; nor shall any court issue

any order in claim and delivery proceedings or otherwise for the taking of any personalty levied on by the sheriff to enforce payment of such tax or assessment against the owner thereof. Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff; but if, at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state or of the county, city, or town, for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such county, city, or town for the amount so demanded, including in his action against the county both state and county tax; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of state taxes for which judgment shall be rendered in such action shall be refunded by the state treasurer. (Rev., s. 2855; 1901, c. 558, s. 30; C. S. 7979.)

Cross Reference.—For similar provision, see § 105-267, which seems to have superseded this section.

Editor's Note.—See 12 N. C. Law Rev. 22.

For a case in which injunctive relief against the collection of taxes was granted, see Barber v. Benson, 200 N. C. 683, 158 S. E. 245.

Constitutionality.—This section is constitutional. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865.

Adequate Remedy at Law.—Under this section the taxpayer has an adequate remedy at law by first paying the tax and then suing to recover it. Henrietta Mills v. Rutherford County, 281 U. S. 121, 50 S. Ct. 270, 74 L. Ed. 737.

Exclusiveness of Statutory Remedy.—The taxpayer is restricted to the remedy provided by the statute, and, in order to avail himself of it, he must comply with all the requirements thereof. Wilson v. Green, 135 N. C. 343, 47 S. E. 469; Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865. Assumpsit for money had and received does not lie to recover improperly listed taxables. Huggins v. Hinson, 61 N. C. 126.

Quo warranto is the sole remedy to test the validity of an election to public office, but not to test the validity of a tax even though it is levied under the authority of a popular election. Barbee v. Board of Com'rs, 210 N. C. 717, 188 S. E. 314.

Burden on Taxpayer.—Where a taxpayer seeks equitable relief against the alleged unlawful assessment of taxes against its property by the county authorities, it must allege and show that the amount claimed as excessive was in fact an excessive valuation. Norfolk-Southern R. Co. v. Board, 188 N. C. 265, 124 S. E. 560.

Payment under Protest.—Where the owner resists the payment of taxes as unlawful, he is required to pay them under his protest and sue to recover them. Carstarphen v. Plymouth, 168 N. C. 90, 118 S. E. 905; Galloway v. Board of Education, 184 N. C. 245, 114 S. E. 165. See also, State v. Snipes, 161 N. C. 242, 76 S. E. 243.

To test the legality of a tax imposed, the taxpayer should pay the same and sue to recover it in accordance with the provisions of this section. Southeastern Express Co. v. Charlotte, 186 N. C. 668, 120 S. E. 475.

Same—Necessary Allegations.—In order to recover money paid under protest to the sheriff as taxes on land within the county, it is necessary to allege that the taxes sought to be recovered were illegally imposed or unlawfully collected, and in the absence of such allegation an injunction against the sale of the land for the payment of the taxes due will be denied. Hunt v. Cooper, 194 N. C. 265, 139 S. E. 446.

Same—When Not Recoverable.—Where a corporation under Public Laws of 1925, ch. 102, submits its report to the State Board of Assessment and the board in accordance with the statute certifies to the register of deeds of the county where the property is situated the corporate excess liable for local taxation, the exclusive remedy of the corporation if dissatisfied with the report of the board is to file exceptions with the board in accordance with the statute, with the right of appeal from the board upon a hearing by it, and the corporation may not pay the tax under protest and seek to recover it under the provisions of this section. Manufacturing Co. v. Commissioners of Pender, 196 N. C. 744, 147 S. E. 284.

Same—Written Demand within Thirty Days.—The General Assembly, as far back as 1887, enacted that demand for the return of taxes must be made within thirty days after payment, and it was held in Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865, and Teeter v. Wallace, 138 N. C. 264, 50 S. E. 701, that the statute applied to all taxes, that the remedy provided was exclusive, and that a failure to make demand within the time prescribed was fatal to the right to maintain an action to recover the tax. Blackwell v. Gastonia, 181 N. C. 378, 379, 107 S. E. 218. The requirement of making a demand within the prescribed time is mandatory. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865. It must also be made in writing. Bristol v. Morganton, 125 N. C. 365, 34 S. E. 512.

The requirement of demand is not confined to claim for refunding any particular taxes or taxes alleged to be invalid on any particular account. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865.

Same—Alleging Demand to Refund.—A complaint which fails to allege that the demand was made within thirty days is insufficient in demurrer. Railroad Co. v. Reidsville, 109 N. C. 494, 13 S. E. 865.

Same—Right to Sue.—Upon the failure of the county treasurer to refund within 90 days, the person so paying the tax may maintain an action against the county, including in his demand both the state and county taxes. Brunswick-Balke Co. v. Mecklenburg, 181 N. C. 386, 107 S. E. 317.

When the party has complied with the condition of this section he has a present right of action for the recovery of the tax without the necessity of having made the presentation and demands to the proper municipal authorities referred to in section 153-64. Atlantic Coast Line R. Co. v. Brunswick Co., 178 N. C. 254, 100 S. E. 428; Sou. R. Co. v. Cherokee County, 177 N. C. 86, 97 S. E. 758.

Where a town ordinance imposes a license tax upon those selling at wholesale or peddling therein, and provides that its violation be punishable as a misdemeanor, the remedy to test the validity of the ordinance is to pay the tax under protest and bring action to recover it back, in accordance with this section, and equity will not enjoin the town from executing its threat to arrest for violations of the ordinance, it not appearing that the plaintiff would be irreparably damaged by the payment of the tax, and the legal remedy to recover the tax affording adequate relief. Loose-Wiles Biscuit Co. v. Sanford, 200 N. C. 467, 157 S. E. 432.

Exception—Injunction.—Injunction is the appropriate relief to prevent the collection of an illegal and invalid tax. This constitutes the exception in the statute and gives the taxpayer an additional remedy (see Purnell v. Page, 133 N. C. 125, 45 S. E. 534) to test the validity of a tax, Range Co. v. Carver, 118 N. C. 328, 331, 24 S. E. 352, but only the collection of the tax will be enjoined, until the merits of the controversy can be determined. North Carolina Railroad Co. v. Commr's, 82 N. C. 260.

Same—When Granted.—An injunction will lie to restrain the collection of taxes and to restrain the sale of property under distraint, for three reasons, to wit: (1) If the taxes or any part thereof be assessed for an illegal or unauthorized purpose. (2) If the tax itself be illegal or invalid. (3) If the assessment of the tax be illegal or invalid. Purnell v. Page, 133 N. C. 125, 45 S. E. 534; Sherrod v. Dawson, 154 N. C. 525, 528, 70 S. E. 739.

Same—Portion of Levy Enjoined.—The courts will not enjoin the collection of an entire levy of taxes if the portion conceded to be valid can be separated from the portion alleged to be unconstitutional. Railroad v. Commissioners, 148 N. C. 220, 61 S. E. 690.

Same—Failure to Give Taxpayer Notice.—An injunction will be granted to the hearing against the sheriff for collecting back taxes on a solvent credit, upon the ground that the plaintiff was not given notice of the assessment or opportunity to be heard before the board of assessors or the tribunal having the power to list or assess much property. Lumber Co. v. Smith, 146 N. C. 199, 59 S. E. 653.

Same—Parties.—The sheriff is the proper party defendant, but the commissioners may make themselves parties if they think the rights of the county require it. Lumber Co. v. Smith, 146 N. C. 199, 59 S. E. 653.

Same—Special Assessment for Improvements.—Where an owner of a town lot resists payment of an assessment of his property for the cost of paving or laying down a sidewalk on the ground of excessive cost, discrimination, or for other causes, the remedy of injunction is an improper one, for the owner should pay, under protest, the assessment levied and bring his action to recover it or the excess over a proper charge. Marion v. Pilot Mountain, 170 N. C. 118, 87 S. E. 53.

Same—Levy for School Purposes.—Injunctive relief is not available to the taxpayers of a county, where a tax levy for school purposes has been made, when it appears that under the levy complained of the moneys have been raised and distributed to the branches of government entitled thereto, some of which are not parties to this suit. Semble, the only remedy for the injured taxpayers is to pay the illegal tax under protest and sue to recover the same, as provided by statute. Galloway v. Board, 184 N. C. 245, 114 S. E. 165.

Applied in Hilton v. Harris, 207 N. C. 465, 177 S. E. 411.

Cited in Bottling Co. v. Doughton, 196 N. C. 791, 793, 147 S. E. 289; Seaboard Air Line Railway Co. v. Brunswick County, 191 N. C. 550, 152 S. E. 627; Henrietta Mills v. Rutherford County, 32 F. (2d) 570; Nantahala Power, etc., Co. v. Clay County, 213 N. C. 698, 197 S. E. 603; Weinstein v. Raleigh, 219 N. C. 643, 14 S. E. (2d) 661.

§ 105-407. Refund of taxes illegally collected and paid into state treasury.—Whenever taxes of any kind are or have been through clerical error, or misinterpretation of the law, or otherwise, collected and paid into the state treasury in excess of the amount legally due the state, the state auditor shall issue his warrant for the amount so illegally collected, to the person entitled thereto, upon certificate of the head of the department through which said taxes were collected or his successor in the performance of the functions of that department, with the approval of the attorney-general, and the treasurer shall pay the same out of any funds in the treasury not otherwise appropriated: Provided, demand is made for the correction of such error or errors within two years from the time of such payment. (Ex. Sess. 1921, c. 96; C. S. 7979(a).)

Cross Reference.—As to suits for recovery of taxes paid paid under protest, see § 105-267.

The difference between this section and § 105-267 is this: When a refund is ordered, simply upon demand and notice by the taxpayer, no interest is allowed, but when the demand for a refund is denied, and the taxpayer is required to bring suit, and recovers, it is provided that "judgment shall be rendered therefor, with interest." This is a reasonable difference between the two statutes. Cannon v. Maxwell, 205 N. C. 420, 422, 171 S. E. 624.

Where the Commissioner of Revenue, with the approval of the Attorney-General, orders a refund of taxes paid under protest in accordance with this section, merely upon demand and notice of the taxpayer, no suit having been brought to recover the taxes, the taxpayer is not entitled to interest on the amount refunded. Id.

Art. 31. Rights of Parties Adjusted.

§ 105-408. Taxes paid in judicial sales and sales under powers.—In all civil actions and special proceedings wherein the sale of any real estate shall be ordered, the judgment shall provide for the payment of all taxes then assessed upon the property and remaining unpaid, and for the payment of such sums as may be required to redeem the property, if it has been sold for taxes and such redemption can be had; all of which payments shall be adjudged to be made out of the proceeds of sale. The judgment shall adjust the disbursements for such taxes and expenses of redemption from tax sales between the parties to the action or proceeding in accordance with their respective rights. And whenever any real estate shall be sold by any person under any power of sale conferred upon him by any deed, will, power of attorney, mortgage, deed of trust, or assignment for the benefit of creditors, the person making such sale must pay out of the proceeds of sale all taxes then assessed upon such real estate and such sums as shall be necessary to redeem the land, if it has been sold for taxes and such redemption is practicable. This section shall apply both to taxes and special assessments for paving, drainage, or other improvements; provided, that the person making such sale, whether under order of court or in the exercise of a power, shall be required, in cases where special assessments are payable in installments, to pay only such installments of special assessments as have become due at the date of such sale. The failure to comply with this section and pay such taxes or assessments shall not vacate or affect the lien of such taxes or assessments, but such lien shall be discharged only to the extent payment is actually made. (Rev., s. 2857; 1901, c. 558, s. 47; 1929, c. 231, s. 1; C. S. 7980.)

Cross Reference.—As to lien of mortgagee who pays taxes, see § 105-409 and note thereto.

Editor's Note.—The Act of 1929 added the last two sentences to this section and provided that the act should not apply to sales already advertised at the time of its ratification, which was on March 18, 1929.

Purpose of Section.—The object of the law embraced in this and section 105-410 is not only to preserve the property for the benefit of all interested parties, but to pass a clear title to the purchaser when it is sold. Smith v. Miller, 158 N. C. 98, 103, 73 S. E. 118. This being the true purpose, an order directing a commissioner to pay "all such taxes and assessments as are and have been levied" thereon is valid. Id.

Foreclosure of Mortgage.—Land sold on the foreclosure of a mortgage is liable for taxes assessed after the execution of the mortgage. Wooten v. Sugg, 114 N. C. 295, 19 S. E. 148.

The rule that taxes assessed at the death of decedent come within the third class for payment is not affected by the provisions of this section, requiring that taxes assessed against the property should be paid from the proceeds of foreclosure sale. Farmville Oil, etc., Co. v. Bourne, 205 N. C. 337, 171 S. E. 368.

Same—Respective Duty of Mortgagor and Mortgagee.—It is the duty of the mortgagor in possession to list the land for taxation and to pay to the proper officer the tax levied on it for each year, and it is incumbent on the mortgagee, the owner of the legal title, to see to it that this is done. Wooten v. Sugg, 114 N. C. 295, 297, 19 S. E. 148. Section 105-409 provides a method whereby he may pay such taxes without loss to himself, and he should take advantage of their privilege to save his security, where the mortgagor fails to discharge the lien. Exum v. Baker, 115 N. C. 242, 243, 20 S. E. 448. But it seems that he does not have to do this even though his lien is secondary to the lien for taxes. Insurance Co. v. Day, 127 N. C. 133, 37 S. E. 158.

Applied in Guilford County v. Estates Administration, 213 N. C. 763, 197 S. E. 535.

§ 105-409. Tax paid by holder of lien; remedy.—Any person having a lien or encumbrance of any kind upon real estate may pay the taxes due by the owner thereof in so far as the same are a lien upon such real estate, and the amount of taxes so paid shall, from the time of payment, operate as a lien upon such real estate in preference to all other liens, which lien may be enforced by action in the superior court in term. The money so paid may also be recovered by action for moneys paid to his use against the person legally liable for the payment of such taxes. (Rev., s. 2858; Code, s. 3700; 1901, c. 558, s. 46; 1879, c. 71, s. 55; C. S. 7981.)

Lien of Mortgagee.—Money paid by a mortgagee to acquire a tax title on the mortgaged lands becomes a lien on the land. Cauley v. Sutton, 150 N. C. 327, 64 S. E. 3. But his purchase of the tax title does not deprive the mortgagor of his equity of redemption. Id. As to duty of mortgagee to pay taxes, see Wooten v. Sugg, 114 N. C. 295, 297, 19 S. E. 148.

Cited in King v. Lewis, 221 N. C. 315, 20 S. E. (2d) 305.

§ 105-410. Forfeiture by life tenant failing to pay.—Every person shall be liable for the taxes assessed or charged upon the property or estate, real or personal, of which he is tenant for life. If any tenant for life of real estate shall suffer the same to be sold for taxes by reason of his neglect or refusal to pay the taxes thereon, and shall fail to redeem the same within one year after such sale, he shall thereby forfeit his life estate to the remainderman or reversioner. The remainderman or reversioner may redeem such lands, in the same manner that is provided for the redemption of other lands. Moreover, such remainderman or reversioner shall have the right to recover of such tenant for life all damages sustained by reason of such neglect or refusal on the part of such tenant for life. If any tenant for life of personal property suffer the same to be sold for taxes by reason of any default of his, he shall be liable in damages to the remainderman or reversioner. (Rev., s. 2859; Code, ss. 3698, 3699; 1901, c. 558, s. 45; 1879, c. 71, ss. 53, 54; C. S. 7982.)

Life Tenant Has Same Protection as Others.—The statutes now in effect in this state for the enforcement of the collection of taxes on real property give the life tenant the same protection as any other interested party. The interest of the life tenant, as well as that of all other interested parties, including lienholders, can be divested only at the final tax sale, authorized by a judgment entered in a tax foreclosure suit in which they were made parties and duly served with process. Under this section life estates are no longer forfeited. Crandall v. Clemmons, 222 N. C. 225, 227, 22 S. E. (2d) 448.

Forfeiture Occurs before Tax-Sale Certificate Is Foreclosed.—By the express terms of this section, a life tenant forfeits his interest in lands to the remaindermen when he fails and refuses to pay taxes thereon and suffers the lands to be sold for taxes and fails to redeem same within one year from such sale, and the contention that the estate of the life tenant is not forfeited until the tax-sale certificate is foreclosed and the land sold by a commissioner is untenable. Sibley v. Townsend, 206 N. C. 648, 175 S. E. 107.

Set-Off.—Where a life tenant, whose estate has been forfeited for failure to pay taxes on the property, has a judgment for debt against the remaindermen, the remaindermen may be allowed to offset the unpaid taxes against the judgment. Meadows v. Meadows, 216 N. C. 413, 5 S. E. (2d) 128.

When Remainderman May Exercise Right.—In Smith v. Miller, 158 N. C. 98, 102, 73 S. E. 118, the court raises the question whether or not the remainderman or reversioner, in operating under this section, must wait until there is a sale and the accumulation of costs and expenses, before he can exercise his right to redeem. The court says that the evident purpose of this section is that if the life tenant does not pay, and thereby exposes the land to sale, he may intervene and prevent a sale by paying the tax.

It is not required that a remainderman should settle for the taxes against the property before bringing action against the life tenant under this section, to have her estate forfeited for allowing the property to be sold for taxes and failing to redeem same within the time prescribed by law. Bryan v. Bryan, 206 N. C. 464, 174 S. E. 269.

Payment after Suit Instituted Does Not Affect Forfeiture.—Where a life tenant has permitted the lands to be sold for nonpayment of taxes and has failed to redeem same within one year of sale, the remaindermen are entitled to have the life estate declared forfeited in their suit thereafter instituted and the fact that after the institution of the suit the life tenant pays the taxes, interest and penalties, does not affect the forfeiture. Cooper v. Cooper, 220 N. C. 490, 17 S. E. (2d) 655.

Nor Does Insufficient Description on Tax List.—A life tenant who has forfeited her estate by failing to redeem the land within one year after sale of the tax lien by the sheriff cannot be permitted to avoid the forfeiture on the ground of the insufficiency of the description of the property on the tax list, since she herself listed the property for taxation and could not have been misled by any alleged insufficiency in the description. Cooper v. Cooper, 221 N. C. 124, 19 S. E. (2d) 237.

What Interest Passes—Prior Law.—Under the old law a sale and conveyance by the sheriff, of lands of a life tenant for default in payment of taxes on his part, operated to convey only the interest of the life tenant and did not convey the interest of the remainderman. Smith v. Proctor, 139 N. C. 314, 51 S. E. 889. Under the present law the property itself passes and not simply the interest of the delinquent. This section, however, protects the right of the remainderman.

A widow who has a homestead allotted her in the lands of her deceased husband in lieu of dower is a tenant for life thereof, within the meaning of this section. Tucker v. Tucker, 180 N. C. 235, 237, 13 S. E. 5.

Taxes Constitute Claim against Life Tenant's Estate.—A life tenant is liable for taxes assessed against the property during his lifetime, and when he dies without paying the same they constitute a claim against his estate for taxes assessed previous to his death within the meaning of § 28-105, and are payable in the third class stipulated by that section. Rigsbee v. Brogden, 209 N. C. 510, 184 S. E. 24.

Purpose of Section.—The fact that the remainderman is given the right of forfeiture and redemption under this section in case the life tenant suffer the land to be sold for taxes, is in recognition of the duty resting upon the life tenant to keep the property free from tax liens, so that it may pass to the remainderman unencumbered by such liens. Rigsbee v. Brogden, 209 N. C. 510, 513, 184 S. E. 24.

Cited in Hutchins v. Mangum, 198 N. C. 774, 153 S. E. 409.

§ 105-411. Remedies of cotenants and joint owners.—Any one of several tenants in common, or joint tenants or copartners shall have the right to pay his share of the taxes assessed or due upon the real estate held jointly or in common, or, if such estate has been sold for taxes, he may redeem his share by paying his proportionate part of the amount required for redeeming the whole. Where he has paid his share of the taxes or amount required for the redemption and the land has been or shall be divided by actual partition the share set apart to him in severalty shall be free from the lien of, and shall not be liable to be subjected in any manner to, the payment of the residue of taxes assessed upon such property; but such residue of taxes and the costs and penalties incident thereto shall be a lien upon the residue of such real estate, which residue shall be subjected to the satisfaction thereof; and when he has paid his share of the taxes, or amount necessary to redeem, and the real estate is sold under judicial proceedings for partition, his share of the proceeds shall not be diminished by disbursements for the residue of such taxes or for redeeming the property, and the costs and penalties incident thereto. Any such part owner in real estate shall have the right to pay the whole of the taxes assessed thereon and all costs and penalties incident to such taxes, and to redeem such real estate as a whole when it has been sold for taxes, and all sums by him so paid in excess of his share of such taxes, costs, and penalties and amounts required for redemption, shall constitute a lien upon the shares of his cotenants or associates, payment whereof, with interest, he may enforce in proceedings for partition, actual or by sale, or in any other appropriate judicial proceeding. When one tenant in common, joint tenant, or copartner shall have paid his proportionate part of the

taxes, as allowed by this section, before a sale for taxes, the sheriff shall except his undivided interest from the sale and in the certificate of sale and deed for the property. (Rev., s. 2860; 1901, c. 558, ss. 13, 14, 47; C. S. 7983.)

Payment of Share by One Tenant.—One tenant in common may pay his or her part of the tax and let the other share go, and three years possession by the purchaser under the tax deed bars the former rightful owner, under section 1-52, subsection 10. Ruark v. Harper, 178 N. C. 249, 100 S. E. 584.

Petitioners in a proceeding for sale of land for partition may not object to the allowance of a sum advanced by one of the parties to pay taxes on the property, as provided by this section, when there is no exception or appeal entered of record by the testator's administrator. Everton v. Rodgers, 206 N. C. 115, 173 S. E. 48.

Where One Tenant in Possession.—This section refers to cases where all the tenants are on the same footing, all or none being in possession. It does not authorize one tenant in common to take title for the whole tract, nor does it apply to a case where one tenant was in possession. Smith v. Smith, 150 N. C. 81, 83, 63 S. E. 177.

§ 105-412. Fiduciaries to pay taxes.—It shall be the duty of every guardian, executor, administrator with the will annexed, agent, trustee, receiver, or other fiduciary in whose care or control any property or estate, real or personal, may be, to pay the taxes thereon out of the trust funds in his hands, if any there be; and if he fail so to do he shall become personally liable for such taxes, and such liability may be enforced by an action against him in the name of the sheriff. If he permit such property to be sold by reason of his negligence to pay the taxes when he has funds in hand, he shall be liable to his ward, principal, or cestui que trust for all actual damages incident to such neglect. This section shall not have the effect of relieving the estates held in trust or under the control of fiduciaries from the lien of such taxes. (Rev., s. 2862; Code, ss. 3698, 1595; 1879, c. 71, s. 53; R. C., c. 54, s. 27; 1868-9, c. 201, s. 32; 1762, c. 69, s. 14; C. S. 7985.)

In General.—The method prescribed by this section for collection of taxes from a decedent's estate is a deduction from the ancillary method for collecting taxes. Sherrod v. Dawson, 154 N. C. 525, 529, 70 S. E. 739.

An order directing the trustee to pay taxes on a house and lot and to keep same in repair, even though the comparatively small amount necessary therefor would be at the expense of the beneficiaries under the residuary trust, is proper, such construction of the will being necessary to effectuate the primary purpose of testator to provide a home for life for his aged and crippled employee. Latta v. McCorkle, 213 N. C. 508, 196 S. E. 867.

Cited in Headman v. Commissioner, 177 N. C. 261, 98 S. E. 776; Cross v. Craven, 120 N. C. 331, 333, 26 S. E. 940; Coltrane v. Donnell, 203 N. C. 515, 166 S. E. 397; Hood v. McGill, 206 N. C. 83, 85, 173 S. E. 20.

Art. 32. Tax Liens.

§ 105-413. Tax lien on railroad property.—The taxes upon any and all railroads in this state, including roadbed, right of way, depots, sidetracks, ties and rails, now constructed or hereafter to be constructed, are hereby made a perpetual lien thereupon, commencing from the first day of May in each current year, against all claims or demands whatsoever of all persons or bodies corporate, except the United States and this state; and the above described property or any part thereof may be taken and held for payment of all taxes assessed against such railroad company in the several counties in this state. (Rev., ss. 2865, 5296; 1917, c. 234, s. 98; 1919, c. 92, s. 98; C. S. 7989.)

§ 105-414. Tax lien enforced by action to foreclose.—A lien upon real estate for taxes or assessments due thereon may be enforced by an action in the nature of an action to foreclose a mortgage, in which action the court shall order a sale of such real estate, or so much thereof as shall be necessary for that purpose, for the satisfaction of the amount adjudged to be due on such lien, together with interest, penalties, and costs allowed by law, and the costs of such action. When such lien is in favor of the state or county, or both, such action shall be prosecuted by and in the name of the county; when the lien is in favor of any other municipal corporation the action shall be prosecuted by and in the name of such corporation. When such lien is in favor of any private individual or private corporation holding a certificate of tax sale or deed under a tax sale, whether as original purchaser at a tax sale or as assignee of the county or other municipal corporation or of any other holder thereof, such action shall be prosecuted in the name of the real party in interest. (Rev., s. 2866; 1901, c. 558, ss. 42, 43; C. S. 7990.)

Local Modification.—Wayne: Pub. Loc. 1939, c. 190.

Cross Reference.—For subsequent statute governing foreclosure of tax lien, see § 105-391.

Summary Proceeding Unnecessary.—Where the Legislature has authorized a municipality to collect back taxes, and in an action for that purpose it appears that the taxes, of the defendant are due, and were properly assessed against lots of land within the limits of the municipality subject to the lien therefor, it is not necessary that the plaintiff should first have resorted to the summary method of levy and sale, for recourse may be had directly by suit to foreclose the lien, under this section. Wilmington v. Moore, 170 N. C. 52, 86 S. E. 775. Commission v. Epley, 190 N. C. 672, 130 S. E. 497.

Prescribed Remedy Optional with State.—The fact that the Revenue Act prescribes a specific remedy for the collection of taxes does not restrict the State to pursue that method, nor preclude it from seeking the aid of the Superior Court through a creditor's suit. The specific remedy pointed out restricts only the officers who collect only the revenue and not the sovereign. State v. Georgia Co., 112 N. C. 34, 17 S. E. 10.

Tax Collector Has No Lien Where Check Returned Unpaid.—The fact that a county tax collector accepted a check in payment for taxes, and the check was returned unpaid, and the collector in his settlement with the county paid the taxes in question, does not give him a lien which may be enforced under this section. Having failed to correct the tax record so as to show the check returned and the taxes unpaid, the tax lien was not reinstated. Miller v. Neal, 222 N. C. 540, 23 S. E. (2d) 852.

The notice must correctly name or describe the parties defendant served by the publication in order for the court to acquire jurisdiction. Board of Com'rs v. Gaines, 221 N. C. 324, 20 S. E. (2d) 377.

Alias Summons.—In an action to enforce a lien for public improvements it was held that the allegations constituted the action one to foreclose the original lien under this section, notwithstanding that a purported alias summons was issued 91 days after the institution of the action, as permitted in an action instituted under repealed § 8037, since the nature of an action is determined by the allegations of the complaint and not by the time the purported alias summons was issued. Asheboro v. Miller, 220 N. C. 298, 17 S. E. (2d) 105.

The receiver of a drainage district may proceed in an action in the nature of an action to foreclose a mortgage under this section for the collection of such drainage assessments. Nesbit v. Kafer, 222 N. C. 48, 52, 21 S. E. (2d) 903.

Statute of Limitation.—The action provided by this section to collect the assessment is as one upon a judgment to foreclose a lien and is not barred within ten years. The statute providing that an action or a liability created on statute shall be brought within three years has no application. Drainage District v. Huffstetler, 173 N. C. 523, 525, 92 S. E. 368. This is on the well settled principle that statutes of limitation, even if applicable to a given case, do not apply to the sovereign unless expressly named

therein. New Hanover County v. Whiteman, 190 N. C. 332, 334, 129 S. E. 808. See also, Charlotte v. Kavanaugh, 221 N. C. 259, 20 S. E. (2d) 97.

Whether such lien be a plain lien arising from the bare purchase at the sale or payment of taxes or such as may be evidenced by a certificate of sale executed by the proper officers, the sovereign may proceed under this section to foreclose the lien, in which event no statute of limitations is applicable. Logan v. Griffith, 205 N. C. 580, 582, 172 S. E. 348.

Where a municipality elects to enforce a lien against land for paving assessments by action under this section, no statute of limitations is applicable, and the pleadings in this action are held sufficient to bring the action within the procedure under this statute. Asheboro v. Morris, 212 N. C. 331, 193 S. E. 424.

An action to enforce the lien for public improvements, even though instituted under this section, is barred after ten years from default in the payment of the assessments, or, if the assessments are payable in installments, each installment is barred after ten years from default in payment of same unless the time for payment has been extended as provided by law. Charlotte v. Kavanaugh, 221 N. C. 259, 20 S. E. (2d) 97.

Same—Complaint.—Where a county brings suit to foreclose a tax lien on the lands of the taxpayer and draws its complaint according to the provisions of section 105-414, other taxes due after the commencement of the action are properly included in the judgment therein rendered in its favor. New Hanover County v. Whiteman, 190 N. C. 332, 129 S. E. 808.

Class Representation of Contingent Remainderman.—In an action under this section to enforce the lien for taxes against lands affected by a contingent limitation over, in which each class of contingent remaindermen is represented by defendants actually served and answering, the judgment is binding upon all contingent remaindermen by class representation. Rodman v. Norman, 221 N. C. 320, 20 S. E. (2d) 294.

Taxes Not Subject to Set-Off or Counterclaim.—Taxes are not debts in the ordinary sense of the word and they do not rest upon contract or consent of the tax payer. Pleas of set-off and counter-claim are not allowed because to do so would delay the collection and payment of taxes, and would deprive the Government of means of performing its functions. Commissioners v. Hall, 177 N. C. 490, 491, 99 S. E. 372; Graded School v. McDowell, 157 N. C. 316, 72 S. E. 1083.

Amount of Interest Recoverable.—Since no rate of interest is fixed by the section, only six per cent interest can be recovered. Wilmington v. State, 122 N. C. 395, 30 S. E. 12.

Section 105-422 destroys tax liens for 1926 and prior years and, hence, this section would not afford a remedy. Raleigh v. Jordan, 218 N. C. 55, 9 S. E. (2d) 507.

Where Clerk's Order Confirming Sale and Decreeing Execution of Deed Is Void.—Where, in the foreclosure of the tax liens upon lands under this section, the clerk's order confirming the commissioner's sale and decreeing that he execute deed was void because entered on a day other than Monday, the owners were entitled to redeem the land from the tax sale upon tender, and such tender having been made two days prior to the effective date of ch. 107, Public Laws of 1939, amending § 1-209 and relating to the clerk's power to enter certain judgments in actions instituted under this section and ratifying judgments and orders theretofore entered by clerks of superior courts in such actions, the effect of this latter statute need not be considered, and the sale being set aside, the authority of the clerk at that time to enter judgment by default final and ordering sale of the lands need not be determined. Beaufort County v. Bishop, 216 N. C. 211, 4 S. E. (2d) 525.

Applied in Bladen County v. Breece, 214 N. C. 544, 200 S. E. 13.

Cited in Wadesboro v. Coxe, 218 N. C. 729, 12 S. E. (2d) 223; Wilkinson v. Boomer, 217 N. C. 217, 7 S. E. (2d) 491.

Art. 33. Time and Manner of Collection.

§ 105-415. Sureties of sheriff may collect, when.—If any sheriff shall die during the time appointed for collecting taxes, his sureties may collect them, and for that purpose shall have all power and means for collecting the same from the collectors and taxpayers as the sheriff would have had, and shall be subject to all the remedies for collecting and settling the taxes, on their bond or otherwise, as might have been had against the sheriff if he had lived. (Rev., ss. 2868, 5264; 1917, c. 234, s. 112; 1919, c. 92, s. 112; C. S. 7993.)

§ 105-416. Sheriff collecting by deputy.—When the sheriff shall collect by his deputies they shall, before the clerk of the board of commissioners or before a justice of the peace of the county, take and subscribe an oath faithfully and honestly to account for the taxes with the sheriff or other person authorized to receive the same. Such oath shall be filed with the register of deeds and kept in the office of the board of commissioners, and for failure of any deputy sheriff to pay over such taxes as he may collect he shall be guilty of a misdemeanor. (Rev., s. 5241; 1917, c. 234, s. 88; 1919, c. 92, s. 88; C. S. 7995.)

§ 105-417. Compromise of tax claims due by railroad companies in which state owns majority of stock, authorized.—The commissioner of revenue of the state of North Carolina and the governing bodies of any county, municipality, or other taxing subdivision in this state, are hereby authorized within their discretion to accept in full settlement for all taxes which have heretofore become due settlements thereof which may be less than the full amount of such taxes, penalties and costs as to any taxes which may be due by any railroad company in North Carolina in which the state of North Carolina is the owner of more than a majority of the outstanding capital stock; and said settlement may be accepted by said officials if in their judgment the acceptance of the same will be for the best interests and to the advantage of the respective taxing units holding such tax claims. (1939, c. 76.)

Editor's Note.—For comment on this enactment, see 17 N. C. Law Rev. 379.

Art. 33A. Agreements with United States or Other States.

§ 105-417.1. Agreements to coordinate the administration and collection of taxes.—The commissioner of revenue is hereby authorized, with the approval of the governor and council of state, to enter into agreements with the United States government or any department or agency thereof, or with a state or any political subdivision thereof, for the purpose of coördinating the administration and collection of taxes imposed by this state and administered and collected by said commissioner with taxes imposed by the United States or by any other state or political subdivision thereof. (1943, c. 747, s. 1.)

§ 105-417.2. Expenditures and commitments authorized to effectuate agreements.—The commissioner of revenue with the approval of the governor and council of state is authorized and empowered to undertake such commitments and make such expenditures, within the appropriations provided by law, as may be necessary to effectuate such agreements. (1943, c. 747, s. 2.)

§ 105-417.3. Returns to be filed and taxes paid pursuant to agreements.—Notwthstandng any other provision of law, returns shall be filed and taxes paid in accordance with the provisions of any agreement entered into pursuant to this article. (1943, c. 747, s. 3.)

Art. 34. Tax Sales.

Part 1. Sale of Realty.

§ 105-418. Sales on dates other than first Monday in June validated.—All sales of land for failure to pay taxes, held or conducted by any sheriff or any tax collector of any county, city, town or other municipality during the year one thousand nine hundred thirty, on any day subsequent to or other than the first Monday in June of said year, are hereby, approved, confirmed, validated and declared to be proper, valid and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales are hereby approved and validated to all intents and purposes, and with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, one thousand nine hundred thirty. (1931, c. 160.)

§ 105-419. Tax sales for 1931-32 on day other than law provides and certificates validated.—All sales of land for failure to pay taxes, held or conducted by any sheriff or any tax collector of any county, city, town or other municipality during the year one thousand nine hundred thirty-one and one thousand nine hundred thirty-two, on any day subsequent to or other than the first Monday in June of said year, are hereby, approved, confirmed, validated and declared to be proper, valid and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales, be, and they are hereby, approved and validated to all intents and purposes, and with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, one thousand nine hundred thirty-one and one thousand nine hundred thirty-two. (1933, c. 177.)

Local Modification.—Durham, Mecklenburg: 1933, c. 177.

§ 105-420. Taxes sales for 1933-34 and certificates validated.—All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town or other municipality during the years one thousand nine hundred thirty-three and one thousand nine hundred thirty-four or on any date subsequent to or other than the date prescribed by law and all certificates of sale executed and issued pursuant to and in accordance with such sales be and the same are hereby approved, confirmed and validated and shall have the same force and legal effect as if said sales had been held and conducted on the date prescribed by law.

The board of county commissioners of any county or the governing board of any city, town or other municipality may by resolution order the sheriff or tax collecting officer of the said county, city, town or other municipality to advertise in the manner provided by law and sell all land for the taxes of any year levied by the said county, city, town or other municipality, which land has not heretofore been legally sold for the failure to pay said taxes. The sale or sales herein authorized shall be held not later than the first Monday in September, one thousand nine hundred thirty-five, and certificates of sale shall be issued in accordance with and pursuant to said sale or sales in the same manner as if said sale or sales had been held and conducted as provided by law. Any sale held and conducted under the provisions of this paragraph and all certificates issued pursuant to such sales shall be and the same are hereby approved, confirmed and validated and shall have the same force and legal effect as if said sale had been held and conducted on the date prescribed by law.

All actions instituted in any county, city, town or other municipality for the foreclosure of certificates of sale issued for the taxes of the years one thousand nine hundred twenty-seven, one thousand nine hundred twenty-eight, one thousand nine hundred twenty-nine, one thousand nine hundred thirty, one thousand nine hundred thirty-one and one thousand nine hundred thirty-two subsequent to October first, one thousand nine hundred thirty-four, and all such actions instituted before October first, one thousand nine hundred thirty-five, shall be and the same are hereby approved, validated and declared to be legally binding and of the same force and effect as if said actions were instituted prior to October first, one thousand nine hundred thirty-four: Provided, that this section shall not be construed to repeal any private or local act passed by the general assembly of one thousand nine hundred thirty-five. (1935, c. 331.)

§ 105-421. Notices of sale for taxes by publication validated.—All sales of real property under tax certificate foreclosures, made since January first, one thousand nine hundred twenty-seven, where the original notice of sale was published for four successive weeks, and any notice of resale was published for two successive weeks, preceding said sales, whether the notice of sale was required to be published in a newspaper or at courthouse door, or both, shall be, and the same are in all respects validated as to publication of said notice: Provided said publication was completed as above set out within ten days of the date of the sale.

The provisions of this section shall not apply to the counties of Alleghany, Beaufort, Cabarrus, Camden, Carteret, Caswell, Currituck, Halifax, Harnett, Henderson, Hertford, Hyde, Iredell, Johnston, Jones, Macon, Mitchell, Moore, Nash, New Hanover, Perquimans, Pitt, Polk, Rowan, Rutherford, Scotland, Surry, Wake, Warren, Washington, and Wayne. (1937, c. 128.)

Part 2. Refund of Tax Sales Certificates.

§ 105-422. Tax liens for 1926 and prior years, not yet foreclosed, barred. — All tax liens held by counties, municipalities, and other governing agencies for the year one thousand nine hundred twenty-six and the years prior thereto, whether evidenced by the original tax certificates, or tax sales certificates, and upon which no foreclosure proceedings have been instituted, are hereby declared to be barred and uncollectible: Provided, that no part of this section shall be construed as applying to liens for street and/or sidewalk improvements. (1933, c. 181, s. 7; 1933, c. 399.)

Local Modification.—McDowell: 1933, c. 399; Pamlico, Richmond: 1933, c. 181. s. 7.

An action by a municipality to foreclose the lien for taxes for the years 1925 and 1926 under § 105-414 is barred by this section, since the legislative intent to bar the enforcement

of all liens for unpaid taxes for the year 1926 and the years prior thereto, under whatever guise attempted, is apparent from the use of the phrase "all tax liens" and the fact that at the time of the passage of this section foreclosure of tax sales certificates under former § 8037 was already barred, and the fact that this part provides for the refunding of taxes only for the years subsequent to 1926. Raleigh v. Jordan, 218 N. C. 55, 9 S. E. (2d) 507.

§ 105-423. Counties excepted.—None of the provisions of § 105-422 shall apply to Davidson, Forsyth, Orange, Hyde and Mecklenburg Counties: Provided, that § 105-422 shall not be mandatory in the following counties or municipalities therein, but within the discretion of the governing bodies of the said counties or municipalities therein, to-wit: Alleghany, Beaufort, Cleveland, Gaston, Polk, Granville, Catawba, Lincoln, Wilkes, Guilford, Surry, Moore, Richmond, Camden, Durham, Rockingham, Burke, Caldwell, New Hanover, Halifax, Union and Hertford. (1933, c. 181, s. 14, cc. 226, 314, 329, 351, 377, 389, s. 2, 391, 424, 427, s. 2, 471, 502.)

Local Modification.—Alamance: 1933, c. 402; Brunswick: 1935, c. 370; Caswell: 1935, cc. 354, 370; Catawba: 1933, c. 315; Chatham: 1933, c. 536; Clayton, Town of: 1935, c. 419; Columbus: 1933, c. 486; Dare: 1933, c. 505; Granville: 1933, c. 304; Johnston: 1933, c. 459; Nash: 1933, cc. 389, 423; Pitt: 1933, c. 513; Scotland: 1933, c. 218.

Art. 35. Sheriff's Settlement of Taxes.

§ 105-424. Time and manner of settlement. — The sheriff or other accounting officer shall, on or before the second Monday of January in each year, settle his estate tax account with the commissioners of his county and pay the amount for which said sheriff or collector is liable to the treasurer of the state, in such manner or at such place as he shall direct, on or before the third Monday of said month: Provided, the state treasurer may extend the time on a sufficient amount to cover the state tax on the land sales in each county to the first Monday in May. The commissioners shall forthwith report to the state auditor the amount due from such accounting officer, setting forth therein the net amount due to each fund; and the treasurer, upon a statement from the state auditor, shall open an account against such officer and debit him accordingly. Upon the failure of the board of county commissioners to make this report to the state auditor on or before the third Monday of January of each year, or if a report has been filed which is not correct and the commissioners fail to file an amended and corrected report within thirty days after being notified so to do by the state auditor, the commissioners of such county shall each personally be liable to a penalty of one hundred dollars, and it shall be the duty of the state auditor forthwith to institute an action in the county of Wake to enforce the same. The sheriff or tax collector, in making his settlements as aforesaid, shall file with the commissioners a duplicate of the list required in this chapter. In such settlement the sheriff or other officer shall be charged with the amount of public tax as the same appears by the abstract of the taxables transmitted to the state auditor; also with all double taxes on unlisted property by him received, and with other tax which he may have collected or for which he is chargeable. The state auditor shall give to each sheriff or tax collector a certified statement embracing the subjects of taxation contained in both lists and the amount of tax on each subject which the sheriff or tax collector shall deposit with the clerk of the commissioners of his county for public inspection. The sheriffs and tax collectors shall receive five per cent on all taxes collected by them for state, county, township, school district, or other purposes whatsoever, up to the sum of fifty thousand dollars, and upon all such sums so collected by him in excess thereof he shall receive two and one-half per cent commission, and the sheriffs or tax collectors shall receive for their own use, in addition to other fees or salary received by them, a commission of five per cent on all privilege and license taxes collected under schedule B of the revenue act, and any provision in any local act in conflict with this provision is hereby repealed. (Rev., s. 5245; 1917, c. 234, s. 101; 1919, c. 92, s. 101; C. S. 8042.)

Local Modification.—Buncombe: C. S. 8042; Perquimans: 1943, c. 745.

Cross References.—For subsequent statute relating to settlement, see § 105-390. As to sheriff's duty to settle school tax, and penalty for failure to do so, see § 115-106 and note thereto.

The Settlement Has Attributes of Contract.—An account stated and settlement between a county and its tax collector have the force of a contract, and operate as a bar to a subsequent accounting, except upon a specific allegation of fraud or mistake. Settle v. Doggett, 87 N. C. 203.

Failure of Sheriff to Pay—Action by Commissioners.—It was held in Commissioners v. Clarke, 73 N. C. 255, that no action upon the bond of a sheriff for a failure to pay taxes could be brought on the relation of the commissioner except on the failure or refusal of the county treasurer to bring the action.

Fees of Sheriff Regulated by Legislature.—The regulation of the sheriff's fees is within the control of the legislature and may be reduced during the term of the incumbent. Commissioner v. Stedman, 141 N. C. 448, 54 S. E. 269.

Same—Basis of Compensation Changed—(1) Right of Out-Going Sheriff.—A sheriff whose term of office expires is entitled to collect the taxes on the lists in his hands and to receive commissioner therefor, notwithstanding the office has been placed upon a salary basis for his successor. Commissioner v. Bain, 173 N. C. 377, 92 S. E. 176.

Same—Same—(2) Where Sheriff Re-Elected.—Upon the re-election of the sheriff he receives only the salary fixed by the act of legislature changing the basis of compensation. Miller v. Deaton, 170 N. C. 386, 87 S. E. 123.

Same—Drainage Districts.—This section, allowing sheriffs a commission of 5 per cent on "assessments collected," refers only to taxes collected for general governmental purposes, and not to assessments in drainage districts imposed for the special benefits to the lands therein, and commissions on assessments for maintenance are limited to 2 per cent by Laws 1909; and this construction is not affected by the repeal of sec. 36, Laws 1909, by ch. 152, sec. 2, Laws 1917. Commissioners v. Davis, 182 N. C. 140, 108 S. E. 506.

SUBCHAPTER IV. LISTING OF AUTOMOBILES IN CERTAIN COUNTIES.

§ 105-425. Listing by owner required.—Every owner of a motor vehicle in the counties specified herein shall list such motor vehicle for taxes in such counties at the same time residents of such counties are or may be required by law to list real and/or personal property for taxation. (1931, c. 392, s. 1.)

§ 105-426. Commissioner of motor vehicles to furnish list of registered automobiles to counties. —The Commissioner of Motor Vehicles shall furnish to the tax listing authorities of the counties enumerated in § 105-429, or to the tax collectors thereof, a list showing the names and addresses of all owners of motor vehicles in such counties as of January first in each year. The list shall

also show the make, type and character of such motor vehicle and the date of registration thereof. This list shall be furnished as soon after the first day of January in each year as it can be prepared and furnished. The cost of preparing such lists shall be paid by the authorities of the enumerated counties to which the lists are furnished. (1931, c. 392, s. 2.)

§ 105-427. Listing by county authorities where owners fail to list.—The tax listing authorities of the counties specified herein shall compare said list of motor vehicle owners with the tax lists of such counties and if it appears that any owner of a motor vehicle has failed to list any motor vehicle registered in his name, it shall be the duty of such tax listing authorities or of the tax collectors of such counties to list such motor vehicle for purposes of taxation, together with any other property of such person, and the tax collectors of such counties shall collect the taxes thereon in the same manner as other taxes of such counties. (1931, c. 392, s. 3.)

§ 105-428. Basis of tax valuation.—All motor vehicles shall be valued or appraised for purposes of taxation upon the rule or standard of valuation established by "The Automobile Blue Book," or any other standard of value which may be reasonable, equitable and just. (1931, c. 392, s. 4.)

§ 105-429. Counties to which article applicable. — This article shall apply to the following counties: Alamance, Buncombe, Cabarrus, Camden, Caswell, Chowan, Currituck, Cleveland, Columbus, Durham, Gates, Guilford, Halifax, Harnett, Henderson, Hertford, Johnston, Iredell, Lee, Nash, Moore, McDowell, Orange, Pasquotank, Perquimans, Pitt, Polk, Rowan, Rutherford, Swain, Wayne and Watauga. (1931, c. 392, s. 5.)

Cross Reference.—As to duty of Commissioner of Motor Vehicles to furnish lists of registered automobiles to county authorities, see § 105-315.

SUBCHAPTER V. GASOLINE TAX.

Art. 36. Gasoline Tax.

§ 105-430. Definitions; "motor fuel," "distributor". — The following words, terms, and phrases hereinafter used for the purpose of this article are defined as follows:

(a) "Motor Fuel" shall mean (a) all products commonly or commercially known or sold as gasoline (including casinghead and absorption or natural gasoline) regardless of their classification or uses; and (b) any liquid prepared, advertised, offered for sale or sold for use as or commonly and commercially used as a fuel in internal combustion engines, which when subjected to distillation in accordance with the standard method of test for distillation of gasoline, naphtha, kerosene and similar petroleum products (American Society for Testing Materials Designation D-86) shows not less than ten per centum (10%) distilled (recovered) below three hundred forty-seven degrees (347°) Fahrenheit (one hundred seventy-five degrees (175°) Centigrade) and not less than ninety-five per centum (95%) distilled (recovered) below four hundred sixty-four degrees (464°) Fahrenheit (two hundred forty degrees (240°) Centigrade); with the exception that the term "motor fuel" shall not include commercial solvents which distill, by American Society for Testing Materials Method D-86, not more than nine (9%) per centum at 176° F. and which have a distillation range of 125° F. or less, of liquefied gases which would not exist as liquids at a temperature of 60° Fahrenheit and a pressure of 14.7 pounds per square inch absolute.

(b) "Distributor" is any person, firm, association of persons, corporation, municipality, county, or other political subdivision or agency that has on hand or in his or its possession in this State, or that produces, refines, manufactures, or compounds such motor fuels in this State for sale, distribution, or use herein. (1927, c. 93, s. 1; 1931, c. 145, s. 24; 1941, c. 376, s. 1.)

Editor's Note.—Sections 2613(c)-2613(i) of Michie's Code as passed in 1921 were repealed by the Act of 1927 and reenacted.

The Act of 1931 amended these sections as amended by the act of 1927 and Public Laws 1929, c. 40, to read as appearing in §§ 2613(i1)-2613(i15) of Michie's Code.

The 1941 amendment, effective July 1, 1941, changed subsection (a) of this section.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 516.

A county purchasing gasoline for use by it in trucks and automobiles in the discharge of its governmental function of maintenance of its highways is not a "distributor" within the purview of this chapter, imposing an excise tax upon distributors of gasoline, since general statutes do not bind the sovereign unless the sovereign is expressly mentioned, and under the express language of the statute the Legislature could not have intended to include counties thereunder since counties could not be subject to the procedure for its enforcement nor liable for the penalty for its evasion. As to whether Article V, § 5, of the State Constitution prohibits the General Assembly from levying such a tax on a county, quaere, but not decided, the question not being necessary to the determination of the case. O'Berry, State Treasurer v. Mecklenburg County, 198 N. C. 357, 151 S. E. 880.

§ 105-431. Purpose of article; double taxation not intended.—The purpose of this article is to provide for the payment and collection of a tax on the first sale of motor fuels when sold, or the use, when used, in this State; double taxation is not intended. Motor fuels manufactured, produced, or sold for exportation, and exported are not taxable and should not be included in the reports hereinafter required to be made by distributors. (1927, c. 93, s. 2; 1931, c. 145, s. 24.)

§ 105-432. Sales in tank car shipments.—In the administration of this article the first sale shall not be construed to embrace the sale in tank car shipments from port terminals to licensed distributors within the State, but the tax hereinafter levied on such motor fuel shall be levied against and paid by such licensed distributor. (1927, c. 93, s. 2½; 1931, c. 145, s. 24.)

§ 105-433. Application for license as distributor.—Any distributor engaged in business on April 1, 1931, shall, within thirty days thereafter, and any other distributor shall, prior to the commencement of doing business, file a duly acknowledged application for a license with the Commissioner of Revenue on a form prescribed and furnished by him setting forth the name under which such distributor transacts or intends to transact business within this State, the address of each place of business and a designation of the principal place of business. If such distributor is a firm or association, the application shall set forth the name and address of each person constituting the firm or association, and

if a corporation, the names and addresses of the principal officers and such other information as the Commissioner of Revenue may require. Each distributor shall at the same time file a bond in such amount, not exceeding twenty thousand dollars ($20,000) in such form and with such surety or sureties as may be required by the Commissioner of Revenue, conditioned upon the rendition of the reports and the payment of the tax hereinafter provided for. Upon approval of the application and bond, the Commissioner of Revenue shall issue to the distributor a non-assignable license with a duplicate copy for each place of business of said distributor in this State, which shall be displayed in a conspicuous place at each such place of business and shall continue in force until surrendered or cancelled. No distributor shall sell, offer for sale, or use any motor fuels within this State until such license has been issued. Any distributor failing to comply with or violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars ($100.00), nor more than five thousand dollars ($5,000.00), or imprisoned for not more than twenty-four months, or both. (1927, c. 93, s. 3; 1931, c. 145, s. 24.)

§ 105-434. Gallon tax.—There is hereby levied and imposed a tax of six cents per gallon on all motor fuels sold, distributed, or used within this State. The tax hereby imposed and levied shall be collected and paid by the distributor producing, refining, manufacturing, or compounding within this State, or holding in possession within this State motor fuels for the purpose of sale, distribution, or use within the State, and shall be paid by such distributor to the Commissioner of Revenue in the manner and at the times hereinafter specified. No county, city, or town, or political sub-division shall levy or collect any tax upon the sale or distribution of motor fuels herein defined. For the purpose of determining the amount of the tax, it shall be the duty of every distributor to transmit to the Commissioner of Revenue not later than the twentieth day of each month, upon forms prescribed and furnished by such commissioner, a report under oath or affirmation showing the quantity of motor fuel sold, distributed, or used by such distributor within this State during the preceding calendar month, and such other information as the said commissioner may require: Provided, that any distributor may, if he elects to do so, use as the measure of the tax levied and assessed against him by this section the gross quantity of motor fuel purchased, produced, refined, manufactured, and/or compounded by such distributor, plus the amount of motor fuel on hand at the beginning of the period when such method of computation is used, less a tare of two per cent (2%) on gross monthly receipts of motor fuels not exceeding 150,000 gallons, and less a tare of one and one-half per cent (1½%) on gross monthly receipts of such fuels in excess of 150,000 gallons and not exceeding 250,000 gallons, and less a tare of one per cent (1%) on gross monthly receipts of such fuels in excess of 250,000 gallons. Provided, that if any licensed distributor who has elected to pay the tax levied herein on the amount of motor fuel purchased, produced, refined, manufactured, or compounded, in lieu of the amount sold, distributed, or used, shall lose any such fuel by reason of fire, lightning, flood, windstorm, wrecking of transportation conveyance, acts of war, or any accidental or providential cause, and such loss is clearly proved to the satisfaction of the commissioner of revenue, the amount of motor fuel lost shall be excluded from the measure of his tax. Provided, further, that the commissioner of revenue shall have power under such rules and regulations as he may adopt for the purpose to refund to any non-licensed distributor the tax on any motor fuel purchased by and delivered to him tax paid that is lost by fire, lightning, flood, windstorm, acts of war, or any accidental or providential cause, after it is delivered to him and before it is sold, but such loss must be clearly proved to the satisfaction of the commissioner. (1927, c. 93, s. 4; 1929, c. 40, s. 1; 1931, c. 145, s. 24; 1941, cc. 16, 146; 1943, c. 113.)

Editor's Note.—The first 1941 amendment, adding the last provisos to this section, does not apply to any loss suffered prior to July 1, 1940. Prior to the second 1941 amendment this section provided for a tare of one per cent.

Prior to the 1943 amendment the last two provisos related only to losses by lightning, flood or windstorm. The 1943 amendment is not applicable to any loss sustained prior to March 1, 1943.

Our state gasoline tax is an excise and not a property tax. Stedman v. Winston-Salem, 204 N. C. 203, 167 S. E. 813.

And It May Be Levied on Municipality.—Under the provisions of our Constitution, Art. V, sec. 5, the General Assembly is prohibited from levying a property tax on property owned by municipal corporations, but the prohibition does not extend to excise taxes, and under the provisions of this section, a municipality is liable for the gasoline tax on gasoline bought by it in bulk and distributed by it to its various departments for use in its governmental functions. Stedman v. Winston-Salem, 204 N. C. 203, 167 S. E. 813.

§ 105-435. Tax on fuels not included in definition; permits to operate vehicles; reports by holders of permits.—(a) Every person who owns or operates over the highways of this state, any motor vehicle propelled by a motor which uses any product not included within the definition of "motor fuels" hereinbefore set out to generate power for the propulsion of said vehicle, shall pay to the commissioner of revenue, for the use of the highways of this state, a tax of six cents (6c) per gallon on the fuel used in such vehicle upon the highways of this state.

(b) The owner or operator of such a vehicle on July 1, 1941, or any person who purchases such a vehicle subsequent thereto, shall, before it is operated on the highways of this state, apply to the commissioner of revenue, on forms prescribed by him, for a permit to operate such vehicle on the highways of the state and shall make the tax payments herein levied direct to the department of revenue. Upon receipt and approval of such application the commissioner of revenue shall issue to such owner or operator a non-assignable permit which shall remain in effect until new license plates are required to be purchased and at that time shall be surrendered and a new permit showing the correct license number shall be issued. This permit shall at all times be in the possession of the operator of such vehicle and subject to inspection by any agent of the department of revenue or any dealer from whom such operator desires to purchase fuel. The holder of a permit issued under the provisions of this section shall be subject to the same laws and to the rules and regulations of the commissioner of revenue in regard to the payments of tax and fil-

ing reports that licensed distributors of motor fuel are subject to, and such person shall also be subject to any other rules and regulations promulgated by the commissioner of revenue for the proper administration of this section: Provided, however, no bond shall be required. Provided, further, any person duly licensed as a motor fuel distributor under the provisions of this article who owns and operates motor vehicles for his own use and utilizes in such vehicles fuel not defined as motor fuel in this article, is authorized to pay the tax levied in this section on such fuel at the same time and in the same manner as is provided for motor fuel distributors, and such tax shall be subject to the tares allowed by law to motor fuel distributors. In the event that a person elects to qualify as a motor fuel distributor and pay the tax as authorized by this proviso, it shall not be necessary for such person to secure the permit or make the reports required by this section, but such person shall comply with all the laws relating to motor fuel distributors.

(c) For the purpose of determining the amount of tax due, the owner or operator of every motor vehicle holding a permit issued under the provisions of this section shall file a report on or before the twentieth day of each month showing the number of miles each vehicle was operated over the highways of the state, the amount of fuel used during the preceding month and such other information as the commissioner of revenue may require. At the time of filing his report, said person shall pay to the commissioner of revenue the tax levied in paragraph (a) of this subsection.

(d) It shall be unlawful for any distributor, dealer or other person knowingly to sell fuel for use in such vehicles to owners or operators who do not hold permits as required by this section without collecting the tax herein levied and remitting the same to the commissioner of revenue as required on sales of motor fuel. It shall also be unlawful for any person who does not hold a permit, as provided herein, to operate such vehicles over the highways of the state on fuel on which the tax is not paid as provided herein.

If the owner or operator of any such vehicle shall fail to secure a permit, file a report or pay the tax as herein provided, his motor vehicle license shall be cancelled. It shall be the duty of the commissioner of revenue, upon such failure, to certify the same to the department of motor vehicles or such agency of the state as has charge of issuing motor vehicle licenses and upon receipt of such certification the department of motor vehicles or such other agency of the state as has charge of issuing motor vehicle licenses shall immediately have the license of the vehicle or vehicles returned for cancellation.

(e) Any person violating any of the provisions of this section shall be required to pay to the commissioner of revenue all taxes found to be due and, in addition thereto, a penalty of twenty-five per centum (25%) thereof, and such person shall also be guilty of a misdemeanor and, upon conviction, shall be fined or imprisoned in the discretion of the court. (1941, c. 376, s. 2.)

Editor's Note.—This section is effective as of July 1, 1941.

§ 105-436. Payment of tax.—Every distributor, at the time of making the report required by § 105-434, shall pay to the Commissioner of Revenue, the amount of tax due for the month covered by such report. The tax so paid shall be transferred promptly by the said commissioner to the State Treasurer as other receipts of his office and the State Treasurer shall place the same to the credit of the "State Highway Fund." (1927, c. 93, s. 5; 1931, c. 145, s. 24.)

§ 105-437. Action by commissioner of revenue if distributor fail to report.—If any distributor shall wilfully fail, neglect or refuse to make the reports required by § 105-434 within the time therein provided, the Commissioner of Revenue shall immediately inform himself as best he may as to all matters and things required to be set forth in such reports, and from such information as he may be able to obtain, determine and fix the amount of the tax due the State from such delinquent distributor for the period covering the delinquency, adding to the tax so determined and as a part thereof, an amount equal to twenty-five per cent (25%) of the tax, to be collected and paid. The said Commissioner shall proceed immediately to collect the tax including the additional twenty-five per cent and transmit the same in the manner provided in § 105-436 for the disposition of other taxes. (1927, c. 93, s. 6; 1931, c. 145, s. 24.)

§ 105-438. Record of transactions.—Every distributor of motor fuels shall keep a record of all such fuels purchased, received, sold, delivered or used by him, which shall include the number of gallons so purchased, received, sold, delivered, or used, and the dates of such purchases and sales, which records shall be preserved for a period of two years and shall at all times during the business hours of the day be subject to inspection by the Commissioner of Revenue or his deputies, or such other officers as may be duly authorized by said Commissioner. (1927, c. 93, s. 8; 1931, c. 145, s. 24.)

§ 105-439. Rebates for fuels sold to U. S. Government or for use in aircraft. — The Commissioner of Revenue is authorized under such rules and regulations as he may adopt for that purpose, to relieve any distributor from the payment of the tax herein levied for any motor fuels sold to the United States Government, and/or gasoline of such quality that it is not adapted for use in ordinary automotive vehicles, but is designed for and sold and used exclusively in aircraft motors, when it appears to the satisfaction of the Commissioner of Revenue that the tax herein imposed has not been added to the sale price of such motor fuel, and the Commissioner of Revenue is likewise authorized to refund by warrant drawn upon the State Treasurer to the person paying the same, any tax paid under the provisions of this article which constitutes an unlawful burden upon interstate commerce, in conflict with the provisions of the Constitution of the United States: Provided, that any claims for such rebate, which are not filed with the Commissioner of Revenue in accordance with forms to be provided by the Commissioner of Revenue within sixty days after the payment of said tax, shall be deemed to have been waived. (1931, c. 145, s. 24.)

§ 105-440. Penalty for making false claim for rebate. — Any person who shall wilfully make any false or fraudulent report as the basis for claim for rebate or deduction under the provi-

sions of this article, shall be guilty of a misdemeanor, and upon conviction shall be fined and imprisoned in the discretion of the court. (1927, c. 93, s. 10; 1931, c. 145, s. 24.)

§ 105-441. Enumeration of acts constituting misdemeanor; cancellation of license and bond.—Any distributor who shall fail, neglect, or refuse to make the reports herein required or pay the taxes herein imposed, or who shall refuse to permit the Commissioner of Revenue or any agent appointed by him, to examine the books and records of such distributor pertaining to the motor fuels made taxable by this article or who shall make any false, or fraudulent report or statement hereunder, or who does, or attempts to do, anything whatsoever to avoid a full disclosure of the quantity of motor fuels sold, distributed or used within this State shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars ($100.00) and not more than five thousand dollars ($5,000.00) or, in the case of an individual or the officer or employee charged with the duty of making such report for a corporation, to be imprisoned not exceeding twenty-four months, or both; and the commissioner of revenue may forthwith cancel the license of such distributor and notify him in writing of such cancellation by registered mail to be sent to his last known address. In the event that the license of any distributor is cancelled as above provided, and in the event such distributor shall have paid to the state of North Carolina all the taxes due and payable by him under this article, together with any and all penalties accruing under the provisions of this article, then the Commissioner of Revenue shall cancel and surrender the bond theretofore filed by said distributor. (1927, c. 93, s. 11; 1931, c. 145, s. 24; 1933, c. 544, s. 10.)

§ 105-442. Actions for tax; double liability.—If any person, firm or corporation shall fail to pay the amount of tax levied in § 105-434 within the time specified in § 105-436 it shall be the duty of the commissioner of revenue to proceed at once to enforce the payment of said tax, and to this end the commissioner of revenue shall have and may exercise all the remedies provided in the revenue laws of the state for enforcing payment of other taxes, including the right of execution through the sheriffs of the several counties of the state upon any property of the delinquent taxpayer, and shall, with the assistance of the attorney general whenever necessary, bring appropriate action in the courts of the state for the recovery of such tax. If it shall be found as a fact that such failure to pay was willful on the part of such person, firm or corporation, judgment shall be rendered against such person, firm or corporation for double the amount of tax found to be due, together with interest, and the amount of taxes and penalties shall be paid into the state treasury to the credit of the state highway fund. All remedies which now or may hereafter be given by the laws of the state of North Carolina for the collection of taxes are expressly given herein for the collection of taxes levied in this article or of judgment recovered under authority of this article. It shall also be the duty of the commissioner of revenue to revoke the license of any licensed distributor who shall refuse, fail or neglect to pay the taxes levied in § 105-434 within the time specified in § 105-436, and whose account shall remain delinquent for any part of said tax for ten days thereafter. (1927, c. 93, s. 12; 1931, c. 145, s. 24; 1933, c. 137, s. 1.)

Editor's Note.—Public Laws of 1933, c. 137, repealed this section as it formerly read and substituted the above in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 105-443. Auditing books of licensed distributors.—It shall be the duty of the commissioner of revenue, by competent auditors, to have the books and records of every licensed distributor in the state examined at least twice each year to determine if such distributor is keeping complete records as provided in § 105-438, and to determine if correct reports have been made to the state department of revenue by every such distributor covering the total amount of tax liability of such licensed distributor. It shall also be the duty of such auditors to check the records of each distributor with the records of shipment by railroad companies, or by boats or trucks, or other available sources of information, and also to check the records covering the receipt and distribution of any other liquid petroleum products handled by each distributor. (1933, c. 137, s. 1.)

§ 105-444. License constitutes distributor trust officer of state for collection of tax.—The licensing of any person, firm or corporation as a wholesale distributor of gasoline shall constitute such distributor an agent or trust officer of the state for the purpose of collecting the tax on the sale of gasoline imposed in this article. When any such person, firm or corporation who adds the amount of the tax levied in this article to the customary market price for gasoline and collects the same, shall fail to remit the gasoline tax to the commissioner of revenue upon the terms and as provided herein, such failure shall constitute embezzlement of state funds, and upon conviction under this section any individual, partner or officer or agent of any association, partnership or corporation shall be guilty of a felony, and upon conviction shall be fined or imprisoned in the discretion of the court. (1933, c. 137, s. 1.)

§ 105-445. Application of proceeds of gasoline tax.—The fund derived from the tax herein levied shall be for the exclusive uses of the purposes set out in this article, and disbursed on vouchers drawn by the State Highway and Public Works Commission in accordance with the acts of the General Assembly dealing with the subject matter herein referred to. (1931, c. 145, s. 24; 1933, c. 172, s. 17.)

§ 105-446. Tax rebate fuels not used in motor vehicles on highways.—Any person, association, firm, or corporation, who shall buy in quantities of ten gallons or more at any one time any motor fuels as defined in this article for the purpose of use, and the same is actually used, for a purpose other than the operation of a motor vehicle designed for use upon the highways, on which motor fuels the tax imposed by this article shall have been paid, shall be reimbursed at the rate of five cents per gallon of the amount of such tax or taxes paid under this article: Provided, however, that motor vehicles designed for use but not used upon the highways of this state shall be entitled to the refund of gasoline tax as herein provided, upon the

following conditions and in the following manner:

(a) Before using such motor fuels the person, association, firm, or corporation proposing to use the same shall apply to the commissioner of revenue, upon blanks to be furnished by him, for a refund permit. Such application shall state the use for which the motor fuels for which taxes are to be refunded are to be used. If such motor fuels are to be used in a gasoline motor or engine, the application shall state the make and kind of such motor, the serial number thereof, and the purpose for which it is proposed to use the same. If such motor fuels are to be used for some purpose other than the operation of an engine, the application shall state the nature and kind of process in which such motor fuels are to be used, and the method and manner in which such motor fuels are to be used, stored and kept. In all cases such application shall state the approximate number of gallons of such motor fuels to be used per month, and shall give such other information as the commissioner of revenue shall require. In making application for refund permit, the person making application may combine one or more of the uses above specified in the same application. Dealers in motor fuel engaged in selling such fuel to motor boats owned by nonresidents, and which boats are not documented in this state, may apply to the commissioner of revenue for a permit on forms to be prescribed by the commissioner of revenue, which permit shall entitle the said dealer to be furnished with blanks by the commissioner of revenue in such form as may be prescribed by him, for the use of such non-resident boat owners to file applications for refunds as provided in this article, and said non-resident boat owners shall not be required to secure permits. Such application for refund shall be filed in the name of the nonresident boat owner on blanks furnished by dealers holding permits. Said applications must be accompanied by an invoice of the dealer holding permit, showing the number of gallons of motor fuel delivered into the tanks of said boats and shall furnish such other information as the commissioner of revenue shall require. Applications must be sworn to before a notary public of this state and filed with the commissioner of revenue. Upon approval of said applications by the commissioner of revenue, said applications shall be paid as other applications for refund are paid: Provided, however, that such non-residents must file applications with the commissioner of revenue within thirty days from the date of purchase of said gasoline and that said applications may be paid immediately upon approval. The application shall be accompanied by a fee of one dollar, to be returned if the refund permit is not issued. Such fees, if retained, shall be paid by the commissioner of revenue to the state treasurer, to be credited by him to the state highway fund.

(b) If, upon the filing of such application, the commissioner of revenue shall be satisfied that the same is made in good faith and that the motor fuels upon which the said tax refund is requested are to be used exclusively for one of the purposes set forth above and specified in said application, he shall issue to said applicant a refund permit specifying the terms and conditions under which refunds on such motor fuels will be made, which refund permits will expire with the fiscal year in which it is issued. Refund permits issued under this article shall state the name of the person, association, firm, or corporation to whom and for whose benefit it is issued, the purposes for which the motor fuels upon which tax refunds are to be made under the provisions thereof are to be used and the approximate number of gallons expected to be used per month for such purposes, and the commissioner of revenue shall determine such amount. Such refund permits shall bear serial numbers and shall not be transferable, nor shall any right or claim for refund under the same be transferable: Provided, however, that the commissioner of revenue shall not be required to issue any refund permit for use of motor fuels unless and until the applicant therefor shall have satisfied the commissioner of revenue that provisions have been made for the storage of such motor fuels in a manner prescribed by the commissioner of revenue, so as to segregate the same from motor fuels for use in vehicles upon the highways.

(c) All claims for refunds for tax or taxes for motor fuels under the provisions of this article shall be filed with the commissioner of revenue on forms to be prescribed by him, between the first and the fifteenth day of January, April, July, and/or October of each year, and at such periods only, and shall cover only the motor fuels so used during the three months immediately preceding the filing of such application. Such application shall be accompanied by ticket, invoice, or other document from the retail dealer or distributor for motor fuels, issued at the time of purchase of such motor fuel and showing the purchase of the number of gallons of motor fuels on which said refund is requested, and upon which shall be written or stamped at the time of purchase appropriate words showing the purpose for which the said motor fuel is purchased and that refund will be requested. The application shall be sworn to before the clerk of the superior court or a notary public of the county in which the applicant resides or has his place of business, and such attesting officer is authorized to charge therefor a fee of not exceeding twenty-five cents. Provided, that claims for refund of the tax on motor fuel that are not filed with the Commissioner of Revenue within the time specified in this section, but that are filed within 30 days thereafter, may be paid by the Commissioner of Revenue after first deducting 10% from said claims as a penalty for not filing them within the time specified. Provided that the invoices or delivery tickets issued by the retail dealer or distributor and filed as a part of any claim for a refund of tax on motor fuel, shall be marked paid by the dealer or distributor and shall show the date of purchase and the date of payment.

(d) If the commissioner of revenue shall be satisfied that the motor fuels specified in such application for refund have been legitimately used for the purpose specified in the refund permit issued to such applicant, he shall issue to such applicant a warrant upon the state treasurer for the said taxes paid on such motor fuels under this article.

(e) No refund of tax or taxes shall be paid on motor fuels except under a refund permit and

to the person, association, firm, or corporation named in said refund permit in the manner herein provided for.

(f) If the commissioner of revenue shall be satisfied that the holder of any refund permit issued under the provisions of this article has violated the conditions thereof, or has collected or sought to collect any refund of tax or taxes thereunder upon any motor fuels not used in strict accordance with said refund permit, he shall issue notice to the holder of such refund permit to show cause why the refund permit should not be cancelled, which notice shall state a time and place of hearing upon said notice. If upon such hearing the commissioner shall find as a fact that the permit holder has violated the terms of his permit, he shall cancel such refund permit and the holder thereof shall be required to repay all tax or taxes which have been refunded to him under such permit.

(g) Any applicant for a refund permit or any holder of a refund permit may appeal from the decision of the commissioner of revenue upon any matters arising under this section to the state board of assessment, who shall hear the matters presented on such appeal at a time and place to be fixed by said state board of assessment. Such state board of assessment shall have authority to cause the attendance of witnesses in behalf of such applicant or of the commissioner of revenue, and shall have authority to administer oaths and take testimony.

(h) The commissioner of revenue is hereby authorized and directed, if at any time in his opinion there is reason to doubt the accuracy of the facts set forth in any application for tax refund, to refer the matter to any agent of the department of revenue or to any member of the state highway patrol, and such person so designated shall make a careful investigation of all the facts and circumstances relating to said application in the use of the motor fuel therein referred to, and shall have a right to have access to the books and records of any retailer or distributor of motor fuel products for the purpose of obtaining the necessary information concerning such matters, and shall make due report thereof to the commissioner of revenue.

(i) If any court of last resort shall hold that the provisions for refund herein set out shall render the levying and collecting of the tax hereinbefore provided invalid, it is the intention of the general assembly that such provisions for refund shall be annulled and the tax shall be levied without any provisions for such refund and that this article shall be so construed.

Any person making a false return or affidavit for the purpose of securing a refund to which he is not entitled under the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding five hundred dollars ($500.00), or imprisoned not exceeding two years, in the discretion of the court. (1931, c. 145, s. 24, c. 304; 1933, c. 211; 1937, c. 111; 1941, c. 15; 1943, c. 123.)

Editor's Note.—The 1941 amendment, adding the first proviso to subsection (c), does not apply to claims filed prior to Jan. 1, 1940. The amendment took no notice of the prior 1933 amendment which changed the wording of the subsection.

The 1943 amendment added the last proviso to subsection (c).

§ 105-447. Reports of carriers. — Every person, firm or corporation engaged in the business of, or transporting motor fuel, whether common carrier or otherwise, and whether by rail, water, pipe line or over public highways, either in interstate or in intrastate commerce, to points within the state of North Carolina, and every person, firm or corporation transporting motor fuel by whatever manner to a point in the state of North Carolina from any point outside of said state shall be required to keep for a period of two years from the date of each delivery records on forms prescribed by, or satisfactory to, the commissioner of revenue of all receipts and deliveries of motor fuel so received or delivered to points within the state of North Carolina, including duplicate original copies of delivery tickets or invoices covering such receipts and deliveries, showing the date of the receipt or delivery, the name and address of the party to whom each delivery is made, and the amount of each delivery; and shall report, under oath, to the commissioner of revenue, on forms prescribed by said commissioner of revenue, all deliveries of motor fuel so made to points within the state of North Carolina. Such reports shall cover monthly periods, shall be submitted within the first ten days of each month covering all shipments transported and delivered for the previous month, shall show the name and address of the person to whom the deliveries of motor fuel have actually and in fact been made, the name and address of the originally named consignee if motor fuel has been delivered to any other than the originally named consignee, the point of origin, the point of delivery, the date of delivery, and the number and initials of each tank car, and the number of gallons contained therein if shipped by rail; the name of the boat, barge or vessel, and the number of gallons contained therein, and the consignor and consignee if shipped by water; the license number of each tank truck and the number of gallons contained therein, and the consignor and consignee if transported by motor truck; if delivered by other means the manner in which such delivery is made; and such other additional information relative to shipments of motor fuel as the commissioner of revenue may require: Provided, that the commissioner of revenue may modify or suspend the provisions of this section with regard to reports of interstate or intrastate shipments or deliveries upon application of any licensed distributor: Provided, also, that the commissioner of revenue shall have full power to require any distributor to make additional reports and to produce for examination duplicate originals of delivery tickets or invoices covering both receipts and deliveries of products as herein provided. The reports herein provided for shall cover specifically gasoline, kerosene, benzine, naphtha, crude oil, or any distillates from crude petroleum. Any person, firm or corporation refusing, failing or neglecting to make such report shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1929, c. 230, s. 1; 1933, c. 137, s. 1.)

Editor's Note.—Public Laws of 1933, c. 137, repealed this section as it formerly read and substituted the above in lieu thereof. A comparison of the two sections is necessary to determine the changes.

§ 105-448. Forwarding of information to other

states.—The commissioner of revenue of the state of North Carolina shall, upon request duly received from the officials to whom are intrusted the enforcement of the motor fuel tax laws of any other state, forward to such officials any information which he may have in his possession relative to the manufacture, receipt, sale, use, transportation or shipment by any person of motor fuel. (1933, c. 137, s. 1.)

§ 105-449. Exemption of gasoline used in public school transportation; false returns, etc. — 1. Any person, firm or corporation holding a North Carolina state contract for the sale of gasoline to be used in public school transportation in North Carolina shall invoice gasoline so sold and delivered to the county boards of education at the prevailing contract price, less the state tax on gasoline. A copy of such invoice showing the board of education to whom the gasoline is delivered, the kind of gasoline sold, the gallons sold, and the contract price per gallon, shall be submitted to the North Carolina department of revenue each month, supported with an official purchase order from the county board or boards of education, which invoice or invoices and supporting purchase order shall exempt the gasoline purchased by said board or boards of education for use in North Carolina public school transportation from the six cents tax per gallon state gasoline tax.

2. The commissioner of revenue of North Carolina is hereby authorized and directed to accept such invoices and supporting purchase orders, duly notarized, in lieu of the six cents per gallon tax imposed by the laws of North Carolina upon said gasoline: Provided, when any authorized dealer has already paid the state gasoline gallon tax and furnishes the commissioner of revenue with proper invoices and supporting purchase orders as required in subsection one of this section, then such dealer shall be entitled to a refund by the commissioner of revenue of six cents per gallon from the gasoline fund for each gallon so sold and delivered to the county boards of education for use in public school transportation in school busses, service trucks, and gasoline delivery wagons used only for school purposes.

3. It is the intent and purpose of this section to relieve gasoline used in the public school system of North Carolina from the six cents gasoline tax now imposed by the state and thereby to that extent reduce the cost of public school transportation.

4. Any person making a false return or affidavit for the purpose of securing a refund to which he is not entitled under the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding five hundred dollars ($500.00), or imprisoned not exceeding two years, in the discretion of the court. (1941, c. 119.)

Editor's Note.—This section was effective as of July 1, 1941.

SUBCHAPTER VI. TAX RESEARCH.

Art. 37. Department of Tax Research.

§ 105-450. Provision for department of tax research.—The governor may, in his discretion, separate the statistical and research unit of the department of revenue and designate it as a department of tax research. (1941, c. 327, s. 1.)

Cross Reference.—As to director being member of state board of assessment, see § 105-273.

Editor's Note.—This article was effective as of July 1, 1941.

For comment on this enactment, see 19 N. C. Law Rev. 445.

§ 105-451. Appointment of director; salary.—When so designated the department shall be directed by an officer to be designated as the director of the department of tax research, who shall be appointed by and responsible to the governor, and shall serve at the will of the governor. The director shall be paid an annual salary to be fixed by the governor with the approval of the advisory budget commission, payable in monthly installments, and shall likewise be allowed his traveling expenses when away from Raleigh on official business. (1941, c. 327, s. 2.)

§ 105-452. Clerical assistants and office equipment.—The director is authorized to employ such additional clerical assistants and to obtain such additional office equipment as may be approved by the governor and the advisory budget commission. (1941, c. 327, s. 3.)

§ 105-453. Study of taxation; data for governor and general assembly; examination of persons, papers, etc.—It shall be the duty of the director to make a statistical analysis by groups and by counties of receipts under each article of the Revenue Act, and to make a thorough study of the subject of taxation as it relates to taxation within and by the state of North Carolina, including cities, counties, and subdivisions, their exercise and power of taxation; and to make a study of the taxation in other states, including the subjects of listing property for taxation, the classification of property for taxation, exemptions, and tax collections and tax collecting, and he shall have the power and authority to make a comparative study of the subject of taxation in all its phases, including the relation between state taxation and federal taxation, and said director shall assemble, classify and digest for practical use all available data on the subject of taxation, to the end that the same may be submitted to the governor and general assembly and may also be available for all citizens and officials of the state who are interested therein.

To carry out the purposes of this article, the director of the department of research shall have the same authority as given the state board of assessment in § 105-276, to examine persons, papers and records and to acquire reports from state departments and counties, cities and towns. (1941, c. 327, s. 4.)

§ 105-454. Purpose of creation of department.—The creation of the department of tax research is for the purpose of securing for the public and the general assembly, as well as for the executive department of the state, at a minimum cost, all such information that the public and the general assembly and the executive department should have relative to tax matters, including methods and systems of taxation in other states, to the end that the executive department and the general assembly in dealing with matters of revenue and taxation may have such information and tax data available for consideration. (1941, c. 327, s. 5.)

§ 105-455. Submission of proposed amendments to budget advisory commission.—The director of the department of tax research shall prepare and submit to the budget advisory commission such amendments to the Revenue and Machinery Acts as the survey made by the director indicates should be made, for their consideration in preparing amendatory Revenue and Machinery Acts for the general assembly. (1941, c. 327, s. 7.)

§ 105-456. Publication of biennial report.—The director of the department of tax research shall make and publish two thousand (2,000) copies of a biennial report, combined with the biennial report of the state board of assessment, of such scope as may be approved by the governor, which shall include recommendations and a digest of the most important factual statistics of state and local taxation. (1941, c. 327, s. 8.)

§ 105-457. Expenses of department of tax research.—All expenses of the department of tax research, except the appropriation for the statistical and research unit and such allotments as may be made by the governor from the contingency and emergency fund, shall be borne by the state department of revenue and all accounts kept by, and vouchers issued by, the accounting division of the department of revenue. (1941, c. 327, s. 9.)

SUBCHAPTER VII. PAYMENTS RECEIVED FROM TENNESSEE VALLEY AUTHORITY IN LIEU OF TAXES.

Art. 38. Equitable Distribution between State and Local Governments.

§ 105-458. Apportionment of payments in lieu of taxes between state and local units.—The payments received by the state and local governments from the Tennessee Valley Authority in lieu of taxes under section thirteen of the Act of Congress creating it, and as amended, shall be apportioned between the state and the local governments in which the property is owned or an operation is carried on, on the basis of the percentage of loss of taxes to each, determined as hereinafter provided: Provided, however, that the minimum annual payment to any local government from said fund, including the amounts paid direct to said local government by the Authority, shall not be less than the amount of annual actual tax loss to such local government based upon the two year average of taxes on said property next prior to its being taken over by the Authority. (1941, c. 85, s. 1.)

§ 105-459. Determination of amount of taxes lost by virtue of T. V. A. operation of property; proration of funds.—The state board of assessment shall determine each year, on the basis of current tax laws, the total taxes that would be due to both the state of North Carolina and the local governments in the same manner as if the property owned and/or operated by the Authority were owned and/or operated by a privately owned public utility: Provided, however, in making said calculations the state board of assessment shall use the tax rate fixed by the local government unit and taxing district involved for the tax year next preceding such calculations. The state board of assessment and the treasurer of the state of North Carolina shall then prorate the funds received from the Authority by the state and local governments between the state and local governments upon the basis of the foregoing calculations. (1941, c. 85, s. 2.)

§ 105-460. Distribution of funds by state treasurer.—The treasurer of the state of North Carolina shall then ascertain the payments to be made to the state and local governments upon the basis of the provisions of § 105-459 and he is authorized and directed to distribute the same between the state and local governments in accordance with the foregoing provisions of § 105-459. The treasurer of the state of North Carolina is further authorized and directed to pay said sums to the state and local governments each month or so often as he shall receive payments from the Authority, but not more often than once each month, after first deducting from any sum to be paid a local government such amount as has theretofore been paid direct to said local government by the Authority for the same period: Provided, however, that the minimum annual payment to any local government from said fund shall not be less than the average annual tax on the property taken by the Authority for the two years next preceding the taking. (1941, c. 85, s. 3.)

§ 105-461. Duty of county accountant, etc.—The county accountant or other proper officer of each local government to which this subchapter is applicable shall:

(a) Certify to the state board of assessment and the treasurer of the state of North Carolina the tax rate fixed by the governing body of such local government immediately upon the fixing of the same;

(b) certify each month to the treasurer of the state of North Carolina a statement of the amount received by the local government direct from the Authority. No local government shall be entitled to receive its distributive share of said fund from the treasurer of the state of North Carolina until the foregoing information has been properly furnished. If any such local government shall fail to furnish the information herein required within ten days from and after receipt by it from the state board of assessment of request for the same, forwarded by registered mail, then and in that event it shall be barred from participating in the benefits provided for the period for which the same is requested. (1941, c. 85, s. 4.)

§ 105-462. Local units entitled to benefits; prerequisite for payments.—Any local governments within the state in which the authority now or may hereafter own property or carry on an operation shall be entitled to the benefits arising under this subchapter: Provided, however, that no payment shall be made to them by the treasurer of the state of North Carolina until such time as such local governments shall have certified to the state board of assessment and the treasurer of the state of North Carolina the average annual tax loss it has sustained by the taking of said property for the two years immediately preceding the taking thereof: Provided, further, that in the event of any disagreement between said local governments and the treasurer of the state of North Carolina as to such annual tax loss, then the same shall be determined by the state board of assessment, and its decision thereon shall be final. (1941, c. 85, s. 5.)